2023

An Exploration of Cybercrime and Criminalization Theory

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I. Introduction

With the advent of the internet in the twentieth century came a need to understand how to govern such a multi-faceted and endlessly complicated innovation. While the process of designing legislation for the newest emerging technologies and phenomenon is not a new process for Congress, the process of designing laws, specifically criminal law, concerning the cyberspace is a relatively new process. While there are issues like the current patchwork system of state data breach laws and lack of a federal data breach law, those just two examples of the many ways in which there are gaps in the legislation for cybersecurity that should be addressed, and the fact that only two were listed here does mean the existence of cybercrimes can be ignored. One may argue that Congress has successfully passed federal cybercrime legislation in the past and the fact that they have not yet passed a federal data breach law is an outlier and insignificant in the grand scope of things. Even taking this into account, in Congress' attempts to police the cyberspace and develop cybercrime statutes, there exists a struggle to design cybercrime legislation that is not only effective in preventing the types of activities that a particular piece of legislation seeks to prevent but also passes any myriad of constitutional challenges. One specific example of this type of conflict can be seen in the First Amendment challenges levied against the Child Pornography Prevention Act of 1996 as seen in the Miller v. California, New York v. Ferber, and Ashcroft v. Free Speech Coalition line of cases starting in 1973 and concluding in 2002.

In this paper, I will attempt to provide a way to overcome that challenge by advocating for a "Step 0" in the development of cybercrimes and perhaps the development of criminal laws more generally. The clear challenge in designing cybercrimes is to ensure their effectiveness in addressing the particular criminal activity that the piece of legislation seeks to address but also to

overcome the possible constitutional challenges that can be raised against it. In the advocacy for a “Step 0”, the approach becomes reminiscent of an old statement from Dwight D. Eisenhower which was as follows: “whenever I run into a problem I can’t solve, I always make it bigger. I can never solve it by trying to make it smaller, but if I can make it big enough, I can begin to see the outlines of a solution”. In order to develop this “Step 0”, which seeks to determine a strategy for developing criminal laws for cyberspace, the first step is to look at different criminalization theories to see what theories, if any, exist that can be applied in this “Step 0”. Broadly speaking, criminalization theories describe what should be criminalized, and why it should be criminalized, while what the penalty for committing the criminalized act(s) should be is the realm of punishment theory, which is outside the scope of this paper.

There will be three popular theories of criminalization that will be analyzed to determine which of those four theories is most useful for developing cybercrime legislation. Two of these three theories of criminalization, the Doctrine of Legal Goods (referred to as “Rechtsguterlehre”) and Functional Moralism (as advocated by Gunther Jakobs), were developed by German thinkers. Why are the criminalization theories of Germann thinkers relevant in a discussion of the development of American criminal law? There is nothing to bar the adoption or the relevance of positions taken by foreign thinkers by virtue of the fact that they are foreign thinkers. Furthermore, it will be shown the Functional Moralism as advocated by Gunther Jakobs best fits the nature of current cybercrimes. For this paper, a criminalization theory is said to fit the nature of current cybercrimes if the theory does not have to be molded to fit the cybercrimes. In other words, a theory, a square block, should not have to be forced to fit the cybercrime, a round hole. Only when there is a square block being slotted into a square hold will we have the highest degree of reliability, predictability, and consistency when using this criminalization theory to

develop future cybercrimes. Functional Moralism, as a theory, not only possesses the most rigid structure, as a block, but also slots most neatly into not only the existing cybercrimes in the United States but is uniquely useful in predicting and resolving the constitutional challenges those cybercrimes face. The remaining two theories present valuable contenders but demonstrate problems that exist across other criminalization theories; those other theories either have flexible blocks whose shapes change with the wind or do not have a rigid peg-board to fit in. Ultimately, "Step 0" would be to apply the framework of Functional Moralism to the hypothetical cybercrime that is going to be developed to see if it fits within the framework.

