A KANTIAN THEORY OF CRIMINAL LAW

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ABSTRACT

In this dissertation, I develop a new theory of criminal law that rests on Kantian principles. I show that attention to two aspects of Kant's political theory—his accounts of civic freedom and civic virtue—can help us develop a more just model of criminal law. In particular, I argue that we may properly criminalize only those activities which, by their nature, violate certain conditions enabling citizens to pursue their civic freedom. I then propose expanding the use of the jury in order to develop certain civic virtues that citizens of a just society ought to embrace. Finally, I show that Kantian principles can both show why criminal punishment is necessary, and also help us discern its proper modes and extent.

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LIST OF ABBREVIATIONS

The abbreviations listed below are used in footnotes for books or essays by Immanuel Kant repeatedly cited throughout this work. Full bibliographic information for each is available in the Bibliography. For these citations, I have used the page number of the modern edition, plus the standard *Akademie* numbers for those consulting alternate editions or translations. For example, the citation *GW 95/4:448* indicates that the relevant text from the *Groundwork of the Metaphysics of Morals* may be found on page 95 if using the same edition listed in the bibliography, or by referring to the *Akademie* section 4:448.

GW	*Groundwork of the Metaphysics of Morals*
LE	*Lectures on Ethics*
MM	*The Metaphysics of Morals*
OCS	*On The Common Saying: That May Be Correct In Theory, But It Is of No Use in Practice*
TPP	*Toward Perpetual Peace: A Philosophical Project*

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INTRODUCTION

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The title of this dissertation is terse—at least by academic standards. I shall therefore endeavor in this introduction to provide an explanation of the present project.

My primary purpose is to answer a question largely (and strangely) unaddressed by scholars in the fields of law and philosophy: *what is the correct theory of criminal law*? To understand why such a theory is important, consider that the paradigmatic criminal legal case in our system involves a number of actions by disparate actors. Legislatures create laws. Police enforce them. When someone is accused of committing a crime, lawyers represent the interests of the government and the defendant. A judge presides over the case, which may be decided by a jury. Convicted criminals are imprisoned or otherwise punished at the hands of corrections officials. One would hope that these various parts of the criminal law work together in some kind of rational way; it is therefore reasonable to seek an account of criminal justice that has explanatory value in all of these areas.

The reality is, however, that academics who theorize about criminal justice generally address only limited aspects of criminal law. Many philosophers, for example, discuss punishment as if it were conceptually distinct from legislation and the trial. Legal scholars, meanwhile, frequently debate the constitutionality of enforcement methods without reference to any other aspects of criminal law. A few criminal law theorists, such as Douglas Husak and William Stuntz, have argued that such a piecemeal approach is misguided, and that both legal practitioners and theorists are in need of a unified theory of criminal justice.[1] No satisfactory account exists, however, within legal or philosophical literature.

[1] See Husak, *Overcriminalization*, and Stuntz, "Pathological Politics."

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The type of theory that would be most useful in this context would be one that both explains intuitively justifiable aspects of relevant social practices, but also provides a framework by which we can measure the ethical worth of those practices.[2] For example, most people share the intuition that punishing people in some way for serious criminal wrongdoing is justifiable—a good theory ought to explain *why* that is the case (or, conversely, why that common intuition is mistaken). On the other hand, it is a contentious question whether specific punishments, such as the death penalty, are ethically permissible. A good theory ought also to provide a compelling response to such questions.

My goal in this dissertation is to present this kind of theory within a Kantian framework. Kant's work is familiar to many philosophers, but not to most legal practitioners and academics—two relevant target audiences for a theory of criminal justice—at least in Anglo-American jurisdictions. My aim, then, is to develop a Kantian account of criminal justice accessible to those with legal backgrounds.

To begin to see why Kant's moral and political theory is useful in this context, consider that criminal justice presents problems of personal morality and public justice that are not easily separable. For example, a legal rule governing a contract dispute (perhaps stating that the terms of a written agreement trump those of an oral one) seems intuitively quite different from a legal rule declaring murder to be a crime. Murder is, obviously, morally wrong regardless of its legal status—the same probably cannot be said for the terms of a business agreement. But how can we make sense of the moral content of the criminal law?

Kant is an ideal resource to begin considering such questions because of the way

[2] I shall have more to say about this kind of theorizing in Chapter 1.

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justice and morality interact in his work. Kant clarifies the theoretical grounds for our intuitive obligations in matters of public justice and personal morality. Few philosophers have succeeded in presenting a theory that addresses both of these areas in a compelling way, which is one reason Kant has been so influential in Anglo-American philosophy. His insistence on respecting others' humanity and ensuring the civic freedom of all citizens are consonant with widely accepted contemporary conceptions of morality and justice.

Scholars of criminal law should, therefore, take Kant's work seriously. At the same time, philosophers should give more attention to the ways in which Kantian thought can fruitfully inform public policy. I intend this dissertation to promote both of these purposes.

The structure of this project will, I hope, proceed in a logical way. I shall begin, in Chapter 1, by giving an interpretation of Kant's theory of justice that will constitute the foundation on which future chapters build. In particular, I focus on two aspects of Kant's theory of justice: civic freedom and civic virtue. Chapter 2 will extend the discussion of civic freedom while focusing on the practical problem of determining what acts are properly considered crimes. In Chapter 3, I shall argue that the notion of civic virtue can play a significant role in justifying a jury-centered model of adjudication. Finally, Chapter 4 will bring together aspects of civic freedom and civic virtue in order to provide a novel interpretation of Kantian punishment.

I should acknowledge at the outset that some scholars will object to an assumption that motivates the present project: that it is possible, and useful, to attempt to formulate what might be called a "unitary" theory of criminal justice. Such a theory

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attempts to "create a rational and properly limited system of criminal law [. . . by] articulat[ing] a single master principle, or set of principles."[3] Indeed, one prominent criminal-law theorist has dismissed such an undertaking as "doomed to failure."[4] I shall have more to say in subsequent chapters about this matter.[5] For now, it is sufficient to say that this dissertation represents an attempt to show that such condemnation is unwarranted.

[3] Duff, "Modest Legal Moralism," 16.
[4] Ibid.
[5] In particular, see Chapter 2 §I.A.

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CHAPTER 1

* * *

KANT'S MORAL AND POLITICAL THEORY

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The purpose of this chapter is to explain why Kant's political theory is a useful resource for addressing questions about the criminal justice system. I answer this question in three parts. In §I, I explain the concept of a "theory" as I use the term in this project. Then, in §II, I describe Kant's account of justice—notably its concepts of civic freedom and civic virtue. Finally, in §III, I suggest some preliminary thoughts about how Kantian justice and morality can be brought to bear on particular questions within the criminal law. Subsequent chapters will develop the ideas proposed in §III.

I. A Brief Theory of Theories

Philosophers are fond of theories—but so are scholars in many other disciplines. One might attempt to develop a sociological theory of law or economic theory of crime, for example. Moreover, philosophers tend to mean different things by a "theory" depending on their goals—such as whether their aim is conceptual or normative. It seems important, therefore, to explain what I mean by a theory of criminal law for the purposes of this project.

In an introduction to his treatise on criminal law, Michael Moore discusses three possible (probably non-exhaustive) types of theories of law: explanatory, descriptive, and evaluative.[6] Explanatory theories are the province of historians—for example, one might have a theory of why judges decided certain cases in certain ways.[7] Evaluative theories are of the kind familiar in normative moral philosophy: they purport to explain the way

[6] Moore, *Placing Blame*, 4.
[7] Ibid., 8.

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something (e.g. the law of *x*) ought to be.[8] A descriptive theory, meanwhile, "seeks neither to evaluate nor to explain the law; only to describe it in a highly general way."[9] The descriptive theorist attempts to articulate "unuttered and unseen principle[s] that stand behind the obvious law."[10] A descriptive theory, while not evaluative, is nonetheless still normative, because it "purport[s] to describe something that is already part of the law that binds judges."[11] Moore's project is essentially descriptive: he purports to show what principles underlie the criminal law as it has developed in Anglo-American systems, with the purpose of allowing criminal-court judges to (1) better promote the "rule of law," (2) "enhance[] predictability" of verdicts, and (3) "treat[] like cases alike."[12] Thus Moore says that descriptive theories like his "do not write on a clean slate to ask ideally, what law ought we to have? Rather [they] describe the law we have. Such descriptions are evaluative in the three ways just indicated, but one of the ingredients in that evaluative process is an institutional history that may be far from ideal."

The type of theory I am concerned with here is closer to what Moore dubs an "evaluative" one, though it will share features of the "descriptive" theory. I begin with an interpretation of Kant's normative political theory. I then argue for a view of criminal justice based upon principles derived from that theory. In this sense, the project is squarely evaluative. Yet while the success or failure of my account will *not* depend on its ability to explain, for example, why a certain act is or is not criminalized in any particular jurisdiction, I do not intend my theory to be wholly divorced from "institutional

[8] Ibid.
[9] Ibid., 9.
[10] Ibid.
[11] Ibid., 10.
[12] Ibid., 11-12.

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history."[13] In particular, I take it as a given that a just criminal justice system will have a general structure similar to those that exist in any modern, developed country. (I shall explain this structure presently.) I assume that such states are reasonably—though not ideally—just entities, and that we can consult our intuitions about the real-life practice of criminal justice in order to test what outcomes might be entailed by our theory. In other words, I will argue that the general structure of criminal justice we are familiar with is supported by Kantian principles—and I will then use those principles to show what justice demands of us given this general structure of criminal law.[14]

As to the nature of this general structure, the paradigmatic criminal legal case in modern states involves four steps. First, certain conduct is declared by an authority (typically a legislature or judge) to be criminal ("criminalization"). Next, police or other state actors investigate a crime and arrest a suspect ("enforcement"). The person accused of a crime is put on trial, usually before a judge or jury ("adjudication"). If convicted, he or she is subject to sanctions such as fines, imprisonment, and the like ("punishment"). Of course, the process is more complex than this, and many caveats are in order. For example, we might consider the treatment of pretrial detainees or released ex-offenders to be part of the criminal justice process—at the least, these are relevant considerations in building our theory. Moreover, there might be alternative ways of responding to criminal conduct that do not involve punishment, at least in the way we typically conceive of it in a highly retributive system such as the United States'. Still, these are the main areas of focus for anyone studying criminal justice, and it is difficult to imagine a criminal system

[13] Moore, *Placing Blame*, 18.

[14] A stronger claim would be that the familiar structure of criminal justice (criminalization, enforcement, adjudication, and punishment) is a *necessary* feature of a just polity. I do not attempt to defend such a view in this dissertation; rather, I claim merely that such a structure is compatible with the requirements of justice.

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that could not be characterized *by something similar to* these four steps.[15] As such, it seems natural to seek an account of criminal justice that has explanatory value in these areas.

Thus the type of theory that will be most useful in this context will be one that both explains intuitively justifiable aspects of relevant social practices (the "descriptive" portion), but also provides a framework by which we can measure the ethical worth of those practices (the "evaluative" portion). For example, most people would likely agree that *some* kind of punishment *at least* for *mala in se*[16] crimes is justifiable[17]—a good theory ought to explain why that is the case (or else why our intuitions are so radically mistaken here). It could turn out, under a *purely* evaluative theory, that *no* punishment would be permissible for *any* type of conduct. And while that would be an interesting theory, it would not be a particularly useful one—certainly not for judges or lawyers, and probably not for anyone else involved in the actual practice of criminal law. On the other hand, it is a contentious question whether specific punishments, such as the death penalty, are ethically permissible. A good theory ought to provide a compelling response to such a question. So if it turns out that the death penalty is permissible (or not) on a compelling theory of criminal punishment, then we will have made progress toward understanding an extant social practice (e.g. punishment) *and* toward evaluating aspects of that practice (e.g. the death penalty).

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[15] Perhaps we could, and perhaps such a system would be better. But the burden of proof is surely on the proponent of an alternative structure. In the meantime, we need to determine how, if possible, to do criminal justice *justly* within such a general structure, and it is my contention that Kant can help us make progress toward this goal.

[16] The term *mala in se* refers to acts which are pre-legal wrongs. For a more detailed discussion of *mala in se*, and the contrasting *mala prohibita*, see §III.A.1-2 in this chapter.

[17] For an important counter-argument, however, see Duff, *Punishment, Communication, and Community*, 30-34, and the references to various "abolitionist" theories contained therein.

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My contention in what follows is that a Kantian theory of criminal justice will help us make sense of aspects of the criminal law that seem non-negotiable (the criminalization of murder, for example) but will also shed light on seemingly intractable problems or contentious questions we face in the real world of criminal justice (such as the problem of overcriminalization broached in Chapter 2).

One might be surprised or skeptical about this starting point. In particular, the reader will find that I have very little to say about criminal punishment before Chapter 4—yet it is common practice in theorizing about criminal justice to *start* with the concept of punishment. This is understandable, for it is initially the type and severity of punishments that seem to distinguish criminal justice from other areas of law. If I commit the crime of robbery, for example, I am likely to face time in prison for my actions. If, on the other hand, I simply fail to keep up my end of the bargain in a business arrangement, a court might force me to pay damages to the opposing party, but I will not be imprisoned for merely breaching a contract. It might seem natural, then, to start by figuring out what, precisely, are the appropriate modes of criminal punishment, and then proceed to determine what kinds of actions "deserve" these punishments, what procedures result in their fair application, and so on. This approach would relegate the problems of criminalization, enforcement, and adjudication to second-order considerations, properly cognizable only after we have solved the basic problem of punishment.

This approach, however, suffers from at a significant drawback. If we begin with the idea that criminal acts are those which merit punishment, then we foreclose the possibility the criminal justice does *not* necessarily entail some kind of burdensome

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reparation.[18] In the language of informal logic, we beg the question. If, on the other hand, we begin simply by trying to explain what criminal justice is—or should be—then we can proceed to determine whether or not punishment is a necessary (or at least permissible) response to a criminal act.

Theorists might also consider a pragmatic reason not to begin with the notion of punishment: it is too controversial. While some criminal penalties are nearly universal (imprisonment, fines), others are historically contingent (whipping, starving, or branding; public humiliation in the stocks or pillory; etc.).[19] We can, of course, discuss punishment without assuming that the particular punishments we currently use are the "right" set. But given the controversial nature of some extant penalties—in the USA, the most obvious are the death penalty and solitary confinement[20]— the theorist who starts with the proposition that punishment is what defines criminal justice runs the risk that his or her argument will seem like a non-starter for those who oppose certain forms of punishment.

My approach is, therefore, to start, not with the topic of punishment, but with the more fundamental question of what the criminal law is *for*—because, as Moore puts it, "one cannot get a handle on what sanctions constitute a punishment unless one has *some*

[18] I am uncertain as to the origin of the phrase "burdensome reparation," though Antony Duff appears to have popularized it in the field of punishment theory. See, e.g., Duff, *Punishment, Communication, and Community*, 97; compare Nathan Hanna, "Say What? A Critique of Expressive Retributivism," *Law and Philosophy* 27(2), 2008: 123-150.

[19] For an overview of the varieties of punishments employed during the colonial era, see James Cox, "Bilboes, Brands, and Branks: Colonial Crimes and Punishments." Colonial Williamsburg Journal (2003): http://www.history.org/foundation/journal/spring03/branks.cfm. For the somewhat more grisly medieval period, see Sean McGlynn, "Violence and the Law in Medieval England." *History Today* 58(4) (2008): http://www.historytoday.com/sean-mcglynn/violence-and-law-medieval-england.

[20] This latter example presents a particular difficulty since, at least in the United States, one cannot be sentenced to solitary confinement per se. Rather, it is imposed by prison officials at their discretion. Still, solitary confinement exists within the prison system as a possible punishment for criminals based on their behavior during their confinement; a mere contract-breacher or tortfeasor will not receive this penalty.

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function in mind as the goal of the criminal law."[21] Although I disagree with Moore about what that function is, I believe his approach is the right one. Once we can give a Kantian explanation of why we have the criminal law, then we can figure out what actions are properly criminalizable. Only then can we answer the question of what punishments are morally permissible responses to crime.

My contention in this dissertation will be that the purpose of the criminal law is to protect the civic freedom of all citizens in a just society. Criminal laws and procedures, including punishment, must therefore be aimed at this goal. A society is more likely to attain this objective when it is characterized by civic virtue. In order to make sense of these claims, I must first clarify precisely what I mean by "civic freedom" and "civic virtue"—a task which shall constitute the main section of this chapter. Subsequent chapters will then elaborate on this basic thesis.

II. KANT'S THEORY OF JUSTICE

The purpose of this section is to present Kant's political theory in a way that will be most useful for the discussion of criminal justice in subsequent chapters. 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. 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, 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 questions of civic freedom (subsection B) and civic virtue (subsection C).

[21] Moore, *Placing Blame*, 25.

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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 I do not think it important (for the purposes of this project, at least) to be able to say that the theory I present is necessarily one that Kant himself would endorse in its entirety.

A. Relationship Between Justice and Morality.

In this subsection, I shall explain in some detail the relationship between justice and morality in Kant's practical philosophy. This will require what some readers may find to be excessive attention to Kant's text. I believe, however, that such an exegetical exercise will be useful in order to understand Kant's political theory. This, in turn, will motivate the discussion of criminalization as the protection of civic freedom in Chapter 2, as well as the subsequent discussions of the role of civic virtue in criminal justice in Chapters 3 and 4.

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.[22] On such a

[22] The phrase "conceptions of the good" comes, as far as I can tell, originally from Rawls; he appears to use it first in describing the parties to the original position. See *A Theory of Justice*, 11.

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view, the government should remain agnostic about the ends citizens choose for themselves, while also ensuring that they have opportunities to attain those ends.[23] For example, it has become axiomatic in Western countries to assume that the government ought to allow citizens to worship God as they please (if at all), and to protect citizens' rights to do so, even if their religious choices differ from the mainstream.[24] Many liberal theorists—not to mention politicians—seem to assume that justice in fact requires this kind of moral agnosticism.

There is certainly something right about this approach. It is important for a liberal society to leave room for, and even promote the existence of, different (and often competing) claims about values. We certainly want 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.[25] 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 gives us at least three reasons to attend to such a connection.

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[23] 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. See Rawls, *A Theory of Justice*, 57-73; cf. Nozick, *Anarchy, State, and Utopia*, 167-174.

[24] This is not to say, of course, that freedom of religion is perfectly recognized, much less protected, in every contemporary liberal society. Many problems remain regarding, in particular, the rights of religious minorities. It is also not to minimize the problems that can arise when claimed religious obligations conflict with demands of citizenship. Still, one would be hard-pressed to find a modern liberal state that did not at least purport to grant its citizens freedom of religious expression, even in places that retain an official state religion or have a history of religious intolerance.

[25] See Rawls' introductory discussion in *A Theory of Justice*, 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."

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First, on the Kantian view, justice and morality are both fundamentally concerned with freedom. Moral freedom is not identical to civic freedom, but they are related concepts. At the least, studying one can assist us in coming to understand the other. And, perhaps, striving for one kind of freedom can better enable us to realize the other. I shall discuss Kantian freedom in more detail in subsection B below.

Second, political theory must be concerned in part with citizenship, and it is philosophically popular to assert that good citizenship has moral worth—thus contemporary theorists routinely speak of "civic virtue" or "citizen virtue," albeit in sometimes vague terms. As I shall argue below, in subsection C, Kant has the resources for the development of a compelling account of citizenship, which relies in part on the understanding that the ideal citizen will act both justly, and also in a manner that is morally praiseworthy.

Third, morality and justice are both pieces of a larger normative puzzle. "What should we do?" is a question that has implications for our personal moral lives as well as our lives within civil society. Kant's claim is not that the answers to these questions will necessarily be identical in any given situation, 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.

In attempting to explain that relationship, Kant identifies three categories of laws: **moral laws** (or "laws of freedom"), **ethical laws**, and **juridical laws**.[26] The latter two are subsets of the former. 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 in such a way

[26] MM 14/6:220.

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that our "external" actions "conform" to the law.[27] 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.[28] To act in such a way that comports with ethical laws is to act according to the proper "determining grounds of [our] actions"[29] 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).

The following figure attempts to visually represent the distinctions Kant makes:

[27] Ibid.
[28] 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 here calls Ethics or, later, Virtue) and also what we might tem *justice* (that which is right to do in our political life—which Kant here calls "juridical" laws or, later, "right" (*Recht*)).
[29] MM 14/6:220.

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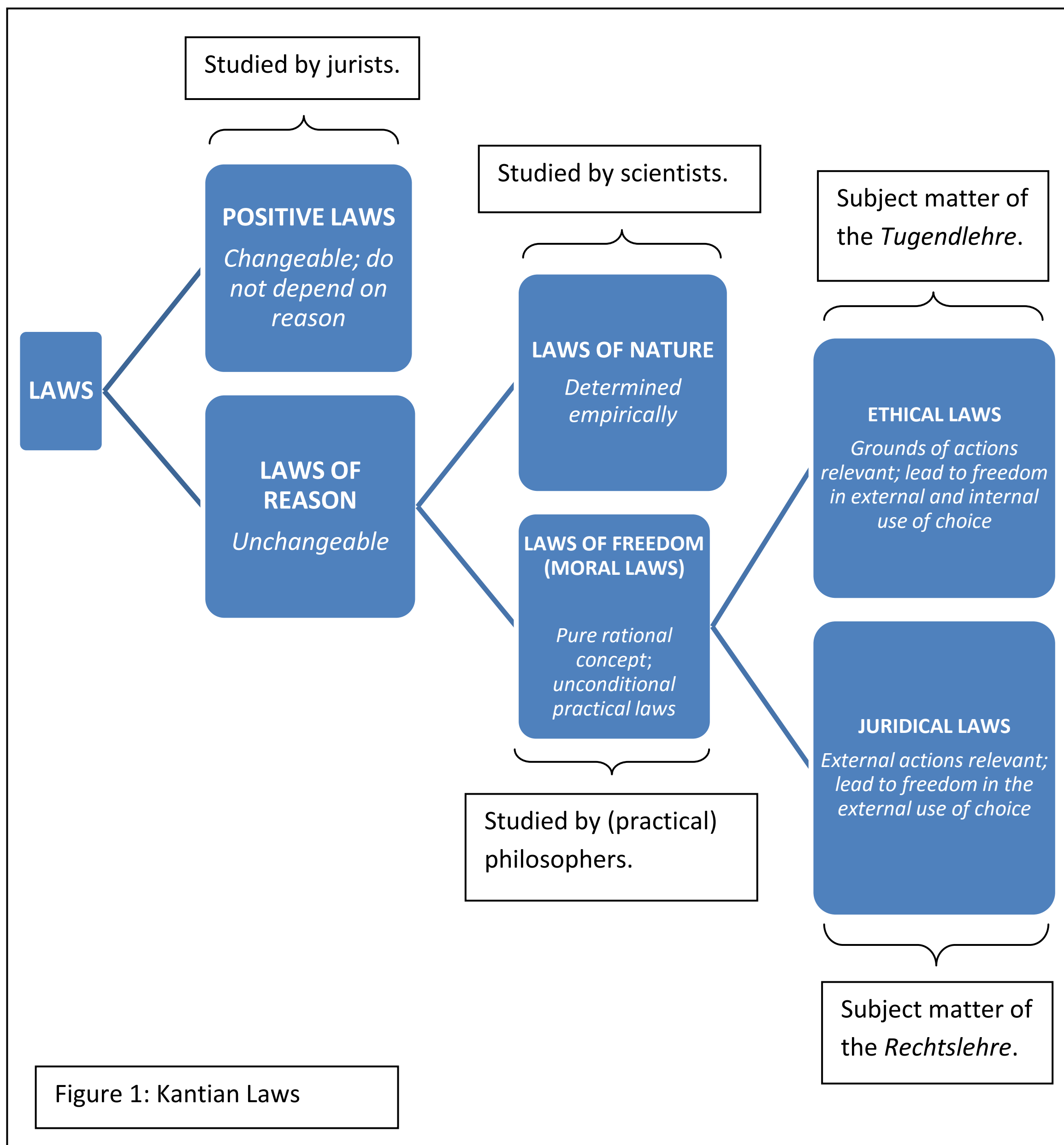

Figure 1: Kantian Laws

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

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ideal conditions[30]—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 of the categorical imperative explained in the *Groundwork for the Metaphysics of Morals*).[31] 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, whatever the particular kind of moral laws (ethical or judicial), their ultimate source 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, of course,

[30] In less-than-ideal conditions, this may not be the case, because positive (juridical) law could be completely 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. (See §III.A in this chapter for a lengthier discussion of the duty to obey positive laws.)

[31] See GW 57/4:402 and 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"); 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"); 81/4:431 for the Formula of Autonomy ("the idea of the will of every rational being as a will giving universal law"); and 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.

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that the laws of nature rely on empirical observations, while the laws of freedom rely on reason alone—they are "pure rational" concepts.[32] Still, both areas of human endeavor result in the discovery of laws. Laws of nature are legislated 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 are legislated by the features of human beings as 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, not from having *no moral constraints* on our conduct but, rather, by *choosing to constrain ourselves* in such a way that we comply with the demands of morality. 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.[33] This notion of moral freedom is one I shall return to shortly; first, however, I shall turn to Kant's political theory.

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

[32] See, e.g., MM 14/6:221.
[33] Thus Kant say 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)." MM 155/6:392, emphasis in original. On the difference between ethical and juridical lawgiving, see MM 21/6:219. And on the "self-constraining" nature of ethical duties, see MM 148/6:383.

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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.[34] In contemporary terms, we might say this section represents an attempt to describe the necessary features of the "basic structure"[35] 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."[36] Again, the term "law" does not refer to *positive* law, where "there has actually been such [external] lawgiving,"[37] but to *juridical* laws, which are one form of lawlike commands of reason. (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*.) Moreover, Kant does not intend to begin by answering

[34] MM 89-113/6.311-6.342.
[35] Rawls, *A Theory of Justice*, 7.
[36] MM 23/6:229.
[37] Ibid. Indeed, Kant says that lawyers and judges are not equipped to answer the question *What is right?* "unless [they] leave[] those empirical principles behind for a while and seek[] the sources of such judgments in reason alone, so as to establish the basis for any possible giving of positive laws (although positive laws can serve as excellent guides to this)." MM 23/6:230. It is not immediately obvious what Kant means here; indeed, it seems surprising that he would suggest that positive law can be a "guide" to determining what laws derive from "reason alone." Perhaps he would approve of the practice of using concrete examples (e.g. legal cases) to test the plausibility of a political theory—certainly he does sometimes refer to specific examples, and it is hard to see how one would do normative moral or political philosophy without doing so. The main point, though, is that specific examples or cases cannot serve as a firm foundation on which to build a reason-based normative theory.

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specific questions about justice or morality but, rather, to elucidate foundational principles that will, eventually, help us address such questions.[38]

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:[39]

> (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."
>
> (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."

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 nonrational entities.

Depending on how this first claim is interpreted, it may seem too strong. But the claim is not that people's feelings about others will always be irrelevant to justice. Indeed, as I will argue later, good citizens *should* be disposed to regard their fellow-citizens in certain ways, which requires cultivating certain attitudes toward them. But it is still right to assert that I can behave justly, in a formal sense, without having those

[38] Thus "the application of these principles to cases the system itself cannot be expected [to address], but only approximation to it." MM 3/6:205.

[39] MM 23-24/6:230, emphases removed.

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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 (that justice is not concerned with the relationship between people and nonrational entities) appears plausible insofar as it entails that justice does not concern itself with, say, people's aesthetic values (except perhaps derivatively, such 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 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.[40] 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).

[40] Thus Kant asserts that "beings without reason, still have only a relative worth, as means, and are therefore called *things*." GW 79/4:428, emphasis in original. See also LE 212/27:458.

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I will tackle these questions in Chapter 2. 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.[41] 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 of course need to reject (A) or, more charitably, find a way of incorporating concern for non-humans into it.[42]

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."[43] 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*).[44] If we are not to concern ourselves with others' needs (as a matter of justice), then it would seem that justice would not require the provision of public

[41] Except, that is, insofar as they implicate rights human beings have, as when someone wantonly pollutes land belonging to another.
[42] For two such attempts, see Lara Denis, "Kant's Conception of Duties Regarding Animals Reconstruction and Reconsideration," *History of Philosophy Quarterly* 17.4 (2000): 405-423; and Thomas E. Hill, Jr., "Ideals of Human Excellence and Preserving Natural Environments," *Environmental Ethics* 5.3 (1983): 211-224.
[43] MM 24/6:230.
[44] The relevant passage in German reads: "Aber zweitens bedeutet er nicht das Verhältniß der Willkür auf den Wunsch (folglich auch auf das bloße Bedürfniß) des Anderen, wie etwa in den Handlungen der Wohlthätigkeit oder Hartherzigkeit, sondern lediglich auf die Willkür des Anderen." https://korpora.zim.uni-duisburg-essen.de/Kant/aa06/230.html. The passage is puzzling, in part because it is not clear how the parenthetical exclusion of needs (*Bedürfniß*) from *Recht* is a "consequence of" (*folglich auch*) the exclusion of wishes (*Wunsch*).

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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 to. Again, we might think that citizens ought to have access to life-saving 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

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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. It will turn out that, for the purposes of this dissertation, we need not decide which is the correct (or more compelling) interpretation. Why this is the case shall become clear by the end of this section.

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 really a free one, 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

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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 it might be in her best interests 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, and 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*.[45] 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."[46] Since that which is right conforms to duty, and the external law is the "juridical" law, what Kant intends 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 freedom."[47] 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

[45] Here I employ the language, though not content, of Rawls' "formal constraints of the concept of right." See *A Theory of Justice*, 112-118.
[46] MM 16/6:224.
[47] MM 24/6:231.

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choice of each can coexist with everyone's freedom in accordance with a universal law."[48]

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."[49] 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 I shall suggest that 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 return to moral theory will be helpful. I noted above, in §II.A, that freedom plays a significant role in Kant's moral theory more generally. 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, rather, 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, 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

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[48] Ibid.
[49] MM 23/6:230.

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ability of pure reason to be itself practical."[50] 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 and trees and (perhaps more controversially) from other sentient beings; nonhuman animals act on instinct and impulse and are therefore capable merely of "animal choice."[51] 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 will be disposed to act on a maxim of honesty for its own sake.

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."[52] We are free to decide what to consume, but overconsumption of certain substances can impair our freedom.[53] So on the Kantian view, a commitment to avoiding gluttony—or certain psychotropic

[50] MM 13/6:213-14 (emphasis removed).
[51] MM 13/6:213.
[52] MM 180/6:427.
[53] 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." Ibid.

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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 clearly does not, at least in his moral theory, endorse this notion of freedom.

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 moral concept. There are, of course, also some important differences, which make sense given that justice involves normative requirements that exist by virtue of living in political communities, rather than those which exist simply by virtue of being a 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).[54] In the political context, we are free when we choose to be subject to just external laws. 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.

[54] See GW, 88/4:439-40, for Kant's discussion of morality-qua-lawgiving.

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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."[55] 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. (Though you could, of course, make it *harder* for me to act morally.) 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. In order 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, for example; 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. By contrast, such a situation would constitute an obvious hindrance to my ability to make meaningful life choices about, say, where I want to live, how I want to be employed, and what I wish to do with my spare time. This

[55] MM 25/6:232.

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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[56]), their view is incomplete. For Kant, civic freedom entails both making "free use of [my] choice" but also being bound by obligations toward others.[57] 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."[58] 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.[59] 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."[60] 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

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[56] See, e.g., Byrd, "Kant's Theory of Punishment," 153-54.
[57] MM 24-25/6:231.
[58] Ripstein, *Force and Freedom*, 34.
[59] MM 24-25/6:231.
[60] MM 30/6:237-38.

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UPR (we interact with fellow citizens at will).[61] 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 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.[62]

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.[63] 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

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[61] MM 30/6:238.

[62] 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." *A Theory of Justice*, 53, 266.

[63] 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)." OCS 294-95/8:294.

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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 (because just) will accord all other citizens the same freedom to act. Of course 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 nearly 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 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 factor, such as social conditions which might be preventing 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, say, 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

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considered autonomous. Thus children and those with severe mental impairments cannot enjoy all the benefits—nor can 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, of course, 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.[64] 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.[65]

[64] I do not intend this list to be exhaustive, though these are commonly cited examples. See Rawls' list of "basic liberties" for a cognate view. *A Theory of Justice*, 53. His discussion of the "concept of liberty" is also useful. Ibid., 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 the UDHR, art. 22-27. http://www.un.org/en/universal-declaration-human-rights/ These would be classified among the *social* conditions of civic freedom.

[65] Rawls thus includes them in his list of "primary goods." *A Theory of Justice*, 54-55. It may be that Rawls is correct that what I am calling social conditions are of secondary importance to the political conditions—which is why he asserts that basic liberties cannot be sacrificed in the name of socioeconomic gains. Ibid., 53-54. In this case, the chart attached to this paragraph should show a dependency relationship between the political and social conditions. My goal here, however, is merely to call attention to the fact that civic freedom in its fullest sense may or may not require the addition of these social conditions.

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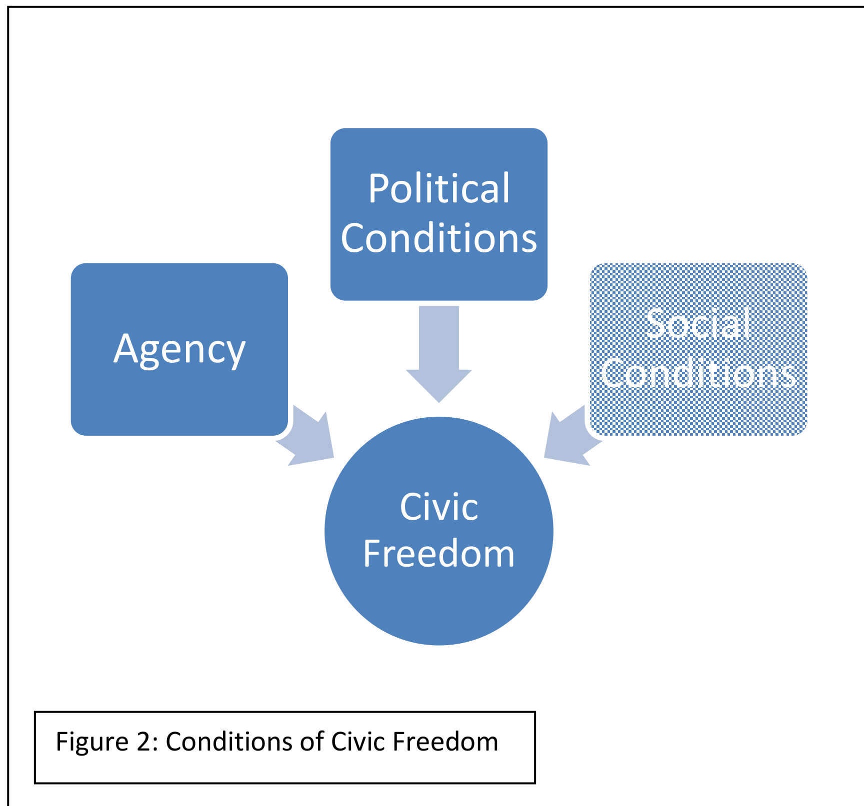

Figure 2: Conditions of Civic Freedom

Libertarian interpreters have thought that Kant, a "classical liberal,"[66] would endorse a minimalistic social order characterized by a paucity of government interference in citizens' lives.[67] 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 (and, of course, concomitant taxation to pay for them). 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,

[66] See, e.g., Roger Sullivan's introductory essay to the edition of the MM cited in the Bibliography herein, xiii ("Kant represented classical liberalism and its attack on what remained of feudalism . . . .").
[67] See Byrd, "Kant's Theory of Punishment" and Scheid, "Kant's Retributivism."

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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.[68]

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"[69] that characterize human interactions within the "rightful condition"[70] of a just society. In other words, the preservation of these political conditions is 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 the present 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.

The notion of civic freedom will play a large role in subsequent chapters. However, while most accounts of Kantian justice begin and end with a discussion of

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[68] Rawls, *A Theory of Justice*, 65-73.
[69] MM 24/6:230.
[70] MM 89/6:311.

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freedom and its ramifications, I propose taking our analysis one step further, by discussing Kant's conception of citizenship and civic virtue. This will prove useful, particularly in Chapters 3 and 4, where I shall explain the duties of just citizens in adjudicating criminal cases and punishing offenders.

C. Citizenship and Civic Virtue

One oft-neglected facet of Kant's theory of justice is his view of citizenship. Kant identifies three fundamental "attributes" of citizenship: (1) "lawful freedom," (2) "civil equality," and (3) "civil independence."[71] The content of these attributes are not surprising, given what we have seen of Kant's political theory more generally.

A *free* citizen is one who has the capacity to "seek his happiness in the way that seems good to him, provided he does not infringe upon that freedom of others to strive for a like end."[72] This freedom entails that the citizen must obey "no other law than that to which he has given his consent."[73] A just law—one which promotes the Universal Principle of Right— is one which the "united will of the people" would endorse.[74] It is, in other words, a law which is reasonably calculated to, and necessary for, the preservation of all citizens' capacity to pursue their ends. Free citizens are those bound by just laws—for they are laws which rational people would give themselves in order to maintain their polity in a "rightful condition."[75] They are thus free not just in the libertarian sense of being able to pursue their ends without interference, but also in the fuller sense of taking seriously others' claims to do the same. Thus, while citizens need

[71] MM 91/6:314; see also OCS 291/8:290.
[72] OCS 291/8:290.
[73] MM 91/6:314.
[74] MM 91/6:313.
[75] MM 89/6:311.

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not endorse the same set of interests or values in order to claim membership in the same community, the enjoyment of their civic freedom does entail that they will be "united for giving law"—that is, they will share a commitment to, and willingness to participate in, the shaping and upholding of just laws that ensure the freedom of all citizens.[76]

Kantian citizens are *equal* in the sense that nobody is taken to have a "superior moral capacity" to another such that she could "bind him as a matter of right in a way that he could not in turn bind [her]."[77] The equality here is one of coercive authority, as well as of susceptibility: "[e]ach member of a commonwealth has coercive rights against every other," and each is also "subjected to coercive right equally."[78] Thus the exercise of my freedom is limited by the ability of other citizens to enforce their own rights against me. Moreover, I can trust that my own rights will be enforceable against all others, no matter their rank or status in society.

Two codicils to this notion of equality are important. First, Kant himself does not appear to believe that civic equality requires anything approaching socioeconomic equality: "this thoroughgoing equality of individuals . . . is quite consistent with the greatest inequality in terms of the quantity and degree of their possessions."[79] He appears, at least in some places,[80] to endorse a version of what Rawls calls "natural liberty" or merely formal equality of opportunity.[81] Kant defends the notion of equality against one of "hereditary prerogative" (in Rawlsian terminology, "natural aristocracy"), in which certain groups of citizens are "ke[pt]…forever beneath the rank" of the more

[76] MM 91/6:314.
[77] MM 91/6:314.
[78] OCS 292/8:291.
[79] Ibid.
[80] See, e.g., OCS 292-93/8:292.
[81] See *A Theory of Justice* § 12, 57ff.

