

IS IT A CRIME TO TOLERATE EVIL?

AN ESSAY ON THE MORAL SIGNIFICANCE OF JUSTICE

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Abstract: *By mapping the boundaries of KANT's categorical imperative to the point where it permits the committing of a crime against HUME's three principles of justice, it shall be demonstrated how far the area is in which these two concepts persist alongside each other and how narrow the border zone is in which they do not. Indeed, the latter is a forbidden place that can only be accessed through destiny and never by choice. Whoever is witnessed to stay there, must wish for JUSTICE to draw her sword against him, and whoever dares to try reaching it, will only wander about a deserted land where both justice and morality are left behind.*

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Introduction

The aim of this study is to shed light on one aspect of the more general question of how a society should or should not be organised. More specifically, it focuses on the need for tolerance and its moral limitations. What evil must be tolerated and what evil must not, lest that tolerance itself be evil? The study will examine this question in three chapters, the first of which will discuss the concept of good and evil based on the moral philosophy of IMMANUEL KANT. It will demonstrate that morality paradoxically compels a toleration of evil. The second chapter will proceed to the general conditions for a coherent society according to the theory of justice set out by DAVID HUME in his principal work "*A Treatise of Human Nature*." This theory will provide the evidence of the unlikelihood of humans being able to continue as a reasonable and potentially moral species without having private property and contracting established in their society. The third chapter will question the moral significance of these institutions in the light of KANT's ethical system. This will lead to the paradox that although morality may (surprisingly) allow the committing of a crime against justice, it can never tolerate such an offense when committed by others.

I. The relationship between reason and morality

§ 1. *The existence of reason*

The principle works of the philosopher Immanuel KANT are based on the metaphysical belief that there is *reason* within the human. “Reason,” approximately in the sense in which KANT uses the term,² denotes the ability to think, and in his first three principle works (namely his “*Critique of Pure Reason*,” “*Critique of Practical Reason*,” and “*Critique of Judgement*”), he systematically discusses the possibilities and limitations of this ability. According to KANT, the apparatus of reason is based on the framework “*time* and *space*” in which all sensations become conscious along with a set of twelve mental “categories” that he subdivides into four different groups: *quantity*, *quality*, *relation*, and *modality*.³ His analysis reveals that, within this framework, humans are able to build mental representations of their surroundings and determine the consequences of their behaviour. Against this background, it is the apparatus of reason that gives human beings an ability to conduct themselves in a purposeful manner. Such use of reason, concerning the means and ends of one’s action, is what KANT calls “practical reason” or rather simply “will.”⁴

§ 2. *The existence of a free will*

A constituting element of KANT’s moral philosophy is the insight that the will as such is necessarily *free*—a self-determining entity. At the moment of making a choice, the human understands himself as liberated from the influence of external causes, capable of influencing the future without being determined by the past. To KANT, the

² KANT’s distinction between “mind” and “reason” is consciously ignored here. In a wider sense, the term “reason” encompasses both of these concepts. This view is adapted from RUDOLF EISLER’s *Kant Lexikon* where there is an entry for both “reason in the wider sense” (“Vernunft im weiteren Sinne”) and “reason (in the narrow sense)” [“Vernunft (im engeren Sinn)”]. Cf. EISLER | 1930\1984 | Kant Lexikon: pp. 572–573.

³ Cf. KANT | 1787\1968 | Kritik der reinen Vernunft [KrV]: I / Zweiter Theil (Die transscendentale Logik | pp. 74–461); especially ibidem: Erste Abtheilung (Die transscendentale Analytik) / Erstes Buch (pp. 85–130).

⁴ Cf. KANT | 1785\1968 | Grundlegung zur Metaphysik der Sitten [GMS]: Zweiter Abschnitt / p. 412, p. 427.

possibility of this realisation is the result of the will being an expression of reason.⁵ It is also understandable, however, that reason as the apparatus of thought is not able to envision the determining causes of a thought within that thought. From the perspective of empirical sciences such as physics and neurobiology, free will may thus be argued as a cognitive illusion of the human who would therefore have to be regarded as a fully determinable creature. But an objection of this kind would miss the core of KANT's argument. KANT himself affirms that the concept of a will spontaneously influencing the world—a “causality by freedom,” as he calls it—is not *real* in the sense of absolute existence.⁶ He demonstrates that such a causality cannot be consequently applied to the universe without logical contradiction.⁷ However, he also demonstrates that the alternative to this, the concept of a deterministic causality which he calls “causality in nature”, is neither applicable to the universe since the attempt leads to similar contradictions. If therefore, the possibility of something incalculable, such as a free will, were denied as being an illusion, one could justifiably argue within KANT's system that in consequence also every attempt instead to explain the human in a deterministic way must be abandoned. This means that either both of these concepts or neither has a legitimate place in philosophy and science. KANT assumes the former.⁸ In his view, both spontaneous freedom and deterministic nature are preliminary and inseparable conditions of human thought, and such conditions are of course also preliminary to philosophy and science. The essence of his argument is that if the human mind—and not the world in total—is assumed as the legitimate setting of their application, these two seemingly opposing concepts of causality do not

⁵ Cf. KANT | 1785\1968 | GMS: Dritter Abschnitt / p. 446; and KANT | 1787\1968 | KrV: I / Zweite Abtheilung (Die transscendentale Dialektik) / Zweites Buch / 2. Hauptstück / 9. Abschnitt / III / pp. 363–364.

⁶ Cf. KANT | 1787\1968 | KrV: I / Zweite Abtheilung / Zweites Buch / 2. Hauptstück / 9. Abschnitt / III / p. 365.

⁷ Cf. KANT | 1787\1968 | KrV: I / Zweite Abtheilung / Zweites Buch / 2. Hauptstück / 2. Abschnitt / Dritte Antinomie (pp. 308–313).

⁸ Cf. KANT | 1787\1968 | KrV: I / Zweite Abtheilung / Zweites Buch / 2. Hauptstück / 9. Abschnitt / III / Erläuterung / pp. 368–369.

contradict each other.⁹ This lays the foundation for his philosophy of morals the baseline of which shall now be briefly explained.

§ 3. *The self-affirmative character of reason*

KANT's moral theory is an investigation of the good in free will, firstly the possibility of its existence and secondly its characteristic properties. The possibility of the will's good is a result of its freedom: Given that there is something unreservedly good, it can only be thought of as something that is unreservedly free of empirical determination which is, as KANT assumes, exclusively the case for a will.¹⁰ To logically derive what would qualify a will as "good" was apparently a task of great difficulty. Philosopher DAVID HUME had already asserted that a normative statement on what *ought* to be could not be derived from a merely positive description of what *is*¹¹ and KANT has adopted this view.¹² In the light of this insight, it may at first seem impossible to analyse the properties of a normative concept such as good without any preceding dogmatism. However, KANT's previous research on reason put him in the position to take on the task. After he had demonstrated that reason is inseparably associated with the idea of a causality by freedom, he went on to show that reason also contains a normative assumption of how such a causality shall develop. This assumption, the underlying premise of any moral consideration, is revealed when the mere act of thought is critically reflected upon: Why would we think if we did not think that it were right to be able to think? The reader is warmly invited to pause for a moment and confirm this in regard to his or her own thoughts...

It seems that the use of reason, exercised in thought, inherently implies that the existence of reason is normatively right because otherwise,

⁹ Cf. KANT | 1787\1968 | KrV: I / Zweite Abtheilung / Zweites Buch / 2. Hauptstück / 9. Abschnitt / III (pp. 362–377).

