Law and Philosophy (2015) 34: 1–22
DOI 10.1007/s10982-014-9209-6
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THE DUTY TO CRIMINALIZE*

To be tortured would be terrible; but to be tortured and also to be someone it was not wrong to torture would be even worse[†]

(Accepted 3 March 2014)

ABSTRACT. The state has a duty to protect individuals from violations of their basic rights to life and liberty. But does the state have a duty to criminalize such violations? Further, if there is a duty on the part of the state to criminalize violations, should the duty be constitutionally entrenched? This paper argues that the answer to both questions is positive. The state has a duty not merely to effectively prevent violations of our rights to life and liberty, but also to criminalize such violations. Further, the duty to criminalize ought to be constitutionally entrenched. In the absence of criminal prohibitions on violations of the right to life and liberty individuals live 'at the mercy' of others. In the absence of a constitutional duty to criminalize, life and liberty of individuals is contingent upon the judgments and inclinations of the legislature. In both cases citizens' rights are 'at the mercy of others'. I also show that the decisions of the German Constitutional Court concerning abortion can be justified on such grounds.

I. INTRODUCTION

The state has a duty to protect individuals from violations of their basic rights to life and liberty. In fact such a duty is traditionally perceived to be the primary justification for the establishment of the state; the state is there to protect its citizens from violation of their basic rights.[1] But does the state have a duty *to criminalize* such

* I wish to thank Arthur Ripstein, Miri Gur Arye and two anonymous referees for very important comments on previous drafts of this paper. I have also presented at a conference Criminalizing and Criminalized States organized by Francois Tanguay-Renault at Osgoode Hall Law School. I am grateful for the comments of the participants at this conference.

[†] Nagel, Thomas, 'Personal Rights and Public Space', *Philosophy and Public Affairs* 24 (2005): 83–107.

[1] I do not wish to deny that the state may legitimately perform other functions or even that it may have additional duties such as to provide health and educational opportunities and to promote the welfare of its citizens.

violations, or is it sufficient that the state prevent such violations in an effective manner, even without criminalizing the violations? Further, if there is a duty on the part of the state to criminalize violations, should the duty be constitutionally entrenched? Should the legislature be constitutionally required to criminalize?

One possible answer favored by retributivists is that the state has a duty to punish because criminals deserve it. This Article argues that the duty to criminalize rests on a concern for potential victims of crime rather than on retributivist concerns. More specifically I argue that the state has a duty not merely to effectively prevent violations of our rights to life and liberty, but also to criminalize such violations.[2] Criminal law theorists often warn against the risks of over-criminalization[3]; yet one ought not to underestimate the opposite risk—namely, under-criminalization. Further, I argue that the state has a duty not only to criminalize such violations but also has a duty to constitutionally entrench this duty.

The duty to criminalize violations of rights and the constitutional entrenchment of such a duty are not grounded in instrumental considerations, namely, in the greater likelihood that criminalization (or entrenching a constitutional duty to criminalize) is conducive to greater protection of life and liberty. Instead, I maintain that in the absence of criminal prohibitions on violations of the right to life and liberty individuals live 'at the mercy' of others. In the absence of a constitutional duty to criminalize, life and liberty of individuals is contingent upon the judgments and inclinations of the legislature to criminalize violations of these rights. The duty to criminalize and the duty to constitutionally entrench the duty to criminalize are grounded therefore in the concern that life and liberty ought not to be left to the mercy of other individuals or even to the mercy of the legislature itself.

To illustrate the argument let us compare three different states: A, B and C. In state A the legislature effectively protects the lives and liberties of its citizens. It does so without criminalizing violations of these rights. Individuals are not criminally liable for such violations,

[2] Some legal theorists seem to concur with this claim although usually the claim that the state has a duty to criminalize is grounded in consequentialist concerns that are often based on empirical conjectures that are subject to dispute. Thus, for instance Anthony Duff and Sandra Marshall described a position (which they ultimately reject) under which the state has 'a duty to use the criminal law to promote respect for… significant individual rights'. See Marshall, S.E., Duff, R.A., 'Criminalization and Sharing Wrongs' *Can. J. L. and Jurisprudence*, 11 (1998): 8.

[3] See, e.g., Husak, Douglas, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008).

although the state does its best to prevent them (by using non-penal means). Citizens in state A are of course *morally* bound to honor these rights, and further, citizens may as a general rule honor these rights. But, given the absence of criminal prohibitions, citizens' rights are 'at the mercy of others'. The protection of their rights is subject to the risk that individuals may change their judgments or preferences.

An analogous argument applies also to the legislature which criminalizes such violations but is not constitutionally bound to do so. Assume that in state B the legislature does not merely effectively protect the lives and liberties of its citizens but also criminalizes violations of the right to life and liberty. Yet the legislature is not constitutionally bound to do so. In contrast, in state C the legislature is constitutionally bound to criminalize violations. I shall argue that given the absence of a constitutional duty to criminalize in state B there is no *publicly recognized* duty on the part of the legislature to criminalize violations of rights. The legislature's decision to criminalize is not dependent upon its publicly recognized duties; instead, it is contingent on the legislature's inclinations or judgments. Consequently, the citizens of state B live 'at the mercy' of the legislature's inclinations (or judgments); they live under the shadow of its whims. In contrast, in state C the legislature is publicly bound to conform to the constitutionally entrenched duties to criminalize, and, consequently, citizens' rights do not hinge on the legislature's inclinations. The rationale underlying both the duty to criminalize and the duty on the part of the polity to constitutionally entrench the duty to criminalize is grounded in the significance of the publicly-salient differentiation between decisions that are discretionary and decisions that are grounded in publicly-recognized duties.

