CRIMINALIZATION: A KANTIAN VIEW

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ABSTRACT

One problem in criminal justice theory is determining what kinds of acts ought to be criminalized. A related practical concern is the rampant overcriminalization in American law. In this Article, I propose to address both of these problems by positing a theory of criminalization based upon Immanuel Kant's political theory. I begin by explaining Kant's account of civic freedom. I show that free and equal citizens in a just political community must refrain from actions that violate the political freedom of other citizens. From this, I derive a definition of crime as an act that by its nature violates the political conditions of freedom, with the added requirement that the actor's maxim is incompatible with Kant's Universal Principle of Right. Finally, I apply this definition to modern criminal codes, concluding that the Kantian approach would result in a more limited criminal justice system based on reason rather than political happenstance.

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INTRODUCTION

Many scholars familiar with Anglo-American criminal justice systems would agree with the proposition that we criminalize too much conduct and punish that conduct too severely. This is particularly true in the United States. As philosopher Douglas Husak puts it, "[t]he two most distinctive characteristics of . . . criminal justice in the United States . . . are the dramatic expansion in the substantive criminal law and the extraordinary rise in the use of punishment. . . . In short, the most pressing problem with the criminal law today is that we have too much of it."[1] Criminal-law scholar William Stuntz concurs, noting that "for the past generation, virtually everyone who has written about federal criminal law has bemoaned its expansion," and the same applies to state-level criminal codes.[2]

The problem here is not merely one of bureaucratic overzealousness. The human costs of ever-expanding criminal codes, and the concomitant increase in punishments, is striking. First, there is the sheer number of citizens who are labeled criminals. As of 2016, between six and seven million people in the United States were either incarcerated or restricted by probation or parole; this number has increased from less than two million in 1980.[3] Moreover, the rate of incarceration has also increased,[4] and is higher than virtually any other place on Earth for which accurate criminal justice statistics are available.[5] The severity of punishments, too, has increased

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1. DOUGLAS HUSAK, OVERCRIMINALIZATION 3 (2008).

2. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508, 512-23 (2001).

3. *Key Statistic: Total Correctional Population,* BUREAU OF JUSTICE STATISTICS (Sept. 8, 2019), https://www.bjs.gov/index.cfm?ty=kfdetail&iid=487 [https://perma.cc/AW78-LTQ8]. The numerical figures for the chart at this site are available by clicking on the "Excel" link. It should be noted that the same chart does show a modest but noticeable decrease since 2007, apparently attributable mainly to a decrease in the number of people on probation, and perhaps reflective of an increasing public and political awareness of the overcriminalization phenomenon.

4. This trend may be stabilizing or even reversing, however. In 1980, the incarceration rate for adult U.S. residents was 0.3%; it rose to a rate of nearly 1% in the late 1990s and has remained relatively constant since then, with a noticeable decrease since 2007. *Key Statistic: Incarceration Rate*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=kfdetail&iid=493 [https://perma.cc/6ND4-P9YJ]. The adult correctional population in the U.S. in 2012 was 2.9%, the same rate as in 1997. Lauren Glaze & Erinn Herberman, BUREAU OF JUSTICE STATISTICS, *Correctional Populations in the United States, 2012*, BUREAU OF JUSTICE STATISTICS 1 (2013), http://www.bjs.gov/content/pub/pdf/cpus12.pdf [https://perma.cc/VVL3-ES5S]. Despite these promising signs, the number and percentage of people within the criminal justice system remains markedly higher than it was several decades ago.

5. The United States has the highest total prison population of any country on Earth, at roughly 2.1 million. The next closest country is China, with 1.6 million. As to the *rate* of incarceration,

alongside incarceration rates.[6] Finally, racial disparities continue to plague our justice system.[7]

While we might point to a number of interrelated causes of the overcriminalization crisis, both Husak and Stuntz argue that this social phenomenon is a symptom of a larger problem: that we as a society have failed to develop any principled basis for determining what kind of conduct is an appropriate target for criminalization. Stuntz thus laments that "American criminal law's historical development has borne no relation to any plausible normative theory—unless 'more' counts as a normative theory."[8] Husak, meanwhile, believes that finding the right theory of criminalization would help curtail the seemingly unchecked growth of the

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the United States ranks first, and far higher than other large Western nations. ROY WALMSLEY, WORLD PRISON BRIEF, INST. FOR CRIMINAL POLICY RESEARCH, *World Prison Population List* (2018), http://www.prisonstudies.org/sites/default/files/ resources/downloads/wppl_12.pdf [https://perma.cc/2EFB-2S6F] (last visited March 23, 2019). There is a convenient tool to parse this data on the ICPR website. *Highest to Lowest – Prison Population Total*, ROY WALMSLEY, WORLD PRISON BRIEF, INST. FOR CRIMINAL POLICY RESEARCH, http://www.prisonstudies.org/highest-to-lowest [https://perma.cc/MET5-ZAFH]. To be fair, information is not available for a few countries, such as North Korea, and it may be that some countries have a low incarceration rate because they have other means of dealing with convicted criminals, such as putting them to death. Still, the results are striking even given such caveats.

It should also be noted that the First Step Act was signed into law by President Trump on December 21, 2018. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. This law is a promising step in criminal justice reform—for example, it shortens some prison sentences in the federal system. It is still too early to determine how significant an impact it will have on criminal justice writ large, particularly when most criminal law takes place at the state, rather than federal, level. Still, it is remarkable that there was large bipartisan and public support for this bill, which bodes well for the prospects of further reform in coming years.

6. For example, the number of people serving life sentences in prisons increased from 34,000 in 1984 to 161,957 in 2016. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 8 (2018), http://www.sentencingproject.org/publications/trends-in-u-s-corrections.pdf [https://perma.cc/GZS7-T2FE]. And thanks to the War on Drugs, not only has the number of people incarcerated for nonviolent substance-related offenses increased, but the length of incarceration has also increased: "in 1986, people released after serving time for a federal drug offense had spent an average of 22 months in prison. By 2004, people convicted on federal drug offenses were expected to serve almost three times that length: 62 months in prison." *Id*. at 3. The total number of individuals incarcerated in state and federal prisons and jails for drug offenses in 1980 was 40,900; in 2017, the number had ballooned to 452,900. *Id*.

7. For example, "African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment [rate] of whites"; the figure is 1.4:1 for Latinos. ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (2016), http://www.sentencingproject.org/publications/ color-of-justice-racial-and-ethnic-disparity-in-state-prisons.pdf [https://perma.cc/XY52-6QQT0]. The comparison is even more dismal in five states, which have a black-to-white incarceration rate of over 10:1. *Id*. at 8.

8. Stuntz, *supra* note 2, at 508.

criminal law.[9] Indeed, there are reasons to think that, in the legal world, practice is (sometimes) informed by good theory. For example, judges must give reasons for their decisions; at the highest levels, this requires doing more than simply following the courts' own precedents or the will of the legislature. Theory is also important in legal systems where a single document purports to answer fundamental legal questions: constitutions are, arguably, incarnations of (strands of) political theories endorsed by their authors. Finally, it is at least sometimes the case that "jurisprudence is the way lawyers and judges reflect on what they do and what their role is within society."[10] Such reflection may be uncommon, but it is desirable. So while we should not overstate the importance of theory to the actual practice of law, I proceed under the assumption that normative legal philosophy is not merely an idle intellectual pursuit.[11]

My goal in this paper, then, is, first, to provide an answer to the question of what constitutes a compelling theory of criminalization and, second, to suggest what we can do to mitigate the problem of overcriminalization. My contention is that a theory of criminalization derived from Immanuel Kant's political philosophy will provide these answers. Legal scholars in particular might wonder why we should seek a Kantian theory instead of an alternative. While I cannot provide a full defense of Kantian political thought here, I aim to show in the subsequent discussion that Kant provides us with both a compelling theoretical grounding for the criminalization question, and some satisfying (if surprising) practical results when applied to the problem of overcriminalization.

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9. HUSAK, *supra* note 1, at 3. Of course, it is conceivable that the "right" theory of criminal law would not solve the problem of overcriminalization that Husak identifies—at least not in the way that Husak desires. But since many scholars of criminal law seem to agree that there is too much of it, it seems reasonable to expect that one of the things that a good criminal law theory will do is limit its expansion. And even in the unlikely event that it turns out that the criminal law *should* expand exponentially, at least in that case we would have a good argument against the widely shared intuitions that too many possible human actions are presently defined as crimes, and that people who are convicted as criminals are punished too severely.

10. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT viii (8th ed. 2009).

11. But for an argument against the proposition that normative theory is of practical value, see Stuntz, *supra* note 2, at 507-12 (asserting, *inter alia*, that "legislators who vote on criminal statutes appear to be uninterested in normative arguments").

I. KANT'S POLITICAL THEORY

The purpose of this section is to present Kant's political theory in a way that will be most useful for the subsequent discussion of criminalization. Kant's theory of justice can be described as having two main goals: (1) providing an account of civic freedom, and (2) describing the ideal roles of virtuous citizens within a political community. For the purposes of this analysis, we shall be concerned with only the first of these.

Painting a complete picture of Kant's theory of justice does, however, require a preliminary sketch of Kant's overarching normative project and, in particular, requires explaining the relationship between justice and morality in Kantian thought. This shall be the task in subsection A below. I shall then turn to the question of civic freedom in subsection B.

Before proceeding, I should make a preliminary comment about methodology. While I proceed largely exegetically, I deviate from Kant's theory where reasonable. My goal is not to adhere strictly to Kant's thought, but rather to take Kant's approach, and many of his grounding assumptions, as generally persuasive. I do not hesitate, however, to modify as needed portions of his theory which seem contradictory or problematic—and I indulge in charitable interpretation which may at times wrest from the text meanings or conclusions that may not have been intended by Kant himself. In short, my approach is a Kantian one, but not one Kant himself would necessarily endorse in its entirety.

A. Relationship Between Justice and Morality.

Some versions of liberal thought insist on a rigid separation between civic justice and personal morality. This approach can be attractive, because it acknowledges the myriad "conceptions of the good" held by citizens in a pluralistic society.[12] On such a view, the government should remain largely agnostic about the ends citizens choose for themselves while also ensuring that they have opportunities to attain those ends.[13] Many liberal theorists

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12. *See* JOHN RAWLS, A THEORY OF JUSTICE 11 (rev. ed. 1999).

13. The precise content of such "opportunities" differs significantly, of course, between liberal theorists—a prominent example is the disagreement between John Rawls and Robert Nozick about the extent to which the government ought to redistribute socioeconomic resources in order to foster fair, rather than merely formal, equality of opportunity. *Compare id.* at 57-73, *with* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 167-74 (1974).

seem to assume that justice in fact requires this kind of moral agnosticism.[14]

There is certainly something right about this approach. It is important for a liberal society to leave room for, and recognize the existence of, different (and often competing) claims about values. We certainly desire a society where people with different life plans, and even very different conceptions of what constitutes morality, can express their ideas and flourish as individuals while maintaining a desirable level of social cooperation.[15] Still, we can sometimes overstate the extent to which our political life is—or ought to be—separate or separable from our moral life. The accommodation of varying conceptions of the good does not entail that we must deny any connection whatsoever between morality and justice.

Kant seeks to clarify the relationship between morality and justice by considering these concepts as pieces of a larger normative puzzle. "What must I do?" is a question that one poses oneself as an autonomous moral agent in some cases, and as a citizen of a polity in others. Kant's claim is not that the answers to these questions will necessarily be identical in the moral and political contexts, but that our method for going about finding such answers will be similar and that the answers will stand in a logical relationship to each other.

To explain the relationship between personal morality and public justice, Kant identifies three categories of laws: moral laws (or "laws of freedom"), ethical laws, and juridical laws.[16] The latter two are subsets of

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14. For example, Rawls believes that justice requires recognizing that human beings have

> their own plans of life. These plans, or conceptions of the good, lead them to have different ends and purposes, and to make conflicting claims on the natural and social resources available . . . . As a consequence, individuals not only have different plans of life but there exists a diversity of philosophical and religious belief, and of political and social doctrines.

RAWLS, *supra* note 12, at 110. Note that, just as embracing theological agnosticism would not entail an acceptance of *any* kind of God (one could be an agnostic who is certain that, whatever else God is, God must be just), this kind of moral agnosticism does not entail that one must accept without limitation any conception of the good whatsoever. Rawls's discussion of the "priority of justice"—that is, the notion that justice imposes certain "restrictions" or "bounds" on individual conceptions of the good—is instructive in this context. *Id*. at 27-28. Nevertheless, the Rawlsian view (consistent with liberal theory more generally) still insists on a fairly rigid distinction between public justice and personal morality.

15. See the introductory discussion in RAWLS, *supra* note 12, at 3-6, characterizing society as "a cooperative venture for mutual advantage"; he sees "social cooperation" as a desideratum of civic life, even "[a]mong individuals with disparate aims and purposes."

16. IMMANUEL KANT, THE METAPHYSICS OF MORALS 14 (Mary Gregor ed. & trans., 1996) (6:214). Here and in subsequent notes I give the *Akademie* pagination, which is included in all modern translations of Kant's works, in parentheses following the regular citation.

the former.[17] Juridical laws, as we might imagine, determine the legality of a particular act. To act in a way that comports with juridical laws is to act so that our "external" actions "conform" to the law.[18] Note, though, that "legality" here does not correspond necessarily to positive law, but only to laws which are rationally required—what some might term "natural law." By contrast, when we act in the "ethical" realm, we are talking about the (personal) morality of an action.[19] To act in such a way that comports with ethical laws is to act according to the proper "determining grounds of [our] actions"[20] or, as moral theorists like to say, acting for the "right reasons." By contrast, acting in accordance with juridical laws entails acting merely in compliance with the external rule at issue (which may or may not be for the morally right reasons).

So, while Kant distinguishes "juridical" law from "ethical" morality, he does not separate them entirely. They are both subsets of morality in the broadest sense—that is, both our juridical and ethical obligations can be traced to our status as free and rational moral agents, and it is this status which in turn allows us to determine what precisely those obligations are. Moreover, acting morally entails acting legally—at least under ideal conditions[21]—because by exercising one's external and internal use of choice according to the demands of reason, one has necessarily exercised one's external use of choice in the proper way. As an example, I could act legally (i.e., juridically) by refraining from murdering you for any reason whatsoever, so long as my external choice (not murdering) conformed to the (juridical) law. But to act morally demands more: I must also ensure that the "determining grounds" of my action (not murdering) comport with the demands of the ethical law (which I can test using the various formulations

17. *Id.*

18. *Id.*

19. I mean "morality" in the everyday use of the term. There may be some confusion here, because Kant seems to use the term "moral" differently than we might—for *any* normative rule derived from reason. Thus Kantian "morality" comprises both morality in the everyday sense (what we ought to do, qua persons, morally speaking—which Kant later calls Virtue) and also what we might tem *justice* (that which is right to do in our political life—which Kant calls "juridical" laws or "right" (*Recht*)).