¹⁰ Cf. KANT | 1785\1968 | GMS: Erster Abschnitt / pp. 393–394.

¹¹ Cf. HUME | 1739\1888 | A Treatise of Human Nature [THN]: Book III / Part I / Section I / pp. 469–470.

¹² Cf. KANT | 1787\1968 | KrV: I / Zweite Abtheilung / Zweites Buch / 2. Hauptstück / 9. Abschnitt / III / Erläuterung / pp. 371.

thoughts that occur could not have any meaning attributed to them, and reason would by its own logic not allow itself to proceed! This characteristic and inseparable trait of reason—that in regarding itself, it must judge its own existence as a normative necessity—will hereinafter be called the *self-affirmative character* of reason. KANT addresses this essential concept of his moral philosophy in at least three passages of his work (quoted in the **Appendix**) and even emphasises its importance.¹³ However, he does not provide a name for it. The introduction of a new term, “self-affirmative character,” shall set these otherwise easily overlooked passages as a reference point for the further course of this argument.

§ 4. *The incompleteness of the human will*

A peculiarity of the *human* will in particular is that it has the ability to create a paradox: While on the one hand, the will is free from the influence of experience, it is on the other hand also able to disallow itself this freedom and become determinable. This paradox induced KANT to classify the human will as “incomplete.”¹⁴ A result of this incompleteness is the fact that human practical reason may manifest itself as an intention towards something that is logically incompatible with its self-affirmative character. Such an intention can easily be empathised with. It is a known fact that the human body is regularly confronted with discomfort and unease, and it is clear that reason envisions numerous effective ways to attain temporary relief from these inconveniences. But although the human body may *have* reason, the body is not reason itself which means that it possesses no foresight, that its natural instincts are betrayable, and that the body alone is disregardful of reason’s future existence within the human. In principle, subordinating himself to the rule of his body would allow the human to take actions that are knowingly damaging to the preservation of reason. From the introspective viewpoint of KANT’s critical philosophy, the

¹³ Cf. KANT | 1785\1968 | GMS: Erster Abschnitt / p. 401; and Zweiter Abschnitt / p. 423, pp. 428–429.

¹⁴ Cf. KANT | 1785\1968 | GMS: Zweiter Abschnitt / pp. 412–414; and Erster Abschnitt / p. 405.

reason for why people would make such a choice must remain beyond comprehension for, although it is a conscious act by reason, its higher motive can never be found in reason.¹⁵ All that seems certain about it is that if reason were used in an uncompromising manner, one could never approve of something that did not affirm the existence of reason, the desirability of its use, and the need for its preservation.

§ 5. A descriptive definition of good and evil

Keeping the observations in mind that the will is free, and that reason is self-affirmative, it is possible to form a normatively neutral definition of “moral” and “evil.” The distinction between these terms equates to the dichotomy of “right” and “wrong” regarding the will. If a will is the practical use of reason and if reason is naturally self-affirmative so that it must always judge itself as something that ought to be, then morality—the property for which a will is reasonably judged as “right”—can be defined as the will’s logical consistency with reason’s self-affirming nature. Since the alignment of a will with the moral state of logical consistency is exercised by reason alone, one may also call the moral will “pure reason in practice” or “pure, practical reason.” Conversely, evil,—the property that renders a will “wrong”—would be a will’s logical inconsistency with reason’s self-affirmative character, expressed in the unreflective use of reason towards a random goal, regardless of whether reason would be further maintained or hindered by the attainment of that goal. In contrast to morality being “pure, practical reason,” evil may be described as “practical reason under purely empirical conditions.”¹⁶ It is noteworthy that these definitions do not allow gradual distinctions. A single decision is either moral or evil. Something like a “degree of morality” could only apply to a set of multiple decisions of which each were either moral or evil.

§ 6. A prescriptive definition of good and evil

While evil may manifest itself in a seemingly endless variety of alternative principles to which the human will could be aligned, there

¹⁵ Cf. KANT | 1794\1968 | Die Religion innerhalb der Grenzen der bloßen Vernunft: Erstes Stück / IV / p. 43.

¹⁶ Cf. KANT | 1788\1968 | Kritik der praktischen Vernunft: Einleitung (pp. 15–16).

is only one principle of morality: the general use of reason in logical consistency with the assumption of its own necessity. Since the human will is incomplete, the human cannot describe himself as a natural agent by this principle but only prescribe himself to act by it. If the above defined principle of morality is applied to the human, its verbal definition must therefore be changed into the form of an imperative sentence. KANT defines this imperative as a demand that is both *general* and *necessary* and calls it “categorical,” as opposed to “hypothetical imperatives” that are derived from suppositions and therefore not general and necessary.¹⁷ There are various ways in which to verbalise the categorical imperative. One of them is the formula:

Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always also as an end.¹⁸

In comparison to the more commonly known “legislative” formulæ of the categorical imperative, this formula has the advantage of expressing the logical groundline of the principle’s derivation more clearly: It is clear that humankind possesses reason and it is understandable that the self-affirmative nature of reason must, therefore, demand the treatment of humanity as a priority and “always also an end.” Furthermore, the sentence reveals the imperative’s addressee: the human, a reasonable creature with an incomplete will. A being with a complete will would naturally act by that principle, and with regard to such an individual, there would be no need for a prescriptive definition in the form of an imperative so that one could instead suffice with the *descriptive* definition given above.

§ 7. The moral significance of the other human being reasonable

Apart from these aspects, the quoted formula of the categorical imperative also reveals something that has not yet been explicitly addressed: the moral implication of a social world. When a person

¹⁷ Cf. KANT | 1785\1968 | GMS: Zweiter Abschnitt / pp. 414–415.

¹⁸ Translated from: “Handle so, daß du die Menschheit sowohl in deiner Person, als in der Person eines jeden andern jederzeit zugleich als Zweck, niemals bloß als Mittel brauchst” KANT | 1785\1968 | GMS: Zweiter Abschnitt / p. 429 (with letter-spacing in the original).

interprets another living being as likewise bestowed with the ability to think and freely determine her own course of actions, he is put into what is called a social context. In this, he can no longer place his decisions under moral self-critique without also considering the consequences that these decisions would have on the will and interests of that other person. This is because the affirmation of reason, implied in any thought, is neither an affirmation of the particular person who has that thought nor on the thought itself but rather of the possibility of thought in general. Moral decisions are therefore made without regard to distinctions such as “me” and “the other,” or “he, this person” and “she, that person.” In situations in which other individuals are knowingly affected by one’s actions, this *rational indifference*, as one may call it, implies a shift in the conditions of morality: On the one hand, the moral agent is now relieved from the otherwise undisputable duty to maintain and cultivate reason within himself. If he believed that he could more effectively awaken or assist reason in someone else, he is morally allowed to focus his efforts on that other person. On the other hand, the moral agent is now saddled with a prohibition on every action that would avoidably obstruct someone else’s will—actions that would be morally legitimate in solitude. All in all, a social context creates both a moral permission and a moral stipulation to respect the will of everybody else as if it were one’s own.