Is it not sufficient to guarantee that individuals are adequately protected from violations of their rights? Why should it matter whether the state protects me from violations of the right to life and liberty by criminalizing violations or by using other (perhaps more effective or less costly) non-penal means? To defend the claim that it matters, I shall argue that both the duty to criminalize and the constitutional entrenchment of such a duty can be rationalized in terms of freedom, understood as non-domination.[4] Freedom does

[4] This concept borrows from the work of neo-republican thinkers. See Pettit, Phillip, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997); Skinner, Quentin, *Liberty Before Liberalism* (Cambridge University Press, 1998).

not merely require that my rights not be violated; it also requires that my rights be publicly recognized, i.e., that honoring these rights will not be subject to the inclinations or judgments of others. Further, freedom does not merely require that such violations be criminalized; it also requires that the legislature not have the power to decriminalize such violations. While it is possible that (given the existing judgments or inclinations of individuals) individuals in state A are adequately protected, they are still subject to domination, namely, to the risk of a potential shift in the judgments or inclinations of other individuals. Similarly, individuals in state B are also subject to domination, namely, to the risk of a potential shift in the legislature's judgments or inclinations. In both cases individuals 'are subject to arbitrary sway: being subject to potential capricious will or the potentially idiosyncratic judgment of another'.[5] Only citizens whose rights are constitutionally entrenched do not live 'at the mercy of' the state.[6]

To motivate the paper section II presents a real life example in which the constitutional duty to criminalize was (at least implicitly) acknowledged—the abortion cases in Germany. Then in section III I turn to present the republican concept of freedom based on non-domination and establish its relevance to the question at stake. I also explore in this section and eventually reject several possible objections to this analysis. The conclusion reaffirms the Article's argument that the state has a duty not merely to protect basic rights, but to criminalize the violation of these rights and that the duty to criminalize ought to be constitutionally entrenched.

II. THE CONSTITUTIONAL DUTY TO CRIMINALIZE: THE ABORTION CASES

A real life example taken from the abortion debate in Germany could help to underscore the significance of the duty to criminalize and the value of constitutional entrenchment of this duty. More specifically I shall argue that some of the debates surrounding the abortion cases in Germany should be understood as debates concerning the duty to

[5] Pettit, Republicanism, supra note 6, at 5.

[6] The term 'risk' used here is a normative rather than a descriptive term. The person is not 'at risk' because of the prospects that his rights may be violated. It is possible that state A provides better protection against such violations than state B or state C. Yet it is still the case that the citizen in state A lives at the mercy of other citizens, and that in state B she lives at the mercy of the legislature.

criminalize and the desirability of the constitutional entrenchment of such a duty.[7] In the rest of this paper, I shall assume (against my own conviction) that abortion is indeed a violation of the right of the fetus to life. The question I address is merely whether *given such an assumption* the state has a duty to criminalize it and whether this duty ought to be constitutionally entrenched. I use the case of abortions not because I concur with the German Constitutional Court that abortion is a killing, but because the debates surrounding these cases illustrate the relevance of the questions I address here.

In 1975 the German Constitutional Court declared that the law which allowed abortion on demand during the first trimester of pregnancy was unconstitutional, as it violates Article 2 section 2 of the German Basic Law protecting the right to life.[8] The Constitutional Court emphasized that abortion is an act of killing which the law is obligated to condemn. As one commentator emphasized, the state had not only the right but also the *duty* to protect developing life in the womb.[9] As a result of reunification, the Constitutional Court had to address again the matter, and in its later 1993 decision, the Court reiterated its commitment to the view that abortion is indeed a violation of the right to life and that the state has the obligation to protect life, including the life of the fetus.[10]

Yet there are significant differences between the two cases. While in its 1993 judgment the Court reiterated its position that abortion ought to remain criminal, it also declared that the state could substitute 'normative counseling' for criminal punishment as a way of fulfilling its obligations to protect fetuses. The Court asserted that the mandated counseling ought to be designed to protect life, and that the provisions of any future law would have to be specifically crafted in an effort to preserve the life of the unborn child and to convince the pregnant woman not to have an abortion. As one

[7] For the history of the abortion controversy in Germany, see Kommers, Donald P., 'The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?', *J. Contemp. Health L. & Pol'y* 1 10 (1994); Neuman, Gerald L., '*Casey* in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany', *Am. J. Compa. L.* 43 (1995): 273..

[8] See 39 BVerFG 1 (1975). For an account of the case and its significance, see Kommers, Donald P., 'Liberty and Community in Constitutional law: The Abortion Cases in Comparative Perspective', *BYU. L. Rev.* 371 (1985); Lange, Felix, 'American liberalism and Germany's Rejection of the National Socialist Past-the 1973 Roe v. Wade Decision and the 1973 German Abortion/Case in Historical Perspective', *German Law Journal* 12 (2011): 2033.

[9] Kommers, supra note 10, at 395.

[10] 88 BVerfGE 203; Kommers, supra note 9, at 19.

commentator argued 'the statutory scheme may include … compulsory counseling (i.e., plans that would leave the final decision to the pregnant woman) so long as the regulatory scheme as a whole 'effectively and sufficiently' protects unborn life'.[11]

If indeed abortion is, as the Court believed, a violation of the right to life, why would anybody be inclined to decriminalize it? How could the Constitutional Court substitute 'normative counseling' for criminal punishment as a way of fulfilling its obligations to protect fetuses?