II. Background

The focus of this paper on criminalization theories warrants a discussion of what criminalization theories are beyond their function of identifying what should be criminalized and why that something should be criminalized first before all else. A criminalization theory is more than "a "one step" method that relies on one very general definition" and "the reasoning that precedes a final decision regarding criminalization must be complex and multi-layered"; it is the identification of the purpose of the criminal law that initiates the differentiation between criminalization theories and "brings us into the heartland of criminalization theories".[1]

In order to understand how well a particular criminalization theory may fit existing cybercrimes, it is first necessary to establish some distinctions in vocabulary. The first is the difference between a rule and a standard. A rule can be defined as a "prescribed guide for conduct or action", or "a usually written order or direction made by a court regulating court practice or the action of parties" or even a legal precept or doctrine.[2] For example, first degree murder can be considered a rule because it is defined as the intentional killing of another person

[1] The Oxford Handbook of Criminal Law 685 (Markus D. Dubber & Tatjana Hornle eds. 2014).
[2] *Merriam Webster's Collegiate Dictionary* (11th ed. 2003)

by someone who has acted willfully, deliberately, or with planning; more generally, every law is a rule because every law is a legal precept or doctrine. A standard can be defined as "something established by authority, custom or general consent as a model or [an] example".[3] For example, when determining whether thing "x" can be classified as thing "y", one would apply a framework to see if thing "x" could be classified as thing "y"; the framework that would be applied is a standard. The second distinction is between a crime and a regulation. The term "crime" can be defined as "an act committed or omitted in violation of a law forbidding or commanding it and for which punishment is imposed upon conviction".[4] A regulation, however, implies the control over something that already exists.[5] The legal definition of "regulation" has a similar meaning in which it is "the act or process of controlling by rule or restriction."[6] The last distinction is between a deontological philosophy and a consequentialist philosophy. A deontological philosophy is a type of ethical theory in which actions are good or bad according to a clear set of rules.[7] A consequentialist philosophy on the other hand holds that whether an act is morally right depends only on the consequences of that action as opposed to the circumstances leading to or the intrinsic nature of that act.[8]

Why do those distinctions matter for determining the merits of a particular theory of criminalization as applied to cybercrimes? As stated previously, a criminalization theory, represented as a wooden block, can be said to explain the current cybercrimes in the United

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[3] *Merriam Webster's Collegiate Dictionary* (11th ed. 2003)
[4] *The American Heritage Dictionary of the English Language* (4th ed. 2000)
[5] See, e.g., *American Heritage Dictionary* (4th ed. 2000); *Cambridge Dictionaries Online*, http://dictionary.cambridge.org, (Cambridge Univ. Press 2001); and the *Merriam Webster's Collegiate Dictionary* (10th ed. 1999).
[6] *Black's Law Dictionary* 1289 (7th ed. 1999).
[7] Encyclopedia Brittanica, *deontological ethics*, https://www.britannica.com/topic/deontological-ethics (Oct. 19, 2022)
[8] Encyclopedia Brittanica, *consequentialist ethics*, https://www.britannica.com/topic/consequentialism (Oct. 7, 2022)

States and the constitutional challenges they face, represented as a hole in a peg board, if that wooden block nor the peg board have to be molded so that the block can fit within the hole in the peg board. In order for this condition to be satisfied, the criminalization theory must be simultaneously rigid in its nature and applicability. For these conditions to be satisfied we look to the distinctions above. A rule is superior to a standard when comparing rigidity in its nature and applicability because of the explicit and precise characteristics of a rule over the non-determinative and vague characteristics of a standard. Given the superiority of rules over standards, a deontological philosophy, or in this case a deontological criminalization theory, is superior to a consequentialist philosophy, or in this case a consequentialist criminalization theory. In the distinction made between a crime and a regulation, it is clear that crimes most resemble rules, and by extension deontological philosophies or deontological criminalization theories while regulations most resemble standards, and by extension consequentialist philosophies or consequentialist criminalization theories. The criteria then that will determine the superiority of the competing criminalization theories will be how close the particular criminalization theory is to be a deontological criminalization theory rather than a consequentialist criminalization theory. The determination of if a particular criminalization theory is deontological or consequentialist will be made depending on to what degree that criminalization theory and or cybercrime needs to be molded so that the criminalization theory, the wooden block, and the cybercrime, the hole in the peg board, line-up with one another. The less molding and adjusting that is needed, the closer the criminalization theory is to being considered deontological and the more molding and adjusting that is needed, the closer the criminalization theory is to being considered consequentialist.