§ 8. *The alleged responsibility to prevent evil in others*

The moral permission for altruism and the moral prohibition against hindering others give rise to the question: What if another person exercises her free will with disregard to reason, would it not be a *crime* against morality to tolerate her evil and allow it to transpire?¹⁹ Initially, this appears to be a legitimate doubt, and the more powerful a person is the greater her urge to expand the reach of her responsibility into areas that are also under

¹⁹ In its wording, the question alludes to a passage from novelist THOMAS MANN’s masterpiece *Der Zauberberg* (1924) where, in a discussion on Masonry, the character LODOVICO SETTEMBRINI demands the protagonist to fix in his memory »that tolerance becomes a crime when applied to evil!«—which is translated from: »dass Toleranz zum Verbrechen wird, wenn sie dem Bösen gilt« MANN | 1924\1954 | *Der Zauberberg*: Sechstes Kapitel / Als Soldat und brav / p. 731.

the control of others may be. However, against the background presented here, the aim to redeem others from an alleged evil is easily revealed to be self-deceit. Every action, evil or not, is by definition an exercise of will. Since will is introspectively experienced as free, one cannot claim to know with certainty what another person's present will is, nor can it be determined—based on past events—what future course a person's will is going to take. It would be contradictory to claim empirical knowledge about something that is regarded in oneself as free from empirical determination. Whether it be one's own will or that of another person, the maintenance and cultivation of reason cannot prevent the possibility of its use for evil motives. The only way to eliminate that possibility would be to eliminate reason, which would paradoxically fall under the definition of evil. Therefore, it would rather be a crime *not* to tolerate evil than to tolerate it! And it is only oneself in a present moment to whom the responsibility to refrain from evil is applicable.

§ 9. The myth that morality could eliminate conflict

But although the possible evil-mindedness of others is not a legitimate concern of a moral person, it seems unavoidable for such a person to sometimes be intolerant against their actions. There are situations in which someone's behaviour hinders the attainment of another one's objective and in order to provide space for their goals, each one must initially act against the will of the other. It is a common and understandable belief that such conflicts between humans could vanish from the world and leave peace on the planet if everybody were guided by morality. But it has to be remarked upon that many conflicts are a logical result of people's converse assumptions about causes and effects within the world—a contradiction that results not from somebody's deficient moral integrity but from everybody's naturally incomplete knowledge. It seems that mankind must always base their decisions to a certain degree on blind speculation, and speculations will differ between humans who have experienced the world differently. Therefore, even in a kingdom of morality, different people's objectives could not stand in a perfect harmony and their actions would regularly oppose against each other. Whether the outcome of such an opposition is more of a hinderance or an assistance to the preservation of reason,

will depend not so much on individual's moral commitment to reason but more on the established norms, or *institutions*, that regulate the interaction. The two remaining chapters of this study shall discuss the judiciary as such a regulative institution, firstly in a merely positive sense on the basis of a theory by DAVID HUME and secondly, returning to KANT, in a normative sense. The argument will conclude by answering what must and must not be tolerated in order to refrain from evil.

II. The emergence of justice

§ 1. A shift from introspection to empirical observation

The last chapter's argument proceeded from the perspective of an introspective science where human action must be regarded as the product of a spontaneous *causality by freedom*. It was necessary to take this perspective in order to define what morality is and to assure oneself of its possible existence. In this second chapter, the human shall instead be regarded from the perspective of an empirical science where there is no freedom so that everything will appear as the result of a deterministic *causality in nature*. Taking this perspective is a necessary step in developing a baseline for a later discussion of whether and how a particular decision could be moral or not. Such a discussion will require assumptions on causal relations in nature, and it is the task of this chapter's argument to develop such statements concerning *human* nature in particular.

§ 2. Society as a cause for the emergence of reason

Humankind shall from now on be regarded as a species of biological organisms that behave intelligently in a world of time and space. Furthermore, it shall be assumed that every biological species is the interim product of a continuous evolutionary process. This viewpoint gives rise to the morally relevant question of how reason could have emerged in the human body. Though the ultimate origin of reason must remain a divine mystery, it seems viable to assume a causal connection to some conditions under which the human species and its biological ancestors have been living. Reason is an essential requirement for command of verbal language and various forms of collaboration. These activities are always social. The absence of a correspondent would make them either meaningless or impossible in solitude. Apart from these abilities, it is difficult to imagine any other life-determining applications of reason that could not be performed on the basis of instinct. It is therefore very unlikely that in the evolution of the human species reason would have emerged and continued for any cause other than human beings' social nature.

§ 3. *The attraction of human society*

But the merit of society had its price. Unlike other creatures, humans have physically regressed to the point that they can hardly subsist without society. This observation is the starting point of a theory by DAVID HUME on the nature of justice and the causes for its emergence in human society. HUME begins his argument with the statement:

Of all the animals, with which the globe is peopled, there is none towards whom nature seems, at first sight, to have exercis'd more cruelty than towards man, in the numberless wants and necessities, with which she has loaded him, and in the slender means, which she affords to the relieving these necessities [...] 'Tis by society alone he is able to supply his defects, and raise himself up to an equality with his fellow-creatures, and even acquire a superiority above them.²⁰

He proceeds with an illustration of the technical hardships that the solitary human would suffer and he detects that each of them can be surmounted by a distinct form of collaboration: the *conjunction of forces*, the *partition of employments* (ADAM SMITH: “division of labour”), and *mutual succour*:

By the conjunction of forces, our power is augmented: By the partition of employments, our ability increases: And by mutual succour we are less expos'd to fortune and accidents. 'Tis by this additional force, ability, and security, that society becomes advantageous.²¹

Hence, the peculiar deficiency that the human body suffers—in the sense that its natural needs greatly surpass its possibilities—along with the repeated experience that this deficiency can be surmounted by union with others, are the main conditions that enforce the maintenance of human society.

²⁰ HUME | 1739\1888 | THN: Book III / Part II / Section II / pp. 484–485.

²¹ HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 485.

§ 4. *The natural impediments to social union*

But the force of attraction towards society has a strong counterforce that results from a set of three other natural conditions under which the human must live.²² These conditions are, in combination with each other, a regular source of conflict and may be called the “natural impediments to social union”. According to HUME; the first of these impediments is—in a but slightly modified form²³—the regular *opposition of human desires* (HUME: “opposition of passions”), especially of basic wants that are always self-related. As a second impediment he names the *transferability of possessions* with which these desires could be fulfilled. The third impediment is the possessions’ scarcity with respect to given desires. It needs no explication that this particular set of conditions is an ongoing potential source of conflict between humans. And it seems that the more widespread these conditions are, the greater their potential is to mitigate society’s benefits. This may even proceed to the point where one’s belonging to society would no longer be advantageous compared to the hardships and dangers of solitude in nature.

§ 5. *Sentiments and justice as natural remedies*

To establish a degree of coherency in society that would allow the peaceful subsistence of its individuals, nature must have provided the human with some form of regulation to surmount the three impediments. Although their everlasting elimination may not be

²² Cf. HUME | 1739\1888 | THN: Book III / Part II / Section II / pp. 486–488, p. 494.

²³ Instead of opposing desires, HUME describes *opposing passions* as the first and foremost impediment to social union:

“For while each person loves himself better than any other single person, and in his love to others bears the greatest affection to his relations and acquaintances, this must necessarily produce an opposition of passions, and a consequent opposition of actions.” HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 487.