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privileged.[82] We may well agree with Rawls that, while natural liberty is surely an improvement over natural aristocracy, it ought to yield to principles of liberal equality or, more controversially, Rawls' "democratic equality."[83] This is because "the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by those factors so arbitrary from a moral point of view," such as one's innate talents or the socioeconomic situation into which one is born.[84] I am inclined to agree with Rawls on this point. Still, it seems right to say that, *whatever else* civic equality requires, Kant is right that it requires *at least* that each citizens' rights be enforceable against all others, regardless of their "rank." While true civic equality may well require more, Kant's definition is sufficient for the purpose of understanding the role of citizens as it relates to their participation in the criminal justice system.[85]

Second, it is not quite correct to say that *all* citizens are equally able to enforce their rights as against all others. Kant posits that one can "fall from this equality" and "lose this authorization to coerce" by committing a crime.[86] What this means, and its implications for the justification of criminal punishment, will be taken up in Chapter 4.[87]

Kant's final attribute of citizenship is that of civil independence. Citizens are *independent* in that they are self-legislators, subject to their own "rights and powers . . .

[82] OCS 293/8:292.
[83] Rawls, *A Theory of Justice*, 65-73. "Democratic equality" corresponds to Rawls' Second Principle, which includes both a standard liberal clause about fair equality of opportunity, plus Rawls' Difference Principle, according to which gains resulting from socioeconomic inequalities must inure primarily to the poorest members of society.
[84] Rawls, *A Theory of Justice*, 63.
[85] Extremely poor socioeconomic conditions are also relevant to discussions of criminal justice specifically, for at least two reasons. First, substantial deprivation may undermine our common assumptions about individual responsibility and, therefore, criminal liability. Second, these same conditions place citizens at risk for criminal victimization. Criminal justice in the real world must therefore not be blind to socioeconomic factors.
[86] OCS 292-93/8:292-93.
[87] It is well known that Kant did not hold women to be equal to men in important ways, including in their status as citizens, but I trust the reader need not be distracted by this unfortunate historical prejudice, which our reconstruction of Kant's theory can easily avoid.

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not to the choice of another."[88] They are also "colegislators" of the public law.[89] In other words, citizens will ideally support those laws which are conducive to and necessary for the preservation of all citizens' ability to pursue their ends. Thus under ideal circumstances (when all citizens use their legislative capacity justly) the "public will…must therefore be incapable of doing wrong to anyone."[90]

With these definitions out of the way, I now return to the notion that Kant views freedom (and, by extension, equality and independence) as reciprocal. Kantian citizens ought to be concerned with the freedom, equality, and independence of all citizens. At a minimum, of course, they do this by refraining from violating the UPR. This is (barely) sufficient for justice. But a *good* citizen will also affirm the values that the UPR seeks to protect, and will work to ensure that they are protected for all other citizens. A good citizen will therefore not merely abstain from interfering with another's freedom, but will actively work to ensure that others' freedoms are protected.

For example, suppose that Tom, an average citizen, recognizes that his government has instituted a policy which discriminates against a racial minority. Tom feels bad for the people affected by the policy, but takes no action to oppose it. We would not necessarily fault Tom for the injustice in question: he had nothing to do with the enactment of the policy, which arose long before he was born, and he bears the minority group in question no ill will. We might, however, fault Tom for failing to be an ideal citizen. For while Tom has done nothing unjust, neither has he taken any positive steps to address the injustice which is, after all, perpetuated by the community of which Tom is a member. What exactly Tom ought to do is an open question. Perhaps he should

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[88] MM 91/6:314.
[89] OCS 294/8:294.
[90] OCS 295/8:294.

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join a protest, or send a letter to his legislative representative, or write an opinion column for the local newspaper. He might have talents that allow him to contribute in other ways: perhaps he is a skilled artist or community organizer. He might even be in a special position to advocate for the minority group, perhaps by doing some *pro bono* litigation for his law firm. The precise nature of Tom's contribution does not matter as much as his attempt to address the injustice he recognizes within his community. Many of the moral demands of citizenship will be "imperfect" ones, in Kant's language:[91] they will not require any particular action on any particular occasion, but are able to be fulfilled in a variety of ways. Just as someone might be considered a generous person regardless of which particular charity she chooses to donate to, Tom would be considered a good citizen regardless of the particular way in which he chooses to stand up for the minority group in question.

One might object that I have placed an unfair burden upon Tom. In a near-ideal Kantian society, perhaps Tom could be expected to act as I have suggested—but in the real world, the sheer number of injustices present within Tom's society (let alone the rest of the world) present an insurmountable obstacle to this conception of good citizenship. Tom would have to spend his entire life attending protests and writing letters to his congressperson—and, even then, he is likely to have missed opportunities to combat injustice within his community.

This objection, though, misses the mark. The moral requirement is not one of *perfect* knowledge of every instance of injustice. It is, as stated, an *imperfect* requirement, as well as a *wide* one. Again, we would not call someone miserly because she failed to donate *all* of her income to charity, or missed some opportunities during her

[91] For some helpful examples of perfect and imperfect duties, see GW 73-75/4:421-23.

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life to donate.[92] Rather, we would consider her generous if she has a general propensity to give of her wealth to worthy causes, and in fact does so as a general rule.[93] So the particular case involving Tom sketched above is intended merely as one vignette among many in the course of Tom's life as a citizen. It may be that Tom fails to confront this particular instance of injustice because he has more pressing concerns: he is ill, he is a new father, or his work schedule does not permit it. That is probably fine, as long as Tom has a general inclination to be aware of and do something about injustices within the community, and actually does so at appropriate times throughout his tenure as a citizen.[94]

So far, I have explained that Kantian citizenship entails that citizens view themselves, and one another, as free, equal, and independent. At a minimum, this requires compliance with the UPR; ideal citizens will, however, do more than simply refrain from interfering with their fellow citizens. They will be actively involved in the promotion of others' freedom, equality, and independence. What good citizenship requires of us is context-dependent and cannot be spelled out with precision in such a way as to cover every possible contingency. Still, we might hope to enumerate some common attributes of citizenship that are more specific than the quite-general notions of freedom, equality, and independence. For example, perhaps good citizens will exhibit

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[92] Of course, some will disagree, alleging that morality in fact *does* require such sacrifices. See, e.g., Peter Singer, "Famine, Affluence, and Morality." *Philosophy and Public Affairs* 1(3) (1972): 229-43. I admit to being drawn to this stance in certain cases; but the Kantian response to Singer strikes me as correct in the particular case of hunger and poverty. See Onora O'Neill, "The Moral Perplexities of Famine and World Hunger." In *Matters of Life and Death*, edited by Tom Regan, 322-29. New York, Random House, 1986. In any case, the analogy with my proposed duty of citizenship seems close enough for present purposes.

[93] And does so, of course, for the right reasons. She would not, I think, be *generous* in the strictly moral sense of the term if she, for example, gave most of her money to charity, but did so in order to induce other people to honor her. A more difficult question might be whether she could be considered generous if she gave of her wealth for a variety of reasons: because she cares about the poor, because she wants to appear generous to others, and because her religious beliefs demand it. I think the answer is yes, but the question need not detain us here.

[94] Perhaps there are certain "emergency" cases where good citizenship demands immediate action, at least barring a good excuse. One example might be military service in the face of a serious, urgent, unjustified threat to the nation.

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some degree of loyalty to the government that enables them to exercise their civic freedom. I shall not attempt such an enumeration here; however, I shall return to this exercise in chapters 3 and 4, where I take up the questions of what civic virtue demands of us in the context of the adjudication and punishment of criminal cases.

III. CRIMINAL JUSTICE: A KANTIAN VIEW

The primary goal of the present project is to develop a Kantian view of criminal justice. In order to do so, subsequent chapters will address three main areas of inquiry: criminalization, adjudication, and punishment. In this section, I give a brief overview of these areas (in subsections B, C, and D). Before doing so, however, I address (in subsection A) an important prefatory question: why should we expect people to obey the law at all? Finally (in subsection E), I make some brief comments about one area of criminal justice that remains unaddressed in this dissertation: criminal enforcement.

A. A Duty to Obey the Law

A discussion of criminal law seems to presuppose that there is something coherent about the idea of passing legislation with the assumption that people ought to follow it. This presupposition has been tested in the literature discussing whether citizens are morally obligated to obey the positive laws of the societies in which they reside.[95] Answering the question of whether we have (at least a *prima facie*) duty to obey the law is important for legal theory generally—and is particularly important in the context of

[95] For a useful summary of various positions, see Smith, "Prima Facie Obligation."

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criminal law specifically. In this subsection, then, I shall briefly explain why a Kantian should assert that we have a duty to obey just criminal laws.[96]

In order to do so, I propose to examine four cases of criminal legislation: (a) laws codifying *mala in se*; (b) laws creating *mala prohibita*; (c) unjust laws; and (d) just laws in an unjust society. These four cases may not exhaust every conceivable type of positive criminal law, but they do account for most types of legislation in contemporary society.

1. Laws Codifying Mala In Se

Legal scholars use the term *mala in se* to refer to acts which are "inherently immoral."[97] Typical examples of *mala in se* include murder, rape, and other violent acts, as well as property crimes such as burglary or theft. The existence of readily identifiable *mala in se* is sometimes used to argue against a moral obligation to obey the law. When we legislate against something like rape, we do not presume to create a new category of wrongfulness—rape is morally wrong, of course, regardless of whether or not there is a law against it. Because acts like rape are wrongful independently of the positive law, some assert that it is incorrect to say that we are morally obligated to obey the law against rape. On this view, refraining from rape *because it is the law* is a misguided way of thinking about rape. We should, of course, refrain from rape *because it is morally wrong*; the fact that it is illegal should not give us any additional reason not to do it.

While these assertions seem right, they fail to prove that we have no moral obligation to obey the law against rape. To see this, consider the following two propositions:

[96] Again, I do not claim that Kant himself would agree with this analysis—only that it is consistent with important aspects of his theory.
[97] *Black's Law Dictionary*, 435.

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i. X ought never to φ, which is illegal.

ii. X ought to obey the law against φ.

Proposition (i) purports to address the morality of φ; the illegality of φ is irrelevant (though the immorality of φ may explain its illegality). Proposition (ii) purports to give the illegality of φ as the reason X ought not to φ. Those who hold that there is no duty to obey the law point to the apparent perversity of uttering (ii) where φ is a *malum in se*. Where φ is rape, for example, then surely proposition (i) is the correct way to think about why people should refrain from φ; proposition (ii) provides an inadequate explanation for the wrongness of rape and, therefore, for the reason why we can coherently state that X ought not to φ.

Why, though, should we think that there can only be *one* reason to expect others to φ? Why must we choose between (i) and (ii)? There is certainly no *logical* reason to think that (i) and (ii) are contradictory or incompatible. And we can easily imagine ourselves endorsing both propositions. Indeed, we do so on a regular basis! Certainly it would be *nice* if we could expect everyone to do the morally right thing for the right reasons—but this is hardly realistic. We routinely rely on assumptions about other people that confer on them something less than perfect motivations. I certainly hope that my fellow citizens refrain from raping one another because they recognize rape's wrongfulness—but I would be satisfied (at least in terms of civic freedom) if I knew that they would refrain from rape merely because of its criminal status.

In Kantian terms, rape is an independent and terrible wrong against a human being—it is hard to conceive of any other act, except perhaps cold-blooded murder,

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which so clearly uses a human being as a "mere means."[98] But rape is, at the same time, *also* an act that violates the "rightful condition" that the laws of civil society are intended to establish and protect. It violates the condition of bodily integrity that is a necessary condition for the enjoyment of civic freedom. Even a (morally repugnant) person who saw nothing wrong with rape *per se* should therefore refrain from rape as a matter of justice. The fact that rape is also (and more importantly) *immoral* does not make it any less unjust. Thus, while it is quite right to say that we should expect people not to commit rape because rape is wrong, it is not incompatible to say that we should also expect people to obey the law against rape.

This is intuitive, but can be put more formally. In the schematic given above (in §II.A), we saw that Kant has a certain category of external juridical laws. These laws are separate from ethical laws, which are relevant to our internal moral decisions. However, juridical laws are still conceived as a subset of moral law more generally and are, therefore, cognizable via human reason. While juridical laws are not positive laws, they are related to them—both concern the merely "external use of choice"[99]—that is, compliance with both positive and juridical laws are determined solely by one's actions, not one's will. Because of this relationship, juridical laws can be used to test the morality of positive law. Indeed, insofar as positive law corresponds to "juridical law," then it is merely a subset of moral laws and, consequently, we have a duty to obey it (just as we do any other moral law). Thus the act of rape violates the juridical law (whereas the mere setting of rape as an end—if not the bare desire to rape—violates only the ethical law). A

[98] See GW 80/4:429.
[99] MM 14/6:220 (emphasis removed).

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positive law against rape codifies the juridical law and is, therefore, morally binding on citizens.[100]

The foregoing analysis succeeds when the laws in question are clearly desirable prohibitions on *mala in se*. But in many cases positive law may *not* achieve such correspondence with juridical law (the most obvious cases being immoral laws, e.g. Nazi laws). In other cases positive law appears, at least on the face of it, to be morally neutral (e.g. the law stating that one must drive on the right-hand side of the street). The Kantian view of juridical laws as a subset of moral laws more generally entails that we have a moral obligation to obey at least *some kinds* of positive laws: those which are ultimately grounded in, and accessible to, human reason, and thus conduce to the civic freedom of all citizens. But what of these other kinds of laws?

2. *Laws Creating Mala Prohibita*

In the United States, laws declare that I must drive on the right-hand side of the road. In the United Kingdom, by contrast, I must drive on the left-hand side. Violations of such traffic laws are classic examples of *mala prohibita*: crimes which acquire their wrongfulness "because [they are] prohibited by statute," and not because they are by nature immoral.[101] There would be nothing amiss in the state of nature about driving on one side of the road or the other; but it certainly seems as if I do something wrong in the United States when I recklessly drive on the left side of the road. Of course, one might think that I owe my obedience, not to the law itself, but to something else. Thus the

[100] There may be exceptions to this pattern, such as in the case of a government promulgating criminal laws which has lost legitimacy in some way. A truly illegitimate government could not claim our allegiance to its laws. But this is just to say that positive law enacted in the absence of civic freedom cannot, by definition, comply with the demands of morality (qua justice).
[101] *Black's Law Dictionary*, 435.

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wrongness here is something like *endangering other motorists*, which is a wrong independent of specific traffic laws. I think, though, that it is still right to say that we have a duty to obey traffic laws.

Granted, in the case of morally neutral laws, the ground for one's obedience to the law does not derive from a direct correspondence between the positive law and the juridical law. Reason does not demand that we drive on one particular side of the road. Such laws do, however, promote justice—in this case, because moral laws derived from reason alone do not solve the kinds of coordination problems that can cause us, even inadvertently, to prevent others from pursuing their ends.

Moreover, part of the Kantian picture of civic justice is that citizens act as co-legislators in promulgating laws for themselves which sustain, or at least comply with, the demands of justice (via the UPR). So while we do not have a particular duty to obey the law that says we must drive on the right (or left) side of the road, we do have a duty to obey laws which result from a just process undertaken by free and equal citizens acting in the capacity of legislators—which would include laws about which side of the road to drive on.

3. Unjust Laws

In the case of unjust laws, we need to distinguish two situations. The first is an unjust law in a radically unjust society; the second is an unjust law in a reasonably just society. The paradigmatic example in the former case is Nazi law. Here, we should recall that an *external* law is not necessarily a *positive* law. The former are *juridical* laws: moral laws governing the external use of our freedom. Nazi law is a clear instance of positive law that is *not* moral law and, hence, cannot fall under the category of

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juridical law that we must follow as a matter of morality. This distinction is important, because the Doctrine of Right is primarily concerned with describing the features of a just society: one whose laws can reasonably be said to be of the juridical kind. Evil laws promulgated by Nazis clearly fail to qualify, and are therefore not within the realm of those laws to which we have a duty of conformity.

The second case may be more difficult. There are typically thousands of laws on the books in any given jurisdiction, and it seems to be asking too much of citizens that they scrutinize each law that they are asked to follow for its conformity to justice. Assuming that I am a law-abiding citizen of a reasonably just society, I may still be obeying some unjust laws. Here Kant recognizes that in some instances we might have a conflict between "two grounds of obligation."[102] In such a case, the "strong ground of obligation prevails."[103] Kant does not clarify how to determine which "ground" is stronger. Still, we could imagine two scenarios that might point us in the right direction.

Perhaps a law is unjust but not very significant, in which case our duty to follow the law outweighs our duty to fight injustice. An example here might be laws forbidding the sale of alcohol on Sundays. Assuming the justification for such laws is merely religious in nature,[104] and assuming a liberal society characterized by freedom of thought and action, there seems to be no reasonable justification for permitting those who wish to purchase alcohol from doing so on a particular day of the week. (Of course, those who wish to observe a Sabbath should be permitted to do so—but others' alcohol purchases

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[102] MM 16-17/6:224.
[103] Ibid.
[104] There may be additional considerations at stake; for example, one Minnesota lawmaker characterized an attempt at repealing the statewide ban on Sunday liquor sales as "an all-out assault on mom-and-pop liquor stores." Pat Kessler, "Minnesota House Defeats Sunday Liquor Sales In Close Vote" (April 28, 2015): http://minnesota.cbslocal.com/2015/04/28/minnesota-house-defeats-sunday-liquor-sales/ (quoting Minnesota State Representative John Considine Jr.).

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seem unlikely to prevent activities such as churchgoing.) On the other hand, an inability to buy alcohol one day of the week hardly constitutes a grave injustice. Moreover, there are clear avenues for a concerned citizen to appeal such a state of affairs: by lobbying legislators, filing lawsuits, and so forth.

We might reach a different result where the law in question is of greater consequence or part of a larger scheme of discrimination. Jim Crow laws are an obvious example here. These laws were deeply unjust, and impacted the ability of blacks to attain the same opportunities as whites. While it might be preferable to attack such laws using the legal system, the failure of one's society to remedy the situation could dictate that one has a "stronger ground of obligation" to disobey such laws in the face of pervasive and morally offensive injustices—and this is the case even when the society is, on the whole, a reasonably just one.

4. *Just Laws, Unjust Society*

What about seemingly just laws promulgated by a regime otherwise characterized by deep, pervasive injustice? I return here to the Nazi example. Do I have a *prima facie* duty to obey Nazi laws when such laws concern, for example, the flow of traffic, rather than the treatment of Jews? Or what if Nazi law forbade murder (at least of favored groups)? Using the "ground of obligation" test noted above, I might conclude that, whatever obligation I have toward the laws of my country, I clearly have a stronger obligation to respect the humanity of people my government wishes to exterminate. My moral obligation to violate *immoral* Nazi laws therefore outweighs any possible *prima facie* moral obligation to follow them. If, on the other hand, I find myself driving within the jurisdiction of a Nazi regime, I still ought to obey the law about driving on one side of

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the street. In that case my obligation to follow sensible traffic regulations designed to prevent injuries outweighs the general obligation I have to oppose the Nazi regime.[105] And, certainly, I am obligated to refrain from murder even within a Nazi regime, because the positive law here corresponds with the moral (juridical) one.

To conclude, then, I have argued in this subsection that Kantian theory has the resources to show why we have a moral obligation to obey *most* laws—at least those which codify *mala in se* and those which are morally neutral. It also succeeds in explaining the intuition many have that it is permissible (and perhaps obligatory) in certain cases to disobey laws. Finally, it can make sense of the troubling case where one finds oneself forced to decide whether to obey the just laws of an otherwise evil regime.

With this initial question resolved, I turn to a brief exposition of the contents of the remainder of this dissertation.

B. Criminalization

So far, I have argued that there is, on the Kantian view, a general (*prima facie*) duty to obey the law. In doing so, however, I relied partly on a distinction between just and unjust laws. Laws governing traffic flow are (under normal circumstances) intuitively justifiable, while Nazi laws (at least those related to the evil treatment of human beings) are intuitively unjustifiable. Of course, many laws will be closer cases. Of particular interest for present purposes are criminal laws. What, exactly, are criminal

[105] One might be justified as an act of civil disobedience in refusing to obey even innocuous laws promulgated by an evil regime. Still, one should not put others who have not consented to the action at risk in doing so. Thus it would be permissible to drive on the wrong side of the road as a sign of protest if other motorists agreed, but it would be wrong to do so if it put others in significant danger.

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laws, and how do we distinguish them from non-criminal laws? What limitations are there on the ability of a society to justly criminalize conduct?

In Chapter II, I will argue for an account of criminalization that takes as its starting point the Kantian theory of civic freedom that I have outlined in this chapter. I will show that the Kantian view provides the procedures necessary to determine what acts ought to count as crimes. Moreover, I will argue that this approach will result in a criminal law that is more limited in scope than our current practices permit, thereby alleviating the crisis of overcriminalization currently plaguing our system.

C. Adjudication

In Chapter 3, I will turn to the question of adjudicative procedures. I will present two competing models of adjudication that legal scholars have proposed; I will argue that one model (the communicative account) is theoretically superior to the other (the instrumentalist account). I will then show that this communicative model can fill in some gaps in Kant's political theory. I will also argue that a combined Kantian-communicative account can explain the importance of a particular adjudicative mechanism common to Anglo-American criminal justice systems: the jury trial. Finally, I will argue for an increased use of the jury in one particular area: the sentencing of criminal defendants.

D. Punishment

In Chapter 4, I will begin by assessing prior scholarly accounts of Kantian punishment. I will argue that the interpretation of Kantian justice I have provided in this first chapter provides the foundation for a superior account of punishment. I will then take the discussion of Kantian punishment in a new direction, arguing that the notion of

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civic virtue can assist us in developing a more just set of punishment practices, by supplementing the reliance on the principle of *lex talionis* with a more flexible standard taken from Kant's own moral theory.

E. Enforcement

The observant reader will be surprised at the omission of enforcement between the anticipated chapters on criminalization and adjudication. There is no question that this is an area in need of theorizing. As I write this dissertation, the United States is experiencing something of a law-enforcement crisis. A series of recent cases involving blatant wrongs perpetuated against black men by police officers has brought to public attention questions about limitations on the use of force; the role of law-enforcement agents within communities; [106] and a host of related social issues, particularly racial equality. I suspect that Kantian theory could help us address such questions. Unfortunately, many of the social problems contributing to the current enforcement climate would take us in directions orthogonal to criminal justice theory, and would undoubtedly require a book-length analysis of their own. I have therefore opted to leave this topic for future treatment.

[106] A useful starting point here is the critical discussion of the changing roles of police forces from protectors to investigators in Weinreb, *Denial of Justice*.

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CHAPTER 2

* * *

CRIMINALIZATION

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In this chapter, I propose a Kantian theory of criminalization. Understanding what I mean by this requires breaking the concept into its constituent parts. I have already explained, in Chapter 1 §I, what I mean by a theory. I shall therefore begin this Chapter (in §I) by explaining why the question of criminalization is of theoretical and practical interest. I shall then (in §II) justify the Kantian approach by pointing out several problems with mainstream theories of criminalization that Kantian theory avoids. Finally (in §III) I give the positive theory itself, and then (in §IV) confront some possible objections to the theory.

I. WHY CRIMINALIZATION?

A. A Theoretical Problem: What Kinds of Acts Should Be Criminalized?

At first, the question *what kinds of acts should be classified as crimes*? might seem easily answered. For example, it seems obvious that rape should be a crime, while consensual sex between adults should not be. As it happens, the law in most Anglo-American jurisdictions reflects this common-sense distinction. But this was not always the case. Marital rape was made illegal relatively recently, for example—and some types of consensual intercourse are still outlawed, at least on the books, in some places. And even if acts like rape clearly *should* be crimes, there are inevitably going to be less clear cases. It would certainly be helpful, then, if we could formulate a way of determining, for any given act, whether that act is properly regarded as a crime or not.

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While the theoretical question is easy to state, we need to clarify what kind of response we are after. In other words, there are at least two possible ways of stating the question more specifically:

(a) What kinds of acts ought to be criminalized in *a particular* polity?

(b) What kinds of acts ought to be criminalized in *any just* polity?

Kantian theory aspires to answer (b). We should, however, confront the possibility that (b) is overly ambitious. Perhaps the best we can do is (a): examine the values of a particular jurisdiction in order to determine what acts ought to be criminalized according to those localized values.

In other words, one might worry that any attempt at separating criminal from non-criminal acts in a principled way is impossible *a priori*. The best we can do is to designate the boundaries of the criminal law based on our experience with the world. We need not embrace a problematic moral relativism to note that the world is crowded by a multitude of theories, opinions, and alleged foundational principles. Even if we succeed at elaborating a set of Kantian principles of criminalization, what entitles us to claim that they are in fact the correct ones?

It seems to be this kind of worry that motivates Antony Duff's view that the search for a "unitary grand theory" of criminal justice is misguided.[107] Indeed, one of Duff's primarily philosophical targets here is Kant himself, though he also discusses contemporary examples.[108] The main problem that Duff has with the Kantian approach is the way in which it makes "universal, ahistorical" claims about political matters: what constitutes a just society, for example. Thus "[w]e should not assume (as too many

[107] Duff, *Punishment,* xiv. See also the discussion in the Introduction herein.
[108] Duff, *Punishment*, xvi.

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theorists tend to assume) that we can create a rational and properly limited system of criminal law only if we can articulate a single master principle, or set of principles, that provides substantive general criteria by which we can identify the kinds of conduct that are in principle criminalizable; the search for such a principle or set of principles is doomed to failure."[109]

It might help to distinguish two different objections at work here. The first could be lodged against what we might term theoretical *unitarianism*: the search for a "single master principle" to explain, in this case, what acts should be criminalized. The second objection could be directed against theoretical *universalism*: the claim that such a unitary principle, if discoverable, will be valid under any set of circumstances—in this case, all criminal justice systems in any polity throughout time and space. A theory could, of course, be unitarian without being universalist. For example, one could attempt to show that criminalization *in the United States* should be determined by the tenets of utilitarianism. Providing support for this claim would not necessarily advance a universalist proposition, such as: wherever there is a criminal law, its content should be determined by the tenets of utilitarianism.

Some might be inclined to think of the Kantian project I advance in this dissertation as being unitary but not necessarily universalist. It would be a substantial step forward for Anglo-American criminal law if we could determine which principle (or principles) of criminalization are most compelling *for us*. Even if it turned out that those

[109] Duff, "Modest Legal Moralism," 16; see also *Punishment*, xvi, using the phrase "doomed to futility." One motivation for this assertion may be that Duff has a particular perspective about the way philosophy works: "Philosophy must always begin from actual human practice, with the concepts and values embodied in and given meaning only by such practice." *Punishment*, xv. This is a broad claim, but I do agree that, at least in the context of practical philosophy, it is hard to see how else to broach whatever subject one has in mind. Developing a theory of political or moral importance seems obviously to require some attention to human practices: we would not worry about the moral permissibility of punishment, for example, if we never actually punished anybody.

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principles were not transferrable into different kinds of legal systems (such as those found in continental Europe), we would have made progress toward a more coherent model of criminal justice. I suspect that many philosophers opposed to grand theories in general might be open to such a unitary (but non-universalist) project.

Still, there are reasons why working toward a universalist theory might be desirable. Anti-universalists reject Kant's "aspir[ations] to a radically transcendent theory, one that will establish some set of universal, ahistorical principles . . . from which we can derive an a priori account of how political society should be structured,"[110] Rather, they seek a theoretical account based on "a particular, historically contingent, normative understanding of political society."[111]

Duff, for example, argues that certain values will play an important part in contemporary Western political communities: "the political and procedural values of liberal democracy; welfare values concerning the physical, psychological, and material goods that matter to us simply as human beings or as preconditions of the pursuit of any substantive conceptions of the good . . . ; and 'other-regarding' values concerning the community's relations to nonmembers, both human and nonhuman."[112] Duff is convinced you cannot derive these from some primary value, despite the desire of those "tempted by value-monism" to do so.[113] Thus he expresses hesitancy about privileging the liberal state above others: it is impossible to "*prove* that we should favor this liberal

[110] Duff, *Punishment*, xvi.
[111] Ibid., xvi-xvii.
[112] Ibid., 47, citations omitted.
[113] Ibid., 47.

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communitarian perspective" because such "'proof' is [not] available in normative political theorizing.[114]

Kant, by contrast, argues that a certain type of state is better than another—that there is such a thing as a living under a "rightful condition" and, by extension, any number of *wrongful* ones. This does not mean that Kant thinks there is only one right way of, say, enacting legislation or arranging the court system. It does mean that he is willing to condemn certain types of political arrangements: those which fail to acknowledge the freedom, equality, and independence of their citizens. Such regimes oppose the very essence of humanity—our status as autonomous moral agents. As of this writing, North Korea has become the paradigmatic contemporary example of an illegitimate state: one that fails to accord even a modicum of civic freedom to its citizens. A Kantian has good reason to say of the North Korean regime that it fails to comport with the most basic requirements of justice. An anti-universalist must, it seems, content herself with the observation that North Korea's political values do not conform to Western conceptions of justice.

This response strikes me as morally inadequate. As an example that attempts to capture this intuition, consider the problem of the United States' indefinite detention of suspected terrorists. If one were to object that this unabashed denial of due process violates the liberal-communitarian value of *freedom*, then the government might reply as follows. "We thought freedom was important, but now we see that security is, in fact, more important than freedom. And since there is nothing *fundamentally* important about freedom—since it is merely a socially constituted value, like security—then you have no (philosophical) grounds for objecting to our policy." One might, of course, point out that

[114] Ibid., 55.

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the state is being hypocritical: it talks about freedom, mentions the value in its constitution, and so on. Americans clearly care about freedom. Therefore, the government ought to respect it. But while releasing indefinitely detained prisoners (or at least granting them trials and other requirements of due process) because it is consistent with other values, or is required by the Constitution, might be fine from the prisoners' perspective, it does not seem to capture the reason why doing so is necessary as a matter of justice. The anti-universalist seems committed to the view that indefinite detention might not be wrong under certain circumstances, under certain regimes, provided that it were otherwise consistent with that regime's values. Indefinite detention is certainly not unjust in North Korea, on this view, because North Korea as a society has no special commitment to freedom.

The anti-universalist might view this result as an inevitable limitation on political theorizing. Kant, on the other hand, is prepared to offer a different reply. Indefinite detention is categorically unjust, on the Kantian view, because it is incompatible with the "rightful condition" of a just society—it violates the UPR by impermissibly using some citizens as means to an end (security), effectively ensuring one group's freedom at the expense of another's. Both North Korea and the United States are committing an injustice by engaging in indefinite detention. (This is not to say, of course, that they are equally culpable in this practice, let alone in other ways.)

My contention is, then, that the Kantian view is preferable insofar as it avoids the situation where the anti-universalist is unable to make definitive statements about patently unjust practices occurring outside her own society (or those structured similarly to her own). In this way, the purported superiority of the Kantian view is similar to that

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of the moral objectivist over the moral subjectivist. The latter is unable to justify her outrage over certain practices she finds immoral but which are considered permissible by others.

The anti-universalist may simply assert that I am wrong—that the Kantian approach is unreasonable because, one assumes, there will always be disagreement across societies over matters of justice. To such an assertion, I am uncertain as to what other kind of argument could be mustered than the one I have already given here. If one is fundamentally committed to distancing oneself from universalist theories, then the Kantian approach[115] will certainly be unsatisfying. But I do not see that anti-universalists have given any compelling reason for *dis*favoring the Kantian approach, other than the merely aesthetic notion that theories which aspire to universal values do not *seem* like the best kind of theories.

In such a case, I cannot offer a compelling *theoretical* reason to favor Kantian theory. I have pointed to some advantages of attempting to formulate the kind of grand principles that some find intuitively objectionable. Given that Kantian theory provides a superior explanation for our intuition that some practices are unjust regardless of their social context, it seems to me that the burden is on the anti-universalist to show exactly what is wrong with it.

B. A Practical Problem: Overcriminalization

Those who are skeptical about the universality of Kantian claims, or even about normative theory generally, should still consider the problem of criminalization, because

[115] At least as I have presented it here. I recognize that some Kantians may endorse a more limited, less universalist interpretation of his political theory.

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contemporary Anglo-American criminal justice systems face a crisis of overcriminalization. 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."[116] Legal scholar William Stuntz concurs, stating that "American criminal law's historical development has borne no relation to any plausible normative theory—unless 'more' counts as a normative theory."[117] He notes 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.[118]

While citizens observing the criminal justice system are frequently outraged when accused criminals are acquitted, or receive what are perceived to be lenient sentences,[119] the public appears unconcerned about overcriminalization. Yet 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 2014, approximately seven million people in the United States were either incarcerated or

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[116] Husak, *Overcriminalization*, 3.
[117] Stuntz, "Pathological Politics," 508.
[118] Ibid., 508; see also 512-523.
[119] The most salient example of the former, at least in my lifetime, has been the O. J. Simpson case, which still inspires complaining about the unfairness of the legal system. A recent example of the latter concerns a Stanford undergraduate who pled guilty to sexually assaulting a fellow student and received, as a term of his felony probation, a sentence of six months in jail. The public appears outraged over this case—and, to be sure, six months for sexual assault does seem lenient, at least compared to other types of sentences typically handed down by criminal courts in the United States. The defendant in this particular case may well have deserved a harsher punishment. But it is striking how comparatively rare it is to hear Americans complain about what is, in reality, a much more common occurrence: people being sentenced to lengthy prison sentences for much less serious offenses.

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restricted by probation or parole; this number has increased from less than two million in 1980.[120] Moreover, the *rate* of incarceration has also increased,[121] and is higher than virtually any other place on Earth for which accurate criminal justice statistics are available.[122] Punishments, too, have increased alongside incarceration rates.[123] Finally, racial disparities continue to plague our justice system.[124]

It is possible, of course, to acknowledge that overcriminalization is a problem, yet still wonder why we should care about a *theory* of criminalization. Husak, for one, believes that finding the right theory of criminalization would help curtail the seemingly

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[120] Bureau of Justice Statistics, Key Statistics, "Total adult correctional population, 1980-2014," available at http://www.bjs.gov/index.cfm?ty=kfdetail&iid=487. The same chart does show a small but steady decrease since 2007, apparently attributable mainly to a decrease in the number of people on probation.

[121] This trend may be stabilizing or even reversing, however. In 1980, the incarceration rate for adult U.S. residents 0.3%; it rose to a rate of nearly 1% in the late 1990s and has remained relatively constant since then. Bureau of Justice Statistics, Key Statistics, "Incarceration Rate, 1980-2014," available at http://www.bjs.gov/ index.cfm?ty=kfdetail&iid=493. And the adult correctional population in the U.S. in 2012 was 2.9%, the same rate as in 1997. Lauren Glaze and Erinn Herberman, "Correctional Populations in the United States, 2012," Bureau of Justice Statistics report (December 2013), p. 1, available at http://www.bjs.gov/content/pub/pdf/cpus12.pdf. Despite these promising signs, the number and percentage of people within the criminal justice system remains markedly higher than it was several decades ago.

[122] According to the World Prison Brief and Institute for Criminal Policy Research, the United States has the highest total prison population of any country on Earth, at roughly 2.2 million. The next closest country is China, with 1.6 million. As to the *rate* of incarceration, the United States ranks second, behind the tiny Republic of Seychelles, and far higher than other large Western nations. "Highest to Lowest – Prison Population Rate," available at http://www.prisonstudies.org/highest-to-lowest/prison_population_rate. To be fair, information is not available for 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.

[123] For example, the number of people serving life sentences in prisons increased from 34,000 in 1984 to 159,520 in 2012. The Sentencing Project, "Fact Sheet: Trends in U.S. Corrections" (2015): 8, available at http://www.sentencingproject.org/publications/trends-in-u-s-corrections/. 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." Ibid., 3.

[124] A recent report found that "African Americans are incarcerated in state prisons at a rate that is 5.1 times the [rate of] imprisonment of whites"; the figure is 1.4 for Latinos. Ashley Nellis, "The Color of Justice: Racial and Ethnic Disparity in State Prisons," report for The Sentencing Project (2016): 3, available at http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/. And, unfortunately, the comparison is even more dismal in places like Minnesota, which has a black-to-white incarceration rate of 11-to-1. Ibid., 8.

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unchecked growth of the criminal law.[125] Indeed, there are reasons to think that, in the legal world, practice is (sometimes) informed by good theory. Judges, for example, 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. Even in a legal system, such as the United States', where a single document purports to answer fundamental legal questions, theory remains important: after all, constitutions are (imperfect) embodiments of (pieces of) political theories. 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."[126] 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.[127]

II. WHY A *KANTIAN* THEORY?

If we can agree that a normative theory of criminalization is a useful pursuit, then the question becomes why we should seek a Kantian theory, as opposed to any other kind. Ideally, we would need to enumerate every extant theory and show why the Kantian approach is superior. This is impractical. In this section I shall, however,

[125] Husak, *Overcriminalization*, 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.

[126] Bix, *Jurisprudence*, viii.

[127] But for an argument *against* the proposition that normative theory is of practical value, see Stuntz, "Pathological Politics," 507-512 (asserting, *inter alia*, that "legislators who vote on criminal statutes appear to be uninterested in normative arguments").

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mention some problems with a few salient approaches to criminalization, and show that the Kantian approach avoids these difficulties. Later, in §IV, I will address several specific objections to the theory to be elaborated in §III.

A. Consequentialism

Broadly, consequentialism evaluates acts based on their consequences. Thus a consequentialist theory of criminalization would assert the following:

> CON: Criminalizing φ is right iff criminalizing φ results in consequences that are superior to those resulting from not criminalizing φ.

This very general definition sounds appealing at first. Note, however, that its force depends entirely upon what we mean by "superior consequences." In the criminal justice context, it is natural to assume that one consequence we ought to be considering is the public good of crime prevention. We can assume, for the sake of argument, that criminalizing murder, rape, and other *mala in se* will have at least some positive deterrent effects. Public safety is not, however, the only social value we should care about, and the act of criminalizing φ will likely have consequences that reach far beyond deterrence, especially when we consider proposed crimes more controversial than rape or murder. But how are we to decide which values outweigh others in a particular case?