One might ask why practically speaking a deontological criminalization theory is superior to a consequentialist criminalization theory and the answer would be the following: consistency and predictability. A deontological criminalization theory allows for the laws that are developed by the application of the deontological criminalization theory to be consistent because of the rigidity of their "block" and predictable because their destination in the peg board does not change. A deontological criminalization theory provides one of the hallmarks of the common-law model, that when you are facing legal trouble, you know what the rules are and how you are expected to play. A consequentialist criminalization theory cannot offer these things.

III. Discussion

With the understanding of how the criminalization theories will be judged, the criminalization theories can now be explained. The first criminalization theory to be explained and evaluated will be the Legal Goods criminalization theory, followed by the Harm Principle, and concluded with Functional Moralism. The criminalization theory that best displays a deontological approach will then be tested to see if different cybercrimes fit its framework.

A. Explanation of Legal Goods

"The concept of legal good serves several crucial functions, at various levels of generality within the German criminal law system. By common consensus, the function of criminal law is the "protection of legal goods," and nothing else."[9] In this way, if something does not fall within the umbrella of a legal good, it cannot be criminalized.[10] In order for a criminal statute to be legitimate, the activity that the statute addresses must fall within the umbrella of a legal good; the

[9] Markus Drik Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53, The American Journal of Comparative Law, 683, 683-707 (2005)
[10] *Id.*

opposite is also true, if a criminal statute targets activity that does not fall within the umbrella of a legal good, the criminal statute is illegitimate.[11] What exactly then are the types of activities covered by the umbrella of "legal goods"? While it is true that over time the concept of Rechtsgut has been interpreted in primarily two ways, it is also generally true that the interests protected, or at least the interests that are eligible for protection, under Rechtsgut include individual interests (like life and health), societal interests (trust in the currency or trust in the integrity of civil servants), and even state interests (fair elections, defense, and protection of state secrets).[12] Putting these broad similarities aside, there are currently two strains of this criminalization theory, and they are the positivism and normativism strains.[13] The positivism strain is championed by Jescheck and Weigend while the normativism strain is championed by Roxin.[14]

The philosophy of Rechtsgut begins with the understanding that it is categorically the case that "criminal law has the objective of protecting legal goods."[15] The broad category of legal goods are divided into two smaller, albeit still relatively broad in themselves, categories.[16] The first of these categories is what is referred to as "elementary life goods" which have been described as goods that are required if we want a society to function in which humans can coexist peacefully.[17] The importance of these types of goods justify their protection through the criminalization of behaviors or actions that would prevent the existence of these "goods".[18] To

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[11] *Id.* at 684.
[12] Kimmo Nutotio, T*heories of Criminalization and the Limits of Criminal Law: A Legal Cultural Approach* 247 1st ed. 2010.
[13] Dubber, *supra* note 9, at 684-685.
[14] *Id.*
[15] *Id.* at 684.
[16] *Id.*
[17] *Id.*
[18] *Id.*

understand the scope of the types of goods that fall into this category, here is a list of examples: "human life, bodily integrity, personal freedom of action and movement, property, wealth, traffic safety, the incorruptibility of public officials, the constitutional order, the external security of the state . . . ethnic or cultural minorities against extermination or undignified treatment, internation peace."[19] The second of the two categories of legal goods are those that find their identify and basis in the most deeply held ethical and moral convictions of a society which "become legal goods through their adoption into the legal order."[20]

Claus Roxin proposes a different method of understanding the philosophy of Rechtsgut. Rather than attempt to state a rule and then provide examples to justify the rule like Jeschek and Weigend, Roxin begins by observing what has been qualified as a legal good and then work backwards to synthesize a rule based on what has been observed.[21] Among his list of existing legal goods are the following: "life, bodily integrity, honor, the administration of law, ethical order, sexual autonomy, property, the state, the currency, dominant moral opinions . . . the variety of species in flora and fauna, maintenance of intact nature, the people's health, life contexts as such, purity of the system of proof."[22] From this, he attempts to derive what makes a legal good, a legal good. He finds that these examples are derived from constitutional principles rather than some explicit or even abstract understanding of the "law" or what is "good".[23] Unfortunately, Roxin does not provide in any detail what exactly those constitutional principles are that create the edges of the universe for what legal goods are or how he identified those