From HUME’s empiricist perspective, it was viable not to describe man as a self-determined and autonomous being but as a subject to causes such as passion and instinct. However, in the context of KANT’s system of ethics, the “opposition of passions” is better substituted with the more conscious and voluntary “opposition of desires” (including desires that are derived from passion). This modification seems necessary to avoid the false belief that this impediment could be surmounted by morality.

attainable (nor even desirable as one may find), it seems possible to reduce each of them by a reasonable degree. On closer examination it becomes evident that if only one of these three conditions were fully absent, the other two could no longer be a source of conflict.²⁴ In the biological and cultural evolution of the human species, two basic approaches have emerged to cope with this task. One approach is to reduce the first impediment, the opposition of human desires, through what shall here be called *social sentiments* (HUME: “natural sentiment of morals”²⁵). Another approach is to reduce the second impediment, the transferability of certain possessions, by cultural conventions, and the underlying principles of these conventions are what HUME calls the three fundamental *laws of nature* or simply, the *rules of justice*.²⁶ Another, third approach exclusively directed towards a reduction of scarcity, the third impediment, is not known. Instead, it seems that scarcity decreased as a by-product of the social coherence that the former two approaches had established.

§ 6. *The regulative limitations of sentiments*

In order to discuss the moral significance of justice, the second approach of social regulation, it seems necessary to critique the regulative capability of the first approach which is based on social sentiments. It is easy to experience how sentiments such as fear or respect of a superior individual, and pity or affection for an inferior one, can stimulate an intrinsic desire to meet the wants and needs of that other individual as if they were one’s own. In this way, an opposition of self-related desires is less likely to persist and even very scarce possessions could be thought of to be voluntarily transferred within a community. Nonetheless, there are clear limitations to this regulatory approach, and a society reliant solely upon sentiment would be unlikely to form a peaceful civilization. Once the number of members in a community had grown too large for everyone to know one another individually, their potentially opposing desires would remain

²⁴ Cf. HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 487, pp. 494–495.

²⁵ HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 491.

²⁶ Cf. HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 484; and Section IV / p. 514; and Section VI / p. 526.

unregulated, and in the light of scarcity, humans would resort to trickery and forceful assertion of their wants if nothing but sentiments were there to hold them back. Through regular waves of extinction, human societies would repeatedly shrink down to the size of small savage hordes in which peace and mutual trust could be restored through sentiments. It seems likely that under these circumstances, the *homo sapiens*' biological evolution would have taken a very different course, and from the (admittedly, remote) perspective of a contemporary human it is hardly imaginable that nature could have fostered or even allowed the further development of human reason if sentiments had been the only regulating instance between conflicting individuals.

§ 7. The three rules of justice

HUME saw that “the [instinctive] avidity and partiality of men wou’d quickly bring disorder into the world, if not restrain’d by some general and inflexible principles”²⁷ that would establish themselves as cultural conventions. These principles would leave the regular opposition of human desires as it is and solely concern the transferability of human possession. According to HUME, the first and foremost of such principles must have been (I) a convention to abstain from usurpation, hence a principle that puts “stability on the possession of [...] external goods.”²⁸ He explains the emergence of this rule not as the sudden invention of a tribal leader, but as a slow progress of gradual discovery, carried out by individuals who interact on rather lateral standings:

I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express’d, and is known to both, it produces a suitable resolution and behaviour. [...] The rule concerning the stability of possession [...] arises gradually,

²⁷ HUME | 1739\1888 | THN: Book III / Part II / Section VI / p. 532.

²⁸ HUME | 1739\1888 | THN: Book III / Part II / Section II / pp. 489.

and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it.²⁹

“By this means,” he notes with regard to the consequences of this rule, “every one knows what he may safely possess” and is left “in the peaceable enjoyment of what he may acquire by his fortune and industry.”³⁰ But in many cases, he proceeds, a general and inflexible stability of possession could also be disadvantageous if one were not, (II) by a second principle, allowed to transfer one’s possession to another one who may have a better use for it, and it is evident that such a transfer must require the other’s consent if this permission shall emerge as a general convention.³¹ This second principle is the foundation of barter with which it creates a peaceful and thrifty alternative to hostile appropriation—an aspect that facilitates people’s abidance by the first principle. However, with barter comes the possibility that the application of the second principle would lead to an abuse of the first if not for (III) a third principle which would then establish itself obliging people to fulfil that which they promised in exchange for something they shall receive.³² This third principle completes the triad: Should further inconveniences arise, it seems that they could not be solved by means of supplementing another, fourth principle without breaking the interaction of the former three and thus re-establishing the problems they had solved. These three principles constitute a natural and, in HUME’s view, necessary regulator to establish social coherence beyond the reach of sentiments. All in all, he names them: (I) stability of possession, (II) transference by consent, and (III) obligation of promises.³³

²⁹ HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 490.

³⁰ HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 489.

³¹ HUME | 1739\1888 | THN: Book III / Part II / Section IV / p. 514.

³² HUME | 1739\1888 | THN: Book III / Part II / Section V / p. 516.

³³ Cf. HUME | 1739\1888 | THN: Book III / Part II / Section VI / p. 526.

§ 8. *Justice and judiciary*

HUME observes that the claims of “property,” “right,” and “obligation” are derived from these principles³⁴ and identifies them as the rules of *justice*.³⁵ This wording seems to express the conviction that the applicability of these principles is not limited to a particular area of judiciary, such as civil law, but of judiciary in general since the aim of judiciary is by definition to establish whatever is regarded as “justice.” And it seems, indeed, that HUME’s three principles would be a viable foundation of a whole legal system. The core of this system would be a *civil code* that would prevent and solve conflicts in the claims people drew from the three principles. A necessary supplement of this civil code would be a *penal code* that would deter potential transgressors of these principles in a systematic way. Further enhancements could be achieved by means of an *administrative code* (or “public code”) that would set out how these deterrents should be achieved by the means of a governmental organisation. The coronation of the system would take the form of a *constitution* that would keep the dynamics of legislation in a constant gravitational pull towards the three principles. Assuming agreement on this opinion, the term “justice” could simply denote a finite state in which the three principles are abided by. This would be the sense in which HUME uses the term.

§ 9. *Justice as a state of social order*

HUME emphasizes that justice is a state of order in society.³⁶ The term “order” can be defined as a state in which the structure of a system shows regularities so that it is, to a certain degree, in accordance with rules.³⁷ The more consequently these rules apply the higher one’s

³⁴ Cf. HUME | 1739\1888 | THN: Book III / Part II / Section II / pp. 490–491.

³⁵ Cf. HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 484.

³⁶ Cf. HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 491, p. 497; Section VI / p. 532; and HUME | 1777 | An Enquiry Concerning the Principles of Morals (ECPM): Appendix III / p. 256.

³⁷ HUME does not give a definition for the term “order”. The definition above is drawn from a monograph by social theorist FRIEDRICH AUGUST VON HAYEK. The original quote reads as follows:

chances are of forming correct expectations about the system and thus, in case that the system's elements are dynamic, of predicting certain events within it. In social systems or, as one may better call them, *sociogeneous* systems (systems that are based on social interactions), such predictions concern the behaviour of people. With the three rules of justice suppositionally laid out as the only known rules of a system, this predictability would be limited to negative statements. Instead of obliging people to certain forms of behaviour, it is ensured that certain forms of behaviour will *not* occur. Although this is achieved through restrictions, the effect is quite the opposite of what is usually associated with such conditions. The small amount of these restrictions and their high degree of abstraction open up a space that people can fill with almost every behaviour that is appropriate to their will. Since this space does not exist as such if the rules of justice are not abided by, it seems appropriate to call justice an order of liberty (and arguably: *the* order of liberty).