For example, I write this section as the United States reacts to yet another "mass shooting": this time around fifty people were killed, apparently by a lone assailant, at a nightclub in Orlando, Florida. Early news reports indicate the perpetrator used an assault rifle he legally purchased in this country to carry out such a terrible act. Predictably, some politicians immediately seized the opportunity to renew calls for increased gun

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control measures. One option would be to criminalize the possession of firearms generally, or some subset thereof. But many citizens will no doubt continue to resist the criminalization of gun ownership. It is unclear to me how we are to determine the right course of action here by a bare appeal to consequentialism. Certainly we could cite statistics showing that people who commit such atrocities tend to use certain kind of weapons, and we could perhaps muster some evidence that criminalizing the possession of these instruments would deter people from using them. On the other hand, gun control opponents will presumably continue to argue that diminishing citizens' liberty, particularly in light of our historical and constitutional commitment to gun rights, outweighs the potential deterrent effects of such a ban. But there seems to be no obvious way to determine how much weight to give to crime prevention on the one hand and the abstract notion of liberty on the other. Consequentialism thus does not seem to get us very far in resolving this debate, unless we can get clearer about which consequences matter, and how to compare competing ones.

We could, as some consequentialists do, fill out our definition via utilitarianism. That is, we could assert that the consequences at issue are the maximization of, say, the satisfaction of people's informed preferences.[128] Unfortunately, this strategy faces a specific instance of a more general challenge to utilitarianism: the theory appears to license, and at times to require, clearly immoral conduct in order to facilitate social welfare. If it turns out that criminalizing all forms of free speech maximizes utility, then the utilitarian would have to commit to such a course of action. If intentionally

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[128] I tend to agree that "informed preference satisfaction" is the most plausible version of act utilitarianism, as argued by Will Kymlicka in *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford UP, 2002), pp. 13-20. Also worthy of consideration in this context would be Robert Goodin's defense of "government house" utilitarianism (a variant of rule utilitarianism). *Utilitarianism as a Public Philosophy* (Cambridge: Cambridge UP, 1995), pp. 60-77.

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convicting the innocent would satisfy the majority's preferences, then we ought to do so. And if sadistically raping, torturing, and dismembering convicted criminals maximizes the criminal law's public-safety functions, then this is how we ought to treat such people. It is based on similar concerns that Douglas Husak concludes that "utilitarianism is a defective theory of criminalization."[129]

Consequentialists need not, however, endorse utilitarianism. They could attempt to revise CON in such a way that it targets the "right set" of consequences. How we determine what constitutes that set, though, is difficult to determine. Consider the following attempt:

> CON′: Criminalizing φ is right iff criminalizing φ is necessary in order to guarantee the political conditions of civic freedom for all citizens in the community.

This definition is consequentialist, in that it assesses the proposed action (criminalizing φ) in light of a consequence (guaranteeing citizens' civic freedom). It is, however, *ad hoc*. I will, in §III below, argue for such a conception of criminalization based on the interpretation of Kant's political theory offered in Chapter 1. But Kant's theory is far from consequentialist. Thus, if CON′ (or something like it) succeeds, it is only after resorting to non-consequentialist criteria. This does not constitute a *proof* against the feasibility of consequentialism as a theory of criminalization. It does, however, suggest that consequentialism is a very weak approach to criminalization, as it requires us to fill in the theoretical gaps with non-consequentialist criteria. The burden of proof is therefore on the consequentialist to develop a more convincing account than the Kantian one that I propose in CON′.

[129] Husak, *Overcriminalization*, 194.

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B. Legal Moralism

A second possible theory of criminalization is legal moralism (LM). In its purest form, LM holds that we are morally permitted to (and indeed ought to) punish *any* moral wrong—though there may be countervailing considerations which lead us to punish only certain wrongs and not others.[130] Legal moralists begin with common intuitions we experience about wrongdoing and retribution. We tend to think it right that someone who does something obviously wrong *suffer* in some way. Thus a "principle of retributive justice" undergirds legal moralists' account.[131]

While opponents have raised a number of objections to LM,[132] one that is of particular interest here is the problem of determining what subset of possible human actions qualifies as immoral. For example, Husak (not a moralist himself) rejects the notion that things which are non-harmful can be morally wrong.[133] Michael Moore, a paradigmatic legal moralist, similarly asserts that many things previously thought to be wrong, such as various types of purported sexual immorality, are in fact *not* wrong. Both treat such propositions as obvious—but, surely, they are unlikely to gain universal assent. And even if we could agree that all things which are morally wrong are also harmful, we must be sure that we understand what "harmful" means here. For example, some people assert that eating meat is morally wrong because it harms non-human animals; others do not see this type of harm as the morally relevant kind. Some (such as Husak) think that drug use is not harmful because it does no harm to anyone other than the user—but the

[130] See Moore, *Placing Blame*, chapter 1 ("A Theory of Criminal Law Theories").
[131] Husak, *Overcriminalization*, 199.
[132] See, e.g., ibid., 196-206.
[133] See, for example, his discussion of drug use in *Overcriminalization,* 140.

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exemption of self-harm from the category of wrongfulness seems arbitrary. Finally, some people following certain religious traditions hold that particular sex acts are wrong (even if consensual), that eating certain kinds of food is wrong (at least for believers), or that (not) wearing certain types of clothing is wrong. Often the "harm" produced by such actions (consensual sex, eating forbidden foods, etc.) is alleged to be spiritual, not physical. But why should LM stop at acts causing physical injury to others? Should we really be satisfied with Moore's resort to countervailing pragmatic considerations?

To put the problem more succinctly, consider that according to LM, the state should criminalize φ just in case φ is immoral. But whether φ is immoral or not is often controversial. LM must therefore have a non-arbitrary way of distinguishing immoral from non-immoral acts, *or* concede that criminalization will not result in a proper distinction between immoral and non-immoral acts. So either LM correctly answers to the question of whether or not φ is morally wrong, or LM places no limitations on what the state would be justified in punishing. This leads to the untenable result that the state must be in the business of evaluating moral claims made by all its citizens, and to the conclusion that the state is justified in punishing *all* kinds of wrongs, including, say, the immoral failure to wear a certain type of religious clothing (assuming we could prove that this failure was, in fact, immoral).

Although I shall go into more detail about these issues in section III below, here I sketch the reasons to think Kantian theory avoids the problems I have raised with legal moralism. On the Kantian view, only a certain subset of acts are criminalizable: those which violate the political conditions of civic freedom. Thus, although Kant does in the *Tugendlehre* (or Doctrine of Virtue) attempt to enumerate those actions, or classes of

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actions, which are immoral, it is not necessary to do so in order to solve the problem that exists under LM. Only those actions which oppose the formal conditions of civic freedom are properly considered criminal acts. This explains (or so I shall argue) why acts such as rape are properly regarded as crimes, while acts such as adultery are not. The state clearly must punish rape where it can be discovered, whereas the state cannot be in the business of punishing adultery.[134]

C. Modest Legal Moralism

Perhaps, though, what is needed is not to abandon legal moralism, but to posit an appropriate limiting principle: an explanation as to why only *some* moral wrongs are punishable by the state, while others ought to be protected from such punishment. This would require, not mere countervailing pragmatic considerations, but positive moral reasons to punish some instances of moral wrongdoing and not others.

One approach is suggested by Duff, who argues for a "modest legal moralism." On this view, "the criminal law is … properly concerned not (even in principle) with every kind of moral wrongdoing, but only with wrongs that should count as 'public' rather than 'private.'"[135] To determine where to draw the line, "we begin with the idea of the public—the *res publica*, the realm of our civil or political life; as we think about how to organise and regulate that realm, we will find a role for a system of criminal law as an appropriate way in which we can mark and respond to wrongs committed within it."[136]

[134] Note that this does not yet show that the government cannot attempt to *discourage* adultery—only that it cannot do so via the threat of criminal punishment. Whether it is permissible for the state to encourage a certain kind of sexual morality or family structure in non-criminal ways is, I think, a very difficult question, but it need not detain us here.
[135] Duff, "Modest Legal Moralism," 5.
[136] Ibid., 7; see also ibid., 11.

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Duff does not, in this paper, argue for a particular view of the *res publica*. He says that there will be no "simple answer"[137] to questions about criminalization, and although he offers three criteria that he thinks criminalization must meet,[138] he reiterates his view that the search for a "single master principle" of criminalization is misguided.[139]

As discussed in §I.A above, I do not share Duff's skepticism about unified theories. Moreover, I do not see how modest legal moralism gets us very far without engaging in political theory—we need to do more than merely wave our hands at the notion of *res publica*. It seems to me that what we need to do, in order for our ruminations about criminalization to have any meaning, is to pick a convincing political theory and determine what that theory entails for the project of criminalization. If a particular political theory comes to intuitively untenable conclusions about criminalization, then we have (at least one good) reason to reject it. (Thus, as noted above, the fact that utilitarianism does not entail that murder *must* be criminalized, nor that free speech *must not* be, is one reason to disfavor utilitarianism as a theory of criminalization.) On the other hand, a compelling political theory might be able to give us guidance about harder cases—such as whether or not to criminalize recreational drug use.

My contention here is that Kantian theory provides a compelling political theory that can answer such questions—as I shall attempt to do shortly, in §III. If I am right, then the burden of proof will be on proponents of modest legal moralism to show why Kantian theory fails as a (admittedly grand and universal) theory of the state.

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[137] Ibid., 11.
[138] Ibid. The criteria are: "the conduct to be criminalized must be wrongful; it must require a collective response; and we must have good reason to make its wrongfulness salient in that collective response."
[139] Ibid., 16.

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D. Husak's Theory

I shall now address one final competing theory: the one presented by Douglas Husak in *Overcriminalization*. Husak's proposal is that we can derive some "internal constraints" on the criminal law "from the criminal law itself."[140] The idea seems to be that we can discover principles already instantiated in the (American) criminal law that militate in favor of decriminalization. These "internal constraints" include the requirement that criminal statutes "prohibit a nontrivial harm or evil"[141] and that "[p]unishment is justified only when and to the extent it is deserved."[142] While these constraints are welcome, and may well serve Husak's primary purpose of limiting the expansion of the criminal law, they are insufficient as guides to the development of a full normative theory of criminalization. For example, stealing twenty dollars from your wallet or driving while intoxicated when nobody else is on the road might be "trivial" wrongs, but they still probably strike most people as criminal acts. Meanwhile, non-harmful acts of avarice and unkindness may well be non-trivial wrongs—but they are intuitively non-criminal acts. What we need is a theoretical explanation of *why* some wrongs are criminal wrongs, while others are not.

Husak does add some "external constraints" to his theory, which he says "depend on a controversial normative theory imported from outside the criminal law itself."[143] Unfortunately, he never clearly defines what this theory is.[144] Perhaps Husak intends *not*

[140] Husak, *Overcriminalization*, 55.
[141] Ibid., 66.
[142] Ibid., 82.
[143] Ibid., 55.
[144] Many of his examples involve decriminalization of paternalistic laws, such as drug criminalization, so one might be inclined to label him as a libertarian—but he does not claim in this book to be relying on libertarian premises.

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endorse any particular political theory; instead, he thinks it sufficient to argue that implementing these constraints "would be superior both to the status quo and to any of the alternative[]" theories mentioned above.[145] It is understandable that Husak wishes to remain agnostic about which political theory is the "right" one, in order to focus on questions of crime and punishment in relative isolation. I am, however, skeptical about this approach. Does it make sense to talk about limitations on state power without an account of state power? I might be prepared to agree with Husak that we can talk about criminalization in a very general way without first endorsing a political theory—but Husak's attempts at describing "constraints" seem to delve deeply enough into the relationship between individuals and the state that it seems he is really just doing covert political or moral theory. For example, as noted above, he repeatedly claims that drug use is not harmful, or at least not wrongful.[146] But it seems obvious that at least *some* drug use is harmful, if only to the individual user. To assume that acts which harm only the individual actor are not morally wrong or, at the least, not proper targets for state punishment, seems to presuppose an account of morality and of the relationship between the individual and the state that Husak never specifies and, indeed, from which he apparently wants to claim independence.

In any case, Husak ultimately agrees that "[t]he details of a comprehensive theory of criminalization require nothing less than a theory of the state."[147] Thus, as with Duff's modest legal moralism, Husak ultimately declines to provide definitive answers about criminalization in the absence of a political theory. Because my goal in this chapter is to make some progress toward this kind of "comprehensive" theory of criminalization, I

[145] Husak, *Overcriminalization*, 120.
[146] Ibid., 167-170.
[147] Ibid., 120.

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will take Husak up on his challenge: I aim to show that Kant's political theory can generate a compelling account of criminalization. If this is the case, then it can be used to test whether Husak's (or anyone else's) proposed "limitations" on criminalization are sensible or not.

III. THE THEORY

In this section, I present the Kantian theory of criminalization that is the main purpose of this chapter. 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."[148] 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.[149] 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."[150]

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[148] MM 91/6:313.
[149] MM 91/6:314.
[150] Kleingeld, *Cosmopolitanism*, 30.

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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 puts it, one governmental "authority" cannot justly "usurp [the] function" of another.[151]

On the face of it, this seems sensible—but upon reflection things are not quite so simple, for 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, 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

[151] MM 93/6:316.

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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."[152] 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 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,

[152] MM 91/6:313, emphasis removed.

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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.[153]

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 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."[154] This initially sounds unhelpful—crimes surely cannot be the violation of *any*

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[153] Wellman, "Rights Forfeiture," 388. The contemporary German solution to this problem is noteworthy. In general the maxim *nullum crimen, nulla poena sine scripta lege* 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." Bohlander, *German Criminal Law*, 11. Thus the ban on retroactivity does not apply to crimes such as genocide or war crimes. Ibid., 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. Ibid., 13. Thus "[n]atural justice . . . should be seen as a kind of safety-valve in a legal system tending toward a positivistic approach." Ibid.

[154] MM 105/6:331.

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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."[155] 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.[156] In a just society—one that is in what Kant calls a "rightful condition"[157]—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 (thought 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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[155] Ibid.
[156] See Chapter I, §II.B herein.
[157] See, e.g., MM 89/6:311.

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C: φ is a crime iff φ interferes with another's[158] 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* 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 the 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) in the process of attempting suicide at the time,

[158] Here, as elsewhere in this section, 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 §IV.C.1 later in this chapter.

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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 from Chapter 1 that the political conditions of civic freedom include rights familiar to liberal democracies: freedom of speech, religion, and assembly; a right to privacy; freedom of 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 competition 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."[159] 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

[159] MM 24/6:230. See also the discussion in Chapter 1, §II(B) herein.

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morally wrong, but because they are incompatible with the "sum of conditions"[160] 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."[161] 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* that ensures all citizens' rights to property ownership, which 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 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

[160] MM 24/6:230.
[161] MM 106/6:333.

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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 Chapter 1, the social conditions include, among other possibilities, access to important public goods such as health care, education, and welfare. As noted in that chapter, 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 the Kantian ought to favor C″ over C‴. The reason for this is *not*, to be sure, the libertarian rationale that matters such as people's health, education, and economic status are outside the scope of justice. Rather, it is because they are outside the scope of *criminal* justice. Consider two different types of violations of civic freedom:

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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 incidentally 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."[162] I shall have more to say about this in Chapter 4, but the idea is that, because civic freedom is reciprocal, in violating another's freedom, I thereby give

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[162] MM 105/6:331.

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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 may well constitute 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 the social rights may be significantly more indeterminate than the 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 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.

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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*.[163] 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 is on the nature of the criminal act itself, rather than on the mental state of the criminal. Arthur Ripstein suggests that a criminal necessarily acts on a maxim of self-exemption from

[163] 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.

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public law.[164] 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.

For Kant, a maxim specifies the reasons for taking a particular action.[165] 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 kill Hugh in order to obtain his money." After all, if we could *not* attribute such a maxim to Geoffrey (if, say, we conclude that Geoffrey had no intention of killing Hugh at all), 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 primary 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, in such a way that precludes Hugh from exercising his own freedom. We can expect that Geoffrey, as a

[164] Ripstein, *Force and Freedom*, 308-09.
[165] Kant himself defines a maxim as "the subjective principle of acting . . . [or] the principle in accordance with which the subject *acts*." GW 73/4:421, author's first footnote.

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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 manslaughter or 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 the 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 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 which 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 proximate 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: "I will drive on this street in a reasonably careful manner in order to get to

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work." 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 fact-finder 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

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are summarized in table following this paragraph, to which the reader may refer in the subsequent discussion.[166]

Table 1: Criminalization Scheme

Class of Acts	Examples	Political Condition(s) of Freedom Violated	Characterization of Criminal's Maxim	Criminalize
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	**Privacy**: condition making it possible to lead one's life with a reasonable expectation of privacy consistent with that of other citizens. **Security**: condition making it possible to exercise other rights and enjoy one's civic freedom.	I will invade others' privacy, or cause them 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**.	In order to further my own purposes, I will act in such a way that others cannot enjoy a reasonably safe community.	Yes
Regulatory (conduct toward government)	Impersonating a police officer, Escape, Failure to Appear, Obstruction of	**Security:** as above.	I will act in such a way that other citizens cannot be assured that the government is protecting their civic	Yes

[166] 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 §IV

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	Justice		freedom.	
Regulatory (licensure)	φ'ing without a license	**Well-Functioning State**: condition making it possible to enjoy all other civic freedoms.	I will exempt myself from legal requirements reasonably expected to make it possible for all citizens to enjoy their civic freedom.	Yes (but φ must be such that a failure to regulate φ reasonably imperils others' civic freedom)
Harm to the State or Public	Treason, Tax Evasion, Abuse of Office, Public Misconduct	**Well-Functioning State**: as above.	I will act against the interests of all citizens in order to further my own purposes.	Yes
Anticipatory	Conspiracy or Attempt to commit φ.	None.	I will act in such a way that my desire to φ will be made easier.	No
Harm to self	Drug use, Suicide	None	I will harm myself in order to fulfill my own desires.	No
Possessory Offenses	Possession or Use of Drugs, Weapons, or Pornography	None	I will engage in risky or unseemly behavior in private.	No
Public Nuisances	Public Nudity, Public Drunkenness, Swearing, Littering, Dog at Large	None	I will engage in behavior others consider obnoxious or immoral but which does not violate any political conditions of civic freedom.	No
Private Immorality	Polygamy, Bestiality, Fornication	None	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

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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 which 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.[167]

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 conceivably 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—

[167] Kant assumes that private property rights are a necessary condition for a just social order. See, e.g., his discussion of property rights in MM 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."

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rather, it is to say that 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.[168] While manslaughter is undoubtedly 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 one's 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 least two kinds of regulatory violations could, under certain conditions, be properly classified as criminal acts: those that threaten the

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[168] The quoted language is from LaFave's analysis of the criminal negligence (or recklessness) standard in American law. *Principles of Criminal Law*, 181.

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provision of government services to other citizens, and those that involve government licensure of otherwise dangerous activities.

The first kind of regulatory conduct involves activities which impact the right that all citizens have to security. 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.

The second type of regulatory conduct is somewhat more complicated. I have in mind here the licensing of activities which, if left unregulated under current conditions, would otherwise violate citizens' freedom. The paradigmatic example here is driving without a driver's license. There is nothing about operating a vehicle without a license that is wrong in and of itself. There are, however, good pragmatic reasons in modern society 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.[169] While obtaining a driver's license may slightly impact citizens' freedom, the requirements in question are rational responses to an everyday problem of

[169] Of course, it is also possible that licensing requirements are a revenue source for governments. For the sake of discussion, I assume that the government is not inflicting licensing burdens on its citizens to obtain pecuniary or other gains, but solely out of legitimate safety concerns.

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justice: how to ensure that people are permitted to operate such vehicles while ensuring, to the extent possible, others' safety.

Similar reasoning will cause us to accept the criminalization of using firearms or other dangerous weapons without a license; setting fires without a permit; and engaging in other activities the state reasonably regulates in the name of public safety. What, though, of the myriad of regulations that do *not* have such a justification? For example, consider the odd Arizona crime of "contracting without a license." If a person performs construction work for another and is paid over $1000, and does not have a contractor's license, then the worker is guilty of a class 1 misdemeanor.[170] It is easy to imagine cases where someone engages in relatively innocuous behavior and is, nonetheless, prosecuted under this statute.[171]

There are a couple of problems with criminalizing this kind of conduct. First, it is not the kind of activity that all citizens ought to know is normally regulated by the state. Some people might be aware of this fact, but plenty of others are probably not.[172] Unlike the activity of driving, which everyone either engages in or is at least aware of, many people have probably never thought about whether construction is regulated in the

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[170] See Arizona Revised Statutes 32-1121(A)(14) and 32-1164(A)(2). Someone convicted of a class 1 misdemeanor could receive up to six months in jail. ARS 13-707(A)(1). In addition, someone convicted of contracting without a license will be publicly shamed by having their name printed on the Arizona Registrar of Contracts website. See "Unlicensed Contractor Violations – Arizona Registrar of Contracts," at http://www.azroc.gov/ wanted/violations.html.

[171] Suppose Vivian has a neighbor, Doug, who is skilled at carpentry, but is not a professional contractor. Vivian wants to build a new deck on her house, and asks Doug if he would be willing to do the work for the bargain price of $1000. Doug, who enjoys doing this kind of work on the weekends, readily agrees. After building the new deck and receiving $1000, the neighborly relationship between Doug and Vivian sours, and Vivian reports Doug to the police, who charge him with contracting without a license. Doug's contention that he had no idea he would need a license to build his neighbor's deck (since he is not a professional contractor and was, after all, just doing his neighbor a favor by working for such a low price) has no traction in the face of this kind of statute.

[172] I first discovered that this was a crime when, while working as a public defender, I happened to be assigned a client charged with it. I had, of course, graduated from law school and passed the Arizona bar exam. If someone can be a criminal defense lawyer and yet be unaware that something is a crime—or even have reason to think it *might* be—how can we expect the average non-lawyer citizen to know this?

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same way. Second, and more importantly, there is nothing about unregulated contracting that is inherently dangerous. True, the goal of contracting regulations is to protect the public from unscrupulous contractors, and the Arizona statute might be viewed as an attempt to preserve the freedom of all citizens from fraud. But fraud is already a crime, and the resort to civil rather than criminal liability is sufficient in other cases. In any case, unregulated contracting does not threaten people's freedom in the same way that unregulated operation of dangerous machines does. We should, therefore, refrain from importing disputes over such things as construction contracts from the civil law into the criminal law. Thus it is justifiable to criminalize φ'ing without a license only in cases where φ would clearly threaten the loss of civic freedom if φ were not regulated.

Finally, just as some licensing laws can be construed as required to ensure that all citizens are able to enjoy their civic freedom, so can prohibitions on certain types of conduct which harm, not individual citizens, but the state as a whole. 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.[173] But if laws regarding taxation are reasonably construed (as I suppose they are) to preserve citizens' ability to pursue their ends (for example, by providing them with education, health care, and other social goods), then exempting oneself from them is tantamount to repudiating the freedom of one's fellow-citizens. Intentionally

[173] I do not mean that it would be impossible to do so in theory. If I fail to pay my taxes, I have harmed some people—for example, children who are entitled to the use of my tax money to pay for their public education. But determining which particular child has been harmed is impossible, and the actual harm (assuming I am not a billionaire) would be *de minimis* when the entirety of the community's tax receipts is taken into account. So while it is correct to say that I have wronged *someone*, since we cannot identify that someone nor point to any *significant* harm, it is easier to grasp the injustice in question by considering tax evasion in light of the self-exemption criterion.

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withholding my share of taxes manifests my unwillingness to do my part to ensure that others' civic freedom is upheld.

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 anticipatory acts, merely self-harmful conduct, possessory offenses, public nuisances, and private immorality.

Anticipatory offenses include principally the "crimes" of *attempt* and *conspiracy*. From a consequentialist standpoint, punishing people for *trying* to commit a crime may have beneficial results in terms of incapacitation and deterrence. But consider what these offenses entail: a citizen has done something (typically referred to as a "substantial step"[174]) in an effort to commit a crime. The defendant has not, however, actually committed the underlying offense. From a Kantian perspective, then, the would-be offender has not succeeding in violating anyone's civic freedom, even if he has desired to do so. He may well be a morally reprehensible person but, as we have seen, moral failings should not be sufficient to trigger criminal liability.

It may sound untenable to exempt from criminal liability the entire corpus of extant anticipatory offenses. Surely someone who attempts to *murder* a fellow human being ought to be punished! If we think more carefully about such cases, however, we will find the Kantian conclusion to be warranted. The reason is that in any realistic case where attempt liability is invoked, there are other offenses of which the defendant is already guilty—we need not therefore worry that dangerous people will go unpunished as

[174] See the discussion in LaFave, *Principles of Criminal Law*, 442-49.

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a result of foregoing the application of attempt liability. Consider the following scenarios that could result when Dwight shoots at Victor with the intent to kill him, but fails to do so. (A similar analysis could be used for conspiracy offenses.)

A_1: Dwight hits Victor; Victor is seriously injured.

A_2: Dwight hits Victor; Victor is slightly injured.

A_3: Dwight misses; Victor experiences psychological distress as a result.

A_4: Dwight misses; Victor is unaware of the attempt.

In A_1, Dwight shoots and seriously wounds Victor. This act clearly violates (at least) one condition of civic freedom: bodily integrity. But there is no need to say that Dwight is guilty of attempting to murder Victor—for we can simply say that Dwight has assaulted Victor. The same applies to case A_2, the only difference being that Dwight has not harmed Victor as gravely. This is, of course, relevant to how seriously we construe Dwight's offense; we probably think that Dwight deserves a more severe punishment in A_1 than in A_2. But we need not convict Dwight in either case of attempted murder: it is sufficient in both cases to convict him of (perhaps different degrees of) assault.[175]

In A_3, Victor is not harmed physically, but is harmed in other ways. Naturally, being the target of an attempted murder is likely to be traumatic for most people, and it is reasonable to say that an assault with intent to kill, under these circumstances, is the kind

[175] One might worry that, in practice, would-be murderers would receive too-light sentences if we convicted them *merely* of assault. But this is a matter of sentencing ranges, not offenses descriptions. As it stands, prosecutors would have no problem sending Dwight to prison for many years if he were convicted "merely" of assault. For example, in Minnesota, assault resulting in great bodily harm and attempted murder are both punishable by up to twenty years in prison. Minn. Stat. 609.17 subd. 4(1); 609.185(a); and 609.221 subd. 1. In Arizona, attempted murder carries a sentence of anywhere from seven to twenty-one years in prison for a first offense, while aggravated assault with a deadly weapon will result in five to fifteen years for a first offense. ARS 13-1001(C)(1); 13-1105(D); 13-704(A); 13-1204(A)(1), (A)(2), and (D). The difference between these offenses in a place like Arizona could, of course, be changed by the legislature should it be determined that locking somebody away for fifteen years is insufficient punishment for an offense which did not result in death.

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of offense that, by its nature, will violate a condition of civic freedom otherwise enjoyed by the victim—namely, his sense of security. But, again, there is no particular reason to say that it is Dwight's *attempt* to do something that has violated Victor's freedom—rather, it is the fact that Dwight *in fact succeeded* in putting Victor in reasonable fear of his safety that is the real crime at issue.

What, though, of A_4? Suppose that Dwight tries to murder Victor, but fails—and Victor, unaware of the attempt on his life, suffers neither physical nor psychological harm as a result.[176] Even in this case, though, there is no reason to charge Dwight with attempted murder—we can still charge him with assaulting Victor. Although Victor has not been harmed, Dwight's act is still *the kind of act* that is incompatible with citizens' civic freedom. And, of course, Victor's maxim (e.g., "I will kill Dwight for personal gain") is incompatible with the UPR.

Since there is no practical need for anticipatory offenses, and since merely attempting to do something, by itself, cannot by definition result in the violation of the political conditions of civic freedom, the application of C* would result in the removal of these offenses from the criminal code.

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.[177] But my ingestion of a toxic

[176] Assuming the crime is discovered and Dwight is prosecuted, this seems impossible, but it could happen in theory. Victor could die of natural causes, for example, before the attempt on his life is discovered. Or he could be an infant, or otherwise lack the intellectual capacity to appreciate the danger he was put in.
[177] See MM 180/6:427.

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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. Or, to put it another way, there is nothing about the act *in itself* that interferes with others' 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 assault 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—the most troubling problem being the violence that seems to pervade the black market. 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?

Upon reflection, however, we will see that the first condition of C* cannot be met by criminalizing drug purchasing. If Daniel purchases a gram of methamphetamine for

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himself, there is nothing about this act *in and of itself* that interferes in any way with other citizens' freedom. It is true that Daniel'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 because the market is itself illegal.[178] 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 would be 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 remarkable job of

[178] For further discussion, see Husak, *Overcriminalization*, 45-54. In particular, Husak argues that "the very harms that drug proscriptions are designed to prevent [are] caused by the proscriptions themselves." Ibid., 46.

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decreasing the prevalence of cigarette smoking through non-criminal means.[179] More importantly, supplying noxious 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.[180]

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.

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[179] 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," *Morbidity and Mortality Weekly Report* vol. 60 (Jan 14, 2011), pp. 109-113, available at http://www.cdc.gov/mmwr/pdf/other/su6001.pdf; and Ahmed Jamal, et al., "Current Cigarette Smoking Among Adults—United States, 2005-2014," *Morbidity and Mortality Weekly Report*, vol. 64 (Nov. 13, 2015), pp. 1233-1240, available at http://origin.glb.cdc.gov/mmwr/pdf/wk/mm6444.pdf.

[180] 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.

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In the case of guns and other harmful objects, we must 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—or even carry publicly—prevents you from pursuing your own ends. Obviously, the moment a dangerous weapon is used to threaten, wound, or kill another human being (without 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; that the Second Amendment instantiates a right that has no 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 *use* dangerous weapons—and can justifiably prosecute those who use 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 rights to privacy (and also, perhaps, 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.[181]

[181] 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 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*

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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 freedom, they cannot be regarded as criminal acts. Again, this is not to say 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

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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.

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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, 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 it is plausible that the family is 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 being the most obvious example, but perhaps also monogamous over polygamous. The result has been the criminal prosecution and social persecution of citizens whose family choices fall outside the norm. We have wasted decades wrangling

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over what to future generations will undoubtedly seem like a fatuous question: *what type of family is the "right" type*? 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.[182] 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;[183] but it constitutes injustice only to the extent that one has violated a legally enforceable promise. The legal remedy for adultery

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[182] Both are contained in the portion of the *Rechtlehre* entitled "Private Right," which deals largely with property rights and family relationships. MM 37/6:245ff. Here it is important to acknowledge that Kant held certain views repugnant to contemporary sensibilities. Thus he asserts that homosexuality is on par with bestiality (MM 62/6:277), that there exists a "natural superiority of the husband to the wife" (MM 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 quasi-egalitarian view of sexual and family matters. Thus he describes (heterosexual) sexual intercourse as being a matter of *reciprocal* acquisition (MM 62/6:278, emphasis added), and marriage as being an "*equality* of possession . . . of each other as persons" (MM 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." MM 63/6:279. He also insists that children have a natural right to be cared for by their parents (MM 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" (MM 65/6:281, emphasis removed).

[183] 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). MM 209/6:46. 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." MM 179/6:425.

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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 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"[184]) 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

[184] MM 63/6:78.

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sex market. There is at least some evidence that the latter is the case[185]—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 overcriminalization described in §I.B above. Some decriminalization advocates might say that this Kantian approach does not take us far enough—it would still allow some regulatory criminalization, for example. 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, nor of prior *ad hoc* attempts at cabining the scope of the criminal law. The burden is therefore on those who desire an even more limited criminal law to develop a more convincing theory.

IV. OBJECTIONS & RESPONSES

In the previous section, I proposed a Kantian theory of criminalization. Prior to that, in section II, I motivated the Kantian picture by pointing to shortcomings in several other mainstream theories of criminalization. In this section, then, I shall confront some salient objections to the Kantian view.

[185] 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 and Manisha Shah, "Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health." National Bureau of Economic Research Working Paper No. 20281 (2014).

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A. **The Nature of Wrongness**

One objection to conceptualizing crime as I have done in §III 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).[186]

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 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 also acts that vitiate the notion of reciprocal freedom for all citizens. To state that an act is a crime in this sense 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

[186] For example, in objecting to a fair-play conception of crime, 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." Duff *Trials*, 212-13. The objection seems equally strong when lodged against the Kantian view. See also Duff, *Punishment*, 22 for a similar argument.

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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. 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 evil—but Argentine citizens are not bound by the laws of the State of Minnesota. Thus the Argentine murderer has committed no *crime* in Minnesota—and Minnesota law has no

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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 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.[187]

B. **The Insufficiency of Freedom**

In this chapter, 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.[188] 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.[189] Thus Yankah thinks that, while Ripstein gives a compelling account of the importance of

[187] Note also that a strict legal moralist, such as Moore (see §II.B in this chapter), has to explain the jurisdictional problem as one of mere convenience, whereas the Kantian approach gives it a more principled basis.
[188] Yankah, "Crime, Freedom, and Civic Bonds," 9.
[189] Ibid., 13.

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Kantian freedom in political life, he fails to acknowledge our "shared moral ties grounded in other political values."[190] 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 the Kantian view incorrectly 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 probably 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.[191] 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.[192] 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-

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[190] Ibid., 16.

[191] Of course, the government could still rightly prosecute citizens who, say, failed to pay a tax, the object of which was to provide healthcare for all citizens. But the crime in question here would be tax evasion, not failing to provide healthcare to others.

[192] 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 future capacity to live as a free citizen.

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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."[193] 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.

This, though, is not quite the whole story. For it turns out that, 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, I will argue in the next chapter that a Kantian approach to criminal justice entails a scheme of civic virtue similar to the one Yankah advances. 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.) 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.

[193] Ripstein, *Force and Freedom*, 55.

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C. **Hard Cases**

In section III above, I argued that Kant's political theory, and in particular his conception of civic freedom, provides a basis for determining whether a particular act should be criminalized. I do not claim to have proven that every single instance of proposed criminalization can be easily explained via the Kantian analysis, although I hope to have shown that much progress can be made in this direction. There are, however, several issues relating to criminalization that merit attention in this section, for they seem to work against the account I developed in the previous one. 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, and 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

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how can we prosecute a Canadian citizen, who has not taken an oath to uphold the laws of the State of Minnesota?

This problem, however, is not as significant 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, they cannot "be treated with hostility . . . as long as [they] behave[] peaceably."[194] Although much more would need to be said in order to develop an account of non-citizen rights and liability based on the notion of hospitality, the basic idea 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 protected by the criminal law. 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.[195]

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 juveniles delinquent (instead of designating them as criminals) is justified, and certainly compatible with the Kantian picture. This is not to say that juvenile justice in the US is perfect: there are many problematic aspects of our delinquency system which I cannot hope to address here. My point is merely that treating juveniles differently (and, in theory, less harshly) from adults, even when they commit

[194] TPP 328-29/8:357.

[195] 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.

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similar offenses, seems intuitively compatible with Kant's views on moral development and autonomy.[196]

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, it is likely in many instances that corporate "crimes" are the result of 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 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. Resort to a contemporary example may be useful here. I write this only a

[196] For a summary of those views, see Herman, "Training to Autonomy."

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short time after revelations that the Volkswagen corporation was accused of fraudulent acts.[197] The allegations are that Volkswagen vehicles were equipped with software that enabled emissions controls only during emissions tests; the controls were disabled at all other times. The result was that the 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 (assuming the allegations are accurate) 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 who, precisely, 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 tool of governmental convenience rather than a protector of civic freedom.[198] Meanwhile, multiple civil lawsuits with punitive damages or huge settlements are almost guaranteed in this case. And aside from possible individual

[197] For an overview of the facts in this case, see Geoffrey Smith and Roger Parloff, "Hoaxwagen," *Fortune* (March 15, 2016), available at http://fortune.com/inside-volkswagen-emissions-scandal/.

[198] Compare this with the peanut executive who was recently sent to prison for knowingly shipping tainted peanuts which resulted in several deaths. See Brady Dennis, "Executive who shipped tainted peanuts gets 28 years; 9 died of salmonella," *Washington Post* (September 21, 2015), available at https://www.washingtonpost.com/ national/health-science/a-life-sentence-for-shipping-tainted-peanuts-victims-families-say-yes/2015/09/19/e844a314-5bf1-11e5-8e9e-dce8a2a2a679_story.html. The peanut corporation itself is not the criminal, of course—it is the executive who apparently recklessly approved of shipping food he knew to be tainted with salmonella.

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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 certainly large-scale regulatory fraud of the sort allegedly perpetuated by some Volkswagen employees 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."[199] 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

[199] Minn. Stat. 343.21 subd. 8a.

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labor, whether it belongs to that person or to another person."[200] This type of act can be a misdemeanor or gross misdemeanor.[201] 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 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[202]—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. To be sure, he avers that it is would be morally wrong to kick one's dog. But the reason it would be wrong, he thinks, is not because of the harm it causes the dog. Rather, it is

[200] Minn. Stat. 343.21 subd. 1.
[201] Ibid., subd. 9. Some states go further—for example, certain kinds of animal cruelty in Arizona can result in a felony conviction. Ariz. Rev. Stat. 13-2910(G).
[202] 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., A.R.S. 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 here is 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.

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because doing so diminishes one's own virtue—it makes one a crueler person.[203] 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 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.[204] 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 counter-intuitive 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. Perhaps animal rights activists should be allowed to sue in tort for the cruel mistreatment of animals. 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 what might be termed "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

[203] See LE 212/27:458.

[204] 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," *Environmental Ethics* 3 (1981): 197-218.

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> Environmental Protection Agency, or in violation of any material term or condition of a hazardous waste facility permit, is guilty of a felony . . . .[205]

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 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.

Again, however, I think 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, morally, to be aware, and even if we are morally required to protect that

[205] Minn. Stat. 609.671 subd. 4 (2015).

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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.[206] 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 §III can generate useful arguments about difficult questions related to criminalization. I shall leave the derivation of more definitive conclusions for future work.

V. CONCLUSION

In this chapter, I have argued that the Kantian political theory I sketched in Chapter 1 allows us to generate a compelling theory of criminalization. This account has distinct advantages over other mainstream theories, and also provides a convincing response to critics of contemporary Anglo-American criminal justice systems who bemoan the tendency toward ever-expanding criminal liability. Having thus completed the task of applying Kant's political theory to the problem of criminalization, I shall turn in the next chapter to a different topic: the adjudication of criminal cases.

[206] See the discussion of the Volkswagen case above, which can be easily reframed in terms of a commitment to environmental rather than consumer values.

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CHAPTER 3

* * *

ADJUDICATION

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In Chapter 1, I presented an interpretation of Kant's political theory, focusing in particular on his accounts of civic freedom and civic virtue. In Chapter 2, I showed that this theory can provide a compelling justification for criminalization of certain conduct, while also limiting the scope of the criminal law to those acts which violate the political conditions of civic freedom for all citizens. In this chapter, I shall tackle another salient aspect of the criminal law: adjudication.