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[19] *Id.*
[20] *Id.* at 684-685.
[21] *Id.* at 685.
[22] *Id.*
[23] *Id.* at 688.

constitutional principles.[24] Rather than answer these fundamental questions, he immediately moves to defining legal goods as "conditions or chosen ends" which are valuable to the individual's independent development in a system whose goal is based on the independent development of the individual or to the functioning of such a system.[25] One may suppose that Roxin's failure to define the constitutional principles that his theory is based upon points to the idea that those supposed constitutional principles are drawn from their effect (the laws themselves) rather than any kind of governing ideology..[26]

The conflict between these two interpretations of Rechtsgut is a result of the concept of "legal good" itself.[27] Rechtsgut is a combination of two terms: "Rechts" and "gut".[28] The translation of "gut" seems straightforward as it can be translated as "good".[29] However, it becomes ambiguous when combined with "Rechts" which has no direct translation to the English language.[30] It is best understood as straddling "the distinctions between justice and law, Tightness and legality, natural and positive law, and even rights and right".[31] Consequently, the difficulty in trying to determine the relevance of abstract concepts like "good" or "bad" (in the moral sense) to this system of law becomes increasingly difficult because it appears both intricately tied to the system and categorically outside of the sphere of what is considered law; it is therefore possible for anything under the sun to be justifiably governed by criminal law.[32] This

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[24] *Id.* at 689.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 685.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 686.
[31] *Id.*
[32] *Id.*

a broadness that if adopted in the US would be quite uncharacteristic for current US criminal law.

Rechtsgut as a criminalization theory stands as a loose deontological criminalization theory. If the positivistic strain of Rechtsgut championed by Jescheck and Weigend only featured its "life goods", it would strongly be a deontological criminalization theory because the description of "life goods" provides a clear rule for what does or does qualify as a "life good" and there are numerous examples to make development of future life goods or the identification of life goods consistent and predictable. However, with the addition of the second type of legal good, morals and ethics that are so fundamentally held by society as a whole that the conviction by which they are held bring them to being formally adopted in the written law is a consequentialist philosophy. It is only *after* the legal good is adopted into the legal order that it becomes a legal good retroactively. Roxin's approach also leaves much to be desired. Although Roxin's approach is set-up as a rule, the rule is full of ambiguities. How is one to know whether a condition or chosen end is useful to their free development in the social system or the functioning of the system itself? This unidentified standard is necessary for the theory to be useful as a tool for the development of further crimes and it is impossible to correctly sort existing crimes into ones that are justified because they protect legal goods without knowing how that determination gets made. In this way, although Roxin establishes a rule, and therefore a deontological criminalization theory, it lacks any kind of teeth.

B. Explanation of Harm Principle

The origin of the Harm Principle can be traced back to John Stuart Mill's essay titled "On Liberty".[33] Mill's purpose in writing this essay was to identify a principle that could be used to

[33] John Stuart Mill, On Liberty 9 (Elizabeth Rapaport ed., 1978) (1859).

determine when it was appropriate to interfere with the autonomy of individuals in the restriction of their actions.[34] Mill found that this principle was self-protection; the only reason that could justify a restriction on the autonomy of any individual or even entire communities was the prevention of harm to others.[35] Mill redefined this newfound idea of harm based on recognized or legal rights in his final restatement.[36] In this restatement he began by explaining that living in society we recognize an unstated rule of conduct when it comes to how we interact with others.[37] This rule of conduct is composed of two parts.[38] The first part of this rule of conduct is not to threaten the interest of another which include express legal rights or things we (as a collective group) tacitly understand to be our rights.[39] The second part is for each member of this society to do their fair share in the protection of society as a whole and its other members from harm.[40]