20. KANT, *supra* note 16, at 14 (6:214).

21. In less-than-ideal conditions, this may not be the case, because positive (juridical) law could be severed from the moral law. Under Nazi law, for example, one would have a moral obligation to act illegally. But where juridical laws are not immoral, conformity to "ethical" laws entails conformity to "juridical" ones. There will be closer cases, of course: positive laws might be unjust but not so clearly immoral as those characterizing the Nazi regime. But we need not worry about such cases for the moment: it is sufficient to realize that if our juridical laws in fact comply with the overarching laws of freedom, then we have an obligation to comply with them.

of the categorical imperative explained in the *Groundwork of the Metaphysics of Morals*).[22] Of course, if I refrain from murdering you for the correct "internal" moral reasons (because such a law is universalizable, because doing so respects your humanity, and so forth), then I will necessarily also have complied with the *juridical* law in the external use of my choice (because ideal external laws forbid murder).

Also of note here is that the ultimate source of any particular moral law (ethical or juridical) is human reason. Reason allows us to discover moral laws as surely as it enables the discovery of the laws of nature. The difference is that the laws of nature rely on empirical observations, while the laws of freedom rely on reason alone—they are "pure rational" concepts.[23] Still, both areas of human endeavor result in the discovery of laws. Laws of nature are mandated by the features of the natural world—because of the way the world is, we cannot defy the law of gravity without stepping outside our physical universe. Laws of freedom derive from the features of rational moral agents: we cannot defy the law of freedom without losing our place in our moral universe. This is why Kant asserts that we can only be free by subjecting ourselves to the moral law. Kantian freedom comes by *choosing to constrain ourselves* in such a way that we comply with the demands of morality, not from having *no moral constraints* on our conduct. We are free, in this sense, when we exercise autonomy of will rather than permitting our acts to be determined by causes external to our reason. Such a freedom ultimately entails, not just following the moral law, but internalizing it. We choose to put ourselves under the authority of the moral law, and in such commitment is true moral freedom attained.[24]

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22. *See generally* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS in IMMANUEL KANT: PRACTICAL PHILOSOPHY 37-108 (Mary J. Gregor ed. & trans., 1996). Specifically, see *id.* at 57 (4:402), 73 (4:421) for the Formula of Universal Law ("I ought never to act except in such a way that I could also will that my maxim should become a universal law"); *id.* at 80 (4:429) for the Formula of Humanity ("So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means"); *id.* at 81 (4:431) for the Formula of Autonomy ("[T]he idea of the will of every rational being as a will giving universal law"); and *id.* at 83 (4:433) for the Formula of the Kingdom of Ends ("A rational being must always regard himself as lawgiving in a kingdom of ends when he gives universal laws in it but is also himself subject to these laws"). I do not take a position here on whether Kant's several formulae are equivalent, or even whether any of them correctly capture the set of conditions that constitute a morally right act. The important point for present purposes is that a morally right act must be performed for the right reasons (whatever those reasons turn out to be), whereas a juridically right one need not be.

23. *See*, *e.g.*, KANT, *supra* note 16, at 14 (6:221).

24. Thus, Kant says that "the greatest perfection of a human being is to do his duty *from duty* (for the [moral] law to be not only the rule but also the incentive of his actions)." KANT, *supra* note 16,

B. Civic Freedom

Having established that personal morality (virtue) and public morality (justice) are concepts related by their derivation from the laws of freedom (discoverable through our status as rational moral agents), we are in a better position to understand Kant's reasoning about the requirements of justice.

Kant's theory of justice is most clearly developed in a section of the *Metaphysics of Morals* called the *Rechtslehre*, or Doctrine of Right. Of particular importance here will be the subsection of the Doctrine of Right entitled "Public Right," which describes citizens' rights and duties in the context of civil society.[25] In contemporary terms, we might say this section represents an attempt to describe the necessary features of the "basic structure"[26] that a political society must have in order to constitute a just regime. We must keep in mind, in doing so, that Kant views the demands of justice as taking the form of rational laws. Thus he defines the Doctrine of Right as "[t]he sum of those laws for which an external lawgiving is possible."[27] Again, the term "law" does not refer to *positive* law, where "there has actually been such [external] lawgiving,"[28] but to *juridical* laws, which are one form of lawlike commands of reason.[29] Moreover, Kant does not intend to begin by answering specific questions about justice or morality but, rather, to elucidate foundational principles that will, eventually, help us address such questions.[30]

In order to understand Kant's conception of civic freedom within the *Rechtslehre*, we first need to understand what he intends by the term *Recht*. Kant says that this concept is one which satisfies the following conditions:

> (A) It "has to do, first, only with the external and indeed practical relation" between human beings "insofar as their actions . . . can have (direct or indirect) influence on each other."

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at 155 (6:392) (emphasis in original). On the difference between ethical and juridical lawgiving, see *id.* at 21 (6:219). And on the "self-constraining" nature of ethical duties, see *id.* at 148 (6:383).

25. *Id*. at 89-113 (6:311-6:342).

26. RAWLS, *supra* note 12, at 7.

27. KANT, *supra* note 16, at 23 (6:229).

28. *Id.*

29. The Doctrine of Right is further contrasted here with laws which are strictly "internal"—i.e. those moral laws which will be at issue in the *Tugendlehre*, or Doctrine of Virtue—the other main section of the *Metaphysics of Morals*.

30. Thus "the application of these principles to cases the system itself cannot be expected [to address], but only approximation to it." KANT, *supra* note 16, at 3 (6:205).

(B) It "signif[ies] . . . a relation to the other's choice" and not another's "mere wish" or "mere need."

(C) Finally, "[a]ll that is in question is the form in the relation of choice" and not "the matter of choice, that is, of the end each has in mind with the object he wants."[31]

Condition (A) initially posits that justice (*Recht*) is a relevant concept when considering the formal, external relations between people living closely enough together that their actions influence each other. This uncontroversial claim is supplemented by two others (still under (A)) that merit closer attention. First, justice is not concerned directly with people's internal feelings about one another. Second, it is likewise not concerned with the relationship between people and non-rational entities.

On its face, the first claim may seem too strong. But the claim is not that people's feelings about others will always be irrelevant to justice. Indeed, Kant would say that good citizens *should* be disposed to regard their fellow-citizens in certain ways, which requires cultivating certain attitudes toward them.[32] But it is still right to assert that I can behave justly, in a formal sense, without having those feelings or attributes on any particular occasion, even if they are conducive to just behavior. For example, I do not violate the demands of justice if I *merely* harbor a private loathing of you or your ilk (though I might violate a principle of personal morality in doing so); but this assertion is compatible with the observation that I am more likely to be the kind of person who acts justly if I in fact attempt to overcome these feelings and regard you in a more positive way.

The second claim—justice is not concerned with the relationship between people and non-rational entities—appears plausible insofar as it entails that justice does not concern itself with, say, people's aesthetic values (except derivatively, as when I unreasonably prevent you from pursuing a desired art form). But it also appears to preclude concern for human-to-animal relationships, or human-to-environment relationships, as matters of justice. Here we confront an unfortunate feature of Kantian thought more generally: it does not appear to accommodate the notion of

31. *Id.* at 23-24 (6:230) (emphases removed).

32. For an example of how this principle might be applied in the criminal justice context, *see* Sarah Holtman, *Kant, Retributivism, and Civic Respect*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 107 (Mark D. White ed., 2011).

valuing non-human animals, or the natural world more generally—at least not for their own sake, rather than for their potential impact on human beings.[33] While we might normally be justified in noting this weakness and moving on, it presents a real problem in the present context, because criminal justice is sometimes thought to properly concern itself with such relationships. For example, we need to determine whether we ought to criminalize conduct which does not harm other humans directly, but which harms other sentient beings (e.g. treating animals cruelly), or which harms the natural world (e.g. polluting a river).

I will tackle these questions in §III below. As a preview, however, I will suggest that the criminal law should rightly focus on a certain subset of wrongful interactions between human beings. Harms to animals or the natural world, however wrongful, fall outside the aegis of the criminal law.[34] If I am right, then this clause of condition (A) presents no particular problem for a Kantian theory of criminal justice. Whether justice (*Recht*), as opposed to morality more broadly, entails the proper treatment of animals or nature is a question I cannot hope to answer here. If so, then we would need to reject (A) or, more charitably, find a way of incorporating concern for non-humans into it.[35]

Condition (B) states that whatever duties arise from the Doctrine of Right will be directed toward others' choices and not their wishes or needs. Attending to others' desires may be laudable, and even required as a matter of morality—surely Kant does not think there is *no* moral difference between "beneficence or callousness."[36] His point is that, whatever we ought *morally* to do, the bar is significantly lower when we ask what is required by *justice*.

A clarification is surely in order here, however, due to Kant's use of the term "need" (*Bedürfniß*). If we are not to concern ourselves with others' needs (as a matter of justice), then it would seem that justice would not

33. Thus, Kant asserts that "beings without reason, still have only a relative worth, as means, and are therefore called *things*." KANT, *supra* note 22, at 79 (4:428), emphasis in original. *See also* IMMANUEL KANT, LECTURES ON ETHICS 212 (Peter Heath trans., Peter Heath & J.B. Schneewind ed., 1997) (27:458).

34. Except, that is, insofar as they implicate rights human beings have, as when someone wantonly pollutes land belonging to another.

35. For two such attempts, *see* Lara Denis, *Kant's Conception of Duties Regarding Animals Reconstruction and Reconsideration*, 17 HIST. OF PHIL. Q. 405 (2000) and Thomas E. Hill, Jr., *Ideals of Human Excellence and Preserving Natural Environments*, 5 ENVTL. ETHICS 211 (1983).

36. KANT, *supra* note 16, at 24 (6:230).

require the provision of public education, welfare, health care, or any other purported social good—after all, these are "mere" needs. Yet many of us no doubt share the intuition that citizens ought to have the basic resources needed to make rational choices, and this seems very likely to include access to goods such as education, health care, and so on.

One possibility is that Kant did not, in fact, intend his conception of civic freedom to move beyond what I will refer to below as "political" conditions of freedom. On this libertarian reading, justice requires us to refrain from interfering with others' choices, but does not require us to assist others in attaining their desires. Thus, justice prevents me from interfering with your choice to vote for a particular presidential candidate but will not require that I (or the State) provide you with educational opportunities that would permit you to make an informed choice in the matter.

A second possibility is that we should read "need" here as something like "perceived need" or "specific need." Thus, it is a plausible interpretation of (B) that justice demands that we enable people to make rational choices—but we are not (again, as a matter of *justice*) required to enable them to attain any particular thing that they might want (or think that they need). On this view, citizens might have a right to a basic level of education (so that they could, among other things, make informed decisions about whom to vote for), though they would not have a right to attend any particular college that they wished. Again, we might think that citizens ought to have access to lifesaving and disease-preventing forms of healthcare, since health is necessary in order to make rational choices about the course of one's life. The state need not, however, subsidize a person's particular desire for cosmetic surgery, since this is (barring exceptional cases) not vital to the person's ability to form and pursue his conception of the good (despite the fact that, in any particular case, such surgery might happen to be something he *wishes* he could choose, and even thinks he needs).

Both of these interpretations seem plausible. The bare text would seem to support the more libertarian reading, but Kant's broader commitments to citizen autonomy seem to argue in favor of the more liberal one. As this section will make clear, however, we need not decide which is the correct (or more compelling) interpretation for the purposes of our discussion about criminalization.

Finally, condition (C) posits that justice is concerned only with the *form* and not the *matter* of choice. Kant's example here is a commercial transaction. The Doctrine of Right does not inquire into whether the parties

to a transaction will "gain" in an objective sense, but merely whether the choice is a free one that accords with universal law. Again, we might worry about the possibility that commercial transactions will not be fair in many cases, despite their form being just. It is probable, though, that Kant has in mind contracts entered into by fully free and rational agents. In the situation where the contracting parties are aware of the ramifications of their choice, and the choice is free, then justice is not concerned with whether the transaction results in what looks like an objectively "fair" trade. All that matters is that the transaction was entered into freely.

Once again, a simple example is instructive. Suppose I purchase two widgets at the store, that I was not coerced into doing so, that I knew what the widgets were, and that I had access to information about reasonable widget prices (and whatever other conditions we might imagine are necessary in order to classify my choice to purchase widgets as a free one). If I later decide that I do not, after all, want any widgets and attempt to undo the transaction by returning them to the store, then we surely would not say that it would be *unjust* for the storekeeper to refuse to accept my proffer of a return. It might be morally praiseworthy if she did so—and of course it might be in her best interest as a businessperson to provide this level of customer service—but it would not be *unjust* if she refused to buy back the widgets. The "form" of the widget transaction was fair and uncoerced. This is sufficient as a matter of justice, even if I spend the rest of my life regretting my widget purchase.

Conditions (A), (B), and (C) are what we might call the formal constraints on the concept of *Recht*.[37] They can help us identify questions that fall under the aegis of "juridical" law. The question then becomes—how do we act justly? Justice, for Kant, is doing what is right "in accordance with external laws."[38] Since that which is right conforms to duty, and the external law is the "juridical" law, what Kant means is that justice is the duty to conform one's actions to the requirements of ideal laws under conditions (A), (B), and (C).

How, though, do we determine what such conformity entails in any given case? After Kant lists the criteria above, he concludes that "[r]ight is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of

37. Here I employ the language, though not content, of Rawls's "formal constraints of the concept of right." RAWLS, *supra* note 12, at 112-18.

38. KANT, *supra* note 16, at 16 (6:224).

freedom."[39] This leads to the formulation of the Universal Principle of Right ("UPR"): "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."[40]

The UPR is the standard against which we can measure our social progress toward justice; it is a "universal criterion" we can use to determine whether an act is just or unjust, and it (similarly to the Categorical Imperative proposed in the *Groundwork*) is cognizable "in reason alone."[41] In other words, Kant believes we will naturally arrive at the UPR if we think about what it means to act justly or unjustly. One might be skeptical about the UPR as the only possible principle of justice, but it provides a compelling starting point for thinking about criminal justice. In order to grasp its import fully, however, we need to determine what "freedom" means in this context.