In Anglo-American systems, a suspect in a criminal case becomes a defendant when formally charged by the prosecutor—which may involve a grand jury indictment in some jurisdictions. In theory, the defendant eventually stands trial in front of a jury, whose members deliberate about evidence in the case and come to a unanimous conclusion about whether the government has proven that the defendant is guilty. The defendant has the support of an attorney, who confronts the state's prosecutor. Both present their side of the case by calling and questioning witnesses and making arguments to the jury about the defendant's guilt or innocence. The outcome of the trial determines the defendant's fate: an acquittal means that the defendant can never be retried for the same crime, while a conviction brings the promise of punishment.

Although the precise procedures vary, sometimes significantly, between jurisdictions, the fundamental point is that our criminal justice system grants defendants a right to a particular kind of adjudicative process: an *adversarial jury trial*. There are two conceptually separate elements here: the characterization of the adjudicative process as adversarial, and the use of the jury as a procedural mechanism. The process is adversarial, in that the prosecution and the defense are pitted against each other; prosecutors and defense attorneys are, within ethical limits, bound to represent the

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perspective of the government or their clients (rather than, say, being neutral with respect to the defendant's culpability). The jury, then, is the mechanism by which we determine which side in the contest is right: jurors listen to both the prosecution and the defense and, ideally, come to a unanimous decision based on deliberation about the evidence each side presents at trial. In this chapter, my focus shall be on the trial as a jury-centered system.

One reason for this focus is that the jury has been a fixture of Anglo-American law for centuries.[207] In various forms its use has been recorded at least as far back as ancient Athens, as portrayed in Plato's *Apology*.[208] In the United States, the jury is often regarded by legal commentators as a "cornerstone of democracy."[209] Defendants in criminal cases have a Constitutional right to trial by jury.[210] Even readers who are unschooled in esoterica of the law are likely to be familiar with the form and function of the jury, particularly in criminal cases; "courtroom drama" has become its own subgenre of popular literature and film, and the evening news would not be complete without some attention devoted to the latest high-profile murder trial.[211]

Despite such a history and presence in our law and culture, criminal jury trials are increasingly uncommon. By one measure, only 4% of people charged with felony crimes

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[207] For a historical perspective on the rise and development of the jury in English law, see Duff et al., *The Trial on Trial*, 17-53.

[208] See Plato, *Apology*, in *The Trial and Death of Socrates*, trans. G.M.A. Grube (Indianapolis: Hackett, 2000): 20-54.

[209] *See* Dzur, *Participatory Democracy*, 12.

[210] United States Constitution, art. III sec. 2 and amend. 6. The Sixth Amendment right to trial by jury in criminal cases has been held to apply to the states via the Fourteenth Amendment. *Duncan v. State of La.*, 391 U.S. 145, 149 (1968). A significant exception is that the right does not apply, unless decided otherwise under state law, in most cases where the defendant faces no more than six months' incarceration. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). In many states, the result is that the majority of misdemeanor defendants do not have a right to a jury trial.

[211] This is not a new phenomenon, though arguably its effects have been intensified at least in the popular imagination. Nearly four decades ago Lloyd Weinreb referred to the adversarial trial, pejoratively, as "an arena for pyrotechnics, where manipulative ability is prized and tactics and strategy determine professional conduct . . . ." *Denial of Justice*, ix.

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within the United States resolve their cases via jury trial.[212] Not only do jury trials seem to be disappearing, but their loss is unlikely to be mourned by many. Citizens in the United States generally dread the notion of being forced into jury duty,[213] and many legal professionals regard the jury with skepticism. All this has led some scholars to worry that "[t]he criminal trial is under attack."[214] Of course, this sentiment assumes that we have good reason to care about the decline of the jury. But how can we be sure that the waning of the jury system is not a desirable, or at least acceptable, process?[215]

This question is all the more significant, because an adversarial jury trial is certainly not the only kind of adjudicative process we could envision. Other countries with modern criminal justice systems do not follow the Anglo-American model. Their adjudicative processes may be less adversarial, and they may not rely on juries, or plea-bargaining, to the same extent that we do. In the German system, for example, the criminal trial is viewed "not [as] a contest between parties, but [as] an objective, judge-led inquiry into the material truth of the facts underlying a criminal charge."[216] France utilizes juries in only a few cases, and places more authority in judges, who are charged

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[212] Cohen, Thomas H., J.D., Ph.D., and Tracey Kyckelhahn, M.A., *Felony Defendants in Large Urban Counties, 2006*, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf. This Bureau of Justice Statistics report is from 2006 and is based on data from the 75 largest counties in the U.S., where approximately 58,100 defendants were charged with felony offenses during one month. Though one might quibble with the accuracy of such statistics (for example, this report does not include information on misdemeanors, which make up a larger percentage of criminal cases than felonies, and the 4% figure is a percentage of people *charged* with crimes, even if their cases were dismissed before resolution via plea or trial), other sources concur that the percentage of jury trials is notably small, probably in the single digits. See, e.g., Dzur, *Participatory Democracy*, 6 (putting the figure at "around 5 percent or lower").
[213] See, e.g, Dzur's description of a typical juror's experiences in the courtroom. *Participatory Democracy*, 6-8.
[214] Duff et al., *The Trial on Trial*, 1. See also Dzur, *Participatory Democracy*, 6.
[215] For example, Dzur discusses the work of one scholar who argues that the comparatively punitive (by most academic accounts, *overly* punitive) nature of American criminal justice has been avoided in Europe by the professionalization and bureaucratization of criminal justice. *Participatory Democracy*, 151, discussing James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (NY: Oxford UP, 2003).
[216] Bohlander, *German Criminal Law*, 10.

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with investigating some types of crimes independently of the police.[217] It would probably be an exaggeration to assert, as one critic has, that "[n]o one who took careful account of the purposes for which we have a system of criminal justice . . . would set up the process we actually have."[218] Still, it is worth asking whether it makes sense to continue to endorse a flagging institution that other apparently well-functioning societies do without.[219]

As a theoretical matter, then, the problem is this: which method of adjudication, if any, is the *right* one? Does it matter whether we use a jury at all, or rely on professional judges? Once we settle the theoretical question, however, we may still have a practical worry: given the apparent demise of the jury trial, what do we do about the "huge gaps between the glowing regard for the jury in mainstream legal theoretical rhetoric . . . and its diminished capacity in practice"?[220] How can we save the jury trial system, assuming there is good reason to save it in the first place?

I ultimately aim to show that the jury system does serve an important function, from a Kantian perspective, within Anglo-American criminal law and should, therefore, continue to be utilized—though in somewhat different ways than we currently do. Before doing so, however, I must begin by explaining the significance of Kantian political theory to the adjudication of criminal cases more generally. To that end, I shall begin (in §I) by

[217] Indeed, France recently ended an "experiment" with increasing its use of juries; critics say the program made criminal cases more costly, and that lay jurors were ill-equipped to decide criminal cases. Dan MacGuill, "France ends 'costly' jury trial experiment," *The Local* (March 19, 2013), available at http://www.thelocal.fr/20130319/ france-ends-jury-trial-experiment.
[218] Weinreb, *Denial of Justice*, 144.
[219] Anecdotally, I once had a conversation with a lawyer from the Netherlands who stated that she found the very idea of the jury to be "unsettling." I suspect that her reaction might be commonplace among those used to a purely professionalized justice system.
[220] Dzur, *Participatory Democracy*, 12. See also Weinreb, *Denial of Justice*, 72 ("In view of the infrequency of a trial in this country, our insistence on the superiority of the trial model is somewhat lame").

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contrasting two salient views of adjudication present in legal-academic literature: the instrumentalist model, and the communicative one. I shall argue that the communicative view is more compelling. Then, in §II, I will suggest that the communicative model shares some key features of the Kantian political theory developed earlier in this dissertation, and fills in a gap in Kant's own work. At the same time, Kantian theory provides the communicative model with a stronger normative foundation than it has standing alone. In §III, I shall proceed to explain why the use of juries in Anglo-American criminal trials reflects a commitment to values found in the Kantian-communicative model. Finally, in §IV, I will suggest one practical reform that would move our adjudicative system in a more Kantian, jury-centered direction.

I. ADJUDICATION: TWO VIEWS

The purpose of this section is to present a compelling theoretical explanation of adjudicative procedures in the criminal law. Ideally, we would start with Kant's views on adjudication. Unfortunately, Kant has almost nothing to say about this topic.[221] Rather than starting from scratch, then, I propose in this section to contrast two views or models of criminal adjudication. The first is an instrumentalist or truth-seeking account, and the second a communicative one. I will argue that the latter provides a more compelling way of conceptualizing criminal adjudication than the former. Then, in §II, I will explain the importance of the communicative model to the larger Kantian project will become clear

[221] He does make a few remarks about the role of judges and juries, but does not make clear what distinction he draws between them. He says that "[a] people judges itself through those of its fellow citizens whom it designates as representatives," and appears here to be talking about judges: "[f]or a verdict . . . is an individual act of public justice . . . performed by an administrator of the state (a judge or court . . . ." MM 94/6:317. But in the same paragraph he states that "only the *people* can give a judgment upon one of its members, although only indirectly, by means of representatives (the jury) whom it has delegated." MM 94/317-18. Exactly what Kant envisioned the functions of judges and juries being in *any* case, let alone criminal cases specifically, is not clear.

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only in §II. Later, in §III, I will proceed to examine the importance of the jury within this Kantian-communicative framework.

A. Instrumentalism and the Truth-Seeking Model

An instrumentalist approach to adjudication sees the purpose of the criminal trial solely as the search for truth. Thus the jury trial is often referred to as a "fact-finding" mechanism. At the outset, I should note that this terminology is imprecise. There are in fact several types of determinations a jury might be asked to make. For example, a jury might find that the defendant shot the victim in the chest, and that this gunshot wound was the proximate cause of the victim's death. However, the jury might also decide that the defendant is not guilty of murder, because he acted in self-defense. I shall discuss these different types of jury determinations in more detail below (in §§III.A and III.D); for the moment, it is sufficient to think of the instrumentalist as being primarily concerned with the various facts that answer the primary question at issue in the adjudicative phase: did the defendant commit the crime(s) charged?

The instrumentalist account seems to be implicit in both consequentialist and retributive accounts of criminal justice. Consequentialists normally view deterrence and incapacitation as primary goals of the justice system, though some rehabilitative models might also be viewed as consequentialist. Naturally, accurate verdicts will normally produce optimal consequences: convicting guilty people will prevent them from committing further offenses, and will deter others from doing likewise. Rehabilitating criminals likewise depends on convicting them.

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Strictly speaking, consequentialists should not care *only* about accurate verdicts: they might need to consider, for example, whether the trial process produces other outcomes, such as rendering the verdict acceptable to the community. It is conceivable that accurate verdicts might, in some instances, lead to undesirable consequences—or that favorable consequences could be attained via inaccurate verdicts. Still, concerns about crime control militate strongly in favor of accurate verdicts in most cases. A system that produced many incorrect verdicts (particularly false acquittals) would fail to control crime successfully or (in the case of false convictions) would fail to gain the widespread support needed to maximize its efficacy. And certainly those favoring a rehabilitative model would need to be sure that those subjected to rehabilitation were, in fact, those who committed the offenses in question.

Meanwhile, for those with more retributivist inclinations, accuracy ensures that wrongdoers are correctly singled out for the harsh penal treatment they deserve. Indeed, the retributivist may be even more concerned with accuracy than the consequentialist, who may be prepared to countenance some proportion of false verdicts in order to maximize efficiency. A properly functioning retributive system requires that those, and only those, who have committed crimes are convicted and punished. Thus, for the retributivist, adjudicative procedures succeed only insofar as they correctly identify those who deserve to be punished.[222]

On both views, then, the purpose of the trial is to serve other ends: crime control or rehabilitation on the one view and punishing deserving offenders on the other. And "the trial can serve such goals as these only because it presents itself as a search for

[222] Duff et al., *The Trial on Trial*, 61. See also Weinreb, *Denial of Justice*, 1 (asserting that "[t]he function of the criminal process is to determine criminal guilt with a view toward imposing a penalty").

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accuracy or truth: as an attempt to establish whether this defendant committed this crime."[223] On the instrumentalist view, trials may be influenced by other considerations or "side-constraints," but these reflect "external" values that "do not flow from that aim [of truth-seeking], and might indeed hinder its pursuit."[224] Thus on this view the trial is entirely contingent: fact-finding might reasonably take other forms, if determined to be accurate methods of obtaining correct verdicts.[225] Likewise, the importance of the jury must reflect the extent to which it succeeds in promoting the fundamental truth-seeking aim of the trial. Instrumentalists see no overridingly important reason to favor a *jury* trial over any other—what matters most fundamentally is, simply put, discovering whodunit.

The instrumentalist approach is exemplified by Larry Laudan's work on the epistemic impact of legal rules on criminal verdicts.[226] Laudan argues against many of the procedural and evidentiary rules that operate within American criminal courts, on the theory that they are inimical to the truth-seeking function of the trial. He calls for an increase in juror participation in criminal trials; he thinks that admitting *all* evidence to the jury will result in more epistemically favorable outcomes.[227] Whether or not he is right about this, it is clear that the jury is only important on Laudan's account insofar as it serves an epistemically beneficial function within the criminal justice system. Other theorists take a different approach to the reform of the criminal process, but also assume,

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[223] Duff et al., *The Trial on Trial*, 63.
[224] Ibid.
[225] Suppose that scientists devised a Verdict Machine which was able to determine with perfect accuracy whether a suspect committed a crime. The utilitarian and the retributivist have no recourse for objecting to a justice system that substituted use of the Verdict Machine for the trial. Indeed, the Verdict Machine need not be 100% accurate in order to satisfy the instrumentalist: it need only be more accurate than the trial system.
[226] See generally Laudan, *Legal Epistemology*.
[227] See, e.g., ibid. at 121. Laudan is insufficiently clear about why he thinks jury trials have an epistemic advantage over other non-jury models.

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like Laudan, that "[t]he function of the criminal process is to determine criminal guilt"[228]—and nothing more.

B. The Communicative Model

An alternative to the instrumental account is the communicative model.[229] Acts are properly criminalized on this view only if they are legitimately viewed as wrongs which are matters of public concern within a democratic political community. Legal procedures, including the criminal trial itself, are conceived as communicative enterprises whose aim is to declare the public norms that the criminal law embodies and to "call to account" actors who violate those norms.[230] Punishment, meanwhile, is conceived as a form of "punitive communication: it censures the offender for her crime and involves intentionally burdensome reparation for that crime."[231]

On the communicative view, then, the purpose of the criminal trial itself is to call a defendant to answer for alleged wrongdoing. Of course the trial "aims at truth . . . but that truth is to be expressed in a normative judgment that declares the defendant's guilt, and thus condemns her . . . or clears her name."[232] The problem with the instrumentalist view is, then, not necessarily that it is *wrong*; rather, it is incomplete, for it "fails to capture the intrinsic importance of the attempt to establish and declare the truth that a

[228] Weinreb, *Denial of Justice*, 1.
[229] See generally Duff (2001), esp. ch. 3. The communicative view might be seen as a further development of the "expressivism" suggested notably by Joel Feinberg in "The Expressive Function of Punishment," in *Doing and Deserving* (1970): 95-118. It is possible to view the criminal trial as having an expressive function, but not necessarily a communicative one, at least in the sense discussed in this section. I find the communicative view to be more complete and compelling than other generally expressivist accounts, however—hence my focus on it here.
[230] See Duff et al., *The Trial on Trial*, chap. 5.
[231] Duff, *Punishment*, 97.
[232] Duff et al., *The Trial on Trial*, 128.

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trial should involve."[233] The communicative aspect of the adjudicative process—in which the norms embodied in the criminal law are expressed, reiterated, and challenged—is absent from the instrumentalist account.

This non-instrumentalist view of truth-seeking is consonant with the way we view the criminal trial in our society. If we were pure instrumentalists about truth, then accurate verdicts would be all we cared about—or at least this would be our primary concern.[234] But accurate verdicts, while important, do not reflect the significance that citizens attach to the judgments of criminal courts. Criminal trials do more than elucidate facts—they communicate collective values.[235] Convictions are more than statements of fact—they are condemnatory judgments.[236] Criminal courts are viewed as having the right or authority to express such condemnation—but such "epistemic warrant" surely cannot derive merely from the fact that a defendant has been found to have committed an offense.[237]

This is not to say, of course, that we as citizens *always* care deeply about the judgments of criminal courts. Indeed, the average citizen is likely to be aware of only a tiny fraction of criminal judgments even within his local jurisdiction. It is also the case, however, that many citizens are aware of, and care about, high-profile criminal cases within their political communities, whether that is the United States or a small town.

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[233] Ibid., 64.

[234] See ibid., 88; cf. Laudan, *Legal Epistemology*, 2 (claiming that "a criminal trial is first and foremost an epistemic engine, a tool for ferreting out the truth …").

[235] See Duff et al., *The Trial on Trial*, 82.

[236] See ibid., 83.

[237] Ibid. at 90. The normative view of the trial also explains why we should still consider our system successful when it sometimes does not achieve epistemically ideal results. "The attempt to establish truth can be of significant value even when it fails. Suppose that a defendant, whom the victim knows to be guilty, is acquitted because the prosecution cannot prove his guilt beyond a reasonable doubt (or even on a 'technicality'). In one way, of course, the trial has failed . . . but in another way, as a search for truth that also respects such values as the presumption of innocence, it has been a success . . . ." Duff et al., *The Trial on Trial*, 83.

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To use a contemporary example, many citizens in the United States are aware of recent incidents involving alleged police mistreatment of citizens. Some Americans, particularly those in minority communities, have expressed a lack of confidence in the police and, more generally, in the criminal justice system. A lack of prosecutions and convictions of officers in many of these cases may be perceived as evidence that the justice system fails to speak for all citizens. A conviction under these circumstances would, to many people, mean more than a mere decision about facts would suggest. Rather, the response would be relief that a collective condemnation of police misconduct has been expressed by the jury on behalf of all citizens.[238]

On a smaller scale, I once participated in a trial where a woman was accused of murdering her husband. Few people outside of the family were aware of this case—certainly it did not make the national news. Yet upon the jury's conviction of the defendant, the daughter of the decedent cried out in the middle of the courtroom "You killed my father!" and burst into tears of relief. Her statement was not merely one of fact, of course—she had been convinced for the several years leading up to the trial that her step-mother was responsible, so it is unlikely that the jury verdict was relevant to her as an epistemic matter. What mattered to her—and, presumably, to others aware of the case—was that the jury had *condemned* the defendant, had judged her to be responsible for this grave wrongdoing, and had done so in a way that carried the weight of the community's punitive authority.

[238] This is not to say, of course, that it would be justifiable to convict someone *merely* to send a message to the community. Such a view would license the intentional conviction of the innocent. The point is, rather, that if one of the accused officers in these cases were *rightly* convicted, then the conviction would have more than mere epistemic value to the community.

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We should, too, consider the seriousness with which we take cases of *mistaken* convictions. Advocacy groups such as the Innocence Project have raised public awareness of the fact that a disturbing number of people who are convicted of serious crimes and have spent many years in prison—or even been executed—are in fact innocent. Describing such cases merely as instrumental failures seems intuitively inadequate. The visceral response that many of us have to such cases shows that more is at stake than mere epistemic accuracy. We feel terrible that we, as a community, have judged these people wrongly; we demand that we compensate them in some way for the many years of suffering that they have unfairly borne. And we support efforts to remedy the epistemic inadequacies of the trial process in order to send the message that we care, as a polity, about our failure to make an appropriate normative judgment of innocence in such cases.

The communicative model is therefore quite convincing insofar as it explains many intuitively important features of criminal trials, at least in Anglo-American systems. Still, those who find the Kantian political theory I outlined in Chapter 1 compelling may be left with the impression that the communicative model of adjudication, while interesting, is irrelevant. And, conversely, why should communicative theorists care about Kant?

II. Kantian Theory and the Communicative Model

In this section, I shall elucidate the normative connection between Kant's political theory, as elaborated in Chapter 1, and the communicative model described in the previous section. In essence, I will suggest that the communicative model provides a way

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of conceptualizing Kantian political values in the adjudication of criminal cases, at least in Anglo-American polities, which is absent from Kant's own political thought. Concomitantly, I will suggest that Kantian theory provides a firmer normative foundation for the communicative model than communicative theorists have heretofore provided.

As noted previously, Kant has very little to say about the adjudication of criminal cases. We can glean some broad adjudicative principles from the central notion that justice requires adherence to the Universal Principle of Right (UPR) and, therefore, respect for the defendant's civic freedom. Respect for citizens' humanity will rule out some obviously unjust procedures, such as the medieval practice of trial by ordeal. Moreover, recall that free citizens should be considered "beyond reproach," capable of being their "own masters," and "authorized to act" in ways compatible with the UPR.[239] This collection of principles seems to argue in favor of a presumption of innocence and, in general, against the practice of pretrial detention; a right to testify and represent oneself; and imposing only a minimal set of restrictions on the defendant at the pretrial stage. Moreover, Kant's concern for equality seems to entail that all accused persons must be accorded whatever basic package of rights is guaranteed by the particular process in question—hence the universal rights to trial, defense counsel, and so on in Anglo-American systems. Still, these minimalist restrictions, while desirable, do not help us determine exactly what the adjudicative process should look like.

The communicative model can provide us with the means to evaluate specific adjudicative procedures. But why should one committed to a Kantian approach accept the communicative model? After all, while it may be theoretically superior to instrumentalism, there might be other possible models to choose from. I believe,

[239] See Chapter 1, §II.C herein.

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however, that there are compelling reasons for Kantians to endorse the communicative approach.

I characterized Kant's conception of civic freedom (in Chapter 1) as being importantly reciprocal. My freedom can be guaranteed only insofar as you respect it (by complying with the UPR), and vice-versa. I thus owe you a duty of civic respect—but you are, at the same time, expected to behave with the same respect toward me. A crime breaks the reciprocal bond of civic freedom that binds us together as community members.

The communicative model can be seen as instantiating this notion of reciprocity. For example, it views the criminal trial as a way in which the community calls the defendant to answer charges against him—and also provides him with an opportunity to challenge the evidence against him. The trial is, as noted in the previous section, not merely a search for facts, but also a medium for communication between the defendant and the community.

More broadly, to be a citizen on the communicative view is not just to be bound by the law, but also to participate in its existence and enforcement. Thus the law is not just "imposed on us by a sovereign"; rather, it is "our law, that speaks to us in our own collective voice in terms of the values by which we define ourselves as a polity; a law by which we bind ourselves."[240] Thus "we are criminally responsible *as* citizens, under laws that are our laws; which implies that we are criminally responsible *to* our fellow citizens collectively. We are held responsible, called to account, by and in criminal courts: but the courts act on behalf of, and in the name of, the polity as a whole . . . ."[241] Acts of

[240] Duff et al., *The Trial on Trial*, 134.
[241] *Ibid.*

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conviction and punishment are given meaning by the nature of citizenship, and in turn inform the view we take of fellow citizens who have violated our laws.

But this view of citizenship is, to put it simply, a Kantian view. Recall from Chapter 1 that ideal Kantian citizens take on the perspective of just lawmakers—they promote and support those regulative laws and policies which advance, not just their own interests, but those of all citizens equally.[242] In practice, this seems inevitably to entail a commitment to civic participation and public deliberation on matters of importance for the community. Kantian citizens would deliberate about the limits of the criminal law, certainly—but they could not stop there. Because they are concerned with the freedom, equality, and independence of all citizens, they would take an active interest in the administration of criminal justice which, after all, impacts their fellow-citizens in quite obvious ways. Such active citizens would be unlikely to view the criminal trial, then, as a mere epistemic tool; they would, rather, conceive of it in a participatory and deliberative way.

Moreover, as shall become clear in Chapter 4, the Kantian view of punishment is one in which citizens demonstrate appropriate respect for criminals, even as they rightly condemn the criminal act. This, though, will require a kind of perspective on, and participation in, the criminal justice process that is different—and more demanding—than what is suggested by the instrumental model. Indeed, it will require viewing the punishment process as, in part, a communicative enterprise.

Thus, the Kantian has good reason to endorse the communicative model, for this approach tends to promote the same notions of reciprocity and mutual accountability that Kantians think are necessary in order to promote justice within society. In turn, it allows

[242] See generally Holtman, *Civic Action*.

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us to evaluate particular adjudicative procedures on the basis of their conduciveness to values shared by the communicative model and Kantian theory. Why, though, should the communicative theorist be prepared to endorse a Kantian political theory? The answer, I believe, relates to the earlier discussion (in Chapter 2, §II.A) about the lack of political theory undergirding the communicative approach. Communicative theorists think it advantageous to remain agnostic about the details of specific political theories. Doing so has, as however, some disadvantages—notably the inability to make normative judgments about states of affairs in societies that reject communicative norms.

This, though, is a strength of Kantian theory. Communicative theorists can give no reason for their insistence on the reciprocal nature of communicative practices, other than appeal to a nebulous "liberal-communitarianism." Kant's political theory, by contrast, claims to be derived from the very structure of the normative world. As such, it has explanatory and normative value in all areas of the criminal law, as well as in other areas of civic life. If communicative theorists are simply opposed to this kind of grand theorizing, then no further argument will convince them to adopt a Kantian (or any other kind of) political theory. I shall proceed, however, under the assumption that the reader is willing to consider what a marriage of these theories would entail for the questions about the existence of the jury posed at the beginning of this chapter.

III. THE ROLE OF THE JURY IN A KANTIAN-COMMUNICATIVE THEORY OF ADJUDICATION

So far, I have shown how the communicative model can explain and justify the institution of the criminal trial in a much more convincing way than the traditional instrumentalist approach. I have also argued that Kantian theory has much more in

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common with the communicative model than communicative theorists might like to admit. I have even gone so far as to suggest that communicative theorists ought to adopt the overarching Kantian approach. For the purposes of this section, however, I need merely to assume that Kantian theorists have good reason to embrace the communicative approach to adjudication. Accordingly, the specific method of trial by *jury* will prove justifiable to the extent that it serves a principally normative function—not (merely) an instrumental or epistemic one—wherein the community attempts to communicate its values by calling the defendant to account for her alleged wrongdoing. This, then, is the primary question before us: to what extent does the jury meet this test?

As a preliminary matter, the communicative model of criminal justice seems to entail that parties involved in the process (defendant, victim, judge, attorneys, and jurors) participate in it. After all, it would seem odd to say that someone is involved in "communication" when he or she does not participate in the conversation. Of course, there may be limitations to our expectations about participation in the criminal justice context—for example, we might think that a defendant's right to remain silent regarding the charges against her trumps our desire that she respond to, or at least acknowledge, those charges.[243] Yet it seems generally true that "[t]he ideal of communicative participation regulates the communicative roles and obligations of" the involved parties, and "[o]utlining these roles adequately is essential to realising the model of communicative participation in practice."[244]

[243] See, e.g., Duff, *Punishment*, 203-213. Notice, though, that our insistence on respect for the defendant's choice to remain silent means that, if she does choose to speak, her words will be voluntary—and, presumably, more sincere. Forcing the defendant to speak is normatively deficient, a mere parody of true communication: her words will not be her own, and will not be genuine.
[244] Dzur, *Participatory Democracy*, 199.

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In particular, the role of the jury in Anglo-American law has traditionally been seen "[A] as a fact finder, [B] as a buffer between defendants and government, and [C] as a representative of community values."[245] In this section, I argue that [A] is an insufficiently good reason to call for the use of juries on their own—but that it is compatible with the Kantian-communicative model. I will further suggest that, while [B] and [C] do provide good reasons for the jury's continued existence, there are two further considerations suggested by the Kantian-communicative model: [D] that juries are the appropriate mechanism for making the type of normative (moral) judgments at issue in criminal cases; and [E] that jury service develops certain Kantian civic virtues, which in turn facilitate the realization of the communicative ideal.

A. Juries as Fact-finders

Juries have traditionally been viewed as epistemically beneficial in a way that other methods of fact-finding are not.[246] The term "fact-finding," however, is ambiguous. Indeed, lawyers and judges are usually not very careful to distinguish between different types of decisions that jurors may be called upon to make. There are, in fact, three categories of judgment. The first I shall call judgments of pure fact; the second are judgments applying the law to the facts; and the third are normative judgments. When it is alleged that juries make good fact-finders, it is typically the first two types of judgments that are intended. I shall therefore discuss these two categories here; the third shall be reserved for subsection D below.

The first kind of "fact-finding" usually involves determining whether to accept or reject assertions made by the prosecution or defense. For example, perhaps the state's

[245] Dzur, *Participatory Democracy*, 5.

[246] See, e.g., Laudan, *Legal Epistemology*, 215 and Duff et al., *The Trial on Trial*, 27.

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witnesses testify that that the footprints found at the crime scene were from a pair of men's size 11 shoes, and that a search of the defendant's home revealed that he possessed a pair of men's size 11 shoes. The jury must then decide whether or not they believe these witnesses—if they do, they will make the purely factual judgment that the defendant's shoes match the size of the footprints found at the crime scene.

Whether jurors are able to make accurate judgments about pure facts depends in large part on their level of knowledge relative to the evidence in question. This does not seem problematic when the evidence consists of shoe sizes. But what about data collected from scientific instruments, such as Intoxylizers or Gas-Chromatograph Mass Spectrometers, or statements from expert witnesses regarding DNA evidence, brain scans, or ballistics trajectories? Most laypersons are simply not in a position to know whether a scientist has made an accurate statement about such matters. Granted, many trials do not involve the level of technological sophistication seen on television shows such as "CSI." Some do, however—and the appearance of such evidence in the courtroom will only increase as technology advances. Many important trials have already become "expert battles" in which the prosecution and defense attempt to convince the jury that their particular experts' opinions are the correct ones. We might well be cynical about laypersons' ability to make accurate judgments in these types of cases.[247]

Social science research bears out this skepticism to some extent. On the one hand, while trial lawyers often assume that juries hold unreasonable expectations about

[247] Even seemingly routine cases may pose more epistemic problems than we might think; scholars and practitioners have become increasing concerned in recent years about jurors' ability to accurately evaluate even common types of evidence, such as eyewitness testimony. See, e.g., Gary L. Wells and Elizabeth A. Olson, "Eyewitness Testimony," *Annual Review of Psychology* 54 (2003): 277-295.

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forensic evidence based on popular culture, at least one study has found no such "CSI effect."[248] On the other hand, other studies do call into question the extent to which it is reasonable to expect juries to properly evaluate whatever forensic evidence *is* presented in the courtroom. For example, jurors do not properly weigh "weak evidence": they tend to take evidence weakly supportive of the defendant's guilt as evidence in favor of the defendant's innocence.[249] Jurors also tend to overstate the importance of forensic fingerprint evidence.[250] Perhaps most disturbingly, the *way* in which experts present the same evidence can influence jurors' decisions about guilt.[251] At the very least, these types of studies should lead us to be cautious about assuming that juries can and do properly weigh pure factual evidence—particularly scientific forensic evidence—in criminal cases.

The second type of judgment jurors must make involves the issue at the core of the case: whether or not the defendant committed the crime charged. This is a different kind of determination from the first, because it requires piecing together a number of "pure" facts in order to make a judgment based on legal standards and definitions.

For example, suppose the jury makes the judgment that the defendant committed burglary. Such a determination would be based on some pure facts (such as the defendant's shoe size) and some legal rules (such as the statutory definition of burglary). In some cases, this process will be fairly mechanical: if the jury believes the

[248] Holmgren, Janne A., and Judith Fordham. "The CSI Effect and the Canadian and the Australian Jury." *Journal of Forensic Sciences* 56.1 (2011): 63-71.
[249] K. A. Martire, et al. "The expression and interpretation of uncertain forensic science evidence: Verbal equivalence, evidence strength, and the weak evidence effect." *Law and Human Behavior* 37(3) (2013): 197-207.
[250] B. Garrett and G. Mitchell. "How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information, and Error Acknowledgment." *Journal of Empirical Legal Studies* 10 (2013): 484–511.
[251] Dawn McQuiston-Surrett and Michael J. Saks. "The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear." *Law and Human Behavior* 33.5 (2009): 436-53.

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prosecution's claims (that the defendant entered the victim's home and stole some of her possessions) then they will necessarily make a decision that the defendant committed burglary.[252] In other cases, however, this type of factual judgment will be more complicated. For example, perhaps jurors disagree about the "pure" facts—some think that the defendant entered the home, while others think he stayed on the back lawn—and must decide together whether the facts fit the charges (burglary) or a lesser offense (trespassing).

More problematic still are cases where the definitions of criminal offenses are difficult to understand. For example, suppose that a Minnesota jury is charged with determining whether Dallas committed the crime of conspiracy. The law stipulates that Dallas commits conspiracy when she "conspires with another to commit a crime and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy . . . ."[253] So in order to decide whether Dallas is guilty, jurors must determine (1) whether she conspired with at least one other person, (2) whether the object of the conspiracy was a (different) criminal act, and (3) whether one of the conspirators did something "overtly" in order to "further" the conspiracy. But note that each of these elements requires the jury to make further factual determinations: what constitutes conspiring with someone (as opposed to, say, merely refraining from opposing another's plan, or fantasizing with another about a criminal act); what the subject of the conspiracy actually was (was it really a criminal act, or was the resultant criminal act merely an unintended consequence?); what constitutes an "overt act" (as opposed, one assumes, to a "covert" one?), and whether such an act really "furthered" the

[252] Note that this is not yet to say that the jury will *convict* him. This requires another kind of judgment that will be taken up in subsection D below.
[253] Minn. Stat. 609.175 subd. 2.

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conspiracy (as opposed to one that is merely taken in view of the conspiracy but does not in fact further it).

In some cases, some of these elements and definitions will seem clear-cut: if the prosecutor can show that Dallas hired Carlos to murder Dallas' husband, then Dallas and Carlos have clearly "conspired" to commit murder. If Carlos shoots at Dallas' husband, then he has obviously committed an act in furtherance of the conspiracy. But if the prosecutor can show merely that Dallas talked with Carlos about murdering her husband, and Carlos approved of the plan, does this constitute "conspiring"? If Dallas purchases a gun but does not give it to Carlos, has she "furthered" the conspiracy? Is Carlos' research of Dallas' husband's daily routine an "overt" act? The answers here are unclear, because the definition of conspiracy is itself ambiguous.[254]

One might object here on two grounds. First, I have chosen a contentious crime to make this point and, second, I have failed to consider the role of courts and judges in refining the definitions of offenses in order to make jurors' jobs easier. It is of course true conspiracy cases are frequently tortuous, and *some* offense definitions are relatively clear-cut. First-degree murder will generally be defined as premeditated killing, and in *some* cases premeditation will be easy to prove, as when the prosecution presents evidence that the defendant told someone else that he was going to kill the victim on such-and-such a date. But there will be many cases where the definition of first-degree murder, seemingly uncontroversial, is insufficient to allow jurors simply to apply the law to the facts.

[254] It is also bizarrely circular: it defines conspiracy in terms of someone "conspiring" with another. This is like defining murder as "murdering someone."

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To give a concrete example, consider the murder case referred to in §I above. The facts (simplified for present purposes) showed that the victim had been shot multiple times in the side and back by a semi-automatic handgun. The prosecutor argued that the existence of multiple gunshots showed that the killing was premeditated—if it had been a heat-of-passion crime, then there would have been only one gunshot wound. As it turns out, the jury convicted the defendant only of second-degree murder.

Discussion with the jury after the fact revealed that they were sure that the defendant had killed the victim (based on the "pure" facts), but were undecided about the first-degree murder charge (a question of applying the law to these facts), mainly because they were unsure whether premeditation required planning the crime a long time in advance, or if the planning could take place just seconds before the killing. If the former, then they made the right epistemic decision; if the latter, then they did not. Perhaps reading appellate-court decisions on premeditation to jurors might have helped them in this case, but even the most carefully crafted jury instructions will rarely be sufficient to make the law perfectly clear to lay jurors. Allowing jurors to ask questions about the law is helpful, too—but most lawyers and judges will have had the experience of jurors asking questions that are obviously irrelevant to the factual and legal issues in the case, which calls into question the extent to which spontaneous courtroom education of jurors is sufficient to close the epistemic gap between legal professionals and lay jurors.

In short, the alleged epistemic benefits of having juries determine "pure" facts are questionable. And even if jurors are competent to accurately determine the pure facts of the case, judges might be in a better position to understand whether these pure facts fit the elements of the criminal statute at issue. Surely a legal professional is better

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positioned than a juror to know what kinds of acts constitute the furtherance of a conspiracy or the commission of premeditated murder. Thus there seems to be no overwhelming *epistemic* reason not to have professional fact-finders making such decisions, for "legal training and court experience appear to assist as much as common sense in fact-finding."[255] Moreover, the communicative model provides no particular reason to accept or reject the jury's role as fact-finder in this sense—as far as the optimal method of such fact-finding is concerned, the communicative view so far remains agnostic.

B. Juries as Buffers

Another traditional justification for the jury is that it ostensibly provides a "buffer" between an oppressive government and an individual citizen. One might initially be skeptical about how strong a justification this is, for "judicial elections and scheduled performance reviews are alternative buffers against official misconduct";[256] and it is doubtful that juries are well-equipped to identify such misconduct in the first place. Moreover, in an adversarial system like ours, the defense attorney is tasked with representing the defendant's interests. This ideally entails identifying and exploiting weaknesses in the State's case, including any wrongdoing at the hands of police or other officials—which an attorney would be better equipped to do than a panel of laypersons.

Still, the communicative model allows us to think about this justification for the jury system in a deeper way. One reason for preferring buffering by means of the jury

[255] Dzur, *Participatory Democracy*, 5. One might think that the fact that the jury is a group, whereas a judge is an individual, is some reason to prefer the former in this context. This might particularly be true where the jurors disagree about some important pieces of evidence: perhaps it is better to ensure that a group of six or twelve people agree about the defendant's shoe size, rather than assuming that the individual judge would decide correctly. But this problem could be solved by requiring the concurrence of a *panel* of judges.
[256] Dzur, *Participatory Democracy*, 5.

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over buffering by some other means (strengthening the power of defense attorneys, holding judges accountable via elections, etc.) is that the jury is uniquely able to both speak on behalf of, and also address its findings to, the wider community. A defense attorney speaks on behalf of her client. A judge speaks on behalf of the law. Jurors, however, speak on behalf of *citizens*.

Indeed, the jury-qua-buffer has both a symbolic and a practical role. Symbolically, the jury represents the interests of members of the polity because it is composed of representative citizens. Ideally, jurors look and act like average community members, and they take seriously their role as impartial citizens tasked with judging cases according to community norms. When a matter of alleged government misconduct is brought before the jury, for example, the purpose is to demonstrate that officials in a democracy are called to answer *to the people* they serve, rather than (or, at least, in addition to) to a judicial figure who is himself an employee of the government. As a practical matter, whatever epistemic worries we might have about juries, we might think that they are more likely than legal professionals to hold government officials accountable—and that their judgment will be taken more seriously by the wider community than one rendered by a legal professional.[257]

If there is something compelling about the notion of jurors acting as the buffer between citizens and the government, then we need to address the thorny issue of nullification. If we accept that the function of the criminal trial is partly to provide a

[257] The jury can also provide another type of symbolic "buffer." For example, indigent criminal defendants in the U.S. are represented by public defenders or other court-appointed attorneys, who are often salaried or reimbursed by the state or other government entity. As a practicing public defender, I experienced skepticism from some defendants at my role as their advocate, given that I received my paycheck from the same entity that was prosecuting them. Though it is insufficient to fully address this concern, it is noteworthy that the involvement of non-government-employee jurors avoids the "appearance of impropriety" we worry about in other legal contexts.