§ 10. *Social regulation by justice and the fusion of societies*

It is understandable that in a state of justice, a sociogeneous system may extend far beyond the size of a system that is solely regulated by sentiments. If at the moment of encounter between two strangers, each

By “order” we shall throughout describe a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some temporal or spacial part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct. HAYEK | 1973 | *Law, Legislation and Liberty*: 2 / p. 36.

A passage from a lecture script by social theorist EDWARD E. EVANS-PRITCHARD served as a basis for this definition. In it he sets out how the high significance of social order results from the predictability it implies:

It is evident that there must be uniformities and regularities in social life, that a society must have some sort of order, or its members could not live together. It is only because people know the kind of behaviour expected of them, and what kind of behaviour to expect from others, in the various situations of social life, and coordinate their activities in submission to rules and under the guidance of values that each and all are able to go about their affairs. They can make predictions, anticipate events, and lead their lives in harmony with their fellows because every society has a form or pattern [...] within which, and in accordance with which, its members live their lives. EVANS-PRITCHARD | 1951 | *Social Anthropology*: pp. 19–20.

of them can predict with certainty that the other will neither do him any physical harm nor that he will deprive him of any external possessions unless the transfer were voluntarily agreed upon, the problem of regulation between their potentially opposing desires would already be solved before such an opposition could occur. Like cogs in a mechanical engine, individuals are, wherever they meet in abidance by justice, preadjusted to pass one another by. An uninvolved observer may suppose that this restricted and highly coordinated state of affairs could not leave any space for emotional relations. But it should be stressed that the close bonds of family and friendship are not replaced in justice but only replenished with emotionally neutral relations of peaceful coexistence between unfamiliar people who could otherwise fall into violent rivalry with each other. On this cultural basis, and by means of barter, a small society that is regulated by sentiment may either merge with- or grow into what shall be called an *extended order of human collaboration*³⁸ in which it will continue as a sub-system.

§ 11. *A great decrease of scarcity as a result of this regulation*

A side-effect of this formation process is the further reduction of scarcity. When “additional *force, ability and security*” are no longer exclusively supplied by a small number of familiar people, but also potentially by any random stranger to whom something is offered in exchange, the possibilities to reduce scarcity through collaboration can immeasurably exceed those that could be granted in an isolated tribe of neighbours and relatives. The systematic study of this phenomenon, initiated in 1613 by ANTONIO SERRA, was the arguable beginning of a science today known under the term “economics.” Though there is much to say on this, the validity of this effect will be of minor

³⁸ The term “extended order” (of human collaboration) was introduced by the late HAYEK in a 1984 presentation held in German. HAYEK’s preference for this term as opposed to “extended society” results from his observation that the nature of this larger system is different from that of the so called “societies” within it. He emphasizes that the term “society” can produce misunderstandings when it is used for both the small world of relatives and the larger sphere of anonymous relations that are kept up in the course of market exchange. Cf. HAYEK | 1986 | Die ausgedehnte Ordnung menschlicher Zusammenarbeit: columns 10–11.

significance in the later course of this study. Here, it shall be assumed without further explanation.

§ 12. *The rebellion of sentiments against justice*

In the light of the conviction that justice not only restricts the transferability of possessions but also reduces their scarcity, one could conclude that this order must be a self-stabilizing state: Once established it could hardly be endangered by any immanent force. But unlike social sentiments, justice will not result in a concordance of human desires and it seems that it will rather foster their diversity. In this case, as two of the three impediments to social union are diminished, the remaining one is nurtured to grow, and in consequence, social sentiments, the natural regulator of this remaining impediment, are easily enticed to rebel against justice. More often than not, just acts of transfer will provoke indignation and resentment in those who witness these acts from the perspective of their individual knowledge and value system. For example, a person who dislikes the non-aesthetic appearance of a craftsman's products may become frustrated when unable to persuade people not to purchase them. She may wish that someone would close access to his supply. Another person may take offense at a wealthy person's apparent lack of responsibility for people who seem to be in need of what she, in a situation of abundance, decides to consume for a solely self-related purpose. He may wish to see her deprived of these possessions for the sake of something that would better fulfil his possible altruism. Such feelings and wishes may often come from an underestimation of others along with a lack of self-reflectiveness, but it is also possible that they result from a sharp-sighted understanding of the given situation. To HUME, it is an observation of interest that the state of justice does not equal a state of perfection and that there are indeed instances in which it allows behaviour that may deserve an intervening hand to correct them.³⁹ However, in very many cases such a correction is technically impossible without violating one of the three principles, and in the light of this dilemma, HUME assures to his reader that:

³⁹ Cf. HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 497; and HUME | 1777 | ECPM: Appendix III / p. 256.

“every individual person must find himself a gainer, on ballancing the account; since, without justice, society must immediately dissolve, and every one must fall into that savage and solitary condition, which is infinitely worse than the worst situation that can possibly be suppos’d in society.”⁴⁰

With these warning words in mind, it shall now be thoughtfully discussed whether and how the occasional rebellion of social sentiments against justice could find rational support in morality.

⁴⁰ HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 497.

III. The moral significance of justice

§ 1. How strong is the link between morality and justice?

The baseline of the argument up to this point was that an immoral decision would be a decision made with disregard to the normative necessity of reason's exercise and maintenance in oneself or others. It was further assumed that human reason is inseparably linked to the social nature of the human species, and some evidence was given that for humans to live by their social nature, they must generally abide by the three rules of justice. It seems tempting to conclude now that for someone who agrees with these considerations, the rules of justice must become general principles of morality. Abidance by them would then be regarded as that person's moral duty in every possible situation, and if such a person had authority over others, her tolerance of another person's crime, in the legal sense, would itself be a "crime," in the moral sense of the term. However, up to this point, two problems have not yet been addressed. Even in the case that the baseline of the argument is fully agreed upon, a consideration of these two issues could erode the supposed link between morality by reason and legality by justice.

§ 2. The ambiguous implementation of justice

The first problem results from the fact that the definition of *crime* in the legal sense must remain ambiguous and controversial among individuals. This concept of crime is based on the observation that for justice to maintain there is a need to establish coercion. In particular, this means that (I) the stability of possession, (II) the transference of possessions by consent, and (III) the performance of promises may, all in all, require (¬I) depriving certain people of their possession, (¬II) restricting people's access to certain forms of voluntary transfer, and possibly (¬III) giving false promises to certain people in order to trick them into abidance by justice (though it may be added that this last measure is very arguable). The legitimacy of these actions could be derived from KANT's following consideration:

The resistance against an impediment to an effect puts an extra force to that effect and is therefore in alignment with it. It can also be seen that every act of injustice is an impediment to

liberty under general laws: coercion, on the other hand, is [also] a resistance that is directed against liberty. Hence: if a certain use of liberty is by itself an impediment to liberty under general laws (i.e. unjust), the coercion that is directed against this act is a prevention of an impediment to liberty and therefore in alignment with the liberty under general laws, i.e. just: this means that by the law of noncontradiction, justice implicates an authorisation to coerce those who violate it.⁴¹