In order to answer this question, a brief foray into moral theory will be helpful. According to Kant, moral freedom is attained by acting via reason for the sake of moral duty alone, unconstrained by any motivations or influences extrinsic to the will. Being morally free entails many obligations—both to others and to oneself. Moral freedom has little to do with the absence of constraint; it is a concept that applies to the use of our will in making moral choices. I act freely (morally speaking) when I choose to conform my conduct, and my reasons for it, to the requirements of morality. I am not free *to do anything I will*; rather, I am free *to will that which I ought to do*.

To be more specific, Kant distinguishes between two senses of moral freedom: "Freedom of choice is this independence from being determined by sensible impulses; this is the negative concept of freedom. The positive concept of freedom is that of the ability of pure reason to be itself practical."[42] Freedom in the "negative" sense thus refers to our choice to act by overcoming base desires. Human beings are free in this sense because they have the capacity to make moral choices. This is what distinguishes humans as a class from rocks, trees, and nonhuman sentient beings; nonhuman animals act on instinct and impulse and are therefore capable

39. *Id.* at 24 (6:231).
40. *Id.*
41. *Id.* at 23 (6:230).
42. *Id*. at 13 (6:213-14) (emphasis removed).

merely of "animal choice."[43] Freedom in the "positive" sense, meanwhile, refers to the capacity that human beings have for internalizing moral principles—that is, we can discover principles of morality using our reason, but we can also claim a kind of ownership of them. Thus, a child might "discover" that honesty is a requirement of morality. He might initially make the choice to behave honestly in a merely negative way: in order to please his mother, for example. Hopefully, though, he will eventually come to endorse the principle of honesty as his own. He will see honesty as morally required regardless of the outcome. And he will be disposed to act on a maxim of honesty for its own sake, not merely as a means to avoid punishment or garner approbation.

This Kantian notion of freedom can be contrasted with a more libertarian one, in which freedom is characterized as the mere absence of constraint. Indeed, our commitment to being free often requires us to constrain our desires. To take a simple example, Kant warns against "[b]rutish excess in the use of food and drink," which "restricts or exhausts our capacity to use them intelligently."[44] We are free to decide what to consume, but overconsumption of certain substances can impair our freedom.[45] So according to the Kantian view, a commitment to avoiding gluttony—or certain psychotropic substances—is the very essence of human freedom. We free ourselves by committing ourselves to follow the constraints of the moral law. Such morally obligatory self-constraint may cause an onlooker to think that the morally upright Kantian is *not* free—but this is only because the onlooker has in mind a libertarian definition of freedom as the mere absence of constraint. Kant does not endorse this notion of freedom in his moral theory.

What does this have to do with freedom in the context of the *Rechtslehre*? As one might expect from someone who sees the entire normative universe as logically connected, Kant's concept of *civic* freedom bears some important similarities to the concept of *moral* freedom. As one would expect, however, there are also important differences between these concepts. These differences exist because justice involves normative requirements that arise by virtue of living in political communities, whereas the normative requirements of morality exist simply by virtue of being a

43. *Id.* at 13 (6:213).

44. *Id.* at 180 (6:427).

45. Kant specifically counsels against the use of "narcotics, such as opium and other vegetable products," which "create a need to use the narcotics again and even to increase the amount." *Id.*

competent moral agent.

The clearest similarity between civic and moral freedom is that both require putting ourselves under law. In the moral context, we act freely when we choose to follow the internal moral law—the Categorical Imperative.[46] In the political context, we are free when we choose to be subject to external laws which are just. In both cases, freedom is not merely the absence of coercion; rather, it entails choosing to be governed by a certain type of law. In the realm of morality, the self-subjection to the moral law allows us to be free from the "sensible impulses" external to our will that otherwise threaten to govern our conduct. In the civic sphere, being subject to the just laws of the polity ensures that we are free from having our choices governed by forces external to our person—that is, by other people's wills.

Here, then, we see an important distinction between moral and civic freedom: while one's status as a morally free agent takes no account of others' actions, civic freedom *is* attained in part through the absence of unnecessary restraint or coercive force by other parties, including the government. Thus a corollary to the UPR is that citizens (and the state) can only "use external constraint that can coexist with the freedom of everyone in accordance with universal laws."[47] I am coerced, *morally*, when *I* permit forces extrinsic to my will to influence my (moral) decision-making. By contrast, I am coerced, *civilly*, when *another person* (or government entity) interferes with my (not-necessarily-moral) decision-making.

Civic freedom is thus importantly reciprocal in a way that moral freedom is not. I am morally free (or not) quite independently of your choices. But because freedom in the political context has to do with relations between people, it entails both that I have obligations toward other people and that they have such obligations toward me. To be free (civilly), others must not interfere with my choices, *and* I must not interfere with theirs.

For example, suppose I am falsely imprisoned by corrupt government officials. I retain moral freedom despite my imprisonment. I can choose to treat other human beings I encounter with respect for their humanity, and I can endorse such respectful treatment as a requirement of morality. True, I might find it more difficult to act this way toward other people while I am languishing in prison—but I nonetheless retain the capacity to act morally.

46. *See* KANT, *supra* note 22, at 88 (4:439-40), for Kant's discussion of morality-qua-lawgiving.

47. KANT, *supra* note 16, at 25 (6:232).

By contrast, such a situation would constitute an obvious hindrance to my ability to make meaningful life choices about where to live, how to be employed, and what to do with my spare time. This diminished civic freedom is a direct result of others' actions, while my moral freedom persists in spite of them.

Thus, to the extent that scholars have interpreted Kantian civic freedom in a libertarian manner (as merely the absence of restraint or coercive force[48]), their view is incomplete. For Kant, civic freedom entails both making "free use of [my] choice" but also being bound by obligations toward others.[49] Making free use of your choice does mean being able to choose your own ends: "nobody else gets to tell you what purposes to pursue; you would be their subject if they did."[50] Part of what Kantian freedom entails is therefore that the just society will be one in which all citizens are free from any type of formally coercive relationship—relationships, such as those between slave and master, or suzerain and serf, which would prevent them from setting and pursuing ends they choose for themselves. But your freedom to pursue your ends is also "limited to those conditions" that permit others to exercise their freedoms.[51] To live freely in civil society is thus to live in a state of mutual civic respect—that is, to respect everyone's status as citizens and their concomitant claim to freedom—and also mutual accountability (the importance of which will become clear in Chapter 3). It is to presume that each is "innate[ly] equal[]" and capable of being his or her "own master."[52] It is to treat each other as "beyond reproach" (we should, in legal parlance, presume one another's innocence) and as "being authorized to do to others anything" that does not violate the UPR (we interact with fellow citizens at will).[53] These requirements go well beyond the mere avoidance of formal coercion.

Such requirements will, of course, necessitate that I give up some of my ends: maiming you might help me achieve my desires but would be incompatible with your ability to do the same. But being "forced" by the principle of reciprocal freedom (instantiated by the UPR) to give up my ends

48. *See*, *e.g.*, Sharon B. Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 L. & PHIL. 151, 153-54 (1989).

49. KANT, *supra* note 16, at 24-25(6:231).

50. ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 34 (2009).

51. KANT, *supra* note 16, at 24-25 (6:231).

52. *Id.* at 30 (6:237-38).

53. *Id.* at 30 (6:238).

is not the same as being "forced" by a dictator to do so. The forcefulness here is a matter of reason and morality, not physical or political power. And reasoning about the basic requirements of a just society leads to the conclusion that civic freedom requires that my ends be restricted to those which are compatible with yours, and vice-versa.[54]

Finally, we can distinguish between negative and positive aspects of civic freedom, just as Kant explicitly does with moral freedom. In its negative mode, civic freedom entails being unconstrained by others' wills. In its positive mode, it entails that citizens internalize the Universal Principle of Justice: they see themselves as under an obligation to act in such a way that is compatible with others' freedom, and they become disposed to act this way even if they have personal incentives to the contrary.[55] Libertarian interpreters of Kant correctly characterize the former aspect of civic freedom but pay insufficient attention to the latter.

To summarize, we have seen that Kant has some formal criteria that purport to separate the concept of justice from that of personal morality. Yet acting justly does not normally require recourse to such conceptual analysis. Rather, we can determine what justice requires in much the same way that we can tell what morality requires: by appealing to the rational grounds of any juridical law, which is the Universal Principle of Right. The UPR holds that a just act is an exercise of freedom compatible with others' freedom. Civic freedom, for Kant, is thus a reciprocal commitment. I am free, politically speaking, when I submit to the authority of just laws, and such laws, by virtue of being just, will accord all other citizens the same freedom to act. Logically, there are a great many acts which comply with the UPR: justice sets certain limits on the way that I act, but still permits a practically infinite combination of choices and acts that form what contemporary liberal theorists refer to as one's "life plan."

Here, though, we face an important question about the scope or extent of Kant's notion of civic freedom. It is clear that civic freedom requires that

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54. This insight may motivate the formulation of Rawls' first principle of justice: "equal basic liberties" must be "compatible with a similar scheme of liberties for others." RAWLS, *supra* note 12, at 53, 266.

55. This is likely what Kant refers to as civic *independence*. Independent citizens see themselves as "colegislators" of "a public law that determines for everyone what is to be rightfully permitted or forbidden him"; this law is "the act of a public will . . . of the entire people (since all decide about all, hence each about himself)." Immanuel Kant, *On the Common Saying: That May Be Correct in Theory, But It Is of No Use in Practice*, *in* IMMANUEL KANT: PRACTICAL PHILOSOPHY 294-95 (Mary J. Gregor ed. & trans., 1996) (8:294).

I not be "hindered" in the pursuit of my ends. But what characterizes such hindrances? Are they to be construed merely as others' choices? Or should we also consider other factors, such as social conditions which might prevent people from pursuing their conceptions of the good? For example, it is clear that it would be unjust for me to prevent you from applying for a job by kidnapping you. But what if your inability to obtain the job in question is due to systemic racial discrimination? Or what if, through no fault of your own, you had no access to educational opportunities that would enable you to compete for this kind of employment?

It would be fruitful at this point to distinguish between different types of conditions that might be said to contribute to people's autonomy within society—that is, to their civic freedom. First, rational moral agency is required for people to be considered autonomous. Thus, children and those with severe mental impairments cannot enjoy all the benefits—nor can they be expected to bear all the burdens—of citizenship. Next, there are what we might call *political conditions* of freedom: citizens must be treated equally under the law; must enjoy a reasonable level of security; and must be afforded certain basic rights. Those rights will include the freedom from interference with bodily integrity (which includes the right not to be deprived of life or liberty unjustly); the freedom from interference with political, religious, or other types of expressive choices; and the freedom from interference with the possession, acquisition, and use of private property.[56] These rights are necessary for citizens to be able to set and pursue their own conceptions of the good. They may not, however, be sufficient. We may wish to add a second category of positive rights (the *social conditions* of civic freedom), such as rights to affordable healthcare, a minimum standard of living (or particular share of society's resources), and educational opportunities. It is quite plausible to think that these social conditions are also necessary in order for citizens to make free choices about the course of their lives within civil society.[57]

56. I do not intend this list to be exhaustive, though these are commonly cited examples. See Rawls's list of "basic liberties" for a cognate view. RAWLS, *supra* note 12, at 53. His discussion of the "concept of liberty" is also useful. *Id.* at 176-80. The political conditions will consist mainly of negative, civil rights, such as those found in the Universal Declaration of Human Rights, art. 3-21; it will exclude many positive economic or social rights, such as those in art. 22-27. UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), http://www.un.org/en/universal-declaration-human-rights/ [https://perma.cc/9BHD-3G97]. These would be classified among the *social* conditions of civic freedom.

57. Rawls thus includes them in his list of "primary goods." RAWLS, *supra* note 12, at 54-55. It may be that Rawls is correct that what I am calling social conditions are of secondary importance to

Libertarian interpreters have thought that Kant, a "classical liberal,"[58] would endorse a minimalistic social order characterized by a paucity of government interference in citizens' lives.[59] On this view, Kant intended civic freedom to include what I have called the political conditions for civic freedom, but *not* the social conditions—which will, after all, typically require a greater governmental role for the provision of social services. As I have already noted, there is some textual evidence that this is in fact the view that Kant held. However, a thoughtful analysis of the requirements of civic freedom seems likely to yield the conclusion (regardless of whether or not Kant himself reached it) that the capacity to exercise my civic freedom will require some minimally satisfactory life conditions of the kind guaranteed by the social conditions. Nobody can seriously be thought to be free to pursue their own conception of the good when starving, dying from preventable disease, or subject to significant and pervasive discrimination by a large sector of their society. Thus, civic freedom will likely entail the provision of certain social services designed to preserve (among other possibilities) citizens' health, economic wellbeing, and social standing. We may wish to go even further: perhaps civic freedom ultimately requires a more equitable distribution of resources than found in most contemporary societies, such as Rawls proposes under his Second Principle.[60]

While I believe a compelling interpretation of Kantian freedom would, indeed, require us to recognize the substantive social conditions noted above, I shall not endeavor to make such an argument here. It will be sufficient for our purposes to note that Kantian civic freedom *at least* entails that I refrain from actions which would result in the violation of the *political conditions* of civic freedom. This is because the purpose of the criminal law (or so I will argue) is to preserve the formal "relation[s] of choice"[61] that characterize human interactions within the "rightful condition"[62] of a just society. In other words, the preservation of these political conditions is

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the political conditions—which is why he asserts that basic liberties cannot be sacrificed in the name of socioeconomic gains. *Id.* at 53-54. My goal here, however, is merely to call attention to the fact that civic freedom in its fullest sense may require the addition of these social conditions.

58. *See*, *e.g.*, Roger Sullivan's introductory essay to an extant edition of the Metaphysics of Morals, asserting that "Kant represented classical liberalism and its attack on what remained of feudalism." *Introduction*, KANT, *supra* note 16, at xiii.

59. *See generally* Byrd, *supra* note 48; Don E. Scheid, *Kant's Retributivism*, 93 ETHICS 262 (1983).

60. RAWLS, *supra* note 12, at 65-73.

61. KANT, *supra* note 16, at 24 (6:230).

62. *Id.* at 89 (6:311).

necessary for civic freedom. Whether it is sufficient is a larger question that I will leave for another day—though I suspect it is not. So, while a full discussion of Kantian justice would require delving into issues such as the ethics of resource inequality, this is beyond the scope of this project. It is sufficient for present purposes to understand that an ideally just society will *at least* be one in which citizens are free as a formal, political matter to pursue their ends, subject to the requirement that they comply with the UPR.