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means for the community to express its values to the defendant, and to call her to account for her conduct, then it must also be an appropriate forum for the defendant to express, if she wishes, her reasons for disobeying the law. Though perhaps infrequently the case, sometimes defendants appear in court because they engaged in conduct they believe to be rightful (or, at least, non-criminal). Sometimes this conduct is the result of willful civil disobedience; other times the defendant realizes only after the fact that she is being prosecuted on the basis of an unjust law. In any case, the defendant ought to be permitted to explain to the jury why she acted the way that she did and argue for her acquittal on the basis of injustice.

The question then becomes whether the jury ought to be allowed to accept the defendant's argument. Should they be permitted to engage in "nullification"—that is, acquittal on the basis of principles other than the State's failure to prove its case? Nullification is unlikely to be a viable option on the instrumentalist view: acquitting a defendant the jury believes beyond a reasonable doubt to be guilty is a bad epistemic result. Even those who do not insist on the instrumentalist position might be skeptical that the nullification power would always be wielded in an honest and ethical way by jurors. But the communicative model suggests that we should at least consider whether we should more clearly present jurors with the option of nullification—reminding them of the potential consequences of their task and their responsibilities and capacities as citizens engaged in a communicative enterprise.[258]

[258] It is not too much of an exaggeration to say that "[t]he biggest and most powerful law enforcement agency in the United States has the absolute, non-negotiable power to ignore laws, judges and prosecutors, to keep people out of prison, to make any jury trial come out the way they want it, and to make our government honest. What is this agency? The Fully Informed Jury." Dzur, *Participatory Democracy*, 133, quoting a poster created by a libertarian activist group, the Fully Informed Jury Association.

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One might reasonably object that the justness of a particular law should not be argued in a criminal courtroom—this is a matter for the legislature. It seems to me, though, that in cases where the defendant has a serious argument as to the failure of the criminal law to produce a just result, he ought to be allowed to present his case to the jury. While acknowledging that "[t]he role of the jury is not politics by other means," legal scholar Albert Dzur thinks that the jury ought to make its decision with awareness of "the particular case, defendant, law, harm, victim, [and] context."[259] Citizens may deem a law on the books to be perfectly reasonable, until they are faced with its ramifications for real people accused of violating it. They should be permitted to render a judgment that takes into account those facts—not merely the fact that the law exists in the first place.

We should not, however, ignore the potential injustices that could result from permitting nullification. Nullification is a double-edged sword. On the one hand, it empowers jurors to acquit defendants who are being unfairly targeted by the government (as when only people of one racial group are being arrested for petty crimes), or whose unlawful act (civil disobedience in protest of a radically unjust government policy, for example) is one the community deems appropriate under the circumstances. On the other hand, nullification also makes it possible for a collection of citizens to acquit people for morally repugnant reasons (as when a racist jury refuses to convict a white man of raping a black woman, despite believing he did so). In both cases, of course, nullification fails to uphold the epistemic function of the jury. In the first case, however, it appears to be morally laudable act; in the second, the moral failure eclipses the epistemic one. In an ideal Kantian system, perhaps the risk of "bad" nullification would be minimal, because

[259] Dzur, *Participatory Democracy*, 104.

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citizens would not endorse the kinds of values that would permit nullification of racially motivated rape. In the real world, I am unsure how to weigh the "good" cases of nullification against the "bad" ones; for present purposes, it will have to suffice to note that nullification has a communicative component that is relevant in assessing whether or not to endorse the practice.[260]

Regardless of what position one takes on nullification, it seems correct to say that the jury-as-buffer argument supports the communicative model. More importantly, this model gives us a different perspective on the way that juries allow defendants to interact with powerful legislators and judges. The jury can be a mechanism whereby the defendant is able to communicate her principled opposition to the law that is the basis for her appearance in the criminal court. The jury in this sense is not so much a "buffer" between the powerless defendant and powerful public officials, but rather a mediator who both communicates the will of the community to the defendant and also, at the same time, listens (and possibly responds) to the defendant's complaints about the way the community is treating her.[261]

[260] More generally, Kant places a great importance on properly devised rules in making up for human beings' failings—be they moral or epistemic. To the extent that one could devise rules that would prevent this kind of misuse of nullification, then Kant would be more likely to approve of the practice. I shall not attempt to formulate such rules here, however.

[261] At one point Dzur says that we should treat the defendant "as a coequal partner in a civic dialogue about the law's demands." *Participatory Democracy*, 160. This does not seem quite correct—it is unrealistic to expect that criminal defendants are "coequal" to the community, and it may even be undesirable. But Dzur's main point here is that we must "treat him [the defendant] with dignity." Ibid. Certainly this does not require that we take seriously *every* instance of dissent from the law—but it probably means that we allow even those with fringe views about criminality to express their sentiments in court, and take the time to explain to them why we are rejecting their conception of justice in favor of a more convincing one.

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C. Juries as Communicators of Community Values

What of the jury as a purveyor of community norms and values? On one level, it seems obvious that juries can adequately fulfill a communicative function: at the least, they communicate a verdict to the defendant. But why do we need a jury in order to perform such communication? Why is it not sufficient for the judge and lawyers to communicate with the defendant? Part of the answer is surely that a jury is, in its ideal form, a representation of the community. It is comprised of citizens, initially chosen at random and then (theoretically) selected by virtue of their lack of bias with respect to the case at hand. An ideal jury is comprised of individuals with diverse viewpoints—different professions and experiences, socioeconomic and cultural backgrounds, and so forth—who nevertheless share the common feature of citizenship in a particular political community in which the defendant and victim are, if not also a part, at least present.

But why should we care that the *jury* represent the community in this way, as opposed to other professionals involved in the criminal justice system? Elected legislators, after all, are said to represent their constituents. Judges are sworn to uphold the laws of the communities they serve. And even the prosecuting attorney is supposed to represent the "people" of the relevant jurisdiction.[262] The most persuasive answer has to do with the nature of the communication at issue. In legislation, the will of individual citizens is far removed from the facts of any particular case. Even if the system is one of direct democracy, the legislation at issue normally remains quite abstract. (Indeed, we reasonably prohibit bills of attainder precisely because we think it unwise, even unjust, to

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[262] A different case, and a troublesome one, involves the existence of elected trial-court judges. Aside from the question of whether laypersons are generally competent to know whether judicial candidates are qualified or not, a further problem is that elected judges might feel beholden to their constituents—and yet their loyalty must, as a matter of professional ethics, be to the law, which does not always comport with the will of the majority.

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legislate at the individual level.) Thus legislators expand the scope of the criminal law and increase criminal penalties because they assume that such policies will be popular and (optimistically) because such decisions may seem wise when made in marbled halls miles away (figuratively and often literally) from the nearest prison. It is easy to condemn putative wrongdoing as a theoretical matter, when one need not look any particular wrongdoer in the eye.

By contrast, in the criminal courtroom, a particular individual's rights, perhaps even his life, are at stake. The defendant stands face-to-face with fellow-citizens and looks them in the eye. Through his attorney, he pleads his case under circumstances that are both alien and intimate: alien because of the courtroom formalities, but intimate because of the presence of his fellow-citizens. Perhaps the defendant does not deny the conduct imputed to him, but has the opportunity to explain himself—to attempt to justify his actions and defend his cause. If citizens vote to convict him under these circumstances, they are making a judgment about *this* case and *this* defendant—not a judgment in the about conduct in the abstract, but about the particularities relevant to the case at hand. They are aware of the effects of their judgment—the nature of the punishment to which the defendant might be subjected, or the potential implications of releasing him from responsibility—in a way that they have not before considered.[263] It is therefore significant that, as Kant puts it, "a verdict . . . is an *individual* act of public justice."[264]

[263] In reality, the jury may often be ignorant of the sentence to which the defendant might be subjected. I address this issue in §IV below. Briefly, I argue that our system takes entirely the wrong approach: sentencing is an obvious place where juries *ought* to be used and, failing that, they certainly must be informed of the defendant's potential sentence in order to make a reasonable, normative judgment about his actions.
[264] MM 94/6:317.

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Thus the jury's verdict is, at least in theory, a careful, reflective judgment of unbiased representatives of the community about this particular human being's actions. This type of judgment is quite different from that made at the level of legislation. Citizens who impose criminal liability and punishment easily in the abstract are suddenly confronted with the implications of that decision for an individual's life. Such a judgment also differs from one made by judges: the defendant cannot complain that she is being unjustly persecuted by elitist professionals when her neighbors are the ones who condemn her, even after hearing her side of the story. She is more likely to receive and acknowledge the condemnatory message when conveyed by her peers than when announced by a distant figure in black robes. At the same time, should she choose to address the jury to explain her actions, defend her cause, or plead for mercy, she does so as a relative equal—as one who may share at least some life experiences with some members of the jury. Finally, if the jury convicts the defendant, it does so with full awareness of the ramifications of its condemnatory message—an awareness that is necessarily lacking at the level of legislation in either a representative or direct democracy.[265] It is thus through the use of juries that our society is forced to take

[265] As Sherman Clark explains, "[t]he criminal trial forces jurors to look at what they do—to feel and accept internal responsibility for their decisions, and in particular for convictions, in a number of ways. For example criminal verdicts require unanimity, which prevents any juror from taking solace in the possibility that the defendant would have been convicted even if he or she had not voted to convict. Trials are generally staged such that the jurors can see the defendant, and be seen by him. Directed verdicts against criminal defendants are prohibited, thus insuring that the jurors know that, if they choose, they can simply acquit, which highlights the choice they make when they convict – and emphasizes their agency in the conviction. These and other aspects of the criminal trial process encourage jurors to recognize that when they convict, they are not simply deciding something; they are doing something. In these ways, jury service contrasts sharply with initiative voting. Jurors are made to realize that they are not merely deciding facts about the defendant, they are determining the fate of the defendant." Clark, "The Juror," 6.

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responsibility for the "exercise[] of power" inherent in the promulgation and enforcement of coercive criminal laws.[266]

D. Juries and Normative Judgments

I suggested above (in subsection A) that there are several different kinds of decisions that juries make in criminal cases. In addition to the two types of judgments described in that section (those regarding pure facts, and those applying the law to those facts), I now add a third. Jurors are also asked to make *normative* judgments.

What I mean by normative judgments are decisions that go beyond mere factual determinations. Typically, if A makes a normative judgment about B, then A determines that B merits something, or deserves to be treated in a certain way. A normative judgment might take the form of condemnation or praise, for example. Normative judgments are dependent upon facts, of course—but they are distinct from merely factual determinations. Suppose, for example, that A and B are friends, and A discovers that B has been lying to him. A's judgment that B has been lying is a purely factual determination. If A, however, then determines that B has done something *wrong* by lying, he has now made a normative judgment. A might further make the decision to confront B, or alter their relationship in some way, pursuant to the normative judgment about B's conduct.

In the criminal courtroom, the most obvious normative judgment the jury makes is whether the defendant is guilty of the crime charged; a related normative judgment is what sentence he should receive if convicted. The decision about the defendant's guilt

[266] Clark, "The Juror," 5.

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requires more than merely matching the facts of the case to the law on the books, for the fact that the defendant committed a criminal act is a necessary but insufficient condition to warrant a judgment of guilt. The jury might decide, for example, that the defendant committed burglary out of necessity (he was starving and had no recourse other than to break into the home in order to find food) or duress (he was forced at gunpoint to participate in the crime).

In most cases, of course, the facts are not as obvious as the burglary-at-gunpoint example. The jury receives relatively little guidance from the law in such cases. They are left to determine whether they think the defendant acted reasonably—did the defendant have alternatives to burglarizing the home, for example—and if so, should he be responsible for not thinking of them at the time?[267] If the jury decides that the defendant's conduct was justifiable or excusable, then they might return a not-guilty verdict, notwithstanding their prior judgment that the pure facts of the case fit the legal definition of the crime. Or they might find that the defendant was insane at the time of the act and, therefore, incapable of possessing the *mens rea* necessary for guilt. Finally, the jury could nullify on the basis of, say, an unjustly enacted law.

To say that the determination of guilt is a normative one entails, in the context of a communicative conception of criminal law, that it expresses a judgment conveyed to the defendant by the jury on behalf of the community. A judgment of guilt is a *moral* judgment. In civil cases, there is not necessarily any moral content to a judgment for or

[267] For example, jurors evaluating a duress defense in Arizona courts would be told that "[a] defendant is justified in committing the conduct giving rise to the charged offense if a *reasonable person* in the situation would have believed that he was compelled to commit such conduct by the threat of immediate physical force against him that could have resulted in serious physical injury that a *reasonable person* in the situation would not have resisted. . . . You must measure the defendant's belief against what a *reasonable person* in the situation would have believed." *Revised Arizona Jury Instructions (Criminal) 3d (Cumulative Supplement 2011)* 4.12 (emphasis added; bracketed language omitted). Jurors would not, however, be told what a "reasonable person" is, nor how to decide what a reasonable person would believe.

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against a defendant: whichever insurance company must pay, nobody is claiming that the insurance company is morally responsible for the car accident.[268] By contrast, a criminal conviction, on the communicative view, is necessarily a moral judgment: the defendant has done something morally wrong, and is being "called to account" for such wrongdoing.[269] A sentence, then, is not merely harsh treatment for the sake of burdening a guilty person; rather, it has "the aim of persuading offenders to face up to and to repent their crimes, to begin to reform themselves, and to make apologetic reparation to those whom they wronged."[270]

Why, though, should we insist that *juries* are the appropriate mechanism for making such normative judgments? There are three reasons which, taken together, militate in favor of the jury performing this function.

First, juries are qualified to make normative judgments. Unlike the two types of jury decisions already discussed (in subsection A above), a determination of guilt does not require legal or technical expertise. It relies, rather, on what philosophers call practical reason. This capacity to make moral judgments is something that all qualified jurors share. Whether or not the average juror is qualified to make a judgment about pure facts, or to apply legal standards to those facts, she is (as a competent adult) qualified to use her practical reason in making the normative judgment that the defendant is (or is

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[268] We do say that the tortfeasor is at "fault," and certainly there is a sense in which we hold her responsible by, for example, requiring her to pay damages to the other party for harm she caused. But not all responsibility is *moral* responsibility—thus absent from such a judgment is a moral condemnation of her actions. True, there may be instances of moral judgment in *some* civil cases, such as when the jury imposes punitive damages for conduct they find to be repugnant. Even in the case of dueling insurance companies, it *may* be that one is morally obligated to comply with the terms of a valid contract, though this depends on the dubious notion of holding a nonsentient entity morally responsible. In any case, often there is no alleged moral content: neither insurance company is at fault in anything but a technical, legal sense—and my point is merely that moral culpability is not a *necessary* feature of civil cases, whereas it is of criminal ones.

[269] Duff et al., *The Trial on Trial*, 134. See also Duff, *Punishment*, 80-82.

[270] Duff, *Punishment*, 145.

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not) guilty. Now it is true that judges and other legal professionals also have a capacity for moral reasoning. So this first point alone shows merely that jurors are qualified to make normative judgments, not that they are necessary to the adjudicative system.

A second consideration, however, is the diversity of perspectives that jurors ideally bring to the process of making a normative decision. An individual faced with a difficult case—should the defendant be convicted of burglary even though he says his actions were necessary?—may have an initial thought that would go unchallenged were it not for the perspectives of other jurors. It is not uncommon in ethical matters that we find ourselves changing our minds, or at least modifying or tempering our initial positions, when we come to see situations from others' points of view. In a criminal case, we do not merely want *a* normative response to the case at hand—we want *the* normative response that best expresses the considered judgment of the whole community about the defendant's alleged actions. The jury is, by virtue of its nature as a subset of community members, better equipped than a professional judge to discover and express such a response.

Third, and most importantly, normative judgments are made at two critical points during a criminal case: at the rendering of a verdict, and at the imposition of a sentence. But these are also the two occasions where the communicative function of the jury is most salient. At judgment and sentencing, the decision-maker speaks directly to the defendant, states that he has been found guilty (or not), and (if guilty) explains why he has been convicted and received a particular sentence. What more important place for a panel of community members to participate in the criminal justice process than at the event which is supposed to communicate to the defendant the judgment of that

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community? While the jury should certainly be present throughout the entire trial—for one thing, the defendant should be permitted to address the jury and, for another, it is hard to understand how to make a normative judgment without having witnessed the presentation of evidence—the crucial points where the jury fulfills the communicative function of the trial are the verdict and sentencing phases.

To these reasons, one might object that we run a significant risk when we use laypersons instead of professionals to make such important normative judgments. The risk is that jurors will make judgments based on their personal values or conceptions of the good, when what we really want is for such judgments to be "objective." For example, a jury filled with committed libertarians who believe taxes are unjust might acquit someone clearly guilty of the crime of tax evasion—whereas what the jurors ought to do is set aside their personal feelings and follow the law. The role of jurors, in other words, is *not* to bring their own opinions and biases to bear in the case at hand, but rather to leave them behind while serving as jurors.

The force of this objection turns on what we mean by an "objective" normative judgment, or by requiring jurors to "leave behind" their personal values. We might mean that we simply want jurors to come up with the answer demanded by the law, regardless of their personal feelings to the contrary. There is something intuitive about this. The judge gives jurors a set of instructions because he wants their decision to be based on the right legal reasons. Still, normative judgments are so called precisely because they respond to questions that are not capable of being answered by appeal to *merely* legal or factual rules. Whether someone is *guilty* of crime depends on a host of factors, but ultimately must involve a judgment about whether or not the defendant should be

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condemned and punished for her alleged actions. Making such a decision might be easy in many cases, but it is still incorrect to think that it is merely a legal or factual one. So when we say that jurors ought to be "objective," surely we do not mean that they should *merely* follow the judge's instructions.

A better way of thinking about the objectivity of juror judgments is that we want jurors to use their capacity for practical reasoning in a particular way. We want jurors to make decisions using the "first-person plural" perspective rather than the "first-person singular" one.[271] That is, we ask jurors to make normative judgments from the perspective of the polity's shared values, rather than from their own personal conceptions of the good (which may at times conflict with such shared values). On this view, then, jury instructions are intended to explain the content of the law in ways that laypersons can understand, and jurors are then supposed to both apply but also endorse the law as reflective of shared community values.

One might still be skeptical of the role of the jury as a communicator of community values because, as Dzur puts it, "most legal theorists reject the idea of a stable and uncontroversial set of community values that lay jurors are able to represent in court."[272] Dzur later revisits this issue in discussing what we might term the problem of value pluralism, that is, "differences in deeply held values that can lead to disagreements about collective goods or ends."[273] On the one hand, the existence of value pluralism might cause us to be skeptical that jurors can accurately reflect so-called "community values." In at least *some* cases jurors will be asked to make normative judgments in cases

[271] Duff et al., *The Trial on Trial*, 71.
[272] Dzur, *Participatory Democracy*, 5.
[273] Ibid., 157, citing Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford UP, 1969): 118-172.

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where they will be unable, or unwilling, to set aside their "first-person" values in order to make "third-person" judgments. To some extent we control for such cases in the legal system already; for instance, potential jurors called for capital cases are released if they are morally opposed to the death penalty or, at the least, are unwilling to set aside such convictions and vote for execution if legally warranted. In most cases, however, no such requirement is mentioned. The problem is that "[i]f the fact-finders are to retain their moral integrity, they need not achieve a close fit between the personal and the official, but they must be able to avoid radical fissures between the two; there will, therefore, be limits to the extent to which they can honestly and non-hypocritically apply legal values and offence definitions that they regard not merely as somewhat misguided, but as illegitimate or unjust."[274] Since such "fissures" seem inevitable, the instrumentalist might argue that value pluralism will result at times in conflict and that the concomitant failure of the jury to reach a decision will result in a loss of truth.

On the other hand, perhaps the importance of the jury derives in part from the fact that it constitutes a diverse assemblage of citizens who, theoretically, bring their differing experiences and perspectives to the table in deliberating about the case at hand. Thus juries might be said to recognize and even embrace the existence of value pluralism in a way that non-jury systems cannot do as easily. The instrumentalist may be correct that juries will not always be able to decide a case. But perhaps those are cases that should not be decided, if in fact citizens cannot agree on whether the defendant should be held accountable in the situation at hand or not—or, in the case of the death penalty, whether a morally controversial punishment ought to be imposed at all. Therefore, what at first

[274] Dzur, *Participatory Democracy*, 87.

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appears to be a weakness in the communicative jury model may in fact be one of its strengths.

Unfortunately, we have weakened the jury's power to make normative judgments precisely where they are most important: at judgment, and at sentencing. Jurors are often tasked simply with checking one of three boxes: "guilty," "not guilty," or "cannot agree." Although the foreperson is sometimes called upon to read the verdict (in other places the judge or clerk may do so), none of the jurors are permitted to make any statements beyond one of these three outcomes. They certainly do not "communicate" with the defendant in any meaningful respect. In many jurisdictions they are allowed to ask questions, but only in writing, and only to the judge. They may not question witnesses, and may certainly not address the defendant. Most juries are not involved in sentencing—the exceptions being capital cases and the occasional jurisdiction, such as Kentucky, which requires jury sentencing in other types of criminal cases.[275] The result, then, is that juries are called upon to make decisions about pure facts and mixed facts—where they are epistemically disadvantaged—while being denied the possibility of meaningfully communicating normative judgments on behalf of the community.

As an example of how this works in practice, consider the following case.[276] After receiving reports of drug activity in the area, the police obtain a search warrant for James' apartment. In his home, the police discover James in the process of pouring acetone over a moderate quantity of methamphetamine. Naturally, James is arrested; he is later charged with multiple drug-related crimes, including both the possession and manufacture of methamphetamine. At trial, James testifies that he is a drug addict, and

[275] An intermediate option is to allow the jury to submit a non-binding sentencing recommendation along with a guilty verdict, as is the case in Texas.
[276] The details are adapted from a criminal case I defended some years ago.

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willingly admits possessing methamphetamine. He denies, however, that he had been manufacturing the substance; he explains that acetone is commonly used by addicts to purify the methamphetamine they buy, which dealers often "cut" with other substances. In their testimony, narcotics officers agree that acetone is commonly used in this manner; they also admit that they found no other chemicals typically used in the manufacture of methamphetamine in James' home. James' argument is that while he is a drug user, he is not a manufacturer, and should therefore not be found guilty of this more serious offense. The prosecutor's argument is that James "manufactured" methamphetamine when he immersed the purchased drugs in acetone in order to make a purer product. The judge instructs the jury that the law requires that they find James guilty of manufacturing methamphetamine if he "produce[d], prepare[d], propagate[d], compound[ed], mix[ed] or process[ed]" the drug.[277] The jury finds James guilty of both possession and manufacture.

The jury later discusses the case with the prosecutor and defense attorney. The jurors state that they do not view James as a drug manufacturer, but merely an addict. They report having voted to convict James of manufacturing *only* because the judge said that they had to follow the law, and the law says that manufacturing includes preparing or processing drugs even for personal use. The jurors are shocked to discover that James will receive a mandatory minimum of five years in prison on the manufacturing charge, which they feel is too much time given the facts of this case.

I assume, based on my practice experience and discussions with other attorneys, that this type of outcome is common enough that we need not view it as aberrant. How, then, should we view this case?

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[277] Ariz. Rev. Stat. §13-3401.17.

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First, we can dispense with the instrumentalist's contention that the jury instructions contributed to epistemically accurate results. The facts of this case were uncommonly clear: the defendant was caught red-handed. There was no conflict between the police officers' account and the defendant's. The story told by both the defense attorney and the prosecutor was essentially the same: that the defendant was a drug addict who had been caught pouring acetone over methamphetamine in order to purify it for his personal use. The only question at trial was whether or not the defendant had "manufactured" methamphetamine. And on this point, the jury instructions required that the jury strictly follow the law—rather than their own common sense—and convict someone who was clearly not a drug "manufacturer" in any reasonable sense of the term. Finally, the jurors were not permitted to learn anything at all about the statutory penalty for a drug-manufacturing conviction—a fact that probably would have changed the result of the case. Whether we view the outcome in this case as epistemically favorable is questionable: yes, the jury correctly applied the law to the facts—but nobody in the courtroom (other than, perhaps, the prosecutor zealously pursuing the charge) could seriously affirm the notion that James was a drug manufacturer in anything but a narrow, legalistic sense, nor that he *deserved* to be put away for five years for feeding his addiction. The jury thus arrived at one kind of truth by disregarding another kind.

On the communicative model, the jurors supposedly expressed the judgment of the community: that manufacturing methamphetamine is a grave wrong with which the community is properly concerned. But knowing what we do about the jurors' explanation for their verdict, it is not clear that the jurors communicated the "right" judgment. The jurors in this case had to set aside their commitment to values such as

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fairness and common sense in order to uphold the letter of the law. It is very likely that the jurors' collective shock at James' sentence would be reflective of their community's normative judgment that such a penalty is outrageous under the circumstances of the case.

If I am right, then under an ideal system the jurors would have had the option of deliberating about the wisdom of the manufacturing statute *in light of the particularities of the case at hand*. Perhaps they all would have agreed that James should be acquitted—or perhaps some of them would have been in favor of applying the law as written in this case, and they would have deadlocked. In either case, the normative judgment expressed by the jury to the defendant—as well as to the court, legislators, and the wider community—would have been that the methamphetamine manufacturing law might need to be reconsidered in light of the results it threatened in this particular case.

Our system narrowly constrains jurors and thereby prevents them from communicating the normative judgments of average community members to the rest of the community. It therefore fails to take advantage of one of the most compelling reasons to involve laypersons in the criminal justice system.

E. Juries and the Development of Civic Virtues

A final reason to favor the jury-centered model of criminal justice has to do with what jury service does for jurors and for communities. This justification for the jury is different from the preceding ones. Whereas they focused on the value of juries in achieving criminal justice, this one suggests that the institution of the jury is valuable in promoting aims that are important outside the criminal process as well.

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In Chapter 1, I sketched a Kantian account of civic virtue. To be a virtuous citizen, on this view, is not merely to refrain from violating the UPR (the minimal condition of justice); it is also to actively support and ensure the freedom, equality, and independence of all citizens with in the political community. This is, of course, an ideal; Kant does not suppose that human beings always act as ideal citizens ought to. Moreover, precise civic obligations supporting this ideal will depend on the context in which citizens find themselves. But, as I suggested in Chapter 1, we can enumerate some general attributes of good Kantian citizens in the hopes of understanding how to go about actuating this capacity within our community.

My contention in this section, then, is that jury service promotes certain attributes that good Kantian citizens should develop. At the same time, these virtues promote good judgment. Thus, insofar as legal professionals and academics are rightly concerned with both the phenomena of decreasing jury service and the generally poor quality of justice in our system, they are identifying two sides of the same coin.

Where, then, can we turn for a clearer picture of what it would mean to be a good Kantian citizen? I propose that we do this by importing some values from Kant's moral theory into his political theory. This may seem, at first glance, philosophically suspect. Kant maintains, as most of us do, a distinction between morality and justice. One can, on this view, be a just person without being a morally worthy one. Specifically, acting morally requires acting for the right reasons, while acting justly merely requires conformity with the requirements of justice.[278] Nevertheless, while being just does not require moral perfection, a morally good person will necessarily act justly, and for the

[278] See, e.g., Kant's discussion of the distinction between moral and judicial laws, MM 14/6:220. See also MM 17-18/6:225 (distinguishing legality from morality) and MM 24-25/6:231 (describing requirements of justice).

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right reasons. She will also be, among other things, a good citizen who endorses particular virtues of citizenship as being conducive to justice. Thus, while Kant rightly acknowledges that personal morality and the demands of political justice are distinct and conceptually separable, his moral theory nevertheless provides us with the basis for describing how an ideal citizen would act. In other words, a Kantian can maintain that a morally worthy citizen is more likely to contribute to the development of the "rightful condition" of justice, while still maintaining the important distinction between justice and personal morality.

There are, I believe, at least two Kantian virtues that jury service demands of jurors: (1) sympathy, and (2) the recognition of others' condition.

1. *The Virtue of Sympathy*.

Kant calls sympathy the "duty of humanity."[279] This duty entails that one cultivates "sensible feelings of pleasure or displeasure . . . at another's state of joy or pain."[280] It is not enough merely to *experience* such feelings from time to time—for "[n]ature has already implanted in human beings receptivity to these feelings,"[281] and they "spread[] naturally among human beings living near one another."[282] It would be odd, Kant thinks, to say that we have a duty to feel sympathy for members of our family or others close to us—for we are already naturally disposed to do so. The duty, then, seems to be to cultivate these sympathetic feelings toward other human beings more generally—including, especially, those toward whom we are *not* naturally inclined to experience compassionate feelings. Sympathy in this latter sense is "free" (chosen by the

[279] MM 204/6:456.
[280] Ibid.
[281] Ibid.
[282] MM 205/6:457.

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will, rather than experienced instinctively) and is therefore an obligation of practical reason.[283]

One oddity in Kant's discussion is his apparent rejection of sympathetic feelings in cases where one cannot assist the person who is experiencing pain or displeasure:

> It was a sublime way of thinking that the Stoic ascribed to his wise man when he had him say 'I wish for a friend, not that he might help *me* in poverty, sickness, imprisonment, etc., but rather that I might stand by *him* and rescue a human being.' But the same wise man, when he could not rescue his friend, said to himself 'what is it to me?' In other words, he rejected compassion.[284]

First, it is unclear whether Kant means to say that the entire Stoic story is "sublime," or merely the first part he quotes. It is therefore initially unclear whether the fact that the wise man "rejected compassion" is, on Kant's view, good or bad. One possibility is that Kant means to contrast the Stoic view with his own: it seems unlikely that Kant would endorse the idea that we should not cultivate sympathy toward those who suffer but whom we have little realistic chance of helping.

Another (compatible) possibility is that Kant intends to warn us against taking an extreme approach to sympathy. Thus he follows the above passage with the assertion that "when another suffers and, although I cannot help him, I let myself be infected by his pain (through my imagination), then two of us suffer, though the trouble really (in nature) affects only *one*."[285] It is possible, Kant seems to be saying, to be *too* invested in understanding and even experiencing the suffering of others, which can blind us to other requirements of morality. We need not starve ourselves (thereby failing to respect our own humanity) in order to understand the problems faced by those experiencing famine;

[283] MM 204-05/6:456-57.
[284] MM 205/6:457.
[285] Ibid.

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we should not deprive our families of shelter (thereby harming them) in the name of a vacuous solidarity with the homeless. Such exercises, which "increase the ills in the world . . . [demonstrate] an insulting kind of beneficence, since it expresses the kind of benevolence one has toward someone unworthy, called *pity*; and this has no place in people's relations with one another."[286] On the Kantian view, pity involves "shar[ing] the sufferings . . . of others,"[287] and suffering, in and of itself, is (contrary to some popular caricatures) not a desideratum of Kantian ethics.[288]

Granting that we should not fall into the trap of replacing sympathy with this (perhaps ill-named) "pity," what is it that a Kantian sympathy would look like in practice, in the context of jury service? First, Kant says of people who are suffering that we ought to "sympathize *actively* in their fate."[289] The notion of sympathy here is therefore twofold: we have an "indirect duty to cultivate the natural (aesthetic) feeling in us," but also to "make use of" such feelings.[290] It is not enough, then, that we *feel bad for* people. We must allow these feelings to work within us and impel us to action.[291]

Jurors can and should attempt to sympathize with criminal defendants, as well as with victims. They should "make use of" such sympathetic feelings in passing judgment upon the defendant. This view is at odds with the common judicial practice of

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[286] Ibid.
[287] Ibid.
[288] This is not to say that it would be wrong, on the Kantian view, to fast on occasion, or to sleep on the streets from time to time, in order to increase one's understanding of and sympathy for those who are forced to endure such conditions. Perhaps, depending on our circumstances, it would even be appropriate to engage in such activities frequently. But we should not do so, Kant seems to be saying, to the point where we cause ourselves or others needless suffering and, in doing so, rob ourselves of the possibility of alleviating *anyone's* suffering.
[289] MM 205/6:457, emphasis added.
[290] Ibid.
[291] More broadly, affective responses are important in Kantian thought insofar as they enable us to grasp morally salient features of a situation and, therefore, to responds appropriately. Affective responses that fail to motivate us in this way are taken to be morally deficient. Hence Kant's distinction between the properly motivating experience of sympathy and the morally harmful sense of pity.

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admonishing jurors *not* to be swayed by sympathy. It would be better to say that jurors should not act *merely* out of sympathy. It would be wrong, of course, to convict a defendant *only* because the jury feels bad for the victim, or to acquit a defendant *only* because she has a sympathetic life story. Nevertheless, the notion that jurors should *lack* sympathy, and should make decisions based on cold logic alone, is flawed. Surely it matters, in making normative judgments about the defendant's culpability, whether the victim was in fact seriously harmed, or whether the defendant does have a seriously disadvantaged background. We make such judgments daily in other areas of life, and it is both odd and unwise to expect jurors to abandon such central aspects of normative judgment-making. Expecting jurors to act merely as logicians, while understandable on the instrumentalist account, is at odds with the normative conception of adjudication.

The practice of Kantian sympathy by jurors will have ramifications that reach beyond the courtroom. Thus one corollary of the duty of sympathy, according to Kant, is that:

> It is therefore a duty not to avoid the places where the poor who lack the most basic necessities are to be found but rather to seek them out, and not to shun the sickrooms or debtors' prisons and so forth in order to avoid sharing painful feelings one may not be able to resist.[292]

One of the features of criminal incarceration in the United States is the tendency to try to keep prisoners in certain areas—typically facilities are built in poor, rural areas. Part of the pressures here are economic: the rich are able to fence out such undesirables, while poorer communities may benefit from the jobs created by jails and prisons. There are also, to be sure, some legitimate security concerns: it may be safer to house at least certain types of violent offenders in more remote areas. Still, these concerns are surely

[292] MM 205/6:457

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outweighed (at least in most cases) by the knowledge that what we are doing in such cases is precisely trying to "avoid the places" occupied by a certain type of human being: those members of our community who have committed crimes. Although America's skyrocketing prisoner population has garnered more media attention of late, most citizens do not make a habit of visiting prisons or involving themselves in the criminal justice system in any significant capacity—unless forced to by jury duty or a family member's involvement. A good Kantian citizen would, at the least, not shrink from the task of jury duty merely because of potential exposure to unsavory characters. And after her service, she would return to the community with a more sympathetic view of the kinds of people she has judged.[293]

2. *The Virtue of Recognizing Others' "Condition"*

We might worry that that cultivation of sympathy, along with the general Kantian notion of respecting people's worth as human beings, could result in a pathological form of tolerance, in which we simply decline to convict or punish anyone. Surely some people ought to be treated differently than others—criminals, in particular, ought to be treated in a different way than law-abiding citizens. Of course this is correct. But to say that we should cultivate sympathy for everyone, or that we should respect our fellow human beings' essential dignity, is not to imply that we should treat everyone the *same*.

[293] Another symptom of the lack of Kantian sympathy in the criminal justice system is the treatment of ex-offenders. Few businesses seek to hire ex-convicts, particularly when economic conditions are such that plenty of non-offenders are seeking jobs. Discrimination in employment—as well as housing and other areas—based on criminal records is legal and, to an extent, understandable. But there is likely *no* good reason to refuse to offer most kinds of jobs to someone with, say, a conviction for drug possession, driving under the influence, or shoplifting. (I say "most," because there are cases where a prior conviction would be a reasonable basis for bar to employment. The obvious cases involve seriously violent offenders working with weapons, serious sex offenders working with children, or career thieves working with substantial sums of cash.) Ironically, if we actually *prioritized* employment (and housing, education, etc.) of ex-offenders, I suspect recidivism would decrease. At the least, it would help us develop the kind of sympathetic understanding of the situation faced by ex-offenders.

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In Chapter 4, for example, I will argue that it is possible to punish people while still respecting their humanity, and even sympathizing with them. So it would be incorrect to say that Kantian virtue demands exactly the same treatment of every person one encounters.

Indeed, quite the opposite is true. Kant says that "different forms of respect [are] to be shown to others in accordance with differences in their qualities or contingent relations—differences of age, sex, birth, strength, or weakness, or even rank and dignity, which depend in part on arbitrary arrangements."[294] Kant does not attempt to explain exactly how one ought to behave toward people who are "in a state of moral purity or depravity," or in "prosperity or poverty," for these are "only so many different ways of *applying*" the duties one owes to other people.[295] He indicates, however, that determining the precise contours of one's duties toward others *is* an important part of one's moral obligation to respect others' humanity.[296]

Good citizen-jurors will, therefore, reason about the morally appropriate stance to take toward people who commit crimes, and will be prepared to modulate such responses depending on relevant factors. A poor person who steals bread in order to survive deserves, intuitively, a much different response from citizens of her community than the rich person who steals because she wishes to live an even more comfortable lifestyle. Of course, determining precisely how to respond to the poor thief versus the rich one will not necessarily be easy. The point, though, is that jurors should try to do so—both because justice demands it in the case at hand, and because doing so promotes good citizenship.

Legal scholar Sherman Clark describes (in non-Kantian terms) a similar idea. He

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[294] MM 213/6:468
[295] MM 214/6:468-69
[296] Ibid.

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believes that jury service encourages citizens to do at least three things: take responsibility for "exercises of power over others"; "see others as fundamentally like ourselves"; and "see things from the perspective to others."[297] These "capacities," as Clark calls them, are clearly relevant both to jury service and to other demands of citizenship. A political community will intuitively be more likely to work toward ideals of justice if its citizens try to see one another's point of view; focus on their common humanity rather than their differences; and take seriously the notion that even legitimately acquired power must be exercised responsibility.

Clark points to some features of jury service, at least as it exists in the USA, that promote these capacities: jurors normally see the defendant face-to-face; they must come to a unanimous verdict; and they alone determine the defendant's fate (since directed verdicts against the defendant are not allowed).[298] Perhaps because of these features, Clark does not suggest that we need many changes to the current system in order to make the capacity-building feature of jury service more salient. He suggests only that we make note of it in jury instructions.[299]

One problem, though, is that jury service is not common—often it is literally a once-in-a-lifetime opportunity, if that. Clark thinks that there is still "symbolic" value in the capacity-building function of the jury, even if the average citizen does not serve frequently.[300] While this may be true, we would certainly be better off, if in fact jury service fulfills this valuable function, using the jury in more than a tiny percentage of cases. I have argued (in Chapter 2) that a Kantian scheme of criminalization would result

[297] Clark, "The Juror," 2.
[298] Ibid., 6.
[299] Ibid., 9.
[300] Ibid.