In the light of this insight, it seems tenable to demand that the various kinds of coercion mentioned above should be exerted in a systematic way against individuals who exert them in an arbitrary way. These latter individuals would then be called “criminals,” the predictable scheme of coercion against them would be called “the law,” and its enforcement may possibly be called an act of justice. However, it is ambiguous which form of systematic coercion would establish justice in the most effective way: To what degree of abstraction should the law be codified? Which kind of coercion must be applied to a specific case? How must a person obtain the legal authority to enforce the law? Is coercion a legitimate way to finance the means of coercion by justice, and if so, who shall be coerced for this purpose and how? The different legislative ideas that refer to these questions are based on empirical judgements which will differ between different individuals. A commitment to morality and an understanding of justice does not equal a commitment to a particular form of its implementation. It is possible to have a variety of legislative ideas and opinions coexist within the world. When these different legislative ideas are applied to the same territory, one particular coercive act may be judged by one person as an intolerable crime against the three principles whereas

⁴¹ Translated from “Der Widerstand, der dem Hindernisse einer Wirkung entgegengesetzt, ist eine Beförderung dieser Wirkung und stimmt mit ihr zusammen. Nun ist alles, was unrecht ist, ein Hinderniß der Freiheit nach allgemeinen Gesetzen: der Zwang aber ist [ebenfalls] ein Hinderniß oder Widerstand, der der Freiheit geschieht. Folglich: wenn ein gewisser Gebrauch der Freiheit selbst ein Hinderniß der Freiheit nach allgemeinen Gesetzen (d. i. unrecht) ist, so ist der Zwang, der diesem entgegengesetzt wird, als *V e r h i n d e r u n g* eines Hindernisses der Freiheit mit der Freiheit nach allgemeinen Gesetzen zusammen stimmend, d. i. recht: mithin ist mit dem Rechte zugleich eine Befugniß, den, der ihm Abbruch thut, zu zwingen, nach dem Satze des Widerspruchs verknüpft.” KANT | 1797\1968 | Die Metaphysik der Sitten: Erster Theil / Einleitung in in die Rechtslehre / § D / p. 231.

another person may judge it a necessary measure that is conducive to them. To interlink morality and justice, one of many alternative legislative ideas must be assumed to be the right one, and such an assumption is arbitrary.

§ 3. *The robustness of justice*

From now on, it will be assumed that the implementation of justice were unequivocal so that an act of crime would equal an act of injustice. A second problem concerning the tie between morality and justice arises when crime, or injustice, is not regarded as the general state of a system but as an exceptional instance within its usual state of order. It has been established that a general abidance by justice would be an advantage for everybody in contrast to the other extreme of a general absence of it. And if the future existence of justice as a whole stood in question after a single transgression of its law, few people would ever find it convenient to commit such a crime or to tolerate one committed by others. But it is most unlikely that a single instance of crime could result in the total and eternal extinction of justice. The assumption of such fragile constellations would demand an explanation as to why justice had not already vanished long since. Instead, it seems that social systems are robust, to a certain degree, against occasional transgressions of their law. This robustness puts the tie between morality and legality once more in question. If there is evidence that occasional acts of crime do not endanger an extended order's usual state of justice, and if this state of justice is, according to HUME, hardly probable to ever become a state of perfection, why should it then be outlawed by morality to correct some distasteful formations within the system by means of selectively suspending its law? In other words, could it not be possible to willingly commit or tolerate a *crime* in full awareness of HUME's considerations as an act of morality, id est *a moral crime against justice*? To discuss this possibility, there must be clarity as to what the consequences should be after such an act of crime, whether the crime be moral or not.

§ 4. *On the theory of predictability*

Before embarking upon this prediction, a brief introduction into the theory of systems shall settle how such a prediction is possible. The term “system” is commonly defined as anything that is constituted by a set of elements and a set of relations between these elements, which is to say that it possesses *structure*. Though the term is applicable to every phenomenon and thus not suited for distinctions between them, the term seems indispensable in some theoretical contexts. Calling something a *system* and thus referring to its structure is a first step in systematically predicting its behaviour. This becomes evident when the meaning behind the terms “element” and “relation” is further reflected upon. If the term “element” is supposed to denote a constituent of a structure, one must always be able to tell elements apart from each other, otherwise there would be no structure but only plane extension. Every element must therefore possess at least one unique property (or configuration of properties) that it shares with no other element in common, be it just a spatial position. If the term “relation” is supposed to denote something between elements that is not an element itself, it seems viable to define a relation as anything through which a change in one element’s properties leads to further changes in the properties of other elements. Therefore, when a specific element is modified or replaced, added to- or taken away from a system’s structure, the knowledge of its elements and their relations enables a certain forecast of how this partial change will affect the system in total. Against this background, the theory of systems appears to be nothing else than a theory of predictability.

§ 5. *On predictability in complexity*

The theory of systems has a significant area of application in phenomena that are not fully predictable for reasons of high complexity. When the assumable number of elements or relations in the structure of a system exceeds an observer’s ability to consider each of them, one may speak of a highly *complex* system. In high complexity, it is no longer possible to give a detailed prognosis of every element’s behaviour that would result from an initial change in one of them. Here, instead of being able to compute the shape of all resulting adjustments in detail, one must content oneself with a general

prediction of the *sort* of shape that is going to emerge or, in other words, with knowing a set of properties that some unknown elements are going to take.⁴² Such abstract predictions (HAYEK: “pattern predictions”) are the utmost that can be expected with regard to the consequences of a crime in the scope of an extended order of human collaboration, a system with a usually very high degree of complexity.

§ 6. *Predicting the consequences of a crime in general*

The prediction that is going to follow is in a threefold sense a general one. It is a prognosis of the *sorts* of consequences (therefore, a “pattern prediction”) that a *sort* of event (crime) will have in a *sort* of system. This sort of system shall now be specified. There are three conditions that necessarily apply to any extended order of human collaboration in which a crime may occur: Firstly, the system’s elements possess reason, so they behave purposefully, and their behaviour has a moral dimension. Secondly, they interact with each other under the natural conditions of human nature amongst which there are a regular opposition of desires, transferability, and scarcity of possessions — otherwise there would be neither an incentive for a crime nor a technical possibility of it. Thirdly, their interactions are to some degree restricted by the three rules of justice so that crime can be distinguished apart from legal behaviour. With these conditions being all that is known about a system, it is possible to predict two general and morally relevant consequences that a single instance of crime will *tendentially* have. The word “tendential” shall denote that these effects are not certain but must be assumed in default of further information.

- a The immediate general consequence of a crime: The first of the two general consequences of a crime is that it will tend to transgress the will or interests of the particular individuals whose lawful titles are offended by it. The predictability of this effect is easy to prove. The entitlement to possess a transferable object or to receive the fulfilment of a promise is under usual (and thus assumable) conditions conducive to the goals of its holder. Otherwise, the title would unlikely have been acquired or

⁴² Cf. HAYEK | 1964 | The Theory of Complex Phenomena.

maintained. Thus, since crime always comprises the violation of a title, it tends to be against the will or interests of the victim. In the following, this shall be called the *immediate* general consequence.

- b The mediate general consequence of a crime: The second of the two general consequences is that the crime will tend to damage the credibility of the law (or hinder it in its recovery if it has already been damaged) and thus transgress the will or interests of unknown individuals whose goals are reliant upon their or other people's faith in people's abidance by justice. The predictability of this effect requires further explanation. Under usual (and thus assumable) conditions, a crime will disturb those who suffer, witness, or hear about its successful execution in their belief in the attainability of certain plans that would require people's collaboration in abidance by justice. This compels them to either not pursue these plans or to pursue them under the additional cost of a self-reinforcement against crime. Both these measures—an avoidance of collaboration and a self-reinforcement—imply an increase of scarcity within the system, compared to a possible scenario were these measures would not have been rendered necessary. Since every increase of scarcity is by definition also a *decrease* of purposes that are taken care of, the result of this tendential consequence is always against the will or interests of somebody. In the following, this shall be called the *mediate* general consequence.