II. A KANTIAN THEORY OF CRIMINALIZATION

In this section, I present the Kantian theory of criminalization that is the main purpose of this paper. In doing so, I will focus on answering the following question: *what kinds of acts ought to be criminalized*? Before proceeding, though, it is worth noting that there is another significant question relevant to the topic of criminalization: *who ought to be doing the criminalizing*? I shall address this latter issue only briefly before turning to the former.

In the *Rechtslehre*, Kant avers that "legislative authority can belong only to the united will of the people."[63] The claim here is not that positive law can never be rendered (in the real world) in the absence of unanimity among voters. Rather, the idea is that *just* legislation (political authority exercised in its pure form) necessarily arises from laws that citizens would give themselves, when acting in a way intended to preserve one another's freedom, equality, and independence.[64] Of course, no legislative system actually succeeds in passing all and only just laws. But where just laws do exist, they can rightly be characterized as decisions of "free and equal, co-legislating member[s] of the state."[65]

It seems, then, that criminal laws in a just Kantian society could only be passed by legislative bodies either composed of or at least representing all citizens. An executive cannot make a unilateral decision to criminalize particular conduct, nor can a judge determine that a law is enforceable via criminal penalties—unless the legislature has not specified this beforehand, and the executive or judge succeeds in acting on behalf of the united will. Thus, as Kant put it, one governmental "authority" cannot justly "usurp

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63. *Id.* at 91 (6:313).
64. *Id.* at 91 (6:314).
65. PAULINE KLEINGELD, KANT AND COSMOPOLITANISM: THE PHILOSOPHICAL IDEAL OF WORLD CITIZENSHIP 30 (2012).

[the] function" of another.[66]

On the face of it, this seems sensible—but upon reflection things are not quite so simple. Laws often fail to provide sufficient specificity to easily determine every case. Judges are therefore often required in the course of their duties to interpret statutes passed by the legislative body. But doing this sometimes requires the exercise of what at least appears to be a lawmaking function.

For example, a domestic-violence statute might criminalize violence against "family members." What constitutes a "family member" might be obvious in some cases, such as when the victim is the defendant's biological child and lives with him. In other cases, however, the answer may not be obvious: what about a non-married and non-cohabitating couple who have been romantically involved for years? What about a case involving a victim biologically related to the defendant, where the two have never lived together and were unaware of their relationship at the time of the offense? Of course, it would be helpful if the legislature would specify what constitutes a "family member," but there is no guarantee that they will do so—and even if they try their best, it is inevitable that courts will be faced with ambiguities at some point. But if the legislature fails to specify what constitutes a "family member," then either the jury must make this determination on a case-by-case basis, or judges must issue an interpretation binding on subsequent cases. Leaving such decisions up to the jury in every case invites inconsistency. Permitting judges to make rules makes sense in these kinds of cases—but this seems to violate Kant's anti-usurpation clause.

Indeed, Kant's view of judging may be too limited. He sees the role of the "judicial authority" as simply "award[ing] to each what is his in accordance with the law," or rendering a "verdict (sentence)[as to] what is laid down as right in the case at hand."[67] Given human nature and the imprecision of human language, it is inconceivable that the judiciary will never be called upon to exercise a kind of lawmaking function, at least in the limited, and very routine, sense of "filling in the gaps" in legislation. Still, an expansion of the judicial function in this sense does not seem contrary to the spirit of Kantian lawmaking: so long as judges are attempting to discern the will of the legislature and limit their role to making reasonable

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66. KANT, *supra* note 16, at 93 (6:316).
67. *Id.* at 91 (6:313) (emphasis removed).

rules about how to implement the united will of the people—and, of course, assuming the legislature has the authority to change its mind if it disapproves of decisions made by the judiciary—then they do not impermissibly "usurp" the function of the legislature.

The issue of who ought to be doing the criminalizing is not quite as simple as this, however. For example, if criminalization cannot justly occur in the absence of some (generally legislative) operation of the united will, then we must conclude that the judiciary cannot rightly exercise a lawmaking function (except perhaps insofar as it fills in the gaps in existing law). Yet there are certain cases where we have historically approved of the judicial genesis of crimes. The classic example here is Nuremburg. High-ranking Nazis were prosecuted after World War II by an international tribunal, convicted of serious war crimes, and punished accordingly. The problem is that the acts in question, while morally reprehensible, were not designated as crimes prior to the trials. This creates an odd result: "[b]ecause their conduct was contrary to neither existing German nor international criminal law, at least some of these Nazi officials were legally innocent"—yet many people find nothing untoward about punishing genocidal war criminals even in the absence of preexisting law criminalizing their conduct.[68]

I suspect that Kantian theory could ultimately address such questions in a satisfactory manner. For now, however, I shall sidestep such complications by assuming that we have in place a system whereby acts can be designated as crimes in accordance with the united will via some kind of democratic legislative process. Given this background assumption, we can then safely turn to the more immediately important question: *which acts should the legislature designate as crimes*? To this end, I will propose (in subsection A) a Kantian definition of criminal acts. I will then (in subsection B) show how an application of this definition will result in a more favorable

68. Christopher Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371, 388 (2012). The contemporary German solution to this problem is noteworthy. In general, the maxim ***nullum crimen, nulla poena sine scripta lege*** (or, "no crime, no punishment without written law") holds, but in "recent German history . . . one category of law [exists] that would stand outside [this requirement]: the demands of natural justice or natural law." MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 11 (2009). Thus, the ban on retroactivity does not apply to crimes such as genocide or war crimes. *Id*. at 26. Importantly, this exception to the general principle applies, not just to "natural crimes" which the state has failed to codify, but also to situations where the defendant has a "natural right" defense similarly uncodified. *Id*. at 13. Thus "[n]atural justice . . . should be seen as a kind of safety-valve in a legal system tending toward a positivistic approach." *Id.*

approach to criminalization than the one currently taken in Anglo-American criminal justice systems.

A. A Kantian Definition of Crime

Kant's only definition of a criminal act is terse: it is a "transgression of public law."[69] This initially sounds unhelpful—crimes surely cannot be the violation of *any* law, and the modifier "public" is ambiguous. We can make some progress, however, when we look at the way Kant describes some example offenses: "counterfeiting money . . . theft and robbery, and the like are public crimes, because they endanger the commonwealth and not just an individual person."[70] Now crimes such as theft surely do not "endanger the commonwealth" in the literal sense—however wrongful they might be, property offenses typically do not rise to the level of treason. So, what could Kant mean by using such a strong phrase?

Recall that Kant's conception of justice entails that citizens must refrain from those acts which deprive other citizens of their civic freedom. In a just society—one that is in what Kant calls a "rightful condition"[71]—the purpose of laws is to ensure the freedom of all citizens. When I violate a just law, I therefore violate others' civic freedom. By subjecting others to my will, I will that my ends become their own. I thus act in pursuit of an end that is incompatible with others' ends. But the wrongdoing here is not merely engaging in an activity that is incompatible with a specific end another holds—for we all hold ends that are, to some extent, incompatible with others'. Rather, the wrong at issue is acting in such a way that undermines the *capacity* that other citizens have by virtue of their citizenship of setting and pursuing their ends. It is for this reason that a crime "endangers the commonwealth," and does not merely harm an individual (though it often does this as well).

To put this more succinctly, the following definition is an initially plausible way of identifying criminal acts based on what we know about Kant's views of justice:

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69. KANT, *supra* note 16, at 105 (6:331).
70. *Id.*
71. *Id.* at 89 (6:311).

C: φ is a crime iff[72] φ interferes with another's[73] civic freedom.

In other words, if A does something that deprives B of B's ability to set and pursue B's ends as a citizen, then A has committed a crime. Definition C captures quite a bit of paradigmatically criminal acts. Murder, rape, and other *mala in se* acts use coercive force in a manner that obviously deprives victims of their ability to enjoy their freedom.

C is not specific enough, however, for there are at least two possible interpretations of it (as well as a third, which shall be dealt with shortly):

C′: φ is a crime iff A's commission of φ interferes with B's pursuit of B's ends.

C″: φ is a crime iff φ is an instance of Φ and Φ by its nature violates the political conditions that enable citizens to pursue their ends.

It should be easy to see that C′ represents an overly broad definition of crime. Many activities that human beings undertake have the effect (intended or otherwise) of interfering with others' ability to pursue their ends. For example, adopting C′ would imply that both economic and athletic competitions should be criminalized. After all, if I attract more customers with a superior product—or if I win a race by running faster—then I have interfered with others' purposes. These activities should obviously not be considered crimes. C′ also has the problem of failing to criminalize acts which, while reprehensible, fortuitously fail to interfere with others' pursuit of their ends. Thus, if A murders B, who was (unbeknownst to A) attempting suicide at the time, surely we would want to assert that A has committed a crime despite unintentionally aiding B's pursuit of his goal.

Definition C″ better captures the Kantian view of criminal acts. I commit a crime if my act is of the kind that violates those formal, political conditions which enable the pursuit of ends by all citizens. (Recall that the political conditions of civic freedom include rights familiar to liberal democracies: freedom of speech, religion, and assembly; freedom of

72. This notation is used in philosophical literature to stand for the biconditional "if and only if."

73. Here, as elsewhere in this paper, I assume that the criminal and victim are both citizens of the same polity, and that the offense takes place within that polity. A fuller account would need to explain why non-citizens who commit criminal acts can be justly prosecuted within the jurisdiction where the offense takes place, as well as why non-citizens are entitled to claim a violation of their civic freedom in the criminal context while not otherwise being entitled to exercise certain aspects of it (e.g. voting or receiving certain government benefits). For a brief discussion, see §III *infra*.

movement and association; a right to bodily integrity; and so on.) This definition is more complicated but avoids the problems in C′. For example, theft and other property crimes violate the condition of private property ownership that enables people to pursue their economic interests. (By contrast, fair economic competition on the Kantian view does not violate this condition.) Any assaultive crime (murder, rape, kidnapping, battery, and so on) violates the condition of freedom of bodily integrity that enables people to pursue the life they wish. Moreover, C″ allows us to call the "lucky" murderer in the above example a criminal: although it turns out that B does not mind being killed, this particular killing is nonetheless an instance of the kinds of offenses which prevent citizens from using their lives as they see fit.

Recall that one of part of the formal definition of *Recht* is that it "has to do, first, only with the external and indeed practical relations of one person to another."[74] These external relationships are governed by the UPR. What we have done in C″, then, is simply apply this definition to the criminal law. Crimes are those acts which are incompatible with other citizens' use of their civic freedom—not just because they are morally wrong, but because they are incompatible with the "sum of conditions"[75] that characterizes a just society.

We cannot be certain whether C″ is precisely what Kant has in mind when he refers to crime as a "transgression of public law." There is, however, at least one passage that lends credence to this interpretation. In discussing the proper method of punishment for thieves, Kant asserts that "[w]hoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property."[76] Kant focuses here on punishment but, in doing so, he describes the crime of theft as the deprivation of *security in any possible property* (not just the taking of another's property) and its effect as *insecurity for everyone* (not merely harm to the immediate victim's interests). While the thief commits a moral wrong by harming his victim, the *crime* is the violation the *condition of security in property* that ensures all citizens' rights to property ownership, rights that in turn are necessary in order for citizens to use their property as they see fit.

This, then, can help us make sense of some common intuitions about

74. KANT, *supra* note 16, at 24 (6:230).
75. *Id*.
76. *Id*. at 106 (6:333).

crimes versus wrongs. Theft is a paradigmatically criminal act. Breaking a promise to a friend, by contrast, is not. Breaking promises will, of course, be morally wrong in many circumstances. That I fail to uphold my promise may be emotionally devastating for you. It does not, however, violate any political conditions for citizens' enjoyment of their freedom. Though saddened by my actions, you are still free to move about, act and think as you like, and develop your own life plan (which might now exclude my friendship!)—and so are all of our fellow-citizens. The "external" relationships among citizens have not been altered; we are all formally still free to go about our business, in a way that we are not if the system of property rights that underwrites our holdings has been violated (as in the case of theft).

There is still one ambiguity to resolve here, however. Why should we not consider the following definition of a crime as superior to C″?

> C‴: φ is a crime iff φ is an instance of Φ and Φ by its nature violates the political *or social* conditions that enable citizens to pursue their ends.

Our definition in C″ proposes that crimes are those acts which are of the type that violate the *political* conditions enabling citizens to pursue their ends. But what about the *social* conditions? As discussed in §I, the social conditions include, among other possibilities, access to important public goods such as health care, education, and welfare. As noted in that section, it may be true that Kant himself saw justice (and, therefore, criminal justice) as limited mainly to the political conditions. That, though, is not a good enough reason for us to exclude the social conditions from our conception of justice, particularly where Kant's notions of civic freedom and citizen autonomy seem to militate strongly in favor of including them. Therefore, we at least need to consider whether our definition of crimes should include violations of the social conditions.

I believe, though, that we ought to favor C″ over C‴. The reason for this is not the libertarian rationale that matters such as people's health, education, and economic status are outside the scope of justice. Rather, the reason is that they are outside the scope of *criminal* justice. Consider two different types of violations of civic freedom:

> V_1: A kidnaps B, preventing B from attending a public school.

> V_2: The government fails to provide B with access to a reasonable

level of public education otherwise available to all citizens.

V_1 is a paradigmatic criminal act. At first, V_1 seems to be a violation of a social condition of civic freedom, because B's educational opportunities are at stake. V_1 can, however, be easily rephrased in a way that makes it clear that A has violated an even more fundamental, *political* condition of B's freedom: by kidnapping B, A has violated B's right to choose what to do with his life (which may include availing himself of educational opportunities). In the case of V_2, we still ought to say that B has not been dealt with justly. But there are two crucial differences. First, the perpetrator of the ostensible crime is a nebulous entity—"the government"—rather than an identifiable citizen. There may be a sense in which *everyone* within B's society is at fault for the failure to provide B with educational opportunities. But there is also a sense in which *no one* is at fault. This is not to minimize the problems that lack of educational opportunities could cause B. We should surely fight for B's right to education—we should call upon government leaders to change policies, for example—and perhaps it would be right to demand that society compensate B for its failure to treat him equally with other citizens. But we cannot say, as we can with V_1, that an identifiable person has done something to prevent B from exercising his freedom.