One possible answer is that while the legislature has a duty to protect life, it does not have a duty to protect life *by criminalizing killings*; it could perhaps protect life more effectively by using other means such as education, counseling, etc. Hence, the willingness to protect the life of the fetus by using non-penal means is precisely what differentiates the 1993 case and the 1975 case. In its earlier decision, the Court ruled that there is a duty to criminalize abortions. In contrast, in its later decision, the Court seemed prepared to allow the legislature to use the most effective means to reduce as effectively as possible the number of abortions, and, consequently, it allowed abortions obtained in the first trimester of pregnancy to remain unpunished (*straffrei*). The Court wrote that a statutory scheme may include a time-phase plan with compulsory counseling (i.e., a plan that would leave the final decision to the pregnant woman) so long as the regulatory scheme as a whole 'effectively and sufficiently' protects unborn life. In this later decision the Court ruled that the state may use non-penal means if it believes that such means provide an effective solution to the problem of unwanted pregnancy by inducing women to cooperate voluntarily with the state without any fear of retribution or loss of personal integrity.

The difference between the Court's early decision (in which it insisted on maintaining a penal scheme) and the Court's later decision in which it was willing to forswear the threat of punishment is central to the discussion here. It is indicative of a fundamental difference between those who care only about protecting the lives of the fetuses as effectively as possible and those who believe that one should also care about maintaining a criminal prohibition on killing even when there are effective non-penal alternatives. The next sec-

[11] Kommers, supra note 9, at 19–20.

tion defends the duty of the state to criminalize and the duty to constitutionally entrench this duty.

III. A REPUBLICAN DEFENSE OF THE DUTY TO CRIMINALIZE

What is the value of criminalizing violations of rights to life and liberty, and what justifies the constitutional entrenchment of a duty to criminalize such violations? One natural explanation is instrumental: criminalization arguably deters violations, and constitutional entrenchment of a duty to criminalize prompts legislatures to criminalize such violations and thus is conducive to the protection of rights.[12] This section develops an alternative hypothesis under which criminalizing violations of the right to life and liberty is desirable for principled, non-instrumental reasons. I argue that it is important not only that individuals and the legislature protect our rights; in addition they ought to be barred from violating our rights. For individuals 'being barred' implies the existence of a criminal prohibition while for the legislature it means a constitutional duty to criminalize. Education or mandatory counseling as suggested by the German Constitutional Court are insufficient even when they are as effective (or even more effective) than criminalization, because they do not form a public acknowledgment of the duty to honor the rights.

Consider the following analogy: A needs $100 to cover some urgent costs. Fortunately B owes A $100 and A turns to B to get his money back. B denies that he owes A the money, but, as a gesture of friendship is willing to grant A $100 'as a present', as B professes to understand that A faces economic hardship.

A is justifiably resentful and even furious. A cares not merely that the $100 be given to him to cover his urgent costs, but also that it be given to him *as a repayment* of a debt rather than as a present. A wants B to repay a debt rather than merely to receive the money. But why should A care? Why should it matter to A whether B gives him a present or repays a debt?

There may be several answers to this question: the granting of a present changes the relations between A and B in certain ways. If B

[12] There are principled reasons to reject more generally instrumental reasoning in political theory. Even perfectly sound instrumental arguments for or against certain entrenched political institutions or procedures simply miss the point as they purport to rationalize political institutions and procedures in terms that do not capture what make such institutions or procedures politically and morally attractive. See Harel, Alon, *Why Law Matters* (Oxford University Press, 2014).

gives the money as a present rather than as a repayment of a debt, it follows that A ought to feel gratitude towards B, and such gratitude would inevitably change his future relations with A. If fortune changes, and suddenly B needs money that A can provide, gratitude may require that A helps B. Further, if B owes A money, A can demand repayment of the debt, while if on the other hand B does not owe A money, A can at most, request rather than demand the money. A therefore wants B to repay his debt rather than merely receive a present.

Even if B insists on giving the money as a present, A may find some consolation in the willingness of the community to support his demand, impose sanctions on B, and force or, at least, urge B to repay a debt rather than merely give a present. Thus, A may not merely insist that B concede the debt, but also (justifiably) insist that if B fails to repay his debt (and insists on giving A 'a present'), then the community at large will reproach B. As long as such a public condemnation is generally effective, it would be appropriate to say that A's right is not 'at the mercy of B'.

There are three clarifications concerning this example which I wish to highlight here. First, in order not to be 'at the mercy of B' it is not sufficient that there are moral norms requiring B to repay his debts. There must also be effective social norms requiring B to do so. It is the public understanding (grounded in social norms) that the failure to repay the debt is a wrong that counts, not merely the binding force of moral norms. In the absence of such a public understanding, it can be plausibly said that the debt is 'up to B' in the sense that the repayment of the debt hinges on B's judgments or inclinations to repay, and therefore A's rights are not adequately protected. This is true even when B is a decent person and is most unlikely to ever fail to repay his debts. It is not the prospects of violation that count but the fact that the decision to violate is 'up to B'; it hinges on the moral judgments or inclinations of B.

Second, not to be 'at the mercy of B' does not imply that B cannot refuse to repay his debt (or to acknowledge it). If there is a public norm prohibiting B from refusing to acknowledge his debt there is still an important sense in which it is not up to B to decide whether or not to repay. When B is asked: 'why did you pay' he may plausibly answer that he had no choice because there is a social or a legal norm requiring him to do so.