Mill's understanding of rights in this final interpretation was resting on a utilitarian calculus in "the permanent interests of man as a progressive being."[41] The product of Mill's system was highly regulated society which regulated everything from the very tangible objects that could be used to commit crimes to the regulation of procreation; there was nothing that was not within its reach.[42] For example, in the mid-1980s, Professor Joel Feinberg, the next champion of the Harm Principle, "discussed the feminist critique of pornography and suggested that the proper liberal position would be to leave open the possibility of regulating pornography if

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[34] *Id.* at 9.
[35] *Id*.
[36] *Id.* at 30.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id.* at 10.
[42] Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90, Journal of Criminal Law and Criminology, 109, 120-186 (1999)

empirical evidence of harm developed."[43] In the case that empirical research could demonstrate that pornography would cause harm there should be "no hesitation in using the criminal law to prevent the harm."[44]

Feinberg begins his own treatise on the Harm Principle by defining what exactly "harming" means.[45] The definition that Feinberg assigns to harm is an intrusion into an interest that someone has and an "interest" is further defined as something in which an individual has a stake.[46] Feinberg clarifies that an individual is said to have a stake in something when the condition of that thing will cause the individual to gain or lose; this gain or loss cannot be trivial, rather the gain or loss must be significant and deeply entrenched in the individual.[47]Additionally, the achievement of this thing an individual has a stake in must have a realistic possibility of actually occurring.[48] Strangely, Feinberg at first defines harm as a setback of interests, his definition however, ultimately changes for the purpose of eliminating the distinctions between harming, wronging, and being at fault. Feinberg finally asserts that harm constitutes a wrongful and unexcused invasion of interest.[49] Feinberg's conclusion about the definition of "harm" is a result of how his concern with the scope of criminal law, and by extension criminal liability, is directly tied to culpable misconduct.[50] Strangely, although he lists the elements of culpability – intent, recklessness, negligence, absence of excuse – in his revised definition of harm nothing

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[43] *Id.* at 140.
[44] *Id.*
[45] Andrew von Hirsch, *Injury and Exasperation: An Examination of Harm to Others and Offense to Others*, 84, 700, 701-701 (1986).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 702.
[50] *Id.*

else is said about these elements and the subject is simply dropped.[51] In any case, Feinberg did propose a three-prong test to determine the relative importance of harms. "Relative importance is a function of three different respects in which opposed interests can be compared: a. how 'vital' they are in the interest networks of their possessors; b. the degree to which they are reinforced by other interests, private and public; c. their inherent moral quality."[52] This test however is the subject of criticism and rightly so. Questions like "what are the inherent moral qualities of interests affected by claims of harm" and "how can the harm principle tell us what those inherent moral qualities are" serve as the chief examples of the type of criticism this test receives.[53]

There is then Feinberg's discussion of "aggregative" and accumulative" harms. Harms are said to be aggregative when taken as a whole, the "harm" in question, in accordance with the definition of harm above, is harmful if conducted en mass even if specific instances of this "harm" are not harmful.[54] Feinberg points out that excessive drinking is a prime example of an aggregative harm; he claims that "[p]robably more harm is done generally by the practice of imbibing alcoholic beverages than would occur if no one ever drank, [but] if the use of liquor is simply banned across the board, millions of citizens will be deprived of their wholly innocent and harmless pleasures."[55] While the person who drives while intoxicated and causes no damage or injury and the person who is drunk, and therefore behaves obnoxiously, but does not drive, both have their behavior criminalized.[56] The justification for punishing something like excessive drinking is present in the minimal setbacks to the "interests" of those individuals who, in this

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[51] *Id.*
[52] Harcourt, *supra* note 42 at 182-183.
[53] *Id.*
[54] Joel Feinberg, The Moral Limits of the Criminal Law, Volume One: Harm to Others 193 (1984)
[55] *Id.*
[56] Hamish Stewart, Harms, Wrongs, and Set-Backs in Feinberg's Moral Limits of the Criminal Law, 5, 55-55 (2002).

case, drink excessively.[57] Reminiscent of the discussion surrounding overfishing and the attempts to regulate that industry is what Feinberg would call an "accumulative harm". An "accumulative harm" is one where a harm is produced only if many people participate in the "harm" but does not produce a harm if very few people participate in the "harm".[58] Feinberg discusses industrial pollution and its regulation as an example of an accumulative harm. The appropriate regulative or administrative agency would determine what is "wrongful" by applying rules for allocating permits or fines and punishments in accordance with their rules and standards despite the fact that there is not necessarily anything inherently "right-violating" in producing gas-powered cares, refining metal, or pumping oil.[59] Without the guidance of the regulations, there would be nothing stopping every industry from committing mass industrial polluting. The harm of mass industrial pollutants is the destruction of the environment itself and the longevity of the environment is our interest so long as we want to keep living in it.