This explains, in part, what motivates Kant's claim that crime renders the criminal "unfit to be a citizen."[77] Because civic freedom is reciprocal, in violating another's freedom, I thereby give up my own. This is quite intuitive for many prototypical crimes: surely the (fairly) convicted murderer has no grounds to complain that his rights are being violated if the court revokes his freedom of movement, for example, when he is sent to prison. The notion that the criminal loses certain rights of citizenship seems, however, impossible to square with the notion of crime as a violation of the social conditions of freedom. The failure of the United States to provide affordable healthcare to all citizens constitutes an injustice, but it is not one for which it is coherent to say that, for example, the Secretary of Health and Human Services ought to lose her rights as a citizen.

A further consideration is that social rights may be significantly more indeterminate than political rights. There will always be questions about what to do when political rights conflict (such as, for example, rights to security on the one hand and free speech on the other). But we can state with

77. KANT, *supra* note 16, at 105 (6:331).

some confidence what these rights involve, and the tradeoffs involved when they conflict are obvious. On the other hand, social rights seem rather more difficult to explain and implement. Does it matter, in terms of justice, whether a country implements a single-payer health insurance system, or a more market-based solution such as the Affordable Care Act? Must public education be provided to all citizens through high school? Through college? If we accept that citizens are entitled to the provision of income guaranteeing a minimum standard of living, how do we determine what that level of income is? How do we even decide who should be in charge of making such a decision? These are, of course, important questions that merit attention within our society. The criminal justice system is not, however, a plausible forum in which to answer them.

C‴, then, goes too far. The criminal law sets a floor for civic freedom, not a ceiling. Justice requires that citizens comply with the UPR and, in doing so, refrain from violating the political conditions of others' civic freedom. Such violations are rightly designated as criminal acts. This does not mean that a society free from crime will be perfectly just; a crime-free society still needs to work out how to guarantee that the social conditions for civic freedom are met for all citizens.

We have almost, then, arrived at a convincing Kantian definition of crime. One matter still requires our attention, however, before we turn to the task of applying this definition to contemporary criminal codes. This is the question of what has come to be called in Anglo-American law *mens rea*.[78] That is, to what extent does the *state of mind* of the alleged criminal matter in determining whether he has, in fact, committed a crime?

As it stands, C″ does not specify any *mens rea* requirement. Thus, it would appear that someone could be convicted of a crime even if he violated the political conditions of civic freedom *accidentally*. This, however, is implausible. It seems axiomatic that if I assault you, I am rightly called a criminal, but if I merely harm you accidentally, then I am not. But there are closer cases: what if I did not *intend* to harm you, but was insufficiently thoughtful (reckless or negligent, as lawyers put it) about the consequences of my action? We therefore need to add to C″ some language about a putative criminal's mental state.

Kant does not provide much direct guidance about this issue; his focus

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78. Formally, *mens rea* is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." BLACK'S LAW DICTIONARY 445 (2d pocket ed. 2001).

is on the nature of the criminal act itself, rather than on the mental state of the criminal. Arthur Ripstein interprets Kant to mean that a criminal necessarily acts on a maxim of self-exemption from public law.[79] This definition is too narrow, however, for reasons that shall become clear shortly. I propose, then, that order to qualify as a criminal act, we must be able to characterize the actor's maxim as being incompatible with the Universal Principle of Right.

A maxim specifies the reasons on which a person acts.[80] In the case of many criminal acts, the criminal's maxim is assumed within the definition of the crime. Thus, if Geoffrey intentionally kills Hugh because he wishes to obtain Hugh's property, we use the term *murder* (rather than, say, *accidental killing*). In doing so, we implicitly attribute to Geoffrey a maxim—something like, "I will take another's life in order to further my own purposes." After all, if we could *not* attribute such a maxim to Geoffrey (that is, if we conclude that Geoffrey's reasons for acting did not include intending to kill anyone), then we would not be dealing with the crime of murder at all.

While this is a rather quotidian example of homicide, the maxim in question does not clearly involve (as Ripstein suggests it must) self-exemption from public law. Whatever is going on in Geoffrey's mind when he sets out to kill Hugh, it is unlikely to be related to the requirements of public law. Indeed, in virtually every case (with the possible exception of treason and similar acts against the state), it would be fatuous to assume that the criminal's intent is circumventing the system of political conditions that underwrites citizens' civic freedom. It would, however, be correct to characterize Geoffrey's maxim, whatever it is, as being *incompatible* with the requirements of the UPR: Geoffrey chooses to act, for whatever purpose,

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79. RIPSTEIN, *supra* note 50, at 308-09.

80. Kant himself explains a maxim as "the subjective principle of acting. . . .[which] contains the practical rule determined by reason conformably with the conditions of the subject . . . and is therefore the principle in accordance with which the subject *acts*." KANT, *supra* note 22, at 73 (4:421), n.1. Kant avers that we can evaluate the moral worth of our maxim by comparing it with the moral law, which is "the objective principle valid for every rational being, and the principle in accordance with which we *ought to act*, i.e., an imperative." *Id*. As an example, Kant suggests that a person in need of money might be tempted to borrow from another knowing that he will never repay the debt. "Supposing that he decided to do so, his maxim of action would go as follows: when I believe myself to be in need of money, I shall borrow money and promise to repay it, even though I know that this will never happen." *Id*. at 74 (4:422). Kant demonstrates that this act would be incompatible with the moral law, because if everyone acted in this way, "no one would believe what was promised him." *Id*. Thus the lying promise is immoral because "we take the liberty of making an *exception* to it [i.e. the moral law] for ourselves . . . to the advantage of our inclination." *Id*. at 76 (4:424).

in such a way that precludes Hugh from exercising his own freedom. We can expect that Geoffrey, as a citizen, will be aware of this very basic requirement of justice and will conform his conduct accordingly. His failure to do so constitutes a criminal act.

This kind of incompatibility does not, therefore, necessarily require that the criminal act with the intent to circumvent the UPR—indeed, it does not even require that the criminal's act be intentional. While many of the *mala in se* can be characterized as having a *mens rea* requirement of intentionality, we can also expect citizens to act with a reasonable level of care when they interact with their fellow citizens. A failure to do so, while not rising to the level of *intentional* conduct, can also rightly constitute criminal behavior.

Suppose, for example, that Geoffrey kills Hugh *unintentionally*, but as the result of reckless conduct: Geoffrey is driving carelessly and runs Hugh down, for example. The law might call such a case negligent homicide, rather than murder, to reflect the fact that Geoffrey's act is different (and less heinous) than if he were to set out to act on a maxim of murder. But it is certainly right to say that driving so recklessly that one runs the risk of killing another person amounts to acting on a maxim (e.g. "In order to further my own enjoyment, I will drive however I feel like at the moment, without regard for rules or road conditions") that is incompatible with others' exercise of their freedom. It is, therefore, a criminal act.

This case can be contrasted with a purely accidental vehicular collision that causes Hugh's death. Perhaps Geoffrey is driving carefully, but Hugh is insufficiently cautious in crossing the street; or perhaps Geoffrey's car malfunctions, and he is unable to stop in time. There are numerous ways in which Geoffrey could be a but-for cause of Hugh's death, but where it would seem incorrect to label Geoffrey a criminal. This is because Geoffrey's maxim could in such cases be characterized as something akin to the following: "In furthering my own ends, I will drive in such a way that takes others' safety into consideration." Geoffrey's killing of Hugh under these circumstances would certainly be incompatible with Hugh's exercise of his freedom. It would not, however, be a criminal act, because we could not attribute to Geoffrey a maxim incompatible with the UPR.

There will, of course, be difficult cases. Perhaps Geoffrey was merely inattentive but not reckless. Perhaps Hugh was contributorily negligent in crossing the street. If Geoffrey were put on trial for vehicular homicide, the factfinder would still need to determine, in this particular case, how best to characterize Geoffrey's act. What is clear, however, is that the Kantian view

could not countenance labeling Geoffrey a criminal unless it was rightly determined that his maxim, whatever it was, was incompatible with the UPR.

Our final Kantian formulation of a criminal act is therefore as follows:

> C*: An act is a crime iff both (1) that act by its nature violates the political conditions that enable citizens to pursue their ends, and (2) the actor's maxim is incompatible with the Universal Principle of Right.

I now turn to the task of applying this definition to the criminal code.

B. Applying the Definition

In this subsection, I aim to show what it would mean for contemporary Anglo-American criminal codes if we subscribed to the Kantian definition of crime, C*, that we arrived at in the previous subsection. In order to do so, I will begin by describing some acts which will certainly be criminalized by the application of C*; I will then identify those which would *not* be criminalized under this definition. The results of this exercise are summarized in Table 1 following this paragraph, to which the reader may refer in the subsequent discussion.[81] To be clear, I cannot hope to evaluate every criminal statute in every jurisdiction in the United States. Rather, I have selected a few examples of how the Kantian definition developed in the previous subsection could help us determine the appropriate scope of the criminal law.

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81. In this chart, I leave out obvious assumptions, such as that the conduct in question is not subject to legal excuse or justification. Moreover, the examples are not intended to be exhaustive, and it is quite possible that a single act will fall under multiple classes and will implicate multiple political conditions of freedom. It should also be noted that I leave a discussion of difficult cases that remain after the application of C* for a later section of this paper.

TABLE 1: CRIMINALIZATION SCHEME

Class of Acts	**Examples**	**Political Condition(s) of Freedom Violated**	**Characterization of Criminal's Maxim**[82]	**Criminal -ize**
Physical harm to other people	Murder, Rape, Assault, Abuse, Kidnapping	This broad category may entail violations of one more basic rights, such as: Bodily Integrity: condition making it possible to do as one wishes with one's body. Movement: condition making it possible to go where one wishes. Association: condition making it possible to associate with others of one's choosing (for social, political, religious, or recreational purposes).	I will harm another person in order to obtain something for myself.	Yes
Psychological harm to other people	Stalking, Threatening, Harassment	Security: condition making it possible to lead one's life with a reasonable expectation of security consistent with that of other citizens, making it possible to exercise other rights and enjoy one's civic freedom.	I will cause others to fear for their safety, in order to satisfy my own desires.	Yes.
Property crimes	Arson, Theft, Robbery, Burglary, Vandalism	Private Property: condition making it possible to hold and use property as one desires.	I will appropriate another's property for my own purposes.	Yes
Criminal recklessness	Manslaughter, Endangerment, Drive-by Shooting, Driving Under the Influence	Varies, but typically bodily integrity as above.	In order to further my own purposes, I will act in such a way that others cannot enjoy a reasonably safe community.	Yes

82. These maxims are, of course, vey general—they would need to be stated with more specificity based on the facts of the particular case at hand.

TABLE 1, CONTINUED

Class of Acts	Examples	Political Condition(s) of Freedom Violated	Characterization of Criminal's Maxim	Criminal -ize
Regulatory (conduct toward government)	Impersonating a police officer, Escape, Obstruction of Justice, Perjury	Security: as above.	To further my own ends, I will act in such a way that other citizens cannot be assured that the government is protecting their civic freedom.	Yes
Harm to the State or public	Treason, Tax Evasion, Abuse of Office, Public Misconduct	Well-Functioning State: condition making it possible to enjoy all other civic freedoms.	I will act against the interests of all citizens in order to further my own purposes.	Yes
Regulatory (licensure)	φ'ing without a license	None. Such regulations are not required in order to ensure the political conditions of freedom.	I will exempt myself from governmental regulations.	No
Harm to self	Drug use, Suicide	None. Self-harm violates moral but not civic freedom.	I will harm myself in order to fulfill my own desires.	No
Possessory offenses	Possession or Use of Drugs, Weapons, or Pornography	None. No political conditions of freedom at issue.	I will engage in risky or unseemly behavior in private.	No
Public nuisances	Disorderly Conduct, Public Nudity, Public Drunkenness, Swearing, Littering, Leash-law violations	None (as above).	I will engage in behavior others consider obnoxious or immoral but which does not violate any political conditions of civic freedom.	No
Private immorality	Adultery, Polygamy, Pornography.	None (as above).	I will engage in behavior condemned by others (but not violative of their civic freedom) for my own purposes.	No

Two common categories of acts in modern criminal codes are harms to other people and harms to their property. These categories are extremely broad, and legislatures currently have no principled reason to keep any particular harm out of the criminal code, other than practical considerations about enforcement and, perhaps, a general sense of equity. The application of C*, however, allows us to assert that it is not *any* harm that will render an act susceptible to criminalization. Rather, the harm must be of the type that (1) violates political conditions enabling people to exercise their freedom and (2) is the result of acting on a maxim incompatible with the UPR.

Applying this definition will lead us to conclude that the standard *mala in se* offenses are properly considered criminal acts. Assaultive offenses (rape, murder, battery, and so on) violate the condition of bodily integrity that is an obvious requirement of justice. Kidnapping or otherwise coercing people into actions against their will violates the freedom of movement that is also a condition of justice. Acts that do not cause physical harm but put people in fear of their safety (e.g., threatening or harassing) violate what we might call the condition of security: in a just society, people must feel reasonably able to go about their business without fear in order to enjoy their freedom. They may also frequently violate the condition of privacy that has a similar justification. Finally, impermissibly taking or damaging others' property (such as in cases of theft, arson, etc.) violates the condition of private property.[83]

In all of these cases, the second condition of C* (that the actor's maxim is incompatible with the UPR) is easily met. Since one cannot murder, assault, or rob someone *unintentionally*, it seems right to conclude that the actor's maxim can be characterized as something like: "I will harm this person in order to obtain something for myself." Again, this is not to say that the offender actually has such a maxim in mind—rather, it is to say that

83. Kant assumes that private property rights are a necessary condition for a just social order. *See, e.g.*, his discussion of property rights in KANT, *supra* note 16, at 49-56 (6:260-70). Though I am sympathetic to this view, I will grant that it *might* be possible to have a just society in which the notion of private property did not exist. This does not mean that property-related crimes are not necessarily crimes; rather, it means that, in such a case, the concept of *theft* would not exist—or would be modified to mean something like the "assertion of unilateral ownership over a piece of communal property." If, in fact, such an assertion could reasonably be said to violate the political conditions of freedom of the society in question, then it would properly be considered a crime—the central wrong in both this case and in the standard theft case being something like "appropriating for oneself a thing which one is not entitled to appropriate."

his actual intent, whatever it may be, will be incompatible with the UPR, and therefore reducible to this kind of maxim.