Third, note that under this view in order 'not to be at the mercy of B' it is not required that B would indeed be forced by the community to acknowledge and repay his debt. Precisely as I am not 'at the mercy' of criminals if I live in a state that effectively enforces the law (even in case a crime is committed against me), so A is not at the mercy of B simply because B refuses to acknowledge his debt, as long as there is a general system of sanctions or at least stigma attached to people who refuse to acknowledge their debts. A sporadic failure of the system to enforce the debt in a particular case does not imply that it is 'up to B' to pay or not to pay his debt, or that A is 'at his mercy'. Further, even when a person is very vulnerable to outside interference, it does not imply that the person lives 'at the mercy' of others. It is one thing to live in a crime-ridden society, and it is another thing to live in a society that does not condemn or prohibit crime or reproach individuals who violate the rights of others. As Louis Phillipe Hodgson noted:

> If I live in a particularly nasty part of town, then it may turn out that, when all relevant factors are taken into account, I am just as vulnerable to outside interference as are the slaves in the royal palace, yet it does not follow that our conditions are equivalent from the point of view of freedom.[13]

I shall argue that the relations between A and B can be analogized to the relations among citizens and to the relations between citizens and the legislature. In the absence of criminal prohibitions, citizens may still be inclined to honor the rights of others to life and liberty. They may even do it because they judge that they have a moral duty to honor the rights of others. Yet the rights are subjected in such a case to the possibility that individuals shift their judgments or change their inclinations. The prospect that such a shift takes place may be remote. Yet, even if it is remote, the rights are at the mercy of the individuals. A similar argument applies to the legislature. When a legislature is constitutionally bound to criminalize, the rights of individuals are not contingent upon the legislature's preferences, inclinations, or judgments. The rights of citizens living in such a system are not 'at the mercy of' the legislature. Even if at times the legislature may violate its constitutional duties, it does not imply that individuals live at its mercy.

[13] Hodgson, Louis Philippe, 'Kant on the Right to Freedom: A Defense', *Ethics* 120 (2010): 791–819 at 816.

What does it mean to live 'at the mercy of' another agent, and why is it so important not to live at the mercy of another agent? Proponents of the concept of 'republican freedom' shed light on this concept.[14] Neo-republicans reject 'the key assumption of classical liberalism to the effect that force or the coercive threat of it constitute the only forms of constraint that interfere with individual liberty'.[15] Instead, they identify liberty with non-domination. Domination is understood in terms of the *potential* for arbitrary interference.[16] One is deprived of republican freedom if one lives in 'a condition of dependence'.[17] Dependence renders a person vulnerable to the whims of others; it exposes a person to the potential interference of a dominant agent.[18] In describing what it means to live in conditions of political dependence Skinner says: 'your rulers possess such arbitrary powers means that the continued enjoyment of your civil liberties remains at all times dependent on their good will'.[19]

The literature on republican freedom is vast.[20] Opponents of republican freedom argue that the notion of republican freedom is used in different ways by its proponents and, further, that some of its main claims are indefensible.[21] I do not wish to defend here the notion of republican freedom, or Pettit's own version of such freedom. The argument that I develop does not hinge on the particularities of contemporary republicanism. It is also the view endorsed by Rousseau that freedom consists in some form of independence from the choices of others. De-facto non-interference as such is not sufficient; what is needed in addition is not being subject to the will of others. As Rousseau famously said, 'Freedom does not consist so much in doing one's will as in not being subjected to the will of others'.[22] Hence, the

[14] See, e.g., Lovett, Frank, Republicanism, *The Stanford Encyclopedia of Philosophy* (summer 2010 edition Edward N. Zalta ed.) http://plato.stanford.edu/entries/republicanism/.

[15] Skinner, supra note 6, at 84.

[16] Pettit, supra note 6, at 52.

[17] Skinner, supra note 6 at 84. See also Viroli, Maurizio, *Republicanism* (New York: Hill and Wang, 2002) p. 10.

[18] Pettit, supra note 6, at 5.

[19] Skinner, supra note 6, at 70.

[20] For references, see Lovett, supra note 16.

[21] Kramer for instance argues that the concerns of theorists of republican freedom are fully addressed by advocates of negative freedom. See Kramer, Mathew H., 'Liberty and Domination', in Cecile Laborde and John Maynor (eds.), *Republicanism and Political Theory* (Malden, MA: Blackwell Publishing, 2008).

[22] Cited in Neuhouser, Fredrick, 'Freedom, Dependence and the General Will', *The Philosophical Review* 102 (1993): 363–395 at 380.

free individual is one who obeys his own will, or more explicitly, *one who obeys no will* other than his own.[23] It rests on the conviction that 'I am free insofar as no one gets to decide for me'.[24] I use Pettit's framework to highlight some of the concerns raised more generally by proponents of freedom as independence, without necessarily endorsing the particularities of his view.[25]

Phillip Pettit described this predicament as follows:

> The grievance that I have in mind is that of having to live at the mercy of another, having to live in a manner that leaves you vulnerable to some ill that the other is in a position arbitrarily to impose… It is the grievance expressed by the wife who finds herself in a position where her husband can beat her at will, and without any possibility of redress; by the employee who dare not raise a complaint against an employer, and who is vulnerable to any of a range of abuses, some petty, some serious, that the employer may choose to perpetrate; by the debtor who has to depend on the grace of the moneylender, or the bank official, for avoiding utter destitution and ruin; and by the welfare dependent who finds that they are vulnerable to the caprice of a counter clerk for whether or not their children will receive meal vouchers.[26]

Further, Pettit continues:

> [W]hether or not they avoid interference, they certainly have a grievance. They live in the shadow of the other's presence, even if no arm is raised against them. They live in uncertainty about the other's reactions and in need of keeping a weather eye open for the other's moods. They find themselves in a position where they are demeaned by their own vulnerability, being unable to look at the other in the eye, and where they may even be forced to fawn or flatter in the attempt to ingratiate themselves.[27]

Some of the assertions of Pettit here are misleading as they seem to rely on the future prospects that the right will be violated and the psychological anxiety resulting from such prospects. Yet, a more interesting way of understanding what it means to be vulnerable or dominated ought to be equated with the public shared normative understanding, and, in particular, with the way the potential violator's decisions are publicly understood by the potential violator itself and by the community as a whole. A person is vulnerable or un-free

[23] See Neuhouse, supra note 24, at 381. See also Hodgson, supra note 15, at 806.