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in fewer criminal cases; presumably there would be a concomitant rise in jury trials as attorneys and judges faced less pressure to move a high volume of cases through the system. We would also be better off in this respect if we used juries in order to sentence defendants—as I will argue in section III below. An increase in jury service would result in an increased understanding (by jurors and by the wider community) of the Kantian "conditions" motivating criminal activity. This would, in turn, render just judgments in individual criminal cases more likely, and would also encourage the development of civic virtue among the citizenry.

3. *An Objection to Virtue*

Here we must attend to a provocative objection: that focusing on the development of jurors' civic virtues seems irrelevant, if not perverse, in the context of the criminal courtroom. The defendant, for one, is probably not concerned with how virtuous the jurors are—he just wants to be acquitted. Much the reverse sentiment might be expressed by crime victims. While we might think it nice to encourage civic engagement, surely the jurors' job should be to convict or acquit, not to develop their own civic virtues. That, after all, is the job of civics classes and public-service announcements in the windows of the local Post Office.

The best answer, I think, is to recognize that the jury system "allows, indeed presses, ordinary citizens to take ownership of the 'terrible business' of criminal justice."[301] When the jury ceases to be a significant part of a criminal justice system, as is arguably the case in contemporary Anglo-American courtrooms, we are letting ourselves as citizens be "left off the hook of moral and political responsibility for

[301] Dzur, *Participatory Democracy*, 40.

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punishment."[302] This collective avoidance of the process makes it easier, perhaps, to justify avoiding convicts themselves, both by erecting prisons in places we are unlikely to venture, and also by separating ourselves from neighborhoods and communities where future- and ex-convicts are likely to reside. It likewise makes it easier to avoid the responsibility of knowing about and critically assessing our community's criminal laws.

It may be true, then, that in a given case what is most important to the defendant or victim will be the judgment of conviction or acquittal, regardless of whether it is handed down by a jury, judge, or other body. But more is at stake for the political community in which the trial takes place: we should also care about the development of civic virtue, which in turn maximizes our chances of achieving a "rightful condition"—that is, a just society, including just criminal laws and procedures. Jury service, I have argued, promotes the development of civic virtue, and should therefore be encouraged on the Kantian view, at least absent a more compelling account.

F. Conclusion: The Role of the Jury

I have argued that there are four compelling reasons to view the jury as an integral part of a criminal trial based on a Kantian-communicative model. First, juries act as both a symbolic and literal buffer between the government and the citizens (see subsection B above); they are capable of communicating community values in a way that professionals are not (subsection C); they are well-placed to make controversial and difficult normative moral judgments on behalf of the community (subsection D); and they foster the development of civic virtues that, in turn, promote a just social order (subsection E). In

[302] Ibid.

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addition, the traditional role of fact-finder (subsection A) does not give us any reason to reject the use of the jury, though it might call into question the propriety of using jurors to decide certain types of facts.

At this point, I might reasonably be accused of setting up a false dichotomy. One might grant that *some* lay participation in criminal justice is desirable, but maintain that expert guidance is also useful. Why assume that the only options available to us are professional judges or lay juries? We might conceive of some sort of hybrid system. Perhaps juries should consist partly of laypersons and partly of experts. Such experts might be magistrates or lawyers who are in a better position than nonlawyer citizens to explain the relationship between the evidence and the law. They might also be scientists or other professionals who would be better able to interpret evidence within their spheres of expertise.

Certainly I have raised concerns about the ability of jurors to decide some matters of "pure" fact, particularly in cases where the subjects require particularized scientific or technical knowledge in order to make an accurate judgment about the claims made by witnesses on both sides of the case. I do believe, however, that any participation by legal or other experts in the process should be limited to the first two kinds of decision-making discussed above (in subsection A). The most important *normative* decisions in the case—whether the defendant is guilty or not, and (if guilty) what his punishment ought to be—should be made primarily by laypersons. Discovering facts about what actually happened at the crime scene may be a task better suited for experienced investigators. Determining whether those facts align with legal definitions might be best accomplished by legal professionals. But *interpreting* those facts—passing a judgment on a fellow human being

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in light of those judgments—should remain the province of those in the best position to make such normative judgments in the name of the community who has enacted the criminal law.

Ought we to conclude that legal systems which rely very little, or not at all, on juries or other forms of lay participation are unjust? I cannot hope to address every conceivable procedure and judicial configuration, though I recognize the significant limitations of a theory that fails to address common practices outside the Anglo-American legal tradition. I think it safe to say that the view I have presented here might be compatible with some "inquisitorial" systems that rely *more* on professionals—but this would depend on the extent to which such procedural configurations could be said to fulfill the roles outlined in subsections A through E above. For example, the practice of mixing professional magistrates with laypersons to decide cases might be seen as a reasonable attempt at including lay citizens in the criminal process; still, when judges are clearly "in charge" of the process, we might worry about the potential loss of communicative power that such a system might have.[303] In any case, I hope to have shown that the jury plays an important role, at least in our system, of promoting the Kantian-communicative model of adjudication and, therefore, that we should care very much about its demise in Anglo-American criminal justice systems.

[303] See, e.g., Bohlander, *German Criminal Law*, 10 (discussing German trial process as "judge-led"); Weinreb, *Denial of Justice*, 138-141 (proposing institution of criminal "court" composed of seven laypersons, two attorneys, and one judge; the three professionals' votes would be taken more seriously than the laypersons').

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IV. A Proposal: Increase the Use of Sentencing Juries

In §III I argued that, on the Kantian-communicative view explained in §I, juries should play an important role in the criminal trial process. In this section, I focus on one aspect of the criminal trial that has thus far gone largely unmentioned: sentencing. In most jurisdictions in Anglo-American systems, nearly every defendant who is convicted of a crime (pursuant to a jury trial, bench trial, or plea agreement) is sentenced by a judge. There are some exceptions, including capital cases in the U.S., and the occasional jurisdiction that requires sentencing juries. Still, nearly all criminal defendants in our system who are convicted will be sentenced to prison or probation by a professional judge. From the Kantian-communicative perspective, this practice is unfortunate. Jury sentencing would be better for four reasons, which reflect the adjudicative model outlined in §III above.

First, punishment is most reasonably viewed as part of the communicative process.[304] It functions similarly to imposed penance in some religions: as inviting and encouraging the defendant to acknowledge his wrongdoing and "repent," with the goal of reintegrating himself into the community.[305] Although the sentencing judge might claim to represent the community—perhaps she is even elected—she is still speaking to the defendant from a position of power. Most defendants are not of the same class as judges; they frequently lack education, and certainly legal education. They do not speak the language of the law. They might be dressed in jail garb already; the judge wears formal

[304] See, e.g., Duff et al., *The Trial on Trial*, 97. See also the discussion of punishment in Chapter 4 herein.
[305] Thus Duff describes punishment as "a species of secular penance." *Punishment*, 106. See also Duff, "Expression, Penance, and Reform."

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robes and is generally seated above the defendant. A chasm exists between the roles of judge and defendant.[306]

By contrast, sentencing juries are comprised of lay citizens who often have much more in common with the average defendant than does the judge. Some may be from a similar social or economic class; there may be at least some jurors of the same race; some may have a similar level of education or sophistication. Certainly most jurors do not speak in the language of the law, and many of the courtroom machinations that take place between the judge and lawyers may escape them as much as the defendant. What the jury is able to do, however, is to look the defendant in the eye and convey the judgment of the community—condemnation (conviction) or non-condemnation (innocence or acquittal)—and call the defendant to answer via the imposition of sentence. The necessary legal formalities involved in conviction and sentencing are softened to some extent by the presence of the jury—the defendant is more likely to feel that he is being condemned by fellow-citizens, by human beings who have considered his plight, rather than by an arbitrary and powerful professional who speaks in the language of "mitigation," "mandatory minimums," "relevant factors," and so on.

A second reason to prefer sentencing juries is that the imposition of a criminal sentence is, in part, a normative judgment. Currently, our tendency is to see sentencing primarily as a matter of numerical calculations: the judge compares the crime the defendant has been convicted of to a sentencing chart; she then determines where the

[306] See Duff, *Punishment*, 75-77 (describing four ways in which defendants are "excluded" from the criminal justice process: politically, materially, normatively, and linguistically); Duff et al., *The Trial on Trial*, 152 (suggesting it is problematic to expect defendant to participate in trial given unfamiliarity and overly formal nature and "style" of trial); and Dzur, *Participatory Democracy*, 161 (arguing that "[t]he laypeople of the jury ensure that the language of the law, the back-and-forth banter of the court professionals, the way the case is articulated, the way the defendant and affected parties are treated discursively all comport with what a defendant's peers find respectable and comprehensible. They ensure, if they are really his peers, that the dialogue of the trial is not alien and remote").

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defendant falls within a given sentencing range, ideally taking into account mitigating and aggravating factors. The sentence imposed is the correct fit for the case at hand based upon these statutory guidelines. What is missing from such a practice is the recognition that the imposition of punishment is more than a matter of adhering to *lex talionis* or any other principle of proportionality. To impose a punishment is to attempt to communicate with the criminal: to call her to accept the jury's judgment that she has acted wrongly, and to impress upon her the seriousness of her crime and, in some cases, the harm she has caused the victim. To determine what punishment is appropriate is, in large part, to make a normative judgment about what kind of treatment will best serve that communicative function of the criminal law under the circumstances. A judge can make a decision with the same content, but a jury is surely the preferable body for communicating it to the defendant.

Third, even if juries are not used elsewhere in the criminal trial process, sentencing juries could act as a "buffer" in at least one significant way. In cases where the government charges and prosecutes someone in a way that the public considers unfair or overzealous, a sentencing jury could decline to sentence the convicted defendant, or could impose a merely nominal sentence. Nominal damages are sometimes assessed in civil cases where it is judged that the plaintiff prevails, but the harm is so trivial that the defendant should not be required to do anything (or very much) in order to make the plaintiff whole. While a criminal conviction is still a more significant outcome than a civil judgment, a "nominal sentence" could send the message that the community is not

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pleased with the government's handling of the case and, perhaps, could motivate prosecutors to reassess their approach.[307]

Finally, using juries for sentencing would promote the civic virtues that the Kantian-communicative theory identifies as important in the context of criminal justice. Ideally, sentencing involves passing a very specific type of judgment on the defendant. Rather than the more or less binary judgment that the defendant did or did not commit the offense (or, more accurately, that the government did or did not provide sufficient evidence to warrant this conclusion), sentencing involves a weighing or balancing of multiple factors including, for example, the defendant's criminal and life history, the circumstances surrounding the crime, and the extent of harm to the victim. Having juries consider and weigh these factors would require them to develop the Kantian virtues of sympathy and recognition of others' conditions.

Thus, even in a world where plea bargaining ensures that most criminal defendants will never go to trial, requiring juries to sentence defendants would be a substantial step toward the fulfillment of the Kantian-communicative adjudicative model.

To this proposal, one might object that the trajectory of Anglo-American criminal justice is away from the jury, and perhaps there are good reasons of efficiency that militate against using juries even for sentencing alone. Of course it is true that mandatory jury sentencing would be costlier than judicial sentencing. This, though, must be balanced against the clear failure of the criminal justice system to utilize an important moral resource. Moreover, as Dzur puts it, achieving such a modest reform—increasing

[307] For example, consider the "James" case in §III.D above. A more just result (and perhaps a better alternative to nullification) would have obtained if the jury could have convicted James of manufacturing methamphetamine, but imposed a nominal punishment (perhaps a one-dollar fine or a jail sentence of one day), in order to send the message that the manufacturing statute was defective, or that the State was unreasonable in pursuing that charge under the circumstances.

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the percentage of defendants who are sentenced by juries instead of judges—certainly seems more practical and attainable than many other reforms that are often posited by academics looking to fix the system.[308]

A more plausible objection is that judges are in a better position than the jury to know what the "typical" sentence is for a given crime, and perhaps in a better position to decide where the case at hand falls along a spectrum of cases (e.g. this is a "really bad burglary" or a "run-of-the-mill assault"). I admit that this is a significant issue; we would not want to end up with a system in which defendants received radically disparate sentences based solely on the whims of jurors. Certainly the judge should tell the jury what the legal sentencing ranges are; likely he should have further involvement in assisting them. But judges also come to sentencing with their own prejudices and opinions about human nature, mental illness, the efficacy of deterrence, the viability of retributive sentiments, and so forth. Surely a collection of people would be better equipped to reach a reasonable consensus about sentencing issues than a lone judge, which is the case in the overwhelming majority of criminal dispositions in the U.S. today. As Dzur puts it, "[p]rocedures like the traditional jury are . . . collaborative devices. They bring citizens together . . . in the procedural hope that under conditions of normative and sociological pluralism, nonprofessionals can speak coherently about and do justice."[309] To the extent that judges could be involved in the sentencing process, perhaps by making recommendations based on comparisons with similar past cases, such involvement should not come at the expense of encouraging the jury to make an independent judgment about the case at hand.

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[308] Dzur, *Participatory Democracy*, 97.
[309] Ibid., 159.

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One might nonetheless worry that laypersons are more likely to make mistakes or be injudicious when it comes to such decisions. In particular, we might be concerned about jurors being overly retributive when it comes to sentencing. Judges are, theoretically, trained to ignore their own prejudices and make decisions rationally, based solely on legal factors. A practical response to such a concern is that we need not do away with appellate review of criminal sentences. We might, in fact, consider empowering appellate courts to review sentences more carefully, particularly with an eye to determining whether a given sentence is seriously disproportionate with respect to sentences handed down to similarly situated defendants.

We should also consider that sentencing juries who have at their disposal all the facts of the defendant's life circumstances, in addition to the facts of the offense, are unlikely to treat the defendant too harshly—even if they were predisposed to support draconian penalties before entering the courtroom. Martha Nussbaum has argued that attention to the "particulars" of an individual's life story normally inclines us toward mercy rather than vengeance,[310] and there is some evidence that this is accurate: death-qualified juries usually vote not to execute defendants, despite having been selected by virtue of their non-opposition to the death penalty.[311]

Finally, we might worry that jurors are not in as good a position as judges to know which *type* of punishment would be most appropriate or efficacious in the particular case at hand. In a system where the usual sentences are either prison or

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[310] See Martha Nussbaum, "Equity and Mercy," 216-21.

[311] Dzur, *Participatory Democracy*, 140. I give this example tentatively, because Dzur does not cite a source for this claim, and because figures are difficult to come by. One Department of Justice report indicates that, from roughly 1988-2000, the DOJ sought 62 capital convictions. Juries returned a guilty verdict in 57 of those cases (a 92% conviction rate), but only imposed the death penalty in 25 (i.e. 44% of eligible cases). *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (June 6, 2001), available at http://www.justice.gov/ dag/pubdoc/ deathpenaltystudy.htm.

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probation, this might not be too significant a concern. But we might think that there ought to be other options available. Some progress has been made to this end with the rise of drug-treatment programs and other alternatives to incarceration (though these are typically imposed as a term of probation, or left at the discretion of the probation officer). In any case, to the extent that other modes of punishment are available, it certainly makes sense for the judge to provide the jury with information relevant to making a wise decision about using them. Perhaps the judge, or an expert sentencing advisor, could make a recommendation to the jury based on their experience and knowledge. We should not be overly concerned with the precise way in which this knowledge is transmitted to the jury, so long as we do not allow the jury to become a mere "rubber stamp" for the judgment of experts.

In the end, these objections are not sufficiently compelling to overcome the clearly beneficial impact that jury sentencing could have on our criminal justice system in terms of the promotion of communicative norms and Kantian values.

V. CONCLUSION

I began this chapter by presenting two models of adjudication: instrumentalist truth-seeking on the one hand, and normative communication on the other. I argued that the communicative model was theoretically superior. I then showed that Kant's theory of justice shares the core commitments of the communicative model—and that it provides that model with a desirable theoretical foundation. I provided several reasons for thinking that the jury serves an important purpose within a Kantian-communicative

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system of adjudication. Finally, I suggested one feasible reform that would move Anglo-American adjudicative systems in a more Kantian direction.

It may seem at this point that I have put the cart before the horse: I have argued that juries should sentence criminal defendants, but I have not yet explained what types of punishments are open to them. This, however, shall be part of the task in the following chapter, which is dedicated to the task of formulating a Kantian theory of criminal punishment.

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CHAPTER 4

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PUNISHMENT

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This chapter shall proceed somewhat differently than the previous two. In developing a Kantian theory of criminalization and adjudication, we acted as pioneers erecting new edifices in uncharted wilderness: very little scholarship has focused on these areas from a Kantian perspective. By contrast, one might be skeptical of finding so much as a square inch of space for new construction in the crowded metropolis of Kantian punishment scholarship. I believe, however, that the view of Kantian justice first explored in Chapter 1, and expanded in Chapters 2 and 3, will allow us to do so.

Because of this surfeit of Kantian punishment scholarship, I shall begin this chapter by addressing, in §I, two popular, competing views of Kantian punishment. I shall argue that they both suffer from various deficiencies that should lead us to search for an alternative view. I shall then offer, as a third possibility, an interpretation of Kantian punishment that builds on the account of justice—and, more specifically, of civic freedom—that I presented in Chapter 1. Following this, in §II, I shall argue that a Kantian account of civic virtue should cause us to modify Kant's theory of punishment in an important way. I shall also give several examples of what punishment would look like in a criminal justice system devoted to Kantian ideals.

I. KANTIAN PUNISHMENT: THREE INTERPRETATIONS

In debates over the ethical permissibility of punishment, scholars often cite Kant as the paradigmatic example of a retributivist.[312] Such a characterization is hardly surprising; after all, Kant himself claims that "only the law of retribution . . . can specify

[312] See, e.g., Murphy, "Introduction," 2; Hill, "Punishment, Conscience, and Moral Worth," 233; and Scheid, "Kant's Retributivism," 265 n.8.

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definitely the quality and the quantity of punishment."[313] The retributivist interpretation is also supported by Kant's uncompromising stance on capital punishment: if someone "has committed murder he must *die*. Here there is no substitute that will satisfy justice."[314]

As facially compelling as the retributivist interpretation may be, however, some scholars have taken Kant's punishment theory to be a "mixed" or "hybrid" account. On this view, retributivism only partially grounds punishment, but relies on utilitarianism for justificatory completeness.[315] A third approach is to examine Kant's wider theory of justice in order to discover the foundational principles underlying his discussion of punishment. My aim in this section is to show that the justice-based interpretation provides the most compelling account of Kantian punishment.

A. The Traditional View: Kant Qua Retributivist

An initially plausible interpretation of Kant's justification for the imposition of criminal punishment is straightforwardly retributive: the government can and must punish criminals because (and only because) they have committed a wrong in violation of the UPR. Kant thinks that if we affirm the UPR (which we must if we are to have a just social order) then we will agree that "whatever is wrong is a hindrance to freedom in accordance with universal laws."[316] If someone violates the UPR by taking an action that limits another person's freedom, then the State may properly use coercive force against the violator. The use of such coercion is admittedly "a hindrance to freedom," but it is

[313] MM 105/6:332.
[314] MM 106/6:333.
[315] See Byrd, "Kant's Theory of Punishment" and Scheid, "Kant's Retributivism."
[316] MM 25/6:231.

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one that is justified because it is limiting the freedom of somebody who has chosen to act contrary to the principle on which the just State is founded.

To give a simple example, the UPR would require that I refrain from kidnapping a fellow citizen—a very obvious deprivation of that person's freedom. If I were to kidnap someone, however, the State could justifiably imprison me—an equally clear deprivation of my freedom. Normally imprisoning citizens would be unjustified: the ruling party cannot simply imprison opposition leaders on a whim, because this would violate the UPR. But imprisoning me after I have violated the UPR is consistent with the UPR.

On this view, punishment is a moral obligation, not merely a facultative policy option at the state's disposal. The State may not consider another rationale for punishment: it "can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*."[317] This language would seem to eliminate both rehabilitation ("some other good for the criminal himself") and even deterrence or incapacitation ("some other good . . . for civil society") as justifiable grounds for criminal punishment.

Furthermore, once punishment has been found to be warranted on retributivist grounds, the "quality and quantity" of punishment must also be determined by the "law of retribution" or *lex talionis*:[318] the punishment must be coextensive with the crime, as in the proverbial "eye for an eye."[319] So it would appear that not only can punishment not

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[317] MM 105/6:331.

[318] MM 105/6:332. Kant uses the term *jus* in place of *lex*, and this may be the most appropriate word: *jus* properly refers to "law in the abstract" or a "legal right, power, or principle," while *lex* is technically reserved for "[p]ositive law," or even "a statute." *Black's Law Dictionary*, s.v. "jus" and "lex." However, this technical distinction is not well maintained in Anglo-American legal scholarship, and the use of *lex* in front of *talionis* seems to be the most common usage nowadays.

[319] This law or principle has ancient roots. See, e.g., Exodus 21:22-25.

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be imposed for reasons other than retribution, but the nature and extent of the punishment must also be determined by "pure and strict" retributivist principles.[320]

One of the common passages used to support the retributivist interpretation is where Kant avers that one who murders another must be put to death in order to satisfy the law of retribution, and any lesser punishment for any reason would be a "public violation of justice."[321] The sentencing judge could apparently not consider, for example, things such as the murderer's age or criminal history, the circumstances of the crime or relationship of criminal and victim, and so forth. The law is clear: "If . . . he has committed murder he must *die*."[322] On the retributivist interpretation, similar propositions must hold for other types of crimes—for example, if someone maims another's arm, her body must be wounded to the same extent.[323]

Although facially plausible, there is a rather significant problem with interpreting Kant as a retributivist simpliciter: the passages used to justify the retributivist interpretation seem to be contradicted by other passages, sometimes on the same page of text. For example, although Kant says that punishment must be meted out only "because [the criminal] has committed a crime," he also seems frequently to refer to deterrence or rehabilitation as goals of criminal punishment. Thus he says that the State may properly "draw[] from [the criminal's] punishment something of use for himself or his fellow citizens," which sounds suspiciously like rehabilitation (something of use for the

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[320] MM 106/6:332.
[321] MM 106/6:333.
[322] Ibid.
[323] Kant does grant that, for certain types of crimes, it is not possible, or morally permissible, to punish the criminal by doing to her exactly what she has done to the victim. MM 130/6:363. In such a case, a reasonable substitute punishment may be imposed. For example, the rapist is not to be raped, but castrated (ibid.), and the thief may be sentenced to "convict or prison labor" (MM 106/6:333).

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criminal) and general deterrence (something of use for fellow citizens).[324] This passage is prefaced by the statement that the criminal "must previously have been found *punishable* before any thought can be given" to these objectives, but it is not clear that being punishable necessarily entails a retributivist reason therefore.[325] The retributivist might argue that Kant intends to relegate these alternative policy goals to secondary considerations: we have determined that the defendant must be executed for murder, but we are now free to consider *how* to execute him in order to, for example, maximize general deterrence (e.g. publicly, on prime-time television). This, though, seems an unsatisfactory, *ad hoc* resolution to the "apparent incompatibility" between these various passages.[326] The retributivist is committed to saying that Kant is rather sloppily inconsistent.[327] We should, however, entertain the possibility of a more charitable interpretation.

Another textual oddity bears particular mention. Kant explicitly approves of non-punishment in cases of what he terms "necessity"—for example, where the drowning man kills another in order to save his own life.[328] Kant explains that we should excuse the killer, not because the killing is morally justifiable, but because "[a] penal law of this sort could not have the effect intended"; nobody would be deterred by the threat of death in the far future when she is facing the immediate prospect of death "that is certain (drowning)."[329]

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[324] MM 105/6:331.
[325] Ibid.
[326] Scheid, "Kant's Retributivism," 265.
[327] Hill, "Kant on Wrongdoing," 412.
[328] MM 28/6:235-36.
[329] Ibid. Related cases Kant mentions are the woman who kills her illegitimate child and the military officer who kills another in a duel—though each kills, neither is punishable. MM 108-109/6:336. These cases are even stranger given contemporary mores: children born out of wedlock are not subject to lifelong "disgrace," and we do not think of one who "fails to respond to a humiliating affront with a force of his

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A retributivist adhering to *lex talionis* would have to say that the drowning offender should be put to death. We might, more commonly, be inclined to say that the person in this case has an *excuse* for his wrongdoing: perhaps it was wrong to kill the victim, but we can understand why one might do so in order to save one's own life. Finally, we might think that what the killer did was wrong and inexcusable, but was not murder—perhaps it was manslaughter or some kind of lesser crime. These latter two cases might be compatible with (a weaker form of) retributivism, though not with *lex talionis*. Still, Kant does not appear to give any of these explanations. Instead, he takes the death penalty off the table for what appear to be purely utilitarian reasons: because the goal of deterrence would be fruitless in such a case. If the retributivist interpretation of Kant's penal theory is correct, then the section on "necessity" is mistaken: Kant neglected to follow his own reasoning to its logical conclusion in this particular case.

In summary, aside from the obvious point that goals such as deterrence and incapacitation are intuitively reasonable ones that Kant likely would have included in his theory (as he explicitly does in the necessity case), the retributivist's main problem is reconciling the clearly retributive-sounding passages in the *Rechtslehre* with other, equally clearly non-retributive-sounding ones. These do not exhaust the potential worries we might have about retributivism generally, or even about a retributivist interpretation of Kant[330], but they certainly suffice to cast doubt on such an interpretation. We shall therefore turn our attention to a second possible way of interpreting Kant's penal theory.

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own" as being a coward. Ibid. Still, setting aside such feelings we might have about the examples, the main point here is that Kant approves of non-punishment of murderers in certain cases, which is puzzling if he is a pure retributivist.

[330] For additional considerations, see Scheid, "Kant's Retributivism," Byrd, 'Kant's Theory of Punishment," and Yankah, "Crime, Freedom, and Civic Bonds."

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B. An Alternate View: Kant Qua Mixed Theorist

Legal and moral philosophers have proposed various versions of "mixed" or "hybrid" theories of punishment, not all of which claim to derive from Kantian thought. As a historical matter, one might see mixed theories as an obvious solution to a philosophical problem: that utilitarianism and retributivism are both attractive but ultimately deficient theories with which to justify punishment. As Whitley Kaufman puts it: "[i]n the mid-twentieth century, it was widely believed that the problem [of justifying punishment] had finally been solved. In a burst of creativity, a number of different thinkers—most famously H.L.A. Hart and John Rawls—developed an approach that purported to reconcile utilitarianism and retribution . . . ."[331] Although Kaufman believes the mass experiment with mixed theories to have been ultimately unsuccessful from a philosophical standpoint, the tradition seems to be alive and well with respect to interpretation of Kant.

To give a salient example of someone who applies the "mixed" viewpoint to Kant, B. Sharon Byrd argues, based on textual as well as "[h]istorical considerations"[332] that "for Kant general deterrence was the justification for criminal law provisions threatening punishment. Retribution, on the other hand, was not a goal or reason for punishment but rather a *limitation* on the state's right to inflict punishment . . . ."[333] Thus punishment may be threatened with the goal of deterring crime, but "[a]fter a criminal

[331] Kaufman, "The Rise and Fall," 38.
[332] Byrd, "Kant's Theory of Punishment," 151. Byrd does not develop her "historical" argument; she cites one journal article for the proposition that "[t]he distinction between punishment as a threat used actively to bind an individual to the rules of conduct and the execution of punishment as a response to the breach of one's obligation was made both before and immediately following Kant's critical philosophy." Ibid., 184. I do not, however, think that this point is crucial for her argument, which is mainly conceptual and textual.
[333] Byrd, "Kant's Theory of Punishment," 152-53.

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violation has occurred,[334] the focus shifts from instrumental priorities of general crime prevention to the just treatment of the individual."[335] The "just treatment of the individual" is embodied in a "limitation on the state's right to inflict punishment," which limitation is the principle of *lex talionis*, or retributive proportionality in punishment. Byrd notes that some prominent scholars, such as H.L.A. Hart, have interpreted the "state's right to inflict punishment" as deriving from *lex talionis* itself.[336] Kant, though, does not make this argument—*lex talionis* is clearly important to his view of punishment, but it is not cited as a justification for that practice.[337]

Byrd correctly points out that Kant does not claim that *lex talionis* does the work that pure retributivists need it to. It is, at most, a limiting principle on the extent of punishment. Scheid phrases the limiting potential of *lex talionis* this way: "What right does the state have to punish an individual for the purpose of deterring others? Indeed, whether the individual is guilty or not, how can the state ever be justified in using a person in this way, as a mere means?"[338] Even if we agree that "the general justifying aim of punishment is crime control, this goal must nevertheless be pursued in a morally

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[334] This is the phrase that Byrd uses, but it seems likely that she means after a *conviction has been obtained*. The *commission* of a crime paradigmatically initiates a process of investigation, accusation, and trial, all of which is public and apparently entails the promotion of various values, among them truth, preservation of the defendant's rights—but also deterrence. Surely, then, she must mean that the shift from deterrence to retribution occurs after someone has been *convicted* of a crime.
[335] Byrd, "Kant's Theory of Punishment," 153.
[336] Ibid., 152
[337] Byrd conceives of the justification in a libertarian fashion: "for Kant law is a means of coercive force applied to guarantee a necessary minimum of external conditions. . . . The conditions for this universal freedom are secured through civil society. . . . The purpose of the criminal law is to protect this social order." Ibid., 153-54. Scheid seems to agree that the libertarian interpretation is correct: "an individual enjoys freedom to the extent that there are activities he may undertake without forceful interference from other people. Essentially, freedom is the absence of coercion by others." "Kant's Retributivism," 269. Punishment is merely a hindering of a hindrance; "[a]ny infringement of the individual freedom defined according to universal laws is wrong, and so coercion which prevents the infringement of such individual freedom is justified." Ibid. The strict libertarian reading is, I think, problematic—I shall not explore that argument further here, except to reiterate that it seems inconsistent with his conceptions of justice and citizenship that Kant would think the *sole* justification for criminal punishment is the minimalist protection of "social order."
[338] Scheid, "Kant's Retributivism," 272.

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acceptable way, that is, in a way which gives full moral respect to the persons to whom the penal system is applied."[339] *Lex talionis* thus acts as a check on the tendency of the state to over-punish individuals who breach the terms of the social contract.

So on this "mixed" interpretation, the role of *lex talionis* is as a guarantor of "moral acceptability" of the punishment itself. Crime-control considerations (deterrence) give us reason to *threaten* citizens with punishment. But the "law of retribution" guarantees that, if someone does in fact break the law, she will be punished to the extent she deserves—and no more (but, of course, also no less). This would seem to allay one concern that is commonly raised about purely utilitarian punishment schemas: that they license the punishment of the innocent and the overpunishment of the guilty. Kant would, on this view, permit citizens to be threatened with punishment for violations of the UPR, to whatever extent necessary to deter crime—but would ensure that the actual punishments citizens receive were limited by *lex talionis*.

This view has some obvious advantages over the pure-retributivist one. It explains the apparent contradiction in Kant's use of deterrence language in some places and retribution language in others: he simply has in mind two different functions of criminal punishment (and perhaps neglects to distinguish clearly between them in his text). The hybrid approach also appeals to common-sense intuitions about the need for societies to deter crime—a theory of criminal justice that sees *no* role for deterrence would, at best, be one that departs radically from most countries' penal practices.

There is, however, a problem with the hybrid view, which suggests that Kant would not have endorsed it. Some reflection on how criminal justice systems function will show that bifurcating the criminal law into threat and execution is pragmatically

[339] Ibid.

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bizarre and possibly incoherent. Assume for a moment that we had a mixed deterrence-retributivist system. Legislators under this system would need to enact legislation that threatens citizens optimally. So, for example, we might find that threatening fifteen years in prison for burglary is the best way to deter people from committing burglary. Of course, it is unrealistic to suppose that *nobody* will ever commit burglary even when the threatened sentence is this high. Suppose, then, that a judge is now faced with sentencing a burglar—one of the few who were not dissuaded by the severity of the law. We might find that *lex talionis* demands that the burglar receive five years in prison for his crime. True, we *threatened* him with fifteen years, but he *deserves* exactly five years.

We now face a conundrum. If the judge imposes five years, then he has rendered the legislation ineffectual. Citizens would observe that, despite what the law says, the burglar in fact only gets five years. The deterrent effect of the fifteen-year threat is vitiated—indeed, we might expect that the only deterrent effect would be of the actual five-year sentence. On the other hand, if the judge were to impose fifteen years, then the deterrent effect of the legislation would be upheld—but at the impermissible cost of violating *lex talionis*. So it would appear that the mixed-justification view leads either to illegitimacy (the law is deceptive and untrustworthy) or incoherence (*lex talionis*, putatively necessary, in fact cannot provide the judge with a reason for deviating from what the legislature has threatened).[340]

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[340] It would also be possible for *lex talionis* to demand a more *severe* punishment than necessary for deterrence purposes, though this seems less likely in practice. In fairness, my example presupposes that would-be criminals have access to, and in fact obtain, information about sentences handed down by the criminal courts. It might be possible to construct a criminal justice system where all sentences are private—this is the default position in juvenile delinquency cases in the United States, for example, though they are not technically "criminal" matters. It seems unlikely, however, that nobody would catch on to the fact that there was a radical difference between threatened and imposed punishments—surely questions would be raised when Uncle Bill suddenly turned up at the family reunion only five years after his burglary conviction. More importantly, a criminal justice system that was radically private in this way might face

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A related question is whether it is reasonable that, as Byrd would have it, our focus should shift entirely away from "instrumental" concerns once an accused criminal has been convicted. Is it really the case that "just treatment of the individual" is the *only* thing that we ought to be concerned with in determining her punishment? This seems unlikely, for several reasons. Common sense would lead us to assume that, in order for the deterrent effect of a "threat" to be effective, we would at least need to publicize criminals' sentences—otherwise, the threat of criminal sanctions would be an entirely empty one. Moreover, Kant would surely not say that the *only* thing that matters once a criminal has been sentenced is how we treat him. This is an important concern—perhaps the most important one—but other considerations merit our attention: whether a dangerous offender will be incapacitated, whether there is a mechanism for publicizing the punishment to the public for deterrence purposes, whether anyone victimized by the crime has been vindicated, and so forth.

For example, suppose that David is convicted of raping Victoria. On the hybrid view, the deterrent purpose of (the threat of) punishment is served by the promulgation of public legislation proclaiming that rape shall be punished by exactly thirty years in prison. This lengthy sentence should, the legislature thinks, dissuade any rational person from committing rape. Once David has been convicted, though, all that matters is discerning the "just" sentence for him. But in order to have a hybrid system be coherent (or something besides a lie), then *lex talionis* has to play some role at the deterrent stage (the legislature has to figure out what is the appropriate penalty—or range of penalties, perhaps—for a given crime). Conversely, deterrence must play a role in sentencing (it

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significant questions about procedural fairness. In any event, it seems very unlikely that this is the kind of system that Kant had in mind—and it is certainly not one likely to be relevant to readers.

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would seem perverse from a deterrence standpoint if we sentenced David to a $100 fine and 20 hours of community service in lieu of prison, even if that were demanded by *lex talionis*). Surely, if we care about deterrence at all, then we still care about it when we are punishing David. So the "focus-shifting" aspect of the hybrid view is also problematic.

To be fair, interpreting Kant via a mixed theory that separates criminal punishment into threat and execution does seem to be an improvement over the pure-retributivist position. And perhaps there is some way to save the hybrid or mixed approach in order to avoid the kind of problem I have identified. I think, however, that we need not make such an attempt—because there is a third way of interpreting Kant's views on punishment which will suggest that whatever roles deterrence and retribution play in Kant's theory, they are at most derivative features of his account of justice as presented in the *Rechtslehre*.

C. A Third Way: Punishment as a Requirement of Civic Freedom

Kant's account of criminal punishment is, I believe, best understood as one facet of his theory of justice. Recall from Chapter 1 that Kant conceives of a just society is one whose basic structure is founded on the Universal Principle of Right: "[a]ny 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."[341] The UPR guarantees that all citizens will be able to pursue their chosen ends, to the extent that those ends are compatible with those of their fellow-citizens. We are free, in the political (rather than moral) sense, when we choose to

[341] MM 24/6:230 (emphasis removed).

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be governed by just laws, which in turn ensure that our wills are not governed by others'. A requirement of justice, then, is that each of us, as citizens, willingly submits to the just laws of our community.

In Chapter 2, we saw that willful violations of these just laws—specifically, of those laws which ensure the political conditions of citizens' civic freedom—are properly referred to as crimes. A criminal is someone who has willfully violated the civic freedom of his fellow citizens; he has not only interfered with others' freedom, but has also done so in a way that undermines the foundational structures upon which such freedom is based.[342]

A criminal, then, is someone who has broken the reciprocal bond that is the foundation of a just society. The "rightful condition" of civil society has been upset. According to Kant, though, restoring a state of free, equal, and independent citizenship depends crucially on the availability of state coercion—indeed, this is why he says that such coercion is *necessary*.[343] A lack of state power (or willingness) to punish criminals would have obvious ramifications for all citizens' civic freedom. If my freedom to pursue my chosen ends is threatened in a significant way by a fellow-citizen's behavior, then I can reasonably expect the state to step in and prevent or rectify such "hindrance" to my freedom.[344]

This line of reasoning has strong intuitive force. We perceive societies that lack adequate police and judicial powers—or willingness—to prosecute criminals as being

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[342] Note that if one violates another's civic freedom, but lacks the will to do something incompatible with the UPR (i.e. does not act on such a maxim), then the violation is, by definition, not a criminal act. The state may be justified in using some kind of lesser coercion in order to restore the rightful condition that existed before, but is not justified in violating the actor's civic freedom.
[343] MM 89/6:311-12. Note that Kant's view is retributive in this limited sense: crime necessitates punishment, and so punishment will always be in "retribution" (a more neutral term might be "response") for a crime.
[344] MM 25/6:231.

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less free than societies which have such capacities. We feel that our government does wrong, and we worry about our own rights and those of other citizens, when it fails to punish certain classes of offenders for spurious reasons—racial bias being an obvious example. The State is, then, rightly viewed as obligated to protect us against violations of the conditions of civic freedom, and to hold people who do commit such violations accountable for their actions.

The fact that the state is obligated to punish criminals in order to restore a rightful condition consistent with the UPR is helpful. Still, we may be left wondering how it is that punishment could be justifiable for one who embraces Kantian values, such as respectful treatment of all human beings. After all, "[c]riminal punishment is coercive state power in its most brutal form. . . . If locking human beings in cages or killing them is not a bad way to treat people, it is hard to imagine what would be. Punishment, in short, seems to involve conduct that is in itself wrong."[345] And even when punishment is administered humanely, it still seems to violate citizens' civic freedom. A fine or a community service order are, after all, still coercive in nature and, therefore, restrict the citizen's ability to fully govern himself. What, then, gives the government the *right* to impose such punishments, let alone more severe ones (such as imprisonment)?