Where does this leave the Harm Principle as a theory of criminalization for our purposes? While one may be tempted to cite how the Harm Principle has "permeated the rhetoric of the criminal law itself as most clearly seen in the drafting of the Model Penal Code by the American Law Institute, which was begun in 1952 and completed in 1962 [where] Professor Herbert Wechsler, the chief reporter and intellectual father of the Model Penal Code, strongly endorsed harm as the guiding principle of criminal liability as evidence of its appropriateness for cybercrimes"[60], this would be a trap. Although the above is only a brief account of the Harm Principle and the various nuances contained within, one thing is clear, and this is that the number of non-trivial arguments today have changed the usefulness of the Harmp Principle as a

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[57] *Id.* at 55.
[58] Feinberg, *supra* note 54 at 228.
[59] *Id.* at 230.
[60] Harcourt, *supra* note 42 at 135-136.

criminalization theory. “Instead of focusing on whether certain conduct causes harm, today the debates center on the types of harm, the amounts of harm, and our willingness, as a society, to bear the harms. And the harm principle is silent on those questions.”[61] The Harm Principle can no longer be an effective tool to analyze current criminal laws, like cybercrime laws, nor will it be able to do so moving forward without a major revitalization. As it stands, at best, the Harm Principle as a criminalization theory is consequentialist because every answer in regards to the principle ends with “it depends” given the three part test referenced above. The reliance on empirical evidence of harm before an activity can be criticized, like Feinberg’s industrial pollution example, establishes that the consequences of an activity must happen first before it can be classified as a harm, and therefore criminalized. Furthermore, all champions of the Harm Principle failed to shield the theory from the problem that normative principles; “in all three cases [(referencing Mill, Hart, another champion of the Harm Principle, and Feinberg)], there were competing normative values lurking behind their definition of harm, and limiting the scope of the harm principle.”[62] This only reinforces the principle’s status as a consequentialist philosophy because we have to know what those normative values are before we can identify whether or not they are within the scope of the Harm Principle. The principle lacks any kind of predictive ability and therefore cannot be used to help guide future development of criminal law including cybercrimes.

C. Explanation of Jakobs’ Philosophy

To understand Jakobs’ Functional Moralism, it is first necessary to understand what Jakobs refers to when he uses the term “legal interests”. “Legal interests” is best understood as

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[61] *Id.* at 182.
[62] H.L.A. Hart, Law, Liberty and Morality, 60-61 (1963); Joel Feinberg, Moral Enforcement and the Harm Principle (from Social Philosophy 1973)).

positions or opinions about a person, state, access to one's property and son that have to be functionalized by the individual.[63] Jakobs goes on to distinguish individual legal interests from collective legal interests. Individual legal interests are all circumstances of purposes which are for the free development of the individual, the realization of his basic rights, and that functioning of a state system based on this objective.[64] Collective legal interests are the "interests" of the state which are usually related to the infrastructure related to the functioning of society.[65] The next question becomes what purpose does criminal law serve? According to Jakobs, it is designed to prevent threats to the existence of society.[66] The existence of society is dependent on two things: (1) it needs people to act without fear, to be fearless when it comes to the realization of their rights, but also that of their wellbeing predicated on the existence of a strong constitution; (2) functioning infrastructure (e.g., the judiciary, national banks, public transportation, orderly capital transactions).[67] The two conditions necessary for the existence of society that Jakobs describes parallel his descriptions of individual and collective legal interests and allows for the formation of a cohesive criminalization theory.

What is difficult to understand about Jakobs' Functional Moralism is how it can explain so called "moral offenses". Although the examples Jakobs provides are