[24] Hodgson, supra note 15, at 806.

[25] For an analysis and an effective Kantian critique of Pettit, see Hodgson, supra note 15, at 809–816.

[26] Pettit, supra note 6, at 5.

[27] Pettit, supra note 6, at 5.

not primarily by virtue of the fact that a violation has taken place or that a violation is likely to take place, but by virtue of the fact that a violation is not labeled by the potential violator and/or publicly recognized and identified by the community as a wrong. I suggest that a plausible way to interpret what it means to be vulnerable or dominated ought to be equated with the *public shared normative understanding,* and, in particular, with the way the potential violator's decisions are understood and publicly or legally conveyed by the potential violator itself and by the community as a whole. The lender in our example is dominated by the debtor if the community refuses to reproach the debtor and urge him to repay his debt in cases of defiance. More generally, a person is vulnerable or un-free not only (or primarily) by virtue of the fact that a violation has taken place or is likely to take place, but by virtue of the fact that a violation is not publicly recognized, identified or labeled by the community as a violation. To take a famous example, the concern of some feminists was not only to prevent and deter sexual harassment but to label or categorize sexual harassment as a wrong. 'To call it a name' is an appropriate expression capturing what much of the literature on sexual harassment has been about.

To return to Pettit's examples, the potential violator—the husband, the employer or the clerk—may not feel inclined to violate the right, as s/he may be good hearted, generous or compassionate. But the mere fact that 'it is up to them' to decide whether or not to do so, is in itself oppressive. To protect against such oppression the potential victim may at least demand that the surrounding community reproaches the husband, the employer or the clerk. A person suffers from deprivation of freedom (understood as non-domination) when the potential violator and the relevant community surrounding him or her do not label or classify the behavior as a violation. Hence the potential victim of their decision is 'at the mercy of the potential violator'.

To borrow this insight and apply it to the context of criminal law let us return to states A, B and C described in the introduction. In state A the legislature does its best to protect basic rights but fails to criminalize violations; in state B the legislature criminalizes violations but is not constitutionally bound to do so; and in state C the legislature has a constitutional duty to criminalize. In all of these

states, let us assume, rights are protected to the same extent. The (benevolent) legislature in state A is as likely to effectively protect rights without criminalizing violations as much as the legislature in state B and in state C. Yet, the status of the citizens in these states is different. Citizens in state A live 'at the mercy of other individuals'; citizens in state B live 'at the mercy of their legislature'; and citizens in state C are free and do not suffer from such a predicament.

In state A citizens' rights are safe (or under the assumptions of our description, at least as safe as citizens' rights in state B). In state A, one may assume, citizens' rights are protected simply because of the social norms prevailing in state A. Social norms are however contingent upon the judgments and preferences of individuals. It is only criminalization of such violations which can overcome this problem.

Further, while in state B, the rights are not contingent on the preferences and inclinations of individuals; they are contingent on the willingness of the legislature to protect these rights. The constitutional duty to criminalize is analogous to the social norms which bind the debtor. The legislature in state C (the legislature which is bound by constitutional duties) is analogous to a debtor living in a community which reproaches debtors who refuse to acknowledge their debts.[28]

To see the significance of the constitutional duty to criminalize, let us examine more carefully what it consists of and in what ways such a duty differs from duties of political morality. Constitutional duties are duties that are grounded in practices, conventions and shared understandings of legislators, lawyers and public officials. Unlike norms of political morality to interpret a constitutional norm one has to resort to the way the norm was interpreted in the past, to the conventionally accepted articulations of the norm and to the ways it was applied in the past. Conformity with the constitutional duty depends on there being an ongoing framework or coordinative effort in which participants immerse themselves in formulating, articulating, and shaping the content and the scope of the constitutional norms. Such a deliberative practice places a constraint on the practical deliberations of the legislature. For instance, what a legislature may do in a particular case depends on the ways the

[28] Arguably even in C no citizen is ever safe. Precisely as social norms may change, so too legal norms and even constitutional norms may change. Even if the duty to criminalize is constitutionally entrenched it is subject to the risk of constitutional amendment. I discuss this objection below.

legislature has reasoned in similar cases, the way such decisions have been understood and interpreted by the legal community, etc.

Given that constitutional duties reflect the convictions of a community of policy-makers, lawyers and other relevant elites, even when the legislature does not honor a constitutional right, the violation of that right is (generally) subjected to condemnation. In contrast, a legislature that is not bound by constitutional duties may conform to its pre-existing moral or political duties. Its conformity however is contingent on its inclinations and judgments. Such a legislature can therefore be analogized to B who is willing to give money to A but insists that the money be given as a present rather than as a repayment of a debt. Citizens living in a state with no constitutional duties therefore live 'at the mercy of' their legislature in the same way that the lender lives 'at the mercy' of the borrower in the absence of social norms which require the lender to repay his debt.