The same will be true if the offender commits certain offenses with a *mens rea* of recklessness. For example, suppose someone acts with "willful and wanton disregard" for the life of others, and thereby causes another's death.[84] While manslaughter is less heinous than murder, it is still an act that is incompatible with the UPR. Reciprocal civic freedom demands that I take reasonable care in going about my business, and my failure to do so, resulting in another's death, may be characterized as resulting from acting on a maxim along the following lines: "In order to attain my own desires, I will fail to act in a reasonably careful way." A similar analysis underwrites the criminalization of many kinds of criminally reckless behaviors of varying degrees of dangerousness, from drive-by shooting to driving under the influence. These kinds of acts all manifest, to varying degrees, that the offender acts without sufficient regard for the civic freedom of his fellow citizens.

While most legal theories will find the *mala in se* to be the proper target of the criminal law, more controversial are the great many regulatory offenses that pervade modern criminal codes. These types of offenses are properly regarded as *mala prohibita*: they acquire their putative wrongfulness only via the operation of the law, not due to their character. One might think, given the first clause of C* (that an offense must be of the kind that violates others' civic freedom) that no *mala prohibitum* could qualify as a criminal act. I believe, however, that at some kinds of regulatory violations could, under certain conditions, be properly classified as criminal acts: those that threaten to undermine the security that is critical to the realization of civic freedom.

I am thinking here of offenses such as impersonating a police officer or escaping from a correctional facility. These types of offenses do not harm anyone in the way the *mala in se* do. But given the role that police, or prisons play in ensuring public safety in our world, acts of this nature threaten the structure reasonably implemented by the government to provide a secure environment in which citizens can pursue their conceptions of the good. To violate that system is to violate a political condition of others' civic freedom (security). Acts of this nature are therefore reasonably criminalized.

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84. *See* Wayne LaFave's analysis of the criminal negligence (or recklessness) standard in American law. WAYNE LAFAVE, PRINCIPLES OF CRIMINAL LAW 181 (2003).

Finally, the criminal law can reasonably prohibit on certain types of conduct that harm the state as a whole, but not individual citizens. The most obvious example here is treason—but much more common will be tax evasion. This is not the kind of crime for which we can easily say that one person harmed or wronged another. But a well-functioning government is necessary in order to preserve citizens' ability to pursue their ends, and this will require that all citizens contribute in some way to the maintenance of the government—which typically (though perhaps not inevitably) involves taxation. Exempting oneself from the payment of (reasonable, fair) taxes is therefore tantamount to repudiating the freedom of one's fellow citizens.

So far, we have seen that the Kantian definition of crime, C*, is consonant with a wide swath of conduct we already consider to be criminal in our system. There are, however, a number of important categories of offenses which would need to be excised from our criminal codes in order to comply with C*. These include licensing violations, merely self-harmful conduct, possessory offenses, public nuisances, and private immorality.

Governments regulate many activities, and sometimes violations of such regulations are criminalized. Perhaps the most common example of this is driving without a driver's license. To be sure, there are good reasons for requiring citizens to obtain licenses to operate vehicles. Cars, trucks, motorcycles, and the like are quite useful, but also potentially dangerous. The licensing requirement allows the government to be sure that people who are operating such equipment are reasonably familiar with traffic regulations, have sufficiently good eyesight, and so forth. Still, the question is whether the failure to follow such regulations should constitute a criminal act. The answer, according to our C* formula, is no: driving without a license does not, by itself, constitute a hindrance to others' civic freedom. Your choice to drive without a license does not prevent me from speaking my mind, practicing my religion, and so on. It might, should the fact become known, make me feel marginally less safe—but my bodily security is not impacted in the way that it would be if you assaulted me.[85]

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85. This would not, however, prevent the use of unlicensed status as an aggravating factor in, say, a vehicular homicide case. It is also important to note here that in many jurisdictions there can be disparate reasons for losing a driver's license. Some are due to a driver's demonstrated dangerousness on the road (e.g. by committing multiple DWI offenses), while others might have nothing to do with driving per se (e.g. failing to pay court fines, child support, or other obligations not related to vehicular safety). There is, to be fair, a more compelling justification for criminalizing driving without a license in the former set of cases than the latter. Still, I do not believe the threat of possible future dangerousness overcomes the inherent harmlessness of the act itself.

It is also worth noting that decriminalizing regulatory violations such as driving without a license is not the same as legalizing them. Surely police officers should be allowed to stop unlicensed drivers, courts should fine them, and perhaps repeat offenders should lose their vehicles. Such civil sanctions may be calibrated as appropriate to deter undesirable conduct—but they would not result in incarceration and the stigma of criminality.

The second category of purported crimes precluded by C* is comprised of offenses which can formally be characterized as *merely* self-harming. The obvious target here is the myriad of drug and other substance-related acts that pervade our current system. If I choose to ingest a noxious substance, I may well harm my body or mind—and, if Kant is right, I thereby violate a duty to myself.[86] But my ingestion of a toxic substance does not, by itself, violate the formal, external conditions that enable citizens to pursue their ends within society. Of course, if you happen to be a family member or close friend, my intemperance may constitute a setback to your interests—even a substantial emotional harm. There has, however, been no violation of the formal conditions that underwrite your civic freedom.

Contrast this example with one where my ingestion of a particular substance is a proximate cause of physical harm to you. If I cause a car accident because I am drunk, or stab someone because I am in the midst of a drug-induced psychosis, I have interfered with the condition of bodily integrity that is an obvious *sine qua non* of exercising freedom. I would justly be held criminally liable in these cases. But here the *crime* in question is not ingestion of alcohol or drugs *per se*—though such an act might be a moral wrong, it does not *by itself* interfere with the formal conditions of civic freedom.

In the face of such an analysis, one might be tempted to point to the various social ills that accompany the use of illegal drugs—such as the violence that may attend black market transactions. Setting aside for a moment the question of whether or not drug *sales* ought to be criminalized, even people who *purchase* illegal drugs for merely personal use contribute to the market. And if it turns out that the existence of such a market contributes negatively to other citizens' civic freedom, then do we not have good reason for labeling as criminals those who choose to participate in such a market?

86. *See* KANT, *supra* note 16, at 180 (6:427).

Upon reflection, however, we will see that the first condition of C* cannot be met by criminalizing drug purchasing. If Daniela purchases a gram of methamphetamine for herself, there is nothing about this act *in and of itself* that interferes in any way with other citizens' freedom. It is true that Daniela's purchase may contribute in a small way to the methamphetamine market, and the existence of that market may be causally related to an increase in social problems such as violence. But this is the case only because methamphetamine is illegal in the first place. The violence accompanying the drug market exists primarily because the market is itself illegal.[87] It operates outside the normal regulatory apparatuses that govern legal transactions between citizens. One need not worry about being murdered by the corner grocer, even if one chooses to buy cigarettes, doughnuts, or other unhealthy products from him. The lack of security in the drug trade has nothing to do with the substances in question, and everything to do with the way those substances are treated within society. It is perverse to use the negative effects of criminalizing drug sales as a justification for criminalizing drug purchases—yet that is precisely what the "social ills" objection to drug decriminalization does.

The next logical question, then, is whether the manufacture, creation, marketing, or sales of illegal drugs should be criminalized. It is common to assert that people who supply drugs are more to blame for attendant social ills than those who merely use them. This seems correct. Still, the question at hand is not *how evil* people are, but whether their actions ought to be proscribed by the criminal law. The answer, I think, is that while we rightly judge certain substances to be injurious to individuals who use them, we are expecting the criminal law to do too much work when we demand that it penalize and punish people who supply unhealthy, even dangerous, products. For one thing, it is unnecessary. In the United States, for example, we have done a good job of decreasing the prevalence of cigarette smoking through non-criminal means.[88] More importantly, supplying noxious

87. For further discussion, *see* HUSAK, *supra* note 1, at 45-54. In particular, Husak argues that "the very harms that drug proscriptions are designed to prevent [are] caused by the proscriptions themselves." *Id*. at 46. While this is overstated (for example, there are obvious health harms that result from ingesting many drugs regardless of their legality), it seems accurate insofar as it relates to harms deriving from the market (production, transfer, etc.) rather than the drug itself.

88. For example, the rate of smoking among white male adults decreased from roughly 60% in 1965 (a year after the influential Surgeon General's report on the negative health effects of smoking) to less than 25% in 2008 and 19% in 2014. The reductions were less dramatic, but still substantial, for other demographic groups. Bridgette E. Garrett, et al., *Cigarette Smoking—United States, 1965-2008*, 60

substances fails the test in C*: selling drugs does not, by its nature, violate others' freedom. If people choose to purchase drugs and ingest them, they may, by doing so, make it more difficult for themselves to pursue their life's goals. But that choice is not one imposed on them by others and, therefore, others should not be held criminally liable simply because they encouraged or enabled such an unwise decision.[89]

A similar analysis will cause us to reject the criminalization of merely possessory offenses. This includes the possession of drugs, of course, but also of other substances or objects. Two initially troubling examples here are the possession of weapons and of child pornography. In the United States, of course, the possession of firearms is held to be a constitutional right—yet many people are prosecuted because they lack a proper license, or have a prior criminal conviction, or possess an unlawful kind of weapon. And while pornography depicting adults is legal, those who possess pornography involving children are prosecuted alongside those who create or distribute it. The question before us is whether the *mere possession* of a harmful or morally repugnant object is sufficient to trigger criminal sanctions.

In the case of guns and other harmful objects, we confront a much harder case, given the prevalence of gun violence in our society. Even granted the clear compelling social interest in regulating firearms, we must nonetheless conclude that merely possessing such items cannot be grounds for criminalization. C* requires that the purportedly criminal conduct violate another's civic freedom, and it is hard to imagine how the gun I keep locked away in my closet prevents you from pursuing your own ends.

MORBIDITY AND MORTALITY WEEKLY REPORT 109-13 (2011), http://www.cdc.gov/mmwr/pdf/other/su6001.pdf [https://perma.cc/PA2B-RNJH]; and Ahmed Jamal, et al., *Current Cigarette Smoking Among Adults—United States, 2005-2014*, 64 MORBIDITY & MORTALITY WEEKLY REPORT 1233-40 (2015), http://www.cdc.gov/mmwr/pdf/wk/mm6444.pdf [https://perma.cc/F7WT-6NG6].

89. Once again, this is not to say that people who manufacture methamphetamine, trade cocaine for sex, or engage in other kinds of unseemly behaviors are making morally praiseworthy choices. In some cases, such people may be morally reprehensible—in many others, they may be desperate addicts themselves, as much in need of society's mercy and assistance as their customers. In any event, I suspect that any visceral reaction against what I have proposed here is due to judgments about the moral worth of drug-related activities, rather than consideration of the extent to which those activities hinder the expression of civic freedom.

Also note that a different result might be reached if, say, A sells B drugs knowing that they are tainted, or knowing B intents on ingesting a lethal dose. In such a case, a criminal act has occurred. But surely that act is reckless endangerment, negligent homicide, or the like—it is not the act of selling an illicit substance *per se*.

Obviously, the moment a dangerous weapon is used to threaten, wound, or kill another human being (absent legal justification or excuse), a criminal act has been committed. But possession alone is not such an act. The mere possession of weapons, like drugs, should therefore not be criminalized. Importantly, though, this conclusion is compatible with assertions many might make that there are too many guns in the United States and too many people infatuated with them; that the Second Amendment purports to instantiate a right that has no clear basis in natural law; that we ought in general to discourage people from possessing dangerous weapons, including firearms; and so forth. It is also compatible with the proposition that the government can and should require licenses for people to possess dangerous weapons—and can justifiably take civil action against those who possess unlicensed weapons.

The possession of child pornography, while apparently similar to the possession of a firearm, cannot be treated in the same way. Because a child cannot consent to be the subject of the pornography, both the creation and consumption of such images violates the child's bodily integrity. Thus, while the possession of adult pornography, in which the subject is assumed to be a consenting adult, should not be criminalized, the possession of child pornography should be.[90]

Two final categories of conduct which should be excluded from the purview of the criminal law are what I will call public nuisances and private immorality. The former category consists of behavior which many citizens find distasteful or offensive. If I allow my dog to run freely in the public square, or swear on the subway, you may quite reasonably be annoyed by my conduct. You may even find it somewhat more difficult to pursue your ends. But because such actions do not, by their nature, violate your civic freedom, they cannot be regarded as criminal acts. Again, this is not to say

90. At least two caveats are in order here. First, given the state of technology, it might be possible to create pornographic images of children without actually involving children in the process. As unpalatable as it sounds, this may well be a legitimate defense to the possession of child pornography on the Kantian view. (And, from a policy standpoint, it would be better if those who are intent on consuming child pornography do so in a way that does not, in fact, harm any children.) Second, there are presumably many cases where the subjects of adult pornography are not willing participants. Anyone coerced into pornography would be rightly considered the victim of a crime such as assault—but the question is whether people who *merely possess* such images should be prosecuted criminally. Assuming that there is no easy way to tell whether a particular (adult) pornographic image is the result of coercion or not, it seems that the right approach here is to attack this problem from the supply side, rather than criminalizing conduct which does not, by its nature (the mere viewing of obscene material) violate others' civic freedom.

that the government has no interest in promoting virtuous conduct. Fining people for certain kinds of nuisances—parking too long in a particular area or littering on the public way, for example—may be a reasonable method of deterring such conduct. But prosecuting annoying individuals as criminals threatens both to curtail civic freedom and minimize the importance of the criminal law.

The second category concerns behavior that people engage in privately, rather than publicly. The most obvious offenses here are sexual behaviors that some might object to on moral or religious grounds. While some sexual misdeeds, such as rape or sexual abuse, clearly interfere with the political condition of bodily integrity, having consensual sex does not. Any such act (between adults, at least) therefore clearly falls outside the aegis of the criminal law. For example, homosexuality has become more readily accepted in recent years but has historically been the subject of criminal prosecutions. And many still object to polygamous or other types of nonstandard arrangements. Given the wide variety of views about such matters, it would be overly facile to assert that there is no such thing as immoral sex between consenting adults. Still, it is hard to imagine a consensual sexual act that, in and of itself, interferes with another's civic freedom. For this reason, such private acts, no matter how vigorously condemned by the wider community, cannot be the basis for criminalization.

Two harder cases implicating sexual relationships are adultery and prostitution. We could easily imagine a case in which adultery results in a great deal of harm—more harm, surely, than many acts of theft or even assault. Moreover, while it may be true that adultery does not interfere with the conditions necessary for the free use of one's body, adultery could certainly interfere with the stability of the family—and the family is surely an important social structure. Why, then, should we think that adultery should *not* be criminalized? After all, if petty theft is a crime because it interferes with the conditions that make property ownership possible, then should we not assert that adultery is a crime because it interferes with the conditions that make family bonds possible? And are not strong families as important to society as private property rights?