§ 7. *In search for a predictable compensation for these consequences*

It is needless to explain the moral inconvenience of these effects. Claiming morality in knowingly causing them would require reasonable confidence in the belief that the consequences of one's actions were highly assistive to the free exercise of reason or conducive to its maintenance so that this would compensate for the action to also be against someone's will. How could this confidence be achieved? Aside from the generally predictable consequences of a crime, there are *specific* consequences that can be predicted from the locally observable conditions under which the crime occurs. Dependent on the case, these specific consequences can include positive effects on reason in

somebody or something. The decisive question is whether and how the possible desirability of a crime's specific consequences could be balanced against the inconvenience of the two general ones.

- a For the immediate general consequence (§ 6 a), this is possible since this offense will usually transpire in a concretely known environment and context. A thorough and perceptive observation of these local conditions could lead to a reasonably justified conviction that the individual intended action would contribute more to reason than the intended action of someone else in the setting. In this case, and only if local conditions neither allowed for both to proceed by their plans nor for one to persuade the other, it would be a self-contradiction to not assert oneself against the other if possible. In such a case the specific consequence of a crime would compensate for the general consequence that the crime is *immediately* against the will or interests of its victim.
- b Contrary to this, the mediate general consequence (§ 6 b) will always transpire in an unknown context. All that can be known is that some plans will, at a later point in time, tend to be prevented from coming into practice. At the moment of committing a crime, neither the content of these plans is known, nor the time or the setting where these plans would be pursued, let alone the individuals who would be affected by their results. To compensate for the moral inconvenience of this effect, one would need reasons to assume that the unknown plans prevented by a crime would not produce a result superior to the idea at hand. Such reasons can never be found. Since these plans are fully unknown, there is no hint of their potential outcome. It would be a self-contradiction to claim superiority over something that is knowingly unknown. Therefore, the mediate general consequence of a crime cannot be compensated for, and it is not more than the immediate consequence against which the possible merits of a crime could be objected.

§ 8. *The possibility of a moral crime against justice: three examples*

Knowing that crime damages the credibility of justice creates an unsurmountable obstacle for its moral justification. To legitimize an act

of crime, this tendency must be either ignored or consciously denied. Obviously, the tendency could be ignored by someone who is unaware of justice and its function, and also could the tendency be denied by someone who holds on a different idea of how justice should be implemented. But is it possible to ignore or deny this tendency in a full awareness of justice and in an accordance with its given legislation? Three examples shall serve as a basis to examine this possibility. In each of them, a principle of justice is violated for a possibly moral motive, and it shall be assumed that the protagonists are aware that crime is tendentially harmful to a multitude of people, not only (§ 6 a) by offending someone directly but also (§ 6 b) by means of damaging the credibility of a legal system that outlaws these actions rightfully.

- I A possibly moral theft: After a catastrophe, a survivor breaks into the cellar of a temporarily unoccupied mansion, searching for items that could ensure his family's temporary survival, and knowing well that the homeowner is in a safe place from where she will return one day to find the food in her pantry replaced with a note that says: "If you are alive please forgive us taking the tins from your cellar. We could not find you anywhere, and in order to survive the collapse we had to assume that you didn't. We also prayed to know what your will would have been if we could have asked you."
- II A possibly moral transfer without consent: A bottle of vinegar concentrate cracks in a store and splashes a female customer. Assuming the liquid to be regular vinegar and ignorant that the acid will burn through her skin if not neutralized immediately, she rejects the water that is offered to her by another customer and instead begins to wipe herself down with a handkerchief. Without her permission, the man pours the water over her body and declares, loudly enough for every witness of the scene to hear, that he is willing to bear the legal consequences for this offense, then helps her with a towel and explains the situation to her. After realising her error, the woman thanks to him.
- III A possibly moral fraud: Out of a selfless motive and in absence of any legal means, a secretary whispers a false promise

into the ear of an inebriated male employee to have him leave a delicate situation at an office party. She knows him well enough to predict that he is going to forget very quickly what she has promised him.

§ 8 a. Compensation for the immediate general consequence in all three examples

If these illegal actions are to confirm the possibility of a moral crime against justice, they must fulfil two criteria: Firstly, the *immediate* (and negative) general consequence of a crime must be compensated for by a positive specific consequence, and secondly, there must be no *mediate* (and also negative) general consequence in these exceptional cases. To confirm that the first criterion is fulfilled by these actions, it must be possible that their specific consequences can be seen in a very positive light. Can these actions lead to anything virtuous that could be claimed to compensate for the inconveniences they bring to the offended party?

- I In the survivor’s case, the crime is supposed to increase a family’s chances of survival. To save a reasonable being’s life can be claimed to be a greater contribution to reason than to respect the homeowner’s legitimate interest in not having to refill her stock again. This opinion relies on the belief that the homeowner is in a safe place from where she will not return until the stolen and thus absent household contents would no longer have a life-determining necessity for her.
- II In the customer’s case, the crime is supposed to protect a woman from the specific consequences that would occur were the crime not committed. Both of the man’s options, the criminal one to help and the legal one not to help, result in an offense against the woman’s rightful claims. To break the dilemma, he must take the role of a fiduciary and execute the assumable will she would have had if he could transmit his knowledge to her. Her satisfaction with the result testifies the compensation.
- III In the secretary’s case, the crime is supposed to keep the personal relations within a company free of unnecessary conflicts. If an employee is inebriated and about to behave against his own future

interests and other people's present interests if not stopped by coercion, it could be claimed that these interests likely outweigh the short-lived goals he pursues in his vacillating state of intoxication.

§ 8 b. Absence of the mediate general consequence in all three examples

All three examples have fulfilled the first criterion for a possibility of morality in their crime. To confirm the second criterion, one must be able to name conditions in the setting of the crime from which it could be predicted that the criminal acts will not mitigate the credibility of any laws that prohibit them.

- I In the survivor's case, it can be supposed as a generally known fact that in the aftermath of a catastrophe, land, real estate, and other items whose owner is no longer alive are rendered free for legal appropriation. Although the survivor knows that the homeowner is alive and his actions are illegal, her and everyone else's faith in his unreserved law abidance is maintained because he does not inform others that he is aware of her being alive.
- II In the customer's case, the crime is combined with the offender's immediate demonstration of his willingness to bear the legal consequences for it. If these consequences are known to be grave enough to deter anyone else from acting in the way he did, the credibility of the law is not negatively affected by this obviously exceptional transgression.
- III In the secretary's case, the employee's mnemonical constitution in combination with her chance to whisper in his ear allows her to predict that nobody will ever know about her deceit, so that the law's credibility is not negatively affected by it.

§ 9. The intolerability of a moral crime: three examples

This analysis has demonstrated that even if a given legislative regime is agreed upon, the logical link between morality and legality is not strong enough to constitute a moral duty of general law-abidance. The remaining question is whether or not it is moral to tolerate someone else's crime if there is evidence that the crime

could have been committed for a moral motive. At first sight, the separate treatment of this question may seem obsolete. Since morality calls for an indifference between individuals, how could a moral person expect others to abide by a rule she would knowingly transgress herself in an act of duty? But with regard to the law, this consideration does not seem applicable. It was argued that a moral crime against justice is only imaginable if there is reason to assume that it will not disturb anyone's trust in the law. This condition depends not only on someone's moral decision whether or not to commit a crime but also on the decisions of those who happen to witness this act from a position from which they could hinder or prevent it being committed. Furthermore, it depends on the decisions of those who are entitled to impose a punishment for it. What would the implication be if these decisions were made in favour of a person who had committed a crime for assumedly moral reasons? Is it moral to tolerate unlawful heroes such as those from the examples above?