Prior to constitutional entrenchment, the conformity of a legislature to its duties can plausibly be interpreted as grounded in its inclinations or judgments. Even if the legislature solemnly declares its conviction that it is morally or politically bound to legislate in certain ways, its declaration could be challenged by future legislatures or by the citizens. In contrast, constitutional duties constitute a publicly verifiable commitment on the part of the legislature as such. Further, being accepted by the community of lawyers, policy-makers and judges, deviations from the constitutionally entrenched duties typically trigger condemnation. Consequently, citizens do not live 'at the mercy of' the legislature's inclinations or judgments.

In this discussion I used examples which assumed no constitutional indeterminacies. For instance, I assumed with the German Court that abortions are indeed violations of the right to life. Yet as we all know constitutions are typically indeterminate. Arguably if such indeterminacies exist, individuals are at the mercy of the interpretations given to the constitutional provision. Should therefore the constitutional entrenchment be a specific one – one that leaves no discretionary powers to the courts? Does it apply for instance to a constitution that constitutionalizes moral rights as such (without specifying their content) and grants courts powers to enforce those norms?[29]

[29] For this possibility, see the discussion in Alexander, Larry, 'Living Trees and Dead Hands XXII', *Canadian Journal of Law and Jurisprudence* 227 (2009): 231.

I believe that the analysis is applicable both to indeterminate as well as determinate provisions. In the case of determinate provisions, the entrenched directives transfer the power from legislatures to the framers of the Constitution. Hence once those duties are entrenched citizens are not at the mercy of their legislatures. In the case of indeterminate provisions, the entrenchment transfers power to the courts, and therefore citizens are not at the mercy of the legislature. In both cases the entrenchment protects citizens from the whims or judgments of the legislature.[30]

Let me turn at this point to address six objections to this analysis.

First one may question whether the concern raised here gives rise to a *duty* (to criminalize and *a duty* to constitutionally entrench the duty to criminalize) or merely gives rise to *a reason* (to criminalize and *a reason* to entrench a constitutional duty to criminalize). To assert that there is such a duty implies that the state is wrong in failing to criminalize or in failing to entrench the constitutional duty. In contrast to merely assert that there is a reason to criminalize and to entrench a constitutional duty to criminalize does not imply that the state is wrong in failing to do so.

The question of what reasons constitute duties is controversial in the literature, and it would be much beyond the ambition of this paper to contribute to this debate. There are however some grounds to support the conclusion that the state has a duty rather than merely a reason to criminalize and a duty to entrench such a duty in the constitution. The protection and promotion of freedom is typically a duty of the state. If indeed in the absence of a criminal prohibition (or in the absence of the entrenchment of a constitutional duty to criminalize) individuals are dominated or are unfree it follows that the state has a duty to do what is necessary to protect their freedoms.

Note that even if one concludes that there is a duty to criminalize and/or a duty to constitutionally entrench such a duty, it does not imply that the duty is an absolute duty, or even a particularly weighty duty. Perhaps to the extent that criminalization creates more harms or that failing to criminalize would reduce incidence of such violations, the state ought not to criminalize or ought not to

[30] Yet it could be argued that it exposes citizens to judgments of the framers (in case the directives are clear) or to the judgments of judges in case in the provisions are indeterminate. I discuss this objection later.

constitutionally entrench a duty to criminalize. It seems evident that neither the duty to criminalize nor the duty to constitutionally entrench the duty to criminalize is an absolute duty. I will also leave the question of what the strength of the duty is unresolved. The primary aim of this paper is to point out that there is such a duty, not to determine its weight. Last even if one remains unpersuaded that my arguments establish a duty on the part of the state and insists that as a matter of fact they merely establish a reason, they have important normative implications. The scope and strength of these implications hinge to a large extent on the weight of the reason (and not only or primarily on whether the reason gives rise to a duty or not).

Second it may seem that the argument implies too broad a duty to criminalize (and to constitutionally entrench such a duty). Arguably there is nothing in the argument that restricts the duty to basic rights. It seems that every wrong irrespective of how minor it may be gives rise to such a duty. Unless the duty is restricted the argument implies a very extensive duty on the state's part, potentially covering the whole sphere of interpersonal wrongs.

This conclusion however does not follow. The argument applies only to those wrongs which the state has a duty to prevent. The state is in charge of protecting us from murder, theft and rape. It does not have a duty (or even a reason) to prevent other wrongs such as the breaking of promises. This Article does not purport to provide a criterion to determine which wrongs the state ought to prevent.[31] Instead it argues that *if* the state has a duty to prevent a wrong, it ought to do it in certain ways. More particularly the institutional mechanisms by which the state ought to honor its duty to prevent certain wrongs must be ones that acknowledge that those are indeed wrongs that give rise to a duty on the part of the state. I make no judgments however as to the scope of the wrongs that the state has a duty (or a reason) to prevent.