There are two possible responses here. The first is a practical, consequentialist one. Our society has not, historically, done a very good job of integrating "family values" into the legal system. In the criminal context, we have implicitly countenanced domestic violence by failing to criminalize or prosecute it, and we have failed to treat women and men equally with our

laws regarding sexual violence. On the other hand, we have valued certain types of familial arrangements over others—heterosexual over homosexual, monogamous over polygamous. The result has been the criminal prosecution and social persecution of citizens whose family choices fall outside the norm. Given this background, one could reasonably admit that, in theory, adultery could be considered a criminal offense but, in practice, we should simply stop the pernicious practice of attempting to regulate sexual and family relationships via the criminal law, because doing seems likely (if history is a reliable guide) to result in more harm than it prevents.

A more Kantian response would start by acknowledging that the formation and maintenance of family systems is, indeed, an important social good. Kant appears to have viewed marital rights as akin to property rights.[91] While putting family relationships in the same category as property rights may seem odd, it helps make sense of what the act of adultery entails from the perspective of *justice*. Adultery is a violation of the *contractual obligations* of marriage, just as delivering an inferior product than the one I have contracted with you to buy is a violation of the contractual obligations of commerce. Adultery is also a moral wrong;[92] but it constitutes injustice only to the extent that one has violated a legally enforceable promise. The legal remedy for adultery should, therefore, be analogous to the legal remedy for violating a commercial contract: the contract is broken, perhaps with damages paid to the adversely affected party. Adultery is thus seen as

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91. Both are contained in the portion of the *Rechtlehre* entitled "Private Right," which deals largely with property rights and family relationships. KANT, *supra* note 16, at 37 (6:245). Here it is important to acknowledge that Kant held certain views repugnant to contemporary sensibilities. He asserts that homosexuality is on par with bestiality, *id*. at 62 (6:277); that there exists a "natural superiority of the husband to the wife," *id*. at 63 (6:279); and so forth. We need not regard such comments as integral to Kant's larger moral and political theory. Moreover, while Kant was, like all of us, partly a product of his time, we should give him some credit for having a kind of proto-egalitarian view of sexual and family matters. Thus, he describes (heterosexual) sexual intercourse as being a matter of *reciprocal* acquisition, *id*. at 62 (6:278) (emphasis added), and marriage as being an "*equality* of possession . . . of each other as persons," *id*. at 63 (6:278) (emphasis in original). Even where he acknowledges the alleged "superiority" of the husband, he qualifies this as being compatible with "the natural equality of a couple." *Id*. at 63 (6:279). He also insists that children have a natural right to be cared for by their parents, *id*. at 64 (6:280), and that parents have the duty to educate their children "both pragmatically, so that in the future [they] can look after [themselves], and morally, since otherwise the fault for having neglected [them] would fall on the parents," *id*. at 65 (6:281) (emphasis removed).

92. On the Kantian view, at least, it is morally wrong on two counts. First, it violates the duty to respect others (one's spouse, certainly, and perhaps one's illicit lover as well). *Id*. at 209 (6:462). Second, it violates one's duty to oneself, because in acceding to sexual desire under such circumstances, one "surrenders his personality . . . since he uses himself merely as a means to satisfy an animal impulse." *Id*. at 179 (6:425).

a legal reason for divorce (in jurisdictions that still require such grounds), since one party has breached the marital contract. Contrast the cases of a *contract breach* and *adultery* on the one hand with the cases of *theft* and *spousal abuse* on the other. The thief has violated the conditions (property rights) making commercial contracts possible. The abuser has violated the conditions ("equality . . . in their possession of each other as persons"[93]) making marriage possible. Theft and abuse are therefore rightly viewed as criminal acts, while breaches of contract and adultery are not.

Prostitution presents a case that is in some ways quite similar to adultery. In theory, prostitution involves the consensual exchange of sex for money (or some other benefit). While some have moral objections to prostitution based on the notion that it is an improper kind of sexual conduct, we have seen (as with adultery) that this cannot be the basis for criminalization. Since an uncoerced market transaction does not, by itself, violate anyone's freedom, the requirements of C* cannot be met. Prostitution would seem, therefore, an obvious target for Kantian decriminalization.

In the real world, of course, prostitution is not always (and perhaps is rarely) as simple as a market transaction. Prostitutes may in fact be enslaved, or at least be subject to unjust coercion at the hands of others. And, as in the drug trade, the black (or at least gray) sex market may carry with it attendant social ills, including violence, substance abuse, and so forth. Again, however, it is worth considering whether these characteristics are inherent in the act of prostitution, or whether they are due to the criminalization of the sex market. There is at least some evidence that the latter is the case[94]—if so, then the Kantian solution should please those concerned with the negative consequences of black-market prostitution as well.

To summarize, then, applying the criteria in C* will result in the criminalization of many acts which we intuitively think of as crimes—both the *mala in se* and at least some kinds of *mala prohibita*. It will also have the effect of decriminalizing many acts currently criminalized in our system, which would go a long way toward addressing the problem of

93. KANT, *supra* note 16, at 63 (6:278).

94. For example, social science researchers found that the (accidental) decriminalization of prostitution in Rhode Island resulted in lower rates of both rape and gonorrhea. Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health* 11-17 (Nat'l Bureau of Econ. Research, Working Paper No. 20281, 2014), https://www.nber.org/papers/w20281.pdf [https://perma.cc/7RRF-HSWN].

overcriminalization described in §I.B above. Some decriminalization advocates might say that this Kantian approach does not take us far enough. Still, it is a systematic way of determining the limits of criminalization that is founded upon a compelling normative political theory. The same certainly cannot be said of our current practices. The burden is therefore on those who desire an even more limited criminal law to develop a more convincing theory.

III. OBJECTIONS & RESPONSES

In this section, I shall confront three of the most salient objections to the Kantian view: that the definition developed above (C*) fails to explain what is wrong about prototypical criminal acts; that the concept of civic freedom is insufficiently broad to capture what is most valuable to human beings in civil society; and that the application of C* fails to address certain types of wrongful acts by nontraditional actors—such as environmental harms caused by corporations.

A. The Nature of Wrongness

The first objection to conceptualizing crime as I have above has to do with the nature of the *mala in se*. In these cases, the objection goes, it seems insufficient, perhaps even callous, to think of the criminal as having done wrong because he has violated conditions of civic freedom. The wrong the murderer has committed is *murder*, the wrong the rapist has committed is *rape*, and so on. To say otherwise is grossly insufficient as a characterization of the act in question (and may also fail to accord the victim the respect she is due).[95]

I believe this objection misses the mark. It is obviously the case that the principle wrongness of a *malum in se* consists in the harm done to the victim. But it is nonetheless coherent to say that committing such an offense *both* harms another individual *and also* violates the political conditions underwriting all citizens' freedom. A criminal who commits one of these

95. For example, in objecting to a fair-play conception of crime, Antony Duff argues that such a view "create[s] an implausible separation between [an act's] wrongness as a crime and the moral reasons in virtue of which it should be a crime; between its criminal and its moral character." R. A. DUFF, TRIALS AND PUNISHMENTS 212-13 (1986). The objection seems equally strong when lodged against the Kantian view. *See also* R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 22 (2001) for a similar argument.

acts causes serious harm to victims but, in doing so, also violates laws protecting all citizens' capacity to enjoy their civic freedom. Thus, crimes such as murder and rape are both acts of terrible violence against human beings *and* acts that vitiate the notion of reciprocal freedom for all citizens. To state that an act is a crime in the sense of violating the conditions of civic freedom does not, as the objection seems to imply, somehow take away from its moral wrongness—it simply designates the wrong at issue as one the state is justified in protecting citizens against.

Consider a heinous crime such as rape. Rape is a gross moral wrong that causes great harm. But it is a *crime* to commit rape, not just because one has greatly harmed another, but because such actions violate a basic freedom of bodily integrity that is a desideratum of any just society. Rape will always be evil, but it cannot be a crime (except in the poetic sense of the term) outside of civil society.

Indeed, one might be concerned that the objection, if taken seriously, fails to distinguish crimes from evils. Surely we want to be able to say that rape is morally wrong even in the state of nature.[96] That it also happens to be a crime (and, concomitantly, that a gross injustice would occur should a society fail to criminalize it) need not detract from our appreciation of its fundamental wrongfulness. At the same time, criminal punishment within civil society is justified in the case of rape because rape is the *kind* of evil that is properly criminalized—other wrongful acts (lying to a loved one in order to save face, for example) simply do not qualify as wrongs we can permissibly punish in this way.

If my response here is compelling, then we are in a position to see how conceiving of crime as the violation of the law's guarantee of the political conditions of freedom helps explain one feature of the criminal law that might otherwise seem puzzling: the jurisdictional limitations on crime. For example, the State of Minnesota cannot punish someone who commits murder in Argentina. The jurisdictional problem is not merely a matter of convenience. Rather, the problem is that the government can only coerce its own citizens: those who can reasonably be said to be bound by the principle of reciprocal freedom to the laws of their own state. The State of Minnesota can, of course, make a *moral* judgment that the Argentine murderer has done something wrong—but Argentine citizens are not bound by the laws of the

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96. This term is used by philosophers such as Hobbes, Locke, and Rousseau as a kind of thought experiment to discuss what life would be like in the absence of government. *See*, *e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 116-22 (Mark Goldie ed., 2000).

State of Minnesota. Thus, the Argentine murderer has committed no crime in Minnesota—and Minnesota law has no claim on him. Moreover, if Argentina had no law against murder, the Argentine murderer could still be said to have done wrong, but not to have committed a crime. The lack of a law in Argentina against murder would, of course, be an injustice in itself—but not an injustice against Minnesota's citizens. This helps explain why murder (or rape, assault, etc.) would be morally wrong in the state of nature—but would not be a crime, since such a concept cannot exist outside civil society.

B. The Insufficiency of Freedom

In this essay, I have largely relied on Kant's account of civic freedom to describe the contours of the criminal law. But one might worry that this reliance on freedom is misplaced, for there are other values that are important in our civic life.

This is the kind of criticism that legal scholar Ekow Yankah directs at Arthur Ripstein, who also endorses a freedom-centered interpretation of Kant's political theory. Yankah alleges that Kantian freedom "begins to look too thin" when one considers what is intuitively required of a just society.[97] Two examples he gives are the provision of basic health care services and "paternalistic" laws such as seatbelt requirements. He suggests that freedom, while important, cannot explain why the state should ensure that its citizens receive health care, nor why the state is justified in enacting seatbelt legislation. Moreover, Yankah contends, Ripstein's Kantian account cannot explain the "necessary richness of civic bonds," which are an important part of life in civil society.[98] Thus, Yankah thinks that, while Ripstein gives a compelling account of the importance of Kantian freedom in political life, he fails to acknowledge our "shared moral ties grounded in other political values."[99] Yankah concludes that a model of civic republicanism is superior to the Kantian approach.

Yankah may be correct that Ripstein's account alone cannot explain why the government should provide basic healthcare services or enact seatbelt legislation. But this does not mean that the Kantian view incorrectly

97. Ekow Yankah, *Crime, Freedom, and Civic Bonds: Arthur Ripstein's Force and Freedom: Kant's Legal and Political Philosophy*, 6 CRIM. L. & PHIL. 255, 264 (2012).
98. *Id.* at 268.
99. *Id.* at 271.

delineates the contours of the criminal law. The purpose of the criminal law is to guarantee the political conditions of civic freedom. Being healthy may help citizens attain their ends, but that is a question of wellbeing and equality, not of freedom in this limited sense. So governmental provision of health care, however important a social condition of civic freedom, is not a matter with which the criminal law should be concerned. Moreover, in the case of seatbelt laws, Kant provides us with good reasons *not* to criminalize the failure to wear a seatbelt. Failing to wear a seatbelt is asinine but does not interfere with other citizens' ability to pursue their ends.[100] The government may certainly encourage seatbelt use, just as it reasonably discourages cigarette smoking—so long as it does not, in doing so, interfere with the conditions enabling citizens to exercise their freedom in ways contrary to those suggested by the government.

So, one response to the kind of objection Yankah pursues is to acknowledge an apparent limitation of the Kantian approach. Indeed, such a limitation is to be embraced in the context of criminalization because it provides us with a means of limiting the ever-expanding scope of the criminal law discussed in section I.B above. The purpose of the criminal law is not to ensure a perfectly safe, healthy, and productive life for all citizens. It is simply to remove obstacles to the most basic requirements of civic freedom that might be put in one's way by other citizens—to "hinder hindrances to freedom."[101] The government might reasonably mount an advertisement campaign encouraging citizens to wear seatbelts, or promulgate regulations requiring automakers to install seatbelts—but it should not bring the force of the criminal law to bear on those who choose to put themselves in danger by declining to cooperate. The criminal law is rightly concerned with the preservation of basic human freedom, not the attainment of human flourishing.

Again, while an appeal to civic freedom properly cabins the scope of the criminal law, Yankah's concern with civic bonds and civic virtue is well-founded. Indeed, some would argue that a Kantian approach to criminal justice entails a scheme of civic virtue similar to the one Yankah

100. Failing to put one's child in a seatbelt, or appropriate restraining mechanism, is a closer case. Perhaps it is neglectful, in which case the Kantian analysis would indicate it is an appropriate subject for criminalization, because it endangers the child's security, even her future capacity to live as a free citizen.

101. RIPSTEIN, *supra* note 50, at 55.

advances.[102] Concern for civic virtue should certainly influence the way we treat offenders and victims and the way we approach our own interactions with the criminal justice system. (Indeed, it should also cause us to ensure our fellow citizens' access to basic services such as health care, education, and so forth, which Yankah rightly notes are important parts of a just society.[103] The concept of civic virtue need not, however, alter the concept of the criminal law as a protector of civic freedom, a minimal requirement of a just society.

C. Hard Cases

In this subsection, I address several aspects of the criminal law that seem to work against the account I developed in §II. In particular, I have not explained what to do about non-citizen offenders or victims. I have also said nothing about juvenile law, nor about corporate criminal liability. I will address these areas briefly, then turn to a more difficult question: what to do about laws protecting animals and the environment. My comments in this section should not be construed as definitive statements, but rather as demonstrating that the foregoing Kantian analysis at least provides a fruitful starting point for further analysis.