- I If the survivors of a catastrophe tolerated each other stealing items from houses, justifying this measure with the superior importance or urgency of their needs, none of them could have a reason to trust in the others anymore. In principle, everyone could claim that his needs are more important than those of another fellow survivor. If such a claim could be raised against the legal punishment of a theft, the laws that deter from stealing would lose their credibility.
- II If the perceptive customer could draw from his superior knowledge a legal authority to provide his discomfiting aid against the declared will of its recipient, it would repeal the laws that establish a transference by consent wherever people are unequal in their level of knowledge.
- III If the secretary's deception of an inebriated employee was revealed and tolerated, this would set an analogous precedent with regard to the laws that enforce the performance of promises.

§ 10. The evil of tolerating crime

In order to not create possibilities for injustice to rise on the pretext of moral intentions, it seems that a regime of justice must be intolerant

against any transgression that a moral person could be urged to commit. Criminal heroes who have reason to assume that their transgressions would find any public approval are saddled with an unsurmountable obstacle (§ 6 b) that deprives them of the possibility to be moral heroes. They must ensure that their transgressions will not be noticed as such, and if they cannot do so, they must declare a desire to receive a legal punishment that would deter potential imitators. For someone who sees this connection with clarity, it would be an act of immoral weakness to succumb to any sentiments of sympathy for these heroes and tolerate their crime, even though one could knowingly be compelled by duty to commit the same sort of crime when put in a situation similar to theirs. Hence, even now that the possibility of a moral crime is confirmed, it seems that still, Lady JUSTICE *must*—and must by *morality*—operate blindfolded, id est, in HUME’s words, “without taking into consideration the characters, situations, and connexions of the person concerned.”⁴³ And when it is “conceiv’d how a man may impoverish himself by a signal instance of integrity, and have reason to wish, that with regard to that single act, the laws of justice were for a moment suspended in the universe,”⁴⁴ it would be an act of evil to give way to that wish.

⁴³ HUME | 1777 | ECPM: Appendix III / p. 256.

⁴⁴ HUME | 1739\1888 | THN: Book III / Part II / Section II / p. 497.

Conclusion

The aim of this study was to systematically clarify what must be tolerated by morality, and what must not, lest that tolerance become evil. The examination was made with regard to one's relation to others and with regard to the relation to oneself. In the relation to others, what must be tolerated are the intentions that their free will may have in a moment, regardless of their possible evil. What must not be tolerated is the crime this freedom may bring upon people as an impediment to their freedom. With regard to oneself, the resulting answers were almost converse to this. The evil that must be tolerated in others is morally intolerable within oneself, and the crime that must never be tolerated when it is committed by others can even become a moral obligation with regard to oneself. The latter of these findings may appear surprising and potentially controversial. It is a delicate statement indeed, and in the case that it is correct and furthermore also worthy of attention (which is not certain), it seems that it must be considered very thoughtfully: Although it was confirmed that it is possible to commit a crime in an act of moral duty, its conditions seem very unlikely to ever be fulfilled in the reality of an honest mind. If it is clearly seen how restrictive these conditions are, knowledge of this possibility is hardly suited to morally support one in choosing the criminal path. On the contrary, it seems that the difficulty of fulfilling these conditions along with the honest admission that it is theoretically possible to fulfil them, form a tempting argument in the defence of law-abidance by laws of justice: By measuring out the boundaries of KANT's ethical system until the point where it permits illegality, it was demonstrated how far the place is where morality must persist with justice and how narrow and difficult it is to access the section of its periphery beyond which it will no longer reside. Indeed, it was shown that this area is a forbidden realm and only accessible through destiny, never by choice. Whoever is witnessed to stay there will wish for JUSTICE to draw her sword against him, and whoever dares to try reaching it will only wander about the deserted fields of a land where both justice and morality are left behind. When it is clear that it is impossible to go there voluntarily and immoral to tolerate those who could stay there, it should be "no crime" to admit that this place *does* exist on the map.

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Appendix

The first passage in which KANT addresses the self-affirmative character of reason is a small subordinate clause at the end of section one of his *Groundwork*:

[A]nd hence thereto was no need for the will of a reasonable being which is, however, the only thing that is discernible as utmost and unreservedly good.⁴⁵

A second passage can be found in his well-known discussion of a fictional example in which someone is wasting one of his talents for the sake of enjoyment. KANT denies that there is any morality in such a decision. In his argument, he seems to suppose that a reasonable and therefore moral use of practical reason would always be one that seeks to enable further practical reason in the form of “all sorts of purposes.” The passage reads as follows:

Because as a reasonable being he must necessarily want all of his abilities to develop since it is clear that they are useful and given for all sorts of purposes.⁴⁶

A third passage confirms this interpretation. It can be found in the paragraph where the third formula of the categorical imperative is introduced. Here, the nature of the self-affirmative character of reason is explained, and it is set out as the basis for morality and as the reason for it:

Thus, if we suppose that there is a highest practical principle and with regard to the human will a categorical imperative, it must be a principle that results from the consideration of that which is necessarily a purpose for everybody since it is a purpose by itself, an objective [429] principle of the

⁴⁵ Translated from: “und es brauchte also dazu nicht des Willens eines vernünftigen Wesens, worin gleichwohl das höchste und unbedingte Gute allein angetroffen werden kann.” KANT | 1785\1968 | GMS: Erster Abschnitt / p. 401.

⁴⁶ Translated from “Denn als ein vernünftiges Wesen will er nothwendig, daß alle Vermögen in ihm entwickelt werden, weil sie ihm doch zu allerlei möglichen Absichten dienlich und gegeben sind.” KANT | 1785\1968 | GMS: Zweiter Abschnitt / p. 423.

will and therefore applicable as a general practical law. The reason for this principle is: Reasonable nature exists as a purpose by itself. This is how man necessarily imagines his existence, therefore it is a subjective principle of human actions. This is but also how every other reasonable being imagines its existence by exactly the same reason in reason (“Vernunftgrund”) that is also valid for myself.⁴⁷

⁴⁷ Translated from “Wenn es denn also ein oberstes praktisches Princip und in Ansehung des menschlichen Willens einen kategorischen Imperativ geben soll, so muß es ein solches sein, das aus der Vorstellung dessen, was nothwendig für jedermann Zweck ist, weil es Zweck an sich selbst ist, ein objectives [429] Princip des Willens ausmacht, mithin zum allgemeinen praktischen Gesetz dienen kann. Der Grund dieses Principis ist: Die vernünftige Natur existirt als Zweck an sich selbst. So stellt sich nothwendig der Mensch sein eignes Dasein vor, sofern ist es also ein subjectives Princip menschlicher Handlungen. So stellt sich aber auch jedes andere vernünftige Wesen sein Dasein zufolge eben desselben Vernunftgrundes, der auch für mich gilt, vor[.]” KANT | 1785/1968 | GMS: Zweiter Abschnitt / pp. 428–429.