Third one may point out a major difference between the case of the loan and the case of a constitutional duty to criminalize. Arguably when legislatures legislate they never act on the basis of unfettered discretion. Instead, they decide on the basis of their judgments concerning the public interest. If this is the case, it follows

[31] For an attempt to delineate the scope of the duty, see Duff, Anthony, *Answering for Crime: Responsibility and Liability in the Criminal Law*, 2007, Chap. 2.

that it is false to say that in the absence of a constitution citizens simply live 'at the mercy of the whims of legislatures', as enlightened legislatures never operate on the basis of their whims but on the basis of judgments concerning what ought to be done and what their duties are. This challenge is most lucidly expressed by John Finnis, who argued that there is no fundamental difference between matters of principle and matters of policy and/or public interest as both are grounded in human goods. In his view: '[N]owhere here do we find a collective welfare determinable apart from individual rights which define, shape and constitute the common good, the public interest'.[32]

Finnis' observation establishes successfully that the dichotomy between duties on the one hand and discretionary decisions on the other is too simplistic. Yet, it would be too hasty to conclude that there is no difference between decisions that are designed to promote the public good *as understood by legislatures* and decisions that are mandatory and are not subject to legislative deliberation. Thus, one may concede that even in the absence of a constitution or a bill of rights the citizen does not live at the mercy of the whims of the legislature, as the legislature's decisions are not determined by its whims. Instead, the citizen often lives at the mercy of the judgments of the legislature concerning the scope and weight of human rights, and, under the view I espouse here, being subjected to the legislature's judgments with respect to these rights is detrimental to freedom.

Fourth an opponent could argue that acknowledgment on the part of a legislature of its duties does not require a constitution or a bill of rights. A legislature could acknowledge its duties by solemnly declaring its commitment to act in accordance with its political duties, and this would be sufficient to protect freedom understood as non-domination. This would be a simple and intuitive extension of the Kantian concept of acting from duty.[33] Thus, when (many or all) individual legislators reason from their (moral and/or political) duties, the institution of the legislature as such could be said to

[32] Finnis, John, 'Human Rights and Their Enforcement in John Finnis', in *Human Rights & the Common Good: Collected Essays* vol. III, (Oxford: Oxford University Press, 2011), pp. 19–46 at 34.

[33] What it means for a person to act from a duty is highly controversial in the philosophical literature. Some believe that to act from duty entails that respect for the duty was present at the time of the act, and would have sufficed by itself to produce the dutiful act. This view was challenged and an alternative proposal put forward under which to count as an act performed from duty it is required that the action be performed 'because the agent finds it to be the right thing to do and take its rightness or requiredness as his reason for action'. See Herman, Barbara, *The Practice of Moral Judgment* (Cambridge: University Press, 1993), pp. 3, 12. But these controversies are irrelevant for our purposes.

acknowledge its duties, and it might be argued that this would be sufficient to justify the conclusion that the citizens are not at the legislature's mercy.

This extension of Kantian individual morality and, in particular, Kant's analysis of acting 'from duty' into the field of politics, is flawed. To the extent that it is worthy that legislatures acknowledge their duties, such an acknowledgment ought to be public, as it ought to be judged by citizens and provide the basis for evaluating the performance of the legislature.[34] But of course the reasoning of individual legislators is not public knowledge. Further, even if individual legislators solemnly and publicly declare that they are obliged to act in certain ways, such declarations are not binding. Legislators can legislate, but they cannot typically legislate the grounds for their legislation.[35]

Fifth an opponent could also raise the question of why would not it be sufficient that the state provide recourse through the civil law for those whose rights are violated. Arguably this is sufficient to make it the case that life and liberty are not 'at the mercy' of others. As long as the state recognizes these as wrongs by providing civil remedy, it acknowledges that one's life or liberty is not 'at the mercy of others'.

I do not preclude the possibility that a civil remedy would be sufficient to protect republican freedom. My only concern is that civil wrongs are typically enforced by private individuals and not by the state. The prerogative of the victim not to pursue a remedy may be insufficient to provide recognition of the duty. Civil wrongs are of course wrongs, but their enforcement is typically at the discretion of the victim. Such discretionary powers are insufficient in my view to convey the force of the duty of the state to protect life and liberty.

Sixth, one could argue that no matter what constitutional duties the legislature has, it is always the case that the right to life and liberty is 'at the mercy' of somebody. After all even if the legislature criminalizes violations of rights, and even if such duties to criminalize are constitutionally entrenched, people are 'at the mercy' of the constitution (or at the mercy of those institutions which have the power to change the

[34] Crime is of course a public wrong, and its public nature is important for Kant. In this respect my view is consistent with the Kantian account developed by Ripstein. See Ripstein, Arthur, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University press, 2009), pp. 308–314.

[35] This could of course be institutionally changed, and perhaps such a change would open the possibility of a different form of public recognition that can substitute for the need for constitutional entrenchment of the duty to criminalize. I will not discuss this possibility here.

constitution or interpret it). Somebody after all, has to draft the constitution and somebody has to interpret it. It follows that even if constitutional rights are entrenched, citizens still live at the mercy of the drafters or the interpreters of their national constitutions. Our rights are therefore inevitably at the mercy of the entity which is in charge of drafting and/or interpreting these constraints. Further, while some of these entities are more trustworthy than others, it is unclear that they are more conducive to republican freedom. In other words it is not clear why living at the mercy of a constitution (or at the mercy of a constitutional court) is more conducive to freedom than living at the mercy of a legislature.

To address this concern, compare the case of the borrower and the lender. Even in a society that condemns the failure of the borrower to repay his debt, the lender is subject to the risk that social norms change. Yet, even if such norms change, their present existence implies that the lender does not live at the mercy of the borrower. All institutional mechanisms and norms including constitutional ones may lose their potency. This does not imply that they do not serve to protect republican freedom. Partly the reason is that what is particularly crucial for freedom in this case is not to be subjected to the mercy of the *borrower*. This is the threat against which the lender ought to be protected. It is one thing to live at the mercy of the borrower and another to live at the mercy of societal norms. Similarly constitutions protect us from being subjected to the mercy of potentially oppressive *legislatures* even if such legislatures are unlikely to become oppressive. It protects us from the *potential* oppressiveness of legislatures in addition to protecting us from their *actual* oppressiveness. This does not imply that it protects us from other entities such as framers of the constitution or courts.