1. Non-citizens, Juveniles, and Corporations

In this chapter so far, I have proceeded under the assumption that criminal offenders and victims are citizens of the polity in which the criminal offense has occurred. In reality, of course, this is not always the case. A crime committed in Minnesota might, for example, involve a victim from Mexico and a perpetrator from Canada. At first, this appears to present a significant problem. Why prosecute a crime committed against a Mexican citizen? After all, her civic freedom is supposed to be upheld by the government of Mexico, not that of the United States (or Minnesota). And how can we prosecute a Canadian citizen, who has made no promise, as a naturalized immigrant might, to uphold the laws of the State of Minnesota?

This problem, however, is not as troublesome as it may first appear. Kant addresses this issue briefly in one of his essays, in which he argues that visiting foreigners have a right to "hospitality" and that, because of this,

102. *See*, *e.g.*, Holtman, *supra* note 32.
103. Yankah, *supra* note 97, at 261-64.

they cannot "be treated with hostility . . . as long as [they] behave[] peaceably."[104] Developing a full account of non-citizen rights and liability based on the notion of hospitality is outside the scope of this article. The basic idea, however, is that we can conceive of non-citizen visitors as having voluntarily adopted the minimal requirement of good citizenship—that is, obedience to the criminal law—in exchange for the freedom to move about the country, participate in commerce, and so on, while being protected by the criminal law.[105] So, although the criminal law is justified by appealing to notions of citizenship (specifically civic freedom), its application is not limited to citizens, but to anyone within the borders of the polity.[106]

The issue of criminal liability for juveniles is also straightforward. To the extent that juveniles are properly viewed as less than full moral agents, the system that we use in the United States of adjudicating juvenile delinquents (instead of designating them as criminals) is justified, and compatible with the Kantian picture. Treating juveniles differently (and, in theory, less harshly) from adults, even when they commit similar offenses, seems intuitively compatible with Kant's views on moral development and autonomy.[107]

Corporate criminal liability presents a slightly more complicated problem. Although it seems facially absurd to claim that a corporation can be guilty of a crime, it is worth considering why we might want to impose corporate criminal liability. There are at least three reasons. The first is that individual criminal responsibility might be diffuse within an organization. Although sometimes one corrupt executive might be entirely to blame, in other instances corporate "crimes" may result from relatively small decisions by a number of individuals. Rather than trying to determine exactly who did what, it is easier for the government to simply prosecute the corporation as a whole. Second, criminal justice is swifter than civil justice. Although one might balk at the number of months criminal cases

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104. Immanuel Kant, *Toward Perpetual Peace: A Philosophical Project*, in IMMANUEL KANT: PRACTICAL PHILOSOPHY 315, 328-29 (Mary Gregor, ed. & trans., 1996) (8:357).

105. Such an account would likely be consonant with the "Kantian cosmopolitanism" espoused by KLEINGELD, *supra* note 65.

106. Of course, a more detailed discussion of non-citizen visitors would need to explain what to do in situations where people find themselves *involuntarily* within the borders of a polity. It would also need to address contemporary practices such as the detention (supposedly on civil, not criminal, grounds) of undocumented immigrants and the existence of diplomatic immunity for some criminal acts.

107. For a summary of those views, see Barbara Herman, *Training to Autonomy: Kant and the Question of Moral Education*, *in* PHILOSOPHERS ON EDUCATION: NEW HISTORICAL PERSPECTIVES 255 (Amélie Oksenberg Rorty ed., 1998).

take to get resolved, this is nothing compared to the years of litigation typical in civil practice. Corporate misdeeds generally receive a lot of media attention, and governments may wish to show its citizen-consumers that the corporation is being punished (relatively) quickly. Third, the government may wish to take the case on behalf of "the people," which is the model in criminal cases, rather than waiting for individuals (or classes) to sue the corporation privately on their own behalf. Partly the government may wish to be perceived as taking a strong stand against corporate malfeasance, and partly they may be legitimately concerned with the ability of individuals to navigate the tricky (not to mention expensive) legal waters of civil law.

These are all reasonable considerations. They are, however, merely pragmatic concerns that can be addressed without resorting to the imposition of criminal liability on corporations. For a contemporary example, consider the case of the Volkswagen emissions-fraud scandal.[108] The allegations were that Volkswagen vehicles were equipped with software that enabled emissions controls only during emissions tests; the controls were disabled at all other times. As a result, vehicles passed emissions tests that they would otherwise have failed, and consumers believed they were buying vehicles that were better for the environment than they actually were.

Although we might assert colloquially that Volkswagen committed a crime, "Volkswagen" is just a trademark—it is not an autonomous agent and cannot "commit" anything. What really happened is that one or more *people* within the corporation decided that a good way to get around government environmental regulations would be to develop and install this software. It may be difficult to determine precisely who was involved with the fraud: did high-level executives order or approve it? Was it done by a rogue team of engineers? It would be nice if we did not have to make such determinations, and corporate criminal liability enables us to get by without doing so. Yet we cheapen the meaning of criminal justice by doing so: we make it into a tool of governmental convenience rather than a protector of civic freedom.[109] Meanwhile, multiple civil lawsuits with punitive damages

108. For an overview of the facts in this case, see Geoffrey Smith & Roger Parloff, *Hoaxwagen*, FORTUNE (2016), http://fortune.com/inside-volkswagen-emissions-scandal/ [https://perma.cc/Z78T-9TMU].

109. Compare this with the peanut executive convicted of knowingly shipping tainted peanuts which resulted in several deaths. *See* Brady Dennis, *Executive Who Shipped Tainted Peanuts Gets 28 Years; 9 Died of Salmonella*, WASH. POST, (Sept. 21, 2015), https://www.washingtonpost.com/national/health-science/a-life-sentence-for-shipping-tainted-peanuts-

or huge settlements are almost guaranteed in this case. And aside from possible individual prosecutions of Volkswagen employees, governments have plenty of ways short of criminal prosecution to manifest their displeasure with the company.

Suffice it to say, then, that the Kantian has reason to worry that corporate criminal liability is more than a "legal fiction"—it seems difficult to square it with the purpose of the criminal justice system, which is to ensure the civic freedom of citizens by holding other citizens responsible for their actions that violate the UPR. Since a corporation cannot "act," it cannot be held criminally responsible. Its employees are another matter, and large-scale fraud of the sort allegedly perpetuated by some Volkswagen employees certainly qualifies as criminal.

2. Animals and the Environment

A final question concerns the status of animals and the environment within the criminal justice system. There are some kinds of offenses that involve animals only derivatively. For example, it is a criminal offense in Minnesota to harm a service animal such that the animal becomes "unable to perform its duties."[110] This kind of criminal law is justifiable on the Kantian view because of the harm caused to the person using the service animal. Likewise, animals are sometimes treated legally as property: stealing someone's pet may reasonably be treated as theft, not kidnapping.

The harder cases, however, are those where the putative wrong at issue is harm to the animal itself rather than to its owner. For example, many jurisdictions have some kind of animal cruelty statute in their criminal codes. Minnesota's is typical (if wordy): "No person shall overdrive, overload, torture, cruelly beat, neglect, or unjustifiably injure, maim, mutilate, or kill any animal, or cruelly work any animal when it is unfit for labor, whether it belongs to that person or to another person."[111] It is clear from the language of this statute ("whether it belongs to that person or to another person") that the activity being criminalized is not harming another's property, which happens to be an animal; rather, the alleged

victims-families-say-yes/2015/09/19/e844a314-5bf1-11e5-8e9e-dce8a2a2a679_story.html?noredirect=on [https://perma.cc/8SLD-HEHS]. The peanut corporation itself is not the criminal, of course—it is the executive who approved shipping food he knew to be tainted with salmonella.

110. MINN. STAT. § 343.21, subd. 8a. (2018).

111. MINN. STAT. § 343.21, subd. 1.

wrongdoing lies in harming *an animal*, regardless of whether it happens to "belong" to the perpetrator or not.

The prevalence of statutes that protect individual animals in this way poses a challenge to the Kantian view that the purpose of the criminal law is to ensure the civic freedom of citizens of a just society. Since harming an animal does not, by itself, have any deleterious impact on other people's civic freedom, it would appear that the criminalization of animal cruelty is improper. But many people no doubt share the intuition that harming animals—or at least certain types of animals[112]—without good reason is a significant moral wrong. Indeed, I suspect many of us find it more repugnant to torture a dog or cat than to commit a petty theft or even a minor assault against a human being.

Kant, moreover, is not exactly the patron philosopher of animal-rights activists. In an infamous passage, he avers that it would be morally wrong to kick one's dog—but not because of the harm it causes the dog. Rather, it is because doing so diminishes one's own virtue: kicking the dog makes one a crueler person.[113] This view seems backwards, of course. It may well be true that one harms oneself by engaging in dog-kicking; but the primary harm and, hence, the locus of wrongfulness is surely causing the dog to suffer.

Let us grant that Kant's conception of the wrongfulness of dog-kicking is insufficient to explain the moral duties we have toward animals.[114] As it happens, what may be perceived as a deficiency to the animal-rights proponent can be seen as a boon to the criminal-law theorist. For what the Kantian view of criminalization shows is that, regardless of the precise contours of our obligations toward animals, those moral obligations are not of the type properly regarded as criminal acts. Although it may be

112. A significant hurdle to defining animal cruelty is determining *which* animals or classes of animals "count" for purposes of defining this kind of wrongdoing. If we take literally the notion that we ought not to harm *any* animals, then swatting flies would be cruel: if we start with the premise that we cannot unjustifiably harm any animal, then surely the inconvenience flies cause us is not a justification for killing them. And even if we restrict ourselves to only certain classes of animals (*see*, *e.g.*, ARIZ. REV. STAT. § 3-2910(H)(1), defining "animal" as "a mammal, bird, reptile or amphibian"), then we must contend with the question of whether it is morally justifiable to kill animals in order to eat them. I am not sure what the right answer is here from a moral point of view, but I am confident that we should not use the criminal law in order to try to enforce it.

113. *See* KANT, *supra* note 33, at 212 (27:458).

114. Some contemporary philosophers have, however, derived more animal- and nature-friendly accounts from Kantian premises. *See*, *e.g.*, Paul Taylor, *The Ethics of Respect for Nature*, 3 ENVTL. ETHICS 197 (1981).

counterintuitive to those of us who are used to thinking of animal cruelty as a crime, whatever moral wrong we do to animals, it is not the kind of wrong that interferes with other citizens' civic freedom. The state is free to enact policies encouraging the proper treatment of animals. Animal rights activists could be allowed to sue in tort for the cruel mistreatment of animals.[115] The Kantian analysis therefore yields the plausible conclusion that the criminal law should be reserved for those acts which threaten other human beings' standing as citizens within their society.

Does this reasoning extend to broader environmental harms? For example, consider this Minnesota statute:

> A person who knowingly disposes of or abandons hazardous waste or arranges for the disposal of hazardous waste at a location other than one authorized by the Pollution Control Agency or the United States Environmental Protection Agency, or in violation of any material term or condition of a hazardous waste facility permit, is guilty of a felony . . . .[116]

This is an example of a common type of criminal statute that "piggybacks" on a civil regulation. This may not be the ideal way to draft legislation, but it does not seem particularly problematic for our purposes. We would simply need to determine whether the regulation in question ensures the civic freedom of all citizens. Let us assume that hazardous waste causes great harm to people if it is disposed of improperly, and that requiring people to dispose of it properly avoids that harm. In such a case, it seems right to say that the state may justly enact criminal penalties for environmental harms such as hazardous waste disposal.

One might, however, wonder whether environmental regulations, such as this one, are deficient for a reason similar to Kant's condemnation of dog-kicking. Perhaps what is wrong with at least some forms of environmental damage (and toxic waste disposal is a likely example) is that the natural world has been harmed in a non-trivial way. While we might not think that a river has the same interest in avoiding pain that a dog does, we might still

115. A possible consequence of this move would be to increase the number of people exposed to liability for the mistreatment of animals, since the shift from the criminal to the civil system would lower the burden of proof. I will leave it to others to argue whether or not this would be a desirable state of affairs. My point is merely that criminal liability is not the only way of discouraging animal mistreatment.

116. MINN. STAT. § 609.671, subd. 4.

want to say it has some intrinsic value. The river might be valuable *qua river*, regardless of whether human beings appreciate it as a source of water or power or even aesthetic pleasure. If this is the case, then once again we might object to environmental regulations that seem to situate wrongdoing in the violation of regulations, rather than in harm to the environment as such.

We need not be overly concerned with this possibility. While it may well be true that a river contains a kind of intrinsic value of which human beings ought to be aware, and even if we are morally required to protect that value, we should nevertheless not utilize the criminal law in order to advance such values. Nor, indeed, do we *need* the criminal law in order to do so.[117] While it may be tempting to enact criminal legislation in order to promote values such as animal welfare and environmental preservation, we should limit the criminal law to its Kantian purpose of protecting citizens' civic freedom.

Again, these suggestions should not be taken as definitive statements. Rather, my intent has been to show that the Kantian analysis developed in §II can generate useful arguments about difficult questions related to criminalization. I shall leave the derivation of more definitive conclusions for future work.

CONCLUSION

I began by pointing out, as others have, that our criminal justice system lacks a coherent theory underwriting out criminalization practices. I then argued that my interpretation of Kantian political theory allows us to generate a compelling theory of criminalization. I began with Kant's reciprocal notion of civic freedom, in which all citizens are bound by just laws that ensure their ability to pursue their ends and argued that the general purpose of the criminal law should be to ensure the civic freedom of all citizens. After proposing a technical definition of a criminal act from this Kantian perspective, I showed that applying this definition would result in a smaller, though by no means parsimonious, criminal code.

While I believe that this account provides a convincing response to critics of contemporary Anglo-American criminal justice systems who bemoan the tendency toward ever-expanding criminal liability, I will

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117. See the discussion of the Volkswagen case above, *supra* note 108, which can be easily reframed in terms of a commitment to environmental rather than consumer values.

nonetheless be content if readers disagree with my interpretations or conclusions—so long as this disagreement results in the proposal of other theories that might be weighed against my own on the scales of reason.

The skeptical realist may deride the attempt to use philosophy to develop public policy, but surely the attempt to generate a reasoned theory of criminalization cannot help but result in a more just, equitable, and rational system than the sprawling, ad-hoc mess we currently call a criminal code. Thus, "[f]or my own part, I put my trust in theory."[118]

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118. KANT, *supra* note 55, at 309 (8:313).