The answer is, in one sense, quite simple. A citizen's civic freedom is, as we have seen, dependent upon his respect of others' civic freedom. But a crime is, by definition, a willful violation of another's freedom. Therefore, it follows that someone who has committed a crime loses the protection of the UPR. A criminal has, in a sense,

[345] Murphy, "Introduction," 1.

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forfeited or lost his civic freedom.[346] And, if he has no civic freedom, then it would not be unjust for the government to treat him coercively.

Now, this answer is perhaps *too* simple. For it would appear, upon closer inspection, to engender some questionable results. For one thing, if someone has lost his civic freedom *entirely*, then the government would appear to be justified in doing *anything* to him. Someone who is not free could, after all, be made a slave. Another worry is that if someone lacks civic freedom, then he is not a citizen (at least not in the full Kantian sense). But if he is not a citizen, then his fellow-citizens have no obligations toward him as far as justice is concerned. They may retain some moral obligations toward him—but they would still be justified in imposing punishment on him themselves, rather than letting the government do so.

These concerns are unwarranted, however, because Kant places some definite limitations on the coercive power of the state—and these limitations are not merely *ad hoc*, but are results of the structure of civic freedom. First, Kant asserts that while criminals lose the "dignity of citizenship," they do not lose their *human* dignity.[347] The difference between these types of dignity can be clarified by recalling that, in the *Groundwork*, Kant refers to human dignity as arising from our capacity for moral self-

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[346] This account is probably compatible with the rights-forfeiture view of punishment, at least on some accounts. See, e.g., Wellman, "Rights Forfeiture Theory." It does, however, provide a clearer explanation of *why* we are justified in asserting that criminals forfeit their rights.

[347] Specifically, Kant asserts that "no human being in a state can be without any dignity, since he at least has the dignity of a citizen. The exception is someone who has lost it by his own crime, because of which, though he is kept alive, he is made a mere tool of another's choice (either of the state or of another citizen)." MM 104/6:329-30 (emphasis removed). One oddity here is the parenthetical at the end of the passage, which makes it sound as if Kant thinks that criminal punishment can somehow be meted out by private citizens, rather than only by the state. This contradicts his later statements about punishment being the province of the government alone. It is *possible* that Kant has in mind some kind of lesser (civil) wrong; this may be what he has in mind when he later speaks, without clarification, of "private crime." MM 105/6:331. I shall proceed under the assumption that this passage is either an aberration, or explicable in another way.

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legislation.[348] The concomitant notion in the *Rechtslehre*, the dignity of citizenship, therefore refers to the capacity that citizens have to be co-legislators of just public law. In particular, the notion of civic *independence* (one key aspect of civic freedom guaranteed by the UPR) is of a citizen who acts "as a member of the commonwealth," which entails that he is a part of the "legislative authority [that] can belong only to the united will of the people."[349]

This, then, explains why Kant says that criminals lose their *dignity of citizenship*: by violating justly enacted laws, they betray themselves as legislators. They remove themselves from the body of those who act according to the "united will," always upholding the UPR. Note, however, that the criminal retains her *dignity of humanity*. Human dignity is without "price"[350]—it is not alienable, as property and even civic rights are. And because all human beings have an absolute duty to respect others' humanity, no just punishment could ever be administered that would violate human dignity. The state is therefore justified in treating criminals in ways that would ordinarily violate their *civic* rights, but not their *human* rights.[351]

So the first limitation on punishment is that the criminal's humanity must not be violated. Precisely what this means is debatable, but it seems clear that some kinds of treatment will be out of the question: torture, rape, and other sadistic practices are

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[348] See GW 84/4:434-35.
[349] MM 91/6:313-14.
[350] GW 84/4:434.
[351] That Kant thinks there are certain rights which nobody can lose, even via criminal activity, is supported in other passages. In answer to the question of "what kinds of punishment are [justifiably] adopted" by the government, he answers that "the legislator must also take into account respect for the humanity in the person of the wrongdoer." MM 130/6:362-63. This leads him to suggest, as noted previously, that some crimes may require a substitute punishment when imposing *lex talionis* in a literal manner would violate the defendant's humanity—as in the case of rape. Ibid. (I am not convinced that Kant's solution—castration—qualifies as much more humane, but the principle seems sound even if the application is questionable.)

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obviously incompatible with people's humanity, and even if the criminal has perpetrated such acts on others, we can never be justified in doing so to him. One important question, particularly for American criminal justice, is whether capital punishment is compatible with the respect of human dignity. As we shall see, Kant thinks so—but we might reasonably debate whether this is the case.

Another clear limitation on punishment has to do with *who* is doing the punishing. If offenders lose their civic dignity, then why could *other citizens* not punish them? Kant thinks part of the social contract (wherein we, as members of a just community, agree to act in accordance with the UPR) entails leaving the right of punishment in the hands of the government. Thus, for example, he states that the "right to punish is the right *a ruler* has against a subject to inflict pain upon him because of his having committed a crime."[352] He reiterates this in a discussion in the *Tugendlehre* on the difference between vengeance and punishment: "punishment is not an act that the injured party can undertake on his private authority but rather an act of a court . . . [for] no one is authorized to inflict punishment and to avenge the wrongs sustained by them . . . ."[353] Kant is not as clear as he could be about *why* this is the case—he seems to take it for granted whenever he mentions punishment—but it is presumably because of concerns similar to those Locke raised, nearly a century earlier, about the difficulties of leaving punishment in the hands of individuals. In the state of nature, we can never be sure whether we are punishing the criminal too much or too little, or letting our personal biases interfere with a rightful determination of deserved punishment. It is therefore necessary to give up our power to

[352] MM 104/6:331 (emphasis added).
[353] MM 207-08/6:460.

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punish to an impartial judge in order to ensure that criminals are punished to the proper extent.[354]

In addition, recall that punishment restores the "rightful condition" of civil society. But individuals cannot, on their own, create such a condition, which is the product of the "united will" of a body of citizens. It follows that individuals cannot, by themselves, *restore* such a condition once it has been disrupted by a criminal act. Only the state—which, of course, is but a representation of the "united will"—can punish criminals in such a way that the reciprocal nature of the UPR can be upheld.

We have, then, good Kantian reasons to assert that punishment must be administered only by the state. We also saw that punishment which violates human dignity cannot be justified. One problem remains, however. Even if we were certain that a particular type of punishment—say, confinement within a safe, well-maintained correctional facility—was permissible, there would seem to be nothing to prevent the government from using it in ways that seem, intuitively, to be unjustifiable. For example, the government could imprison a petty thief for the rest of her life. Even if imprisonment as such is not inhumane, there is something intuitively unjust about imprisoning someone for many years for a minor offense. This is, of course, the oft-discussed problem of *proportionality*. How are we to ensure that whatever punishment we impose "fits" the crime?

As mentioned in subsection A above, Kant holds that the nature and extent of a punishment should be determined by the principle of *lex talionis*: punishments should be,

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[354] John Locke, "Second Treatise," chapter 2, in *Two Treatises of Government*, ed. Mark Goldie, 116-122 (North Clarendon, VT: Tuttle Publishing, 2000). Kant's brief discussion of the problems human beings would face in the state of nature seems to echo Locke's concerns—thus such a condition would be "a state devoid of justice in which when rights are in dispute, there would be no judge competent to render a verdict having force." MM 90/6:312 (emphasis removed and parenthetical Latin translations omitted).

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as far as possible, *identical to* the crime committed. Kant thinks that this will answer both the means and extent questions—thus when someone steals, his property is forfeited; when he commits murder, "he must die".[355] This, though, might seem troubling. *Lex talionis* is, after all, one of the reasons scholars have traditionally thought of Kant as a retributivist. Moreover, a strict insistence on this principle—even excepting cases where its application would result in violations of human rights—can seem unfair in many cases. For example, we often assume that someone who is a first-time criminal offender ought to receive a lesser sentence than someone who has spent a lifetime violating the law. But applying *lex talionis* would seem contrary to the intuition that we should mitigate (or perhaps aggravate) sentences based, not merely on the nature of the offense, but also on the circumstances of the offender.

Perhaps some insight can be gained by considering *why* Kant seems to insist on *lex talionis*. What argument could justify his reliance on this principle as the *only* proper response to questions about extent and method of punishment? Here is the main passage in the *Rechtslehre* on this topic:

> But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. . . . [O]nly the *law of retribution* (*ius talionis*)—it being understood, of course, that this is applied by a court (not by your private judgment)—can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.[356]

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[355] MM 106/6:333 (emphasis removed).

[356] MM 105-106/6:332 (emphasis in original). Note that Kant's reference to "within the people" is consonant with the view that Kant conceives of crime as a breach of the social contract based on the

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Of note here is that the principle motivating *lex talionis* is not retribution—it is *equality*. Although Kant uses the word "retribution," it is employed only to identify *lex talionis*, not to justify it. Kant's sole reason for claiming that *lex talionis* is the *only* just way to punish is that any other way of meting out punishment would be "fluctuating." Competing principles would cause the scales of justice to tip to one side or the other—to become unbalanced—resulting in an inequitable distribution of punishments.

In section II of this chapter, I will argue that *lex talionis*[357] should be supplemented by a more flexible principle of punishment based on an aspect of civic virtue. For the moment, though, it is sufficient to note that, whatever misgivings we might reasonably entertain about *lex talionis*, Kant thinks that this principle serves the end of civic equality, and surely he is right that utilitarian calculations should not alter our commitment to just punishment. We should not be prepared to sacrifice the innocent at the whim of the majority, nor should not be willing to release the guilty because it is politically expedient. We might wonder whether consideration of the criminal herself, or even the crime victim, ought to cause us to alter our initial calculation of the degree of punishment the criminal deserves—but this is, I think, *not* the kind of factor that Kant is most worried about here. He seems, rather, to be cautioning against the kind of

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reciprocal nature of the UPR. Wronging someone *outside* the state is not a crime (though morally wrong), because one is not legally bound in a reciprocal relationship with that person. The State cannot overstep its authority and punish wrongs that occur to people who are not parties to the social contract. This raises the question of whether Kant's theoretical framework can provide a reasonable account of *international* criminal law. I cannot hope to broach that topic here, though it should be noted that Kant does discuss matters of international justice, particularly in "Toward Perpetual Peace."

[357] For a more detailed argument against *lex talionis*, see Holtman, "Toward Social Reform." Holtman argues that Kant made some unwarranted empirical assumptions that motivate his discussion of *lex talionis*; if we do not accept these assumptions, then *lex talionis* becomes a less compelling principle. Ibid., 18. Assessing the strength of each of these assumptions would be complicated; Holtman's main project, though, is not to argue definitively against Kant's insistence on *lex talionis*, but simply to point out that this commitment does not follow necessarily from his larger theory of justice. Ibid. My goal in the latter half of this chapter is similar.

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"Pharisaical" reasoning that would cause us to, as it were, crucify those who were above reproach on the one hand, and fail to mete out just punishment to deserving offenders on the other, simply because doing so would be unpopular.[358]

Similar considerations seem to be at work in another passage, where Kant argues that it would be impermissible to offer to "preserve the life of a criminal sentenced to death if he agrees to let dangerous experiments be made upon him and is lucky enough to survive them, so that in this way physicians learn something new of benefit to the commonwealth."[359] Kant thinks that this would be unacceptable because "justice ceases to be justice if it can be bought for any price whatsoever."[360] On the one hand, one might wonder why this would be so offensive. If someone already condemned to death offered to undergo an experiment in the hopes of helping other people, why should we not allow him to do so? Would this not be a noble gesture? Might it not be born of a desire for penance on the part of the offender?

Kant's objection, however, is probably twofold. First, this kind of experimentation seems to use the criminal's very life as a mere means to an end, which is categorically prohibited by the moral law.[361] Second, the proposal permits the criminal to buy his way out of punishment. If one can offer one's body to science in order to escape punishment, why could one not offer the government enough money to reduce one's sentence? This might seem more repugnant than the possibility of medical experimentation—but Kant avers that, if justice is to be equal among citizens, then one

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[358] MM 105/6:331. Kant's allusion is presumably to the New Testament story of the Roman leader Pilate placating the Pharisees (portrayed as hypocritical religious leaders concerned with maintaining their positions of authority) by ordering Jesus (though innocent) to be killed, and a robber (though guilty) to be set free. See Matthew 27, esp. vv. 20-24.
[359] MM 105/6.332.
[360] Ibid.
[361] GW 80/4:429.

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cannot use any means whatever, be it one's money or one's body, as a get-out-of-jail card. To allow otherwise would be to offer an advantage to some criminals that is not extended to others—and this inequality would be impermissible from the standpoint of justice.[362]

The bottom line here is that Kant thinks *lex talionis* is the proper answer to questions about the mode and extent of punishment because it is conducive to treating criminals equally, and equality is important in a system of Kantian justice. Whatever qualms we might have about Kant's embrace of *lex talionis*, however, we have seen how punishment can reasonably be viewed as a requirement of Kant's account of civic freedom. And this account is, I hope to have shown, significantly more convincing than the existing retributivist and hybrid ones.

1. *Objections to this Interpretation*

Thus far, our interpretation of Kantian punishment as a facet of his theory of justice sounds reasonable. Can we, though, reconcile this interpretation with textual concerns the hybrid theorist raises? Consider first the references Kant makes to deterrence (and occasionally rehabilitation) as apparent goals of punishment. Threatening citizens with punishment for the violation of the UPR can be seen as a way of preserving the freedom, equality, and independence of all concerned. Such deterrent threats, if effective, reduce the likelihood that a citizen will be victimized by a criminal.

[362] What if the medical experimentation were offered equally to all prisoners, or all prisoners condemned to death? Would this not fulfill the equality requirement? If so, perhaps this is not all that Kant is concerned about. I doubt, however, that this scenario would really be indicative of equality, at least of the kind Kant cares about. If all prisoners took part in the medical experiment voluntarily, it would still be the case that some would live and some would die. Or, even if the drug worked perfectly as expected, the scenario would still entail the *risk* of some living and some dying. Human life may well be characterized by random luck, but Kant seems to be saying that it is not a proper basis for a just social institution. We ought to demand more of political equality than having an equal chance at entering the lottery.

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Deterrent threats of punishment are applied equally to all citizens—nobody is singled out as a potential criminal—which sends the message that the state takes seriously the rights of all citizens and wishes all to benefit from the freedoms gained by participation in civil society. They also put potential offenders on notice that their freedom will be diminished, and their status as independent citizen-agents jeopardized, should they choose to act in abrogation of their basic duties as citizens to uphold the UPR.

Thus, while deterrence is arguably an important aspect of (the threat of) criminal punishment in a Kantian scheme, this would only be the case insofar as deterring crime actually promoted Kantian justice within civil society—an important point that hybrid theories do not recognize. This is why we are able to evaluate the justness of criminal laws independently of their deterrent efficacy; unjust laws may well serve deterrent purposes admirably but nevertheless be problematic because, say, the act being punished is one compatible with (or even necessary for) civic freedom.[363]

Rehabilitation as a (partial) aim of punishment from a Kantian perspective is a more interesting question. Insofar as the criminal justice system could "rehabilitate" offenders, it is worth asking what this might mean. We cannot mean strictly *moral* rehabilitation, since we rejected legal moralism as a proper basis for criminalization (see Chapter 2). Perhaps, though, we could conceive of a kind of *civic* rehabilitation, in which the offender is offered help regaining his literal and figurative citizenship: his place in the community, and his commitment to the civic freedom of his fellow-citizens. *This* type of rehabilitation seems reasonable, and compatible with Kant's view of civic freedom.

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[363] From a communicative perspective, there may also be some value in promulgating criminal laws even if they are anticipated to have little deterrent effect. Doing so constitutes an assurance by the government that it values its citizens' rights.

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The justice-based interpretation can also make sense of the seemingly strange passage on "necessity" mentioned in subsection A above: the drowning man who, "in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself."[364] Kant does seem to say that the reason the drowning murderer is unpunishable is that punishment would have no deterrent effect in such a case. But a closer look reveals that Kant's main point is that "there could be no necessity that would make what is wrong conform with law."[365] On the one hand, Kant seems to be saying that a morally bad act can never be "legal": we would not want our law to say that murder is ever *permissible*. On the other hand, there is a certain category of bad-luck cases where murder does not, strictly speaking, violate the UPR, and where it would therefore be inappropriate to apply coercive punishment.

If I am drowning in the ocean, I am not acting as a citizen within civil society, but as an animal struggling for survival. The circumstances are not such that the demands of justice are relevant—nor can they be met. No action that I take under such circumstances will preserve the aims of the UPR. If I let myself die (which Kant acknowledges may be the more noble and morally worthy act), I fail to preserve my own freedom; whereas appropriating the plank for myself will fail to preserve the freedom of the other drowning man. There can be no equality here, since one of us must die. And our status as independent citizens is hardly at issue at the moment. Since state coercion is justifiable *only* to preserve the aims of freedom, equality, and independence of citizens, it fails to be relevant in this particular case—even though we privately might judge that I lack some personal virtue because I chose to save my own life at the expense of another's. In

[364] MM 28/6:235.
[365] MM 28/6:236.

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contemporary terms, I am excused, though not justified: what I did might not be morally right, but I should not be punished for having done it.

Thus, while the hybrid theorist can point to the few references to deterrence in order to explain the "necessity" case, the justice-based interpretation provides a fuller and more compelling explanation of that initially abstruse passage. Now, however, we need to confront a particularly well-known section of the *Metaphysics of Morals* that is commonly used to paint Kant as a hard-nosed retributivist. Can we square Kant's discussion of capital punishment with the justice-based interpretation?

Kant categorically rejects any sort of mitigation or tempering of capital punishment for convicted murderers.[366] If the death penalty is taken to be merely the starkest example of Kant's retributivist stance—that is, if Kant intends us to be able to replace "murder" with any other crime and "death" with a concomitant penalty—then there would seem to be little need to appeal to other principles, as both the hybrid and justice-based interpretations attempt to do.

I believe, however, that this is not an accurate reading of the death-penalty discussion, which begins precisely by *distinguishing* murder from other crimes. Kant prefaces the murder passage with a discussion of theft, pointing out that, since taking all a thief's possessions would result in a burden on the state to "provide for him free of charge," the thief can be forced to perform "prison labor" instead.[367] Kant believes murder to be different in kind, however, from ordinary crimes such as theft. Murder ends a human existence not only in the biological sense but also in the Kantian one, where

[366] Kant does say that we ought to execute murders humanely. MM 106/6:333. However, this seems a rather minor concession considering that he apparently does not consider the possibility that *any* murder might be justly punished by anything other than death (except of course in the "necessity" cases).
[367] MM 106/6:333.

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human life is particularly valuable because of its potentiality: to be human is to be free and autonomous, capable of willing and creating and reasoning. To kill is to deprive a human being of such potential. For all other offenses,[368] no matter how heinous, the victim at least remains capable of realizing that potential (albeit possibly to a lesser degree than before the victimization). In the context of life in civil society, murder permanently deprives the victim of the freedom, equality, and independence of citizenship. Again, no other crime can effect such a result.

For this reason, Kant thinks that, while the thief can be punished by a method other than stealing, if a criminal "has committed murder he must *die*. Here there is no substitute that will satisfy justice. There is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer."[369] Whether or not we agree with Kant about this, the important point here is that Kant's commitment to capital punishment is grounded at least partly in a contemplation of the magnitude of the injustice perpetrated upon a victim by a murderer. Many will disagree with Kant's dramatic assertion that "blood guilt" will "cling to the people" who do not "insist upon [capital punishment]; for otherwise the people can be regarded as collaborators in this public violation of

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[368] Well, almost all. It is unclear whether Kant considers something like negligent homicide to be equivalent to murder. In that situation the negative impact of the defendant's actions is generally grossly disproportional to the defendant's punishment, which is normally something significantly less than life in prison, let alone the death penalty. I am setting aside for present purposes cases of crimes involving death where the defendant's *mens rea* is something less than intentional or knowing. Also, one could conceive of a situation where, say, the defendant only assaults the victim, clearly without the intent to kill, and the victim is rendered comatose for the rest of his life. In such a situation perhaps the defendant has committed an offense with substantively the same effects as a murder, although technically the victim has not died. Kant might simply treat this as a murder. I am also disregarding such difficult scenarios for now, since the distinction between murder and lesser crimes is usually much more obvious.

[369] MM 106/6:333. (emphasis in original).

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justice."[370] Still, Kant is surely correct to emphasize the importance of punishment for certain types of crime, most notably murder. Failure to prosecute and punish murder amounts to a failure of justice: free, equal, and independent citizens can reasonably expect that the government will pursue and prosecute such offenses—and will naturally view police, lawyers, judges, and others as complicit in injustice if they fail to do so. If we were to accept the premise that the death penalty is the appropriate punishment for murder, then surely a failure to impose it *would* indicate a failure on the part of society to take murder seriously.

Many will nonetheless find Kant's argument in favor of capital punishment insufficient. We might think that, while murder is heinous and should be treated accordingly, the government ought to consider other options in punishing even the worst kind of criminals. If we are skeptical about the exacting demands of *lex talionis* in the first place, then we certainly should question whether homicide is really the *only* appropriate response to homicide. And while Kant criticizes an anti-death-penalty advocate for being "moved by overly compassionate feelings,"[371] perhaps justice would best be served by "tempering" retribution with mercy.[372] Moreover, even if we were to accept that for the "average" murderer death would be the appropriate penalty, it is easy to construct a scenario where it seems grossly unfair to impose this sentence. Even in the United States, where capital punishment remains legal in many states and on the federal level, the Supreme Court has restricted the practice where certain categories of individuals are concerned—notably juveniles and the mentally handicapped. This seems right: surely at least *some* capital cases call for a "substitute" form of punishment.

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[370] Ibid.
[371] MM 108/6:334-35.
[372] See Steiker, "Tempering or Tampering?"

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Kant may simply not have thought out the injustice of executing certain classes of citizens. But we should also remember that Kant's initial attraction to *lex talionis* arises primarily out of a concern with *equality*. A common criticism of the death penalty as implemented in the United States is that it is racially biased. Although this is generally taken to be an argument in favor of abolishing capital punishment, one could understand why Kant, given a particular historical context, might *insist* on executing murderers. While it would be patently unfair to execute only black murderers while sparing the lives of white murderers, there is at least a sense in which equality would be served by executing *all* murderers, regardless of race. Many contemporary readers (including me) will find this conclusion incomplete, if not perverse—after all, we do not generally find it a good argument for clearly immoral practices (slavery, genocide, and so on) that people are victimized *equally*. If putting people to death is *prima facie* wrong, then the fact that we do it equally will not justify it morally. But, as Thomas Hill puts it, "considerations of comparative justice make understandable, even if not defensible, Kant's thought that the long-standing (supposedly) just policy of executing murderers should not be abandoned" until everyone has received the same kind of treatment.[373]

Regardless of one's feelings about capital punishment, Kant's endorsement of the practice can be explained within the context of a prior commitment to the promotion of a just social order—one in which citizens' civic freedom is of primary importance. We might easily disagree with Kant's conclusions while retaining the general structure of his theory of punishment.

[373] Hill, "Kant on Wrongdoing," 434.

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D. Conclusion

The foregoing constitutes an overview of three competing interpretations of Kantian punishment. I have argued that an interpretation based on Kant's account of justice—wherein the purpose of punishment is to preserve the civic freedom of all citizens—is superior to the standard retributivist and hybrid accounts. Further work remains to be done in order to show what practical implications this interpretation has for a criminal justice system aspiring to fulfill a Kantian model of justice. First, however, we must address a salient issue I mentioned and left unresolved: whether we should accept *lex talionis* as the ideal way of determining the nature and extent of criminal punishment.

II. PUNISHMENT AND CIVIC VIRTUE

I argued in Chapter 3 that citizens ought to be more involved in the practice of criminal justice. One specific recommendation I made was to provide a greater role for the jury in sentencing convicted defendants. When jurors do this, they are participating in punishment—by directing the state to carry out their sentence. But how are jurors to determine the appropriate punishment for a given defendant?

As I discussed in section I of this chapter, Kant's response is simple: punish according to *lex talionis*. I suggested, however, that even if we agree with Kant's argument for the justification of criminal punishment, we ought to be skeptical of his reliance solely on this principle. In this section, then, I will argue that the second component of Kant's theory of justice—his account of civic virtue—can provide us with rationale for deviating from *lex talionis*. In order to do so, I will resort to the same approach I defended and utilized in Chapter 3: deploying Kant's moral theory in order to

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strengthen his political theory. In particular, I will focus here on one moral value which, I will argue, is a desideratum of any just system of criminal punishment: moral cognition. In order to see what moral cognition has to do with criminal punishment, I shall first need to explain what role this concept plays in Kant's moral theory.

A. The Duties of Conscience and Moral Cognition

In the *Tugendlehre*, Kant describes two duties that one owes to oneself as an autonomous moral agent: the duty to be one's "own innate judge,"[374] and the duty to "know [one]self."[375] The former is tied to Kant's conception of conscience, which he analogizes to a court of law. In Kant's simplified courtroom, there is an accuser (the prosecutor), an advocate (the defense attorney), and a decision-maker (the judge). The attorneys plead their case, and the judge renders a verdict ("condemnation or acquittal").[376] Conscience, for Kant, is an analogous procedural mechanism internal to the rational moral agent. One brings charges against oneself based on some putative lapse of morality (as a prosecutor), defends one's actions against such charges (as a defense attorney), and passes judgment on oneself (as a judge). Finally, to this judgment is affixed a punishment: "happiness or misery" depending on whether the action has been judged to be morally worthy or not.[377] Kant clarifies, though, that an "acquittal" cannot lead to a "reward" nor to "joy" but to mere "relief from preceding anxiety."[378] Furthermore, this internal tripartite courtroom drama is not only a *capacity* humans have, but it is something that is omnipresent in our consciousness: "Every human being has a

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[374] MM 188/6:437.
[375] MM 191/6:441. Kant appears to use the terms "self-knowledge" and "moral cognition" interchangeably. I shall do so as well when discussing Kant's moral theory. However, when I argue for an extension of this duty to the societal realm, I will use the term "moral cognition" exclusively.
[376] MM 189/6:438.
[377] MM 189/6:439 (author's footnote).
[378] MM 190/6:440.

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conscience and finds himself observed, threatened, and, in general, kept in awe (respect coupled with fear) by an internal judge; and this authority . . . follows him like his shadow when he plans to escape."[379] Kant thinks that we cannot escape self-judgment—at least, perhaps, without significant efforts at self-deception.

One might question whether this conception of conscience-as-courtroom is satisfying. For one thing, why is it that there is no "reward" for morally right actions? We have a tendency to praise others for morally laudable actions that is perhaps as strong as our penchant for condemning wrongdoing. We think *good* parents praise their children for right behavior as well as punish them for wrong behavior. It may be that children learn to act at least in part based on rewards and punishments, and Kant would say that they have for that reason not attained full moral development. We do, though, also reward *adults* who (for example) perform acts of charity in the community, or who sacrifice time and money on projects that benefit others. Perhaps these are supererogatory acts: public rewards are often bestowed upon those who seem to go above and beyond the requirements of morality. But what about the person who is overall an unsavory character but manages to rise above his animalistic inclinations to perform an act of "merely moral" quality? I am thinking, for example, of the addict who celebrates a few months free of her addiction, or the lifelong Scroogeish miser who finds joy in deciding, for once, to bestow his largesse on others. While Kant would find these people to have behaved in a morally worthy fashion, he seems to deny that they should be able to "reward" themselves for such laudable behavior.[380]

[379] MM 189/6:438.

[380] One possible response, compatible with the one I will explore shortly, is that "rewards" of this latter type are not for acting morally in the fullest sense, but because someone like the addict is, in part, morally childlike. Rewards in this type of case function as encouragement toward fuller moral development, which

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A second potential objection is that it seems at first glance far too simplistic in at least some cases to be able to make a binary judgment about the moral worth of one's actions. If your inner prosecutor calls you to task for having stolen something, it seems obvious that your inner judge will condemn you. Likewise, if you try to prosecute yourself for a momentary lapse of forethought (you unwittingly neglect to hold a door open for someone), it seems equally clear that a well-functioning inner judge will acquit you. In many cases where there is an ostensible moral violation, though, it is not at all clear that the correct judgment is simply condemnation or acquittal. It seems that in many cases something more is required: "No, I didn't steal anything, *but* I had morally unworthy thoughts about doing so"; or "Yes, I failed to treat others with polite respect *but* I had a lot on my mind and had every intention to behave otherwise." How can the binary "courtroom" model account for the seeming necessity of making these more nuanced judgments?

One way of responding to these concerns is by appealing to the second duty that Kant presents in this section of the *Tugendlehre*: that of self-knowledge.[381] Kant explains that to gain this knowledge one must "scrutinize" or "fathom" oneself, and that the knowledge sought is that of the "heart – whether it is good or evil."[382] The idea seems to be that we have a duty to explore our own motivations and desires, and to determine whether and to what extent our actions result from right reasons (conformity with the moral law) rather than morally suspect ones (desire for public approbation, say, or even

includes the capacity to act free of the influence of addictive substances. Importantly, though, Kant would likely point out that *all* of us are morally deficient in some respect—we are all subject to influences that interfere with our moral autonomy. Incentives toward goodness (publicly bestowed or granted by oneself) are perhaps a permissible way to encourage moral development, so long as we do not make the mistake of thinking of the reward as the right reason for acting morally. For further discussion of Kant's views on moral training or education, see Herman, "Training to Autonomy."

[381] MM 191/6:441.

[382] Ibid.

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the wish to be free from guilt). Kant thinks that engaging in this sort of "moral cognition will, first, dispel fanatical contempt for oneself . . . [and] will also counteract that egotistical self-esteem which takes mere wishes . . . for proof of a good heart."[383]

In other words, the particular self-judgments rendered by our conscience ought to be balanced by a more generalized view of our moral selves, which requires "impartiality" and "sincerity" about our "moral worth or lack of [moral] worth."[384] I might, then, rightfully condemn myself for a moral failing, but nevertheless recognize when viewing myself objectively that I act in morally sound ways most of the time, and should regard myself as morally worthy, on the whole. On the other hand, I might correctly acquit myself of a certain transgression yet recognize that, all things considered, I was really just lucky that I did nothing wrong this time around.

The tempering effect of this type of self-knowledge—which allows us to avoid being both too hard and too easy on ourselves—supplies the apparently missing elements from Kant's description of the conscience. For although our inner judge might not allow us to experience "joy" simply because we are acquitted of putative wrongdoing, perhaps Kant would allow us to feel this sort of "reward" when considering ourselves objectively. Thus the aforementioned addict who has found the strength of will to remain free from her vice for a period of time might genuinely experience joy at having come this far since, all things considered, that is rather an impressive accomplishment for her. Similarly, although one's conscience renders a simple "guilty" or "not guilty" when considering the moral worth of a specific act, self-knowledge may be what supplies the "*but*" that we often attach to actions with moral content. Thus I might as an act of

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[383] Ibid.
[384] Ibid.

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conscience correctly acquit myself of, say, a particular instance of lying, yet also as an act of *moral cognition* recognize that honesty is unfortunately not representative of my actions as a general matter and, therefore, I deserve very little self-satisfaction for not having lied on this particular occasion.

One question we might pose is whether Kant intends for the self-knowledge aspect of our moral duty to diminish or augment in any way the *penalty* our conscience-qua-judge imposes on us for violation of the moral law. Kant does not address this explicitly. Indeed, he does not say much at all about what the penalty is for a guilty verdict rendered by one's conscience—only that it will be "happiness or misery." Presumably, though, not all moral failings ought to make us feel equally guilty: murdering and overindulgence in food hardly seem to warrant the same degree of self-imposed misery. It would seem, then, that there must be some means by which we determine how *much* misery or happiness we ought to allot ourselves based on our moral status. Since Kant does not supply such a mechanism in the section on conscience, but follows this up with the section on self-knowledge, it would be reasonable at least to consider whether this latter component of the moral being can do this work.

One might think that determining how much guilt to punish oneself with does not require self-knowledge in most cases. Obviously one who commits murder ought to feel much worse about himself than even the most reprehensible glutton. But the issue is not simply one of comparing two types of moral failings, but one type under different circumstances. Thus, for example, a person who has told a small lie one time to avoid a stressful confrontation might reasonably impose less misery on herself than ought to be entailed by the average lie; conversely, one who engages in systemic deception of a

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spouse in order to cover up an affair ought with full self-knowledge to impose a greater degree of conscience-ordered misery than for an average lie.[385] Viewed this way, the duty of self-knowledge is intended not primarily to augment or diminish self-punishment but, more importantly, to discover the *appropriate* punishment for one's wrongs.

So far, I have argued that Kant intends the duty of self-knowledge or moral cognition to temper or refine the judgment we pass on ourselves through our conscience, based on the totality of our moral life circumstances. This is not the usual interpretation of Kant's view of conscience, which is commonly characterized as being "far from a gentle whisper of moral encouragement. It places us on trial for (perceived) moral failings, accuses us, passes sentence, and makes us suffer."[386] I am suggesting, though, that while Kant does view morality categorically in one sense (one does or does not violate the self-legislated moral law[387]), he also views human beings as motivationally complex creatures, and invites us to acknowledge the complexities involved when we make choices that either comport with or deviate from the strict standards of morality. Such self-examination is just as much a duty to ourselves as is self-judgment, and

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[385] Kant is notoriously opposed to all forms of lying, even in cases where doing so would seem to be morally permissible, if not obligatory—as in the infamous "murderer at the door" scenario. See Kant, "On a Supposed Right to Lie from Philanthropy," trans. Mary Gregor, in *Immanuel Kant: Practical Philosophy*, ed. Paul Guyer and Alan W. Wood, 605-615. Cambridge: Cambridge UP, 1996. Part of the explanation for this may be Kant's concern about the moral wellbeing of the liar. Indeed, his discussion in the *Tugendlehre* on lying (MM 183-83/6:429-30) falls under the general heading of "a human being's duty to himself merely as a moral being." MM 182/6:428 (capitalization altered). By lying, even about small matters, one opens oneself to the possibility of self-deception. But proper moral judgment requires, above all, honesty with oneself, for moral cognition cannot function properly in the absence of such truth. It might be possible to agree with this general sentiment without taking the seemingly extreme position that Kant does with respect to lying to the murderer. But there is undoubtedly *something* right, even noble, about his unwavering commitment to the truth.

[386] Hill, "Kant on Wrongdoing," 408.

[387] This is not to say that all Kantian duties are simple or immediately recognizable. Many of our "imperfect" moral duties may be difficult to discern; it may certainly be challenging to balance all the ends to which we are required to attend. It is only to say that Kant endorses a view by which we can, ultimately, give a specific answer to questions such as: "Is my action a morally praiseworthy one?"

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inevitably leads to a more nuanced (and, often, more merciful[388]) view of our selves than Kant is usually given credit for.

My point in this section has been to show that, while Kant's conception of conscience can seem just as unyielding as his discussion of punishment is sometimes taken to be, this is at best a superficial reading. While self-judgment is an important to our moral life, so is the duty of self-knowledge or moral cognition. Only when we attend to both of these duties do we treat ourselves in a way that is respectful both of our moral agency, but also of our position as imperfect human beings subject to many influences other than the self-legislated moral law. Assuming this interpretation is correct, we might then ask whether a Kantian should countenance some analogue to self-knowledge or moral cognition in our relationships with others—a proposition for which I argue in the following section.

B. Moral Cognition in Social Life

Kant does not discuss the capacity for moral cognition as applicable beyond the duty of self-knowledge. I think, however, that reflecting on the ways that we interact with other people will convince us that moral cognition is, in fact, a natural and essential part of social life—and that Kant would himself willingly endorse such an extension of this principle. Consider, for example, the types of judgments we must regularly make about the motives behind someone's actions. For example, imagine that a friend fails to

[388] I am thinking here of instances where we judge ourselves too harshly, as many of us are wont to do. Of course, at times we may also fail to appreciate the moral significance of our actions—we may underestimate the harm we have caused another, for example—in which case moral cognition will result in harsher judgment. My suggestion in section II of this chapter will be that moral cognition in a social context will generally result in a tempering of our judgments rather than the reverse.

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follow through on a promise, or that a child misbehaves, or that a spouse deceives. What are we to do under such circumstances?[389]

I should think it clear that our response in such situations is highly dependent on the motives of the actor and background conditions of the action. If the friend is ill, or the child very young, or the spouse under intense stress, then we are likely to react in different—specifically, more merciful—ways than if the friend turns out to be selfish, the child old enough to know better, or the spouse systematically dishonest. But how do we make such determinations? Quite naturally, and without always being aware of it, we engage in moral cognition.

For example, suppose that Joan's friend, Kevin, promises to watch her children one afternoon so that she can go to a job interview. Kevin does not show up, and fails to answer her phone calls. Joan, having relied on Kevin's promise, cannot find anyone else to watch her children on such short notice, and so she misses the job interview. This is a significant setback for her, since she has been unemployed for months, this job would have been ideal for her, and the interview cannot be rescheduled.

How should Joan react in this situation? That is, what should she do *with respect to Kevin* and their friendship? She has many options, such as telling Kevin what a great friend he is, pretending that nothing happened, writing an angry letter to him, refusing to ever talk to him again, explaining to him that she is upset, or hiring someone to kill him. Some of these options will be morally inappropriate due to their nature: killing someone without a sufficiently good reason is obviously immoral, and obsequiously praising

[389] I have chosen *negative* actions because, as should be obvious, I will ultimately be drawing an analogy with criminal actions. Still, this is clearly the case with *positive* actions as well. We must determine how to respond appropriately to praise, gifts, and other indicia of social approbation, esteem, or love.

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someone who has harmed us may be as well.[390] But many other options seem open to Joan. How is she to determine which ones are morally appropriate in the case at hand?

What Joan ought to do is, of course, try to learn more. Ideally, Joan will determine the facts of the situation with "impartiality" and "sincerity" in order to determine Kevin's "moral worth" with respect to this incident.[391] Certainly, if Joan discovers that Kevin got into a serious car accident on the way to her home, then she ought to judge his failure to watch her children much differently than if it turns out that he spent all night drinking and therefore failed to wake up in time. It will matter, too, whether this is the first time Kevin has ever failed to follow through on a promise, or whether this is a chronic problem.

