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. But does the state have a duty to criminalize such...
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-criminalization3; 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,

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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.