Is living at the mercy of constitutional order less oppressive than living at the mercy of legislatures? I believe there is an important sense in which it is less oppressive. Legislatures are perceived to reflect the judgments and preferences of majorities. Constitutions in contrast, are not documents that are subject to such judgments or preferences; they are understood to establish duties that are somewhat detached from the preferences and judgments of particular individuals. Even when courts interpret constitutions their judgments are not ones that are perceived to be based on their *own* judgments or

their *own* preferences. Hence I would say that living at the mercy of a legislature (as they are currently understood) is different from living at the mercy of constitutions or courts.

Admittedly even if living at the mercy of a drafter or an interpreter of a constitution is less oppressive than living at the mercy of a legislature, it may not be sufficient for republican freedom. As skepticism concerning the national constitution grows there is a greater need for an additional layer of normativity that will bind the state. The turn to globalism can be regarded as a way to overcome the concern of living at the mercy of national constitutions. Precisely as constitutionalists insist that living at the mercy of the constitution is less detrimental to freedom than living at the mercy of the legislature, so arguably living at the mercy of global norms is less detrimental to freedom than living at the mercy of national constitutions (or, at the mercy of constitutional courts).

In the absence of global norms, individuals live at the mercy of the provisions of their own national constitutions and at the mercy of the judicial interpretations of their own national constitutions. The establishment of an additional normative layer (a global one) contributes to the protection of freedom in the same way that adding a layer of constitutional norms contributes to republican freedom. Individuals who live in a global order are free not (only) because their rights are better protected but because the protection of their rights does not depend upon the good will of national courts or other national institutions in charge of interpreting the constitution. Precisely as the turn to constitutionalism protects us from the prospects of living at the mercy of legislatures, so the turn to globalism protects us from the prospects of living at the mercy of the drafters and interpreters of national constitutions.[36]

[36] Further the relationship between global norms and constitutional norms could be a reciprocal relationship. The establishment of a layer of global norms contributes to republican freedom in that the protection of rights does not depend on the good will of national courts or other national institutions, and, at the same time, the establishment of constitutional norms contributes to republican freedom in that the protection of rights does not depend on the good will of the international community. Thus the protection of rights is neither at the mercy of national courts (because of the existence of a global order or a global constitution); nor at the mercy of the global community (because of the existence of national constitutions and national courts). Precisely as houses are supported both by internal walls and by external framework whereas each provides support to the other, so the two layers of norms (constitutional and global) mutually support each other. The co-existence of the two layers is justified not (only) by its instrumental contribution to the protection of rights but also by the fact that the protection of rights is neither at the mercy of national constitutional courts nor at the mercy of the global community.

Let me turn now back to the decision of the German Constitutional Court. Under my analysis of the Court's ruling, the decision of the Bundestag to decriminalize abortion simply on the grounds that such a decision reduces the number of abortions is unjustifiable as it subjected fetuses 'to the mercy' of their mothers. Pursuant to the legislative act, the decision of a pregnant woman not to abort would have been based on her inclinations, not on a publicly recognized right of the fetus. Further, my interpretation of the Court's reasoning is that it is not only that the decision to abort ought not to be left to the discretion of the pregnant woman, but the decision to criminalize abortions ought not to be left 'to the mercy' of the Bundestag. If the decision to criminalize is at the mercy of the Bundestag, it follows that the life of the fetus hinges ultimately on the inclinations of the Bundestag.

The abortion debate in Germany has much deeper significance than is often recognized. More specifically, this debate highlights the sharp difference between *protecting life* and protecting *a right to life*. Life can be protected in a state without protecting *a right to life*. Further, protecting a right to life may even be detrimental to the protecting of life, when criminalization of abortions leads to a greater number of abortions. Under the interpretation provided here, the abortion case can be justified on the grounds that life as well as basic freedoms ought not merely to be protected; the violations of the right to life and other basic freedoms ought to be criminalized, and the duty to criminalize ought to be constitutionally entrenched.

IV. SUMMARY

This paper defends the view that the state has a duty to criminalize violations of basic rights to life and liberty and, further, that this duty ought to be constitutionally entrenched. More specifically, I argue that criminalization is justified not merely instrumentally on the basis of the conjecture that a criminal duty is likely to be conformed to by citizens, or that a constitutionally entrenched duty to criminalize is likely to be conformed to by legislatures. Instead, the state has a duty to criminalize as criminalization is a form of public acknowledgement of the wrongfulness of violations of the right to life and liberty, and further such a duty to criminalize ought to be constitutionally entrenched.

It is also my contention that the duty to constitutionally entrench the duty to criminalize is part of a much more expansive duty. While this paper focuses its attention on the duty to criminalize the broader duty is a duty to entrench pre-existing political duties. Constitutional entrenchment of pre-existing moral and/or political rights is valuable (regardless of whether such an entrenchment is conducive to the protection of these rights).[37] Such an entrenchment of pre-existing moral and/or political rights need not be accompanied by an effective institutional system of enforcement such as judicial review, and it need not be conducive to the greater or more efficacious protection of the rights enshrined in the constitution. Its value is grounded in the fact that constitutional entrenchment of political rights is a form of public recognition that the protection of rights is the state's duty rather than a discretionary gesture on its part.

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[37] Note that I do not claim that all constitutional rights entrench pre-existing moral/political rights. Larry Alexander distinguishes among three ways of conceptualizing constitutional rights. My concern in this paper is merely with Alexander's second category, namely, those rights that incorporate real moral rights in the constitution. See Alexander, supra note 31, at 230.