One might wonder whether expecting Joan to "morally cognize" Kevin in such a situation is unrealistic. Given the harm caused to her in this case, can we reasonably expect Joan to react in such a rational manner, when her initial inclinations will likely be anger at Kevin? Kant's moral theory is again helpful here. He proposes that personal virtue involves the "capacity and considered resolve to withstand a strong but unjust opponent."[392] Such "opponents" include the "[i]mpulses of nature" that beset human beings and create "obstacles" to doing their moral duty."[393] It is perfectly *natural* for Joan to be angry—it is even, in a sense, justifiable. But surely Joan ought ideally to resist her impulse to react angrily. Perhaps this means she should never act out of anger[394]—

[390] See Kant's discussion of "servility," MM 186-88/6:434-37.
[391] MM 191/6:441.
[392] MM 146/6:380. See also the discussion of virtue at MM 156-57/6:394-95.
[393] MM 146/6:380.
[394] Although it initially appears that anger is never a morally virtuous response to others' wrongdoing, I am unsure whether this is *always* the case. There may be something to be said for a kind of "righteous indignation" that impels us to seek justice for ourselves and others. Still, it seems clear that even this kind of response is improper until we are aware of all the relevant facts in a given situation. Helpful here is

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but it means *at least* that she should not act from anger until she knows all the facts about Kevin's failure to appear for babysitting duty.

In reality, of course, engaging in moral cognition will be particularly difficult when we have been seriously wronged by others. In some cases it may simply be psychologically impossible under the circumstances, and we must be wary of judging Joan if she fails to fulfill this moral duty in this case. Still, it seems reasonable to assert that the use of moral cognition in social circumstances such as Joan's is the proper moral ideal, however difficult it may be to attain in practice.

A more significant worry here, though, is that the purpose of moral cognition—proper judgment of others—is misguided. While we might be *tempted* to pass judgment on other people, and while we might in fact *do* this regularly, we really *should not* do so. One might appeal to religious aphorisms, such as "judge not, that ye be not judged" in support of this proposition.[395] On this view, it would perhaps be acceptable to engage in moral cognition of *oneself*, but not of others; we should live in such a way that we accept others regardless of their actions, while leaving judgment in the hands of God. While there is certainly something noble about this kind of sentiment, as an objection it misses the aim of moral cognition. The purpose is not necessarily *judgment-qua-condemnation* of those who fail to meet some standard of goodness. Rather, the purpose is to understand what type of *judgment-qua-social response* is appropriate under the circumstances, given the relationship and other specific moral commitments we might have.

Kant's discussion of the "vices of hatred for human beings," in which he decries revenge, endorses forgiveness—but also distinguishes this from the "meek toleration of wrongs." MM 206-08/6:458-61.

[395] Matthew 7:1.

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To see this, take a more serious case. Suppose that Vivian discovers that Wayne, her spouse, has had an affair; furthermore, Wayne refuses to admit to the affair, apologize, or even discuss the matter with Vivian. After engaging in the process of moral cognition, Vivian determines that the appropriate response is to seek a divorce. Vivian might reasonably say that she still cares about Wayne, wants the best for him, and respects him as a fellow human being; she has, however, determined that divorce is the morally appropriate response to Wayne's actions. Admittedly, maintaining such a positive attitude toward Wayne might be difficult, but the point is simply that Vivian's "judgment" of the appropriate response to Wayne need not entail a condemnation of Wayne. Moreover, this type of judgment is fully compatible with the notion that making an ultimate determination about whether Wayne is, all things considered, a "good" person or not is not one that mere mortals are equipped to make. What Vivian can, and should, make a judgment about is what her relationship to Wayne should be, and what response his actions and motives merit.

Finally, as a practical matter, it is hard to see how we can avoid making these kinds of judgments, nor would it be healthy in many cases to do so. We cannot, and should not, expect Joan, much less Vivian, to simply go about their lives as if nothing at all had happened. This may be possible (and desirable) in cases of very minor social conflicts, as when an inconsiderate driver cuts one off in traffic. But in cases where we suffer a cognizable harm at the hands of those we associate with, then we must determine

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what response is appropriate under the circumstances—and failing to do so, at least consistently, amounts to a failure to respect oneself.[396]

C. Moral Cognition in Criminal Punishment

In subsection A, I explained Kant's view that humans are capable of engaging in moral cognition after condemning themselves by the operation of their consciences—and that doing so is morally required in order to respect themselves as moral agents. I then proposed that we can and should conceive of moral cognition as possible and desirable in our interactions with other people, particularly in cases where others wrong us. In this section, I suggest that moral cognition is required of good Kantian citizens who act as decision-makers in the area of criminal punishment. My comments in this section will be mostly general, and are intended to motivate the proposition that moral cognition makes sense to discuss in this context; I turn to more specific proposals in subsection D. The main goal here is to show that moral cognition does better than *lex talionis* alone as a principle guiding the nature and extent of punishment.

As in the previous subsection, this analysis is intended as an extension of Kant's thought, rather than a direct interpretation of it. Indeed, Kant limits his discussion of moral cognition to the context of self-knowledge. My contention, however, is that introducing this notion into the criminal justice system will be in keeping with Kant's more general commitments to justice and morality.

Moral cognition in the realm of criminal punishment may be fruitfully compared to moral cognition in the two circumstances we have already covered:

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[396] Kant memorably declares that "[b]owing and scraping before a human being seems in any case to be unworthy of a human being. . . . But one who makes himself a worm cannot complain afterwards if people step on him." MM 188/6:437.

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(1) In its mode of self-knowledge, moral cognition complements the operation of the conscience. Fulfilling our duties of conscience and self-knowledge are both required in order to properly respect ourselves as human beings. When we submit to the judgment of our conscience, we respect ourselves as moral agents capable of choosing in accordance with the demands of morality. When we introspectively seek self-knowledge, however, we respect ourselves as mortal beings subject to factors external to our will. Both conscience and self-knowledge are required in order to properly fulfill our duties of personal virtue with respect to ourselves.

(2) In its mode of making social judgments, moral cognition complements the operation of practical reason. Respecting other human beings requires (in certain cases) passing judgment on their actions—in doing so, we respect them as moral agents. Yet respecting others also requires cognition of their circumstances, including the most general circumstance of being subject to the conditions of mortality. A judgment tempered by moral cognition is required in order to fulfill duties of personal virtue with respect to other people.

Moral cognition in criminal punishment is both similar and different from moral cognition in the areas above. For one thing, moral cognition of the self is required by all competent moral agents—it is an inescapable duty of beings that have the capacity for moral agency. Moral cognition of other people, while not strictly necessitated by virtue of being a moral agent, is inescapable as a practical matter due to the social nature of human beings. Judgments made through the operation of the criminal law, however, are rarer. Human beings are not called upon to make such judgments except when required to serve as jurors or, perhaps, when making decisions about what kinds of criminal legislation to support.

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Nevertheless, while the circumstances in which the moral cognition of criminals is relevant will be more limited than the previous categories, the duty will look quite similar:

> (3) In its mode of judging convicted criminals, moral cognition moderates the binary judgment of the criminal law. Respecting people who have committed crimes requires punishing them, for this shows respect for them as moral agents who could have chosen not to violate others' civic freedom. But it also requires attending to the circumstances and background conditions that contributed to the act in question. Both administering punishment and engaging in moral cognition of offenders are therefore required in order to fulfill our duties of virtue as citizens.

Virtuous Kantian citizens will, then, support policies and procedures which impose reasonable punishments that attend both to the nature of the criminal act (via *lex talionis*), but also to the motives and background of the criminal (via moral cognition).

It is worth thinking about the special difficulties citizens engaging in this kind of moral cognition will face. It will often require citizens to set aside their prejudices in order to reason about the needs of their community in pursuit of the ideal of justice. Most of us have no doubt experienced visceral negative responses in the face of serious criminal acts—either directed at us or at fellow human beings. Some theorists have argued that these sentiments are themselves indicia of the direction that criminal justice ought to take.[397] If Kant is correct, though, then such an approach is misguided. Although these sentiments are a natural part of the human experience, they alone do not provide us with good reason to act on them. We must, rather, reason about our moral obligations in order to determine what the morally appropriate attitudes toward criminality are. Moreover, despite his reputation as a retributivist, Kant believes that we

[397] See, e.g., Moore, "Moral Worth of Retribution"; and Murphy, "Getting Even."

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have the duty to "[d]o good to other human beings insofar as we can . . . whether [we] love[] them or not . . . [and] even toward a misanthropist."[398] In the face of criminal behavior, which often stirs within us understandable feelings of revulsion and vengeance, Kant would say that we retain an obligation to act benevolently, and to attempt in doing so to develop an "inclination to beneficence in general" even in the face of wrongdoing.[399]

D. Specific Proposals for Moral Cognition in Punishment

Given Kant's commitments to justice (as described in §I) and his characterization of the duty of moral cognition (as described in the preceding subsection of §II), there are good Kantian reasons to think that moral cognition must supplement *lex talionis* in order to determine the nature and extent of criminal punishment. In order to demonstrate how moral cognition could fulfill such a role, consider first what it means to sentence a criminal offender according to such a principle. Just as self-knowledge could increase or decrease the extent to which we punish ourselves for a specific lapse based on our character generally, a similar moral cognition applied to the convicted criminal could cause us to alter his punishment (relative to a *lex talionis* baseline) based on factors relevant to his background. Thus moral cognition might simply be viewed as the type of fact-finding undertaken (ideally) by a jury in a sentencing or penalty hearing. A person convicted of a particular crime may be exposed to a range of possible sentences. The

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[398] MM 162/6:402.

[399] Ibid. Virtue does not preclude us from making the necessary judgments about others' actions and responding accordingly. It does, however, require that we make such judgments in a way that is careful to distinguish what consequences another human being merits for her actions from the consequences we might initially be inclined to dispense due to our unexamined emotional responses. It might also require (or at least have the effect of) being "inclined" toward mercy rather than vengeance in the face of criminal acts. See Nussbaum, "Equity and Mercy."

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prosecutor often asks for a harsh penalty, the defense attorney a less severe one—and the jury makes a decision based on all the circumstances, which generally includes, not just the circumstances of the crime, but other information about the defendant's age, mental health, upbringing, and so forth. Two people who commit the same crime may, therefore, receive disparate sentences depending on how these various factors are weighed. For example, if two people are convicted of participating in the same robbery, it is possible that one co-defendant might receive a mitigated sentence (he is younger, has no criminal record, and has led a generally exemplary life until this lapse) while the other might receive an aggravated sentence (he is an older, experienced criminal with no good deeds to his name).

While one might initially think that treating people in the *same* way manifests an equal respect for them, some reflection should cause us to realize this is not the case. Kant himself asserts that "different forms of respect [are] to be shown to others in accordance with differences in their qualities or contingent relations—differences of age, sex, birth, strength, or weakness, or even rank and dignity, which depend in part on arbitrary arrangements."[400] Kant does not attempt to explain exactly how one ought to behave toward people who are "in a state of moral purity or depravity," or in "prosperity or poverty," for these are "only so many different ways of *applying*" the duties one owes to other people.[401] He indicates, however, that determining the precise contours of one's duties toward others *is* an important part of one's moral obligation to respect others' humanity.[402]

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[400] MM 213/6:468.
[401] MM 214/6:468-69.
[402] Ibid.

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Those involved in sentencing convicted criminals will therefore be prepared to modulate punishments depending on relevant factors. A poor person who steals bread in order to survive deserves, intuitively, a much different response from citizens of her community than the rich person who steals because she wishes to live an even more comfortable lifestyle. Of course, determining precisely how to respond to the poor thief versus the rich one will not necessarily be easy—but the civic duty of moral cognition demands that we make the attempt.

Still, one might worry about such unequal outcomes. Permitting juries to consider this type of information will lead to inequities with respect to defendants' sentences. And unequal sentencing seems, in some cases, problematic. After all, a common criticism of the criminal justice system in the United States is precisely that some categories of offenders (black men in particular) receive harsher sentences than others. We might therefore be inclined, as was Kant, to endorse a strict application of *lex talionis* (without attendant moral cognition) out of concern for equality.

I think, however, that such an endorsement would be misplaced. It is true that troubling examples of sentencing inequities abound in our system. But so, too, do examples of defendants' sentences in ways that, while equal to others with similar convictions, are intuitively unjust given the defendant's particular circumstances. (See the example of "James" in Chapter 3, §III.D.) What we need to decide is whether moral cognition, with the attendant possibility of inequality, is better or worse than *lex talionis* standing alone.

In doing so, we should first recognize that, while Kant initially seems convinced that *lex talionis* alone guarantees equality, it is also true that he recognizes the

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impracticability in many instances of doing to the criminal exactly what she has done to the victim.[403] In such cases, Kant seems to allow for consideration of the criminal's background in fashioning an appropriate punishment. For example, Kant avers that "[a] fine . . . imposed for a verbal injury" would be insufficient punishment for a rich person, because he "might indeed allow himself to indulge in a verbal insult on some occasion" because of the minor cost of the criminal act.[404] However, the rich man is more likely to be harmed to the same extent as one he has verbally abused if he is forced "not only to apologize publicly to the one he has insulted but also to kiss his hand . . . even though he is of a lower class."[405] Apparently the fine would be an appropriate sanction for a lower-class person (because it would hurt as much as the "verbal insult" hurt the victim). Thus, despite his infatuation with *lex talionis*, Kant's interpretation of like-for-like punishment is not that the punishment must be identical to the crime, but that the impact on the offender must be proportional to the impact on the victim.[406]

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[403] This would be most clearly a problem in cases of victimless crimes, though it is unclear whether Kant would recognize such a concept. As discussed earlier, Kant also recognizes the *immorality* of *lex talionis* in some cases.

[404] MM 106/6:332.

[405] Ibid.

[406] Assuming we could come to a correct determination of what *lex talionis* requires in a given case, there are two interpretations: the punishment itself must be as close as possible to the *criminal act*, or that the punishment must *result* in harm to the defendant that is as close as possible to the *harm caused*. The former interpretation results in the literal taking of the defendant's eye when the nature of the crime is that the victim has lost an eye. The latter interpretation could conceivably result in, say, eliminating both of the defendant's eyes even though he has only destroyed one of the victim's eyes (because, say, the victim only had one eye to begin with, or because the victim is a child forced to live with one eye for the rest of her life, while the defendant has had the luxury of living an already long life with two eyes). Kant seems to favor the second interpretation at least in the case of the rich man who has insulted the lower-class citizen. He does not explain clearly why this is the case, however. These could result in considerably different consequences: the impact of a given sentence is almost sure to have a highly variable impact depending on both the defendants' and victims' circumstances. If it is correct that Kant countenances this version of *lex talionis*, this does not necessarily mean that Kant would agree with *mitigation* based on the defendant's character or circumstances. But if we are going to consider *aggravation* based on circumstances (the rich man gets a more significant, public penalty than the poor man) then surely we ought also to consider mitigation as well (e.g. the pauper who insults the rich man might also receive a different sentence than a fine, because this would be a catastrophic penalty grossly disproportionate to the harm caused).

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But if we are able to take into consideration something like a person's wealth or social status in determining what his punishment ought to be, then why should we not be able to consider other factors, such as age, mental health, education, upbringing, criminal history, and so on? Surely in many (if not all) cases these factors are at least partially determinative of whether a proposed punishment would harm the defendant proportionally to the harm she has caused. Kant's example of the rich man being punished by shaming rather than fining suggests a sentencing jury may—and perhaps *must*—consider such factors.

Kant also makes a distinction between "punishment by a court" and "natural punishment …, in which vice punishes itself and which the legislator does not take into account."[407] Perhaps Kant is referring to something like deleterious health effects brought about by substance abuse; or perhaps he is simply thinking of the pangs of guilt imposed by one's inner judge. In either case, Kant seems to be saying that whatever the "natural" consequences of one's action might be, they are separate and irrelevant to what punishment is appropriate based solely on the criminal nature of the act. Kant thus says that the *legislator* cannot consider natural punishment, and this makes some sense: statutory law proscribes certain conduct and affixes a proportional punishment to it, but is generally not concerned with specifics about a criminal's circumstances.

Kant does not explain, though, why a *jury* (or judge) may not appropriately consider "natural punishment" when using their discretionary authority to pronounce sentence in a specific case. Doing so would have the same effect as if a drug addict were to sentence herself to misery because of her choice to indulge in a narcotic, yet acknowledge that her life has already been turned upside down by her addiction. This

[407] MM 105/6:331.

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self-knowledge might cause the addict to decide to focus on rehabilitation rather than further self-punishment. Likewise, the sentencing jury might reasonably decide that the convicted addict has suffered enormously already and needs a sentence that involves more rehabilitation and less imprisonment. This vision of the jury's role makes sense if it is seen as responsible for using moral cognition to fashion an appropriate response to a criminal defendant that treats her as a free, equal, and independent moral agent—not merely as a wrongdoer.

Finally, another interpretation of Kant's approval of *lex talionis* suggests that "the law cannot assess the 'inner' moral worth of offenders because that would require knowing more about the agent's motives and 'will' than we can determine with confidence."[408] We ought to be skeptical of such a claim, even if Kant believed it. For one thing, the law *does* do this, and has for centuries. Proving *mens rea* is essential to demonstrating that a crime actually occurred. The alleged criminal found to lack the right state of mind—the necessary motive or will—must, in theory, be set free. This is, admittedly, not an easy task in all cases. Moreover, while "moral worth," in any deep, meaningful sense, is not what the criminal justice system attempts to discern, sentencing courts (good ones, anyway) *do* attempt to gather as much information about the circumstances surrounding the defendant's crime as possible before imposing judgment. It may be that such determinations are often flawed—but certainly we should try, insofar as we are able, to distinguish between those who commit crimes for motives of profit and those who do so out of desperation; between those who harm others out of spite and those who do so out of ignorance; and between those who are fully cognizant of their options and those who have limited capacities for such introspection. Again, these are not always

[408] Hill, "Kant on Wrongdoing," 429.

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simple decisions, and when made properly, they may not serve the interests of "judicial economy." But we know from our inner moral lives that they are necessary and relevant considerations when assessing wrongdoing. They therefore seem equally vital in assessing the proper punishment for offenders.

It would appear, then, that even Kant's own view of punishment is more flexible than it first appears. Even if it were not, Kant's own commitment to equality, which underwrites his endorsement of *lex talionis*, militates in favor of more flexible sentencing policies. Equality in a Kantian sense does not imply that we should punish all criminals in the same way. Rather, it implies that we ought to attempt to tailor a defendant's sentence to take into account his background as well as his motives and intentions. Despite Kant's thoughts to the contrary, *lex talionis* on its own seems destined to fail in realizing a full conception of Kantian equality.

This is sufficient to show that moral cognition needs to supplement *lex talionis* in making decisions about the nature and extent of punishment. I think, however, that the principle of moral cognition can do more. I shall therefore proceed to give several brief examples of ways in which developing this virtue can assist us in crafting more just criminal policies.[409]

1. *Jury Sentencing*

Moral cognition gives us an additional reason, in addition to the argument made in Chapter 3, to favor jury sentencing. Consider that the rise in plea bargaining and the legislation of mandatory sentences for certain crimes have caused a shift away from trials

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[409] Once again, I intend these examples to be construed as reasonable derivations from Kantian principles. Kant himself does not necessarily endorse them—indeed, he has almost nothing to say about criminal justice policies at this level of detail.

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and, to some extent, discretionary sentencing. Many defendants plead guilty pursuant to an agreement that imposes a nondiscretionary sentence. In other cases, the judge has some discretion over sentencing, but relies primarily on a cursory presentencing report provided by the probation department—generally an overtaxed agency which has incentives to recommend prison for all but the most obviously innocuous defendant.[410] Meanwhile, absurdly lengthy mandatory sentences, such as those resulting from "three strikes" laws, appeal to voters who have been primed by overzealous politicians with unreasonable fear of criminals. Defendants facing the prospect of a lifetime in prison for relatively minor, nonviolent felony offenses (e.g. theft) are, moreover, induced to plead guilty to lengthy sentences which will at least permit them to see the light of day at some point in their lives. Certainly in some cases, much more attention is paid to the defendant's background, given the enormity of the consequences (capital cases are an obvious example, at least when defended competently) but this is not true for the vast majority of defendants going through the sentencing process.

Ideally, we would require *every* defendant to be sentenced in front of a jury, who would hear detailed arguments from both the prosecutor and the defense about the circumstances of the crime and the defendant's background. This expensive proposition is unlikely to receive much support in our system, of course.[411] A somewhat more realistic starting point would be to require sentencing juries in "serious" cases, even when resolved via plea agreement[412]—in the same way that, for example, larger juries are

[410] Defendants denied probation mean fewer files on the busy probation officer's desk, whereas granting least-risky defendants probation is likely to boost the probation department's success rate.
[411] At least one federal judge has made such an argument, however. See Morris B. Hoffman, "The Case for Jury Sentencing," *Duke Law Journal* 52 (2003): 951-1010.
[412] When crafting a plea, the parties sometimes agree to a stipulated sentence—for example, the agreement might say that the judge must sentence the defendant to exactly three years in prison. But the agreement might be open or include a range—for example, the agreement might give the judge the option of sending

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generally required for more serious cases.[413] While this might have the effect of reducing incentives for plea bargaining, it would not eliminate them entirely: the defendant might still be offered a plea to a reduced charge, for example, and prosecutors would still value the efficiency of a quicker conviction than if the entire case were tried in front of a jury. Moreover, enacting such a proposal would encourage participants in the criminal justice system to engage in a more serious moral cognizing of the defendant—an exercise likely to result in fairer treatment and more just outcomes than under current procedures.

2. *Post-Conviction Treatment*

Ideally, one of the things we do as moral beings who seek self-knowledge after an act of wrongdoing is to carefully attend to whatever conditions precipitated our action. We may find it necessary to spend time or resources to change something about ourselves or our situation in order to prevent subsequent misbehavior. Similarly, we ought to treat the convicted criminal in a way that reflects his status as a citizen as well as the specific background circumstances that might have contributed to the crime. Sometimes these circumstances call into question a citizen's capacity for independence, as may be the case with serious mental illnesses. Other times we may recognize a failure of civic equality and substantive freedom when, for example, the defendant has grown up in an impoverished community and has lacked access to basic resources such as education.

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the defendant to prison for anywhere from two to four years. Requiring sentencing juries is compatible at least with the latter practice.

[413] In the federal system, juries must consist of twelve people unless the parties stipulate otherwise or, rarely, unless the court permits a jury of eleven after excusing a twelfth juror. Federal Rules of Criminal Procedure 23(b). States may permit smaller juries, however. For example, Arizona requires only six or eight jurors (depending on the court) if the defendant is facing a sentence of less than thirty years in prison. Ariz. Rev. Stat. § 21-102. And, of course, many misdemeanor defendants do not receive jury trials at all due to the relatively short length of incarceration they face.

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This is not to say that we ought not to punish offenders where appropriate. Punishment can be a way of recognizing a defendant's capacity for moral autonomy. It can, however, also be an opportunity to address regrettable injustices that have made the defendant's choices more difficult than they would have been in an ideally just society. Thus, while we have a duty to punish the criminal, we ought also to recognize a duty to discover his needs and attend to them, much as we might rightly experience emotional pain after doing something morally repugnant, but also muster enough self-knowledge to realize that we need something more than punishment (perhaps, for example, we need counseling to help us confront whatever demons are encouraging our moral misbehavior).

So even if we were to agree that, say, ten years in prison were the appropriate response for an aggravated assault, after imposing that sentence we might have the continuing duty to offer services to the criminal, both during and after incarceration. Obvious examples of such services are mental health treatment, anger management counseling, education, and job training—whatever is necessary to help the person overcome circumstances contributing to the criminal act. We do this to some extent in our current system, but to an insufficient extent. Probation and parole are usually either overly onerous (resulting in inevitable violations and re-incarceration) or too lax (a lack of structure and assistance frequently resulting in recidivism and, again, re-incarceration). Part of the reason is, perhaps, that the rehabilitative model of criminal justice that was popular in the first half of the twentieth century has been largely abandoned. While there may be good reasons to distrust a purely "medical model" of criminology,[414] surely rehabilitation ought to play a more distinctive role in our system than it currently does. This is particularly clear in the case of drug crimes, where imprisonment is, at best,

[414] See generally Morris, "Persons and Punishment."

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unlikely to result in the changes within the individual which are necessary in order to prevent recidivism.

Even in cases where the rehabilitative needs are being attended to, we must also ensure that the criminal's punishment is decent and humane—"free[] from mistreatment," as Kant puts it[415]—in order to respect her status as a human being. Kant believes that the virtue of our society, and our freedom as citizens, depends largely on the way in which we treat our fellow citizens—including those who are being punished for wrongdoing. There is a stark difference between being deprived of liberty for ten years, and being subjected to a violent nightmare for the same period of time. Unfortunately, the latter is closer to the reality in American prisons.[416] Certainly an increased moral cognition of the plight of convicted criminals would encourage mostly stagnant efforts toward prison reform.[417]

The tendency in American society is to view convicts with anger, fear, and contempt. We assume that people who commit crimes will do so again—and, as if to ensure that such prophecies are realized, we refuse to offer them the services and support that would maximize their chances for successful reintegration into society. At one time, the ostensible purpose of "penitentiaries" was what the root of the word implies: to encourage penitence and character reformation.[418] Theoretically, people who emerged from such facilities were changed and ready to be welcomed back into the community. Instead, we now relegate criminals to facilities that are nearly certain to encourage, rather than dispel, whatever criminal intentions they arrive with. Clearly, "[t]reating offenders

[415] MM 106/6:333.
[416] Husak, *Overcriminalization*, 5-6.
[417] Se generally Holtman, "Prison Reform."
[418] Rothman, *Asylum*, 79-108.

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as worthless scum, utterly incapable of reform, is obviously contrary to Kantian principles."[419] It is in keeping with the spirit of the Kantian moral law that we ought to treat people convicted of crimes better than we do. This must include recognizing their intrinsic worth, their adverse backgrounds, and their potential for progress—just as we recognize such factors when viewing ourselves with properly objective self-knowledge. Moreover, since the American public seems to think that prisoners have it too easy, education both about what conditions are like inside prisons, as well as what factors often contribute to criminal behavior, would be useful ways of increasing our collective moral cognition in this sphere. Doing so would serve the ends of Kantian justice, by promoting the civic equality and independence that would, in turn, make criminal violations of the UPR less likely to recur.

3. *The Retributive Ethos*

Once we have condemned ourselves, via our conscience, for having acted wrongly, our subsequent moral cognition surely entails that we do not give up on ourselves—we respect ourselves as competent moral agents capable of repentance and worthy of redemption.[420] Kant asserts that moral cognition will "dispel fanatical contempt" for ourselves.[421] Though self-punishment (misery) is appropriate and necessary when we violate the moral law, moderation in self-perception through the process of cultivating self-knowledge is also necessary. While moral failures ought to involve a period of psychic self-flagellation, they ought not to induce self-hatred.

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[419] Hill, "Kant on Wrongdoing," 439.
[420] This is perhaps one reason Kant speaks so forcefully against suicide. MM 176-78/6:422-23.
[421] MM 191/6:441.

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In the social context, one of the vices that Kant mentions in the *Tugendlehre* is "malice," which he characterizes as "the direct opposite of sympathy."[422] Significantly, Kant addresses in his discussion of malice the propensity which human beings experience toward vengeance:

> The sweetest form of malice is the *desire for revenge*. Besides, it might even seem that one has the greatest right, and even the obligation (as a desire for justice), to make it one's end to harm others without any advantage to oneself. . . . But punishment is not an act that the injured party can undertake on his private authority . . . .[423]

Except in the case of punishment properly administered by a civil authority, acts of vengeance (even though seemingly "the greatest right") are permissible only to God—the rest of us have "a duty of virtue not only to refrain from repaying another's enmity with hatred out of mere revenge but also not even to call upon the judge of the world for vengeance."[424]

As Kantian citizens, then, one duty we incur by virtue of our status as moral beings is to refrain from punishing those who wrong us—another is to refrain from endorsing appropriate state punishment from motives of vengeance. This, in turn, provides us with some understanding of the way in which punishment is to be administered in a just society: "no punishment, no matter from whom it comes, may be inflicted out of hatred."[425] Criminal punishment must not be confused, in other words, with state-sanctioned vengeance. The former is an appropriate way for the community to demonstrate that certain types of behavior are unacceptable by its citizens; the latter is merely the institutionalization of malice.

[422] MM 207/6:459.
[423] MM 207/6:460 (emphasis in original).
[424] MM 208/6:460.
[425] MM 208/6:461.

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To such a way of thinking about punishment, one might worry that there are at least *some* crimes which merit, if not *demand*, an attitude of vengeance.[426] Is it really the case that we should seek to cultivate a dispassionate attitude toward, say, serial killers or child rapists? It is surely true that humanity's capacity for evil in some cases demands moral outrage. But it is worth considering how outrage, anger, and indignation differ from vengeance, hatred, and malice. For one thing, the former feelings are compatible with forgiveness, mercy, and sympathy, while the latter do not seem to be. The former may also be directed toward ideas—one is indignant that a human being could behave in such-and-such a way—while the latter seem inevitably directed at a person or group—one seeks revenge *on* someone, or hates *people like that*. Kant's point is not, I think, that punishment should be entirely devoid of emotion. Rather, it is that punishment ideally involves certain kinds of publicly appropriate reactions to offenses but does seek to limit the extent to which we utilize punishment as a vehicle for satisfying our animalistic lust for revenge.

One of the concerns that might be raised here is the possibility of becoming too "soft." If a person exhibits no response whatsoever to any sort of wrong inflicted on her, we might worry that she is being taken advantage of—that she is failing to exercise the self-respect that is sometimes manifested by the behavior of identifying and objecting to a wrong. Kant does address such an objection, though, when he notes that although "[i]t is therefore a duty of human beings to be *forgiving* . . . this must not be confused with *meek toleration* of wrongs . . . [nor with the] renunciation of rigorous means . . . for preventing the recurrence of wrongs by others; for then a human being would be throwing away his rights and letting others trample on them, and so would violate his

[426] For such a view, see Moore, "The Moral Worth of Retribution."

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duty to himself."[427] Restraining oneself from exercising punishment, and endeavoring to act non-maliciously, does not mean that we should not assert our rights, where appropriate, or act in ways disrespectful of our own autonomy. We should surely not stay in an abusive relationship—but we can let others do the punishing, and work toward forgiveness, but for the sake of the abuser and ourselves.[428]

Kantian morality therefore demands a fine balance in responding to crime. On the one hand, we must respect ourselves (and, by extension, our fellow-citizens) enough to stand against, and be willing to punish via appropriate authorities, criminal wrongdoing. On the other hand, we must strive to replace feelings of malice, hatred, or vengeance that we might experience with more productive sentiments that preserve our respect for the dignity of others. In doing so, we contribute to a more just society and, equally important for Kant, to our own moral development.

Here are three preliminary suggestions that aim at moral cognition in this area. First, scholars and jurists need to devote more energy toward educating the public about the connections between criminality on the one hand and socioeconomic privations on the other. Although we should not overstate such correlations, we must recognize that there is at least some responsibility that we bear collectively as citizens for permitting the social conditions to exist that foster criminal behavior.[429]

Second, we should also ensure that convicts' voting rights are maintained even during their period of incarceration. There are many rights which convicts reasonably

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[427] MM 208/6:461.
[428] As Kant puts it, "a human being . . . possesses a *dignity* (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world." MM 186/6:434-35.
[429] For an argument to this end, see Bazelon, "Morality"; Morse, "Twilight," provides a response. Bazelon does, I think, overstate the case; nevertheless, his essay is a powerful antidote to the tendency to ignore social factors in attempting to understand and respond to criminal behavior.

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forfeit for a period of time upon conviction—the right to travel, the right to own a firearm, and so on—but there is no compelling reason to prevent them from voting. The right to vote is the most basic right we can accord citizens, and while allowing criminals to vote harms no one, it is a small but symbolically significant step in the direction of conceiving of them as (punishable) fellow-citizens, rather than as outcasts.[430]

Third, we should follow some European countries' practice of viewing criminal convictions as private (or quasi-private) records, which in turn discourages discrimination in areas such as employment and housing on the basis of prior criminal behavior.[431] Allowing people who have "served their time" to return to as normal a life as possible would encourage others to view them in a way that respects their status as free, equal, and independent fellow-citizens.

These suggestions are hardly the end of the story. They are preliminary thoughts about the way the notion of moral cognition could be deployed to counteract the lamentable retributive ethos that characterizes Anglo-American punishment practices.

E. Lawyerly Objections

In the course of the preceding argument, I addressed a number of theoretical objections. Legal professionals, however, might have some legitimate pragmatic concerns. In particular, defense attorneys and prosecutors might worry that the concept of moral cognition could be detrimental to the interests they are ethically bound to

[430] It may turn out that permitting inmates to vote would do significantly more than this, since African-American communities may be disproportionately affected in terms of democratic representation by the incarceration of such a large percentage of their members. See, e.g., Dorothy E. Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities," Stanford Law Review 56 (2004): 1271-1305.

[431] See generally Jacobs and Larrauri, "Criminal Convictions." Obviously there would need to be exceptions. Someone convicted of child abuse might reasonably be barred from working as a school teacher, but there is likely no good reason to prevent him from taking up a career in accounting.

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protect. The defense bar might be concerned about some of the proposals, such as requiring jury sentencing, which have the possibility of resulting in harsher sentences for criminal defendants. In many cases lawyers advise clients to enter plea agreements in order to reduce the risks and uncertainties of trial and subsequent sentencing hearings where a terrifyingly wide range of options may be open to the judge. To demand the moral cognition of each individual defendant invites judges (or, ideally, juries) to punish some people more harshly than they would be able to do given the way the system works currently.

It is undeniable that moral cognition will *sometimes* incline us towards increasing punishment. Just as we sometimes reflect on our own actions and realize that we behaved in some way *worse* than we might initially have judged, so it is likely that some criminals are in fact deserving of harsher punishment than we initially think—though in no case could the upper limitation of *lex talionis* be exceeded. I suspect, however, that this is unlikely to be the outcome in the vast majority of cases. This is suggested by Martha Nussbaum, who has argued for an increase in mercy within the criminal justice system by way of the ancient Greek concept of *epieikeia*, which she explains as "the ability to judge in such a way as to respond with sensitivity to all the particulars of a person and situation, and the 'inclination of the mind' toward leniency in punishing—equity and mercy."[432] She believes that while the "retributive idea is committed to a certain neglect of the particulars,"[433] the practice of *epieikeia* is "a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding

[432] Nussbaum, "Equity and Mercy," 214.
[433] Ibid., 217.

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the whole story."[434] Nussbaum's contention is that an increased moral cognition, as Kant would say, almost always leads us to "see[] defendants as inhabitants of a complex web of circumstances, circumstances which often, in their totality, justify mitigation of blame or punishment."[435]

Of course, those who *prosecute* criminal cases might not see such an outcome as desirable. Some prosecutors might worry that an increase in moral cognition will result in too *little* punishment—that wrongdoers will "get away with murder" based on circumstances (poverty, abuse, and so on) shared by many non-criminals. More broadly, we might be concerned that, if moral cognition in fact generally inclines us toward mercy, such an approach denies the importance of personal responsibility and minimizes the deterrent potential of the criminal law. Although I have less sympathy for this view, given the excessively harsh nature of criminal justice in our society, it is worth remembering that "[m]ercy is not acquittal."[436] Kant certainly agrees that wrongdoing must be punished—and that this is true both at the level of personal morality and within civil society. Moral cognition does not "fail to say that injustice is injustice, evil is evil."[437] It may, however, result in most cases in a more merciful and understanding approach to punishing those who violate our laws. To this extent, the prosecutor's concern is well-founded: a system imbued with increased moral cognition will very likely result in shorter prison terms and fewer death sentences, among other consequences. I do

[434] Ibid., 219.
[435] Ibid., 235-36. As noted in Chapter 3, although many Americans claim to support the death penalty (and those who categorically oppose it are, in principle, barred from serving on juries in capital cases), juries frequently refuse to sentence defendants to death. Dzur, *Participatory Democracy*, 140. Apparently an initial, unreflective retributive commitment often yields in light of the understanding, gained during sentencing, of the defendant's life and the circumstances of the crime.
[436] Nussbaum, "Equity and Mercy," 247.
[437] Ibid.

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not find this to be an objectionable result, particularly in the context of our current criminal penal practices.

A skeptical realist might still be shaking his head. Criminal justice in the real world is a messy business, and the suggestion that moral cognition ought to play a role in our penal practices is unrealistic. The skeptic has a point. Kant acknowledges the difficulty of moral cognition in its personal incarnation of self-knowledge, saying that "the depths . . . of one's heart . . . are quite difficult to fathom"; still, he is confident that the attempt to do so is "the beginning of all human wisdom."[438] Attempting to engage in moral cognition in the context of criminal justice will be equally difficult. Doing so will, however, result in penal practices that are similarly wiser—and, for that matter, more just—than our current ones.

III. Conclusion

In §I of this chapter, I suggested that Kant's views on punishment are most plausibly interpreted as an expression of his theory of justice. In particular, I argued that criminal punishment on the Kantian view is justifiable and necessary insofar as it aims at the preservation of the civic freedom of all citizens. While I endorsed this general justification for punishment, I suggested that we should leave open the possibility that *lex talionis* does not provide a complete answer to questions about the proper modes and extent of punishment. In §II, I argued that Kant's notion of moral cognition, conceived as a facet of civic virtue, is a compelling supplement to *lex talionis*. Finally, I gave several examples of what a system that took moral cognition seriously would look like in practice.

[438] MM 191/6:441.

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CONCLUSION

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As noted in the Introduction, I had several goals for this dissertation; I believe they have been met. In the foregoing chapters, I advanced a theory of criminal law having both descriptive and evaluative value for Anglo-American legal systems. I showed that Kant's practical philosophy has the resources to develop such a theory. And I provided even the skeptical reader with reasons to think that attempting to develop such a unitary—even universalist—theory is not wholly without philosophical or pragmatic value.

In particular, Chapter 1 set out to interpret Kant's political theory in a way that was both loyal to his general intentions, but also cognizant of areas of his work that might be problematic given more than two centuries of hindsight. Chapter 2 applied Kant's political theory—particularly his account of civic freedom—to the problem of criminalization. I argued that applying Kantian principles to our system would require the decriminalization of many acts we currently consider crimes. This reduction in the scope of the criminal law would make it easier to implement the suggestion I subsequently made in Chapter 3 to increase the role of the jury in sentencing criminal defendants. This way of utilizing the jury is consonant with Kant's account of civic virtue and would, in turn, promote the kind of punishment practices that are, as I argued in Chapter 4, demanded by closer attention to Kantian values.

At various points throughout this dissertation, I made note of important questions that merited lengthier answers, as well as areas of inquiry that remained unexplored. A few of these topics are: (1) the *enforcement* of criminal laws, including what role the police ought to play in a Kantian system; (2) whether Kantian theory can generate a useful model of *international* criminal law; and (3) how to explain and account for the

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rights of *non-citizens* within the criminal justice system. To be sure, these are important questions, and there are undoubtedly many others that also deserve attention. While I have not been able to address these issues in a satisfactory way here, I hope that I have—to borrow a Kantian phrase—laid the groundwork for future efforts in these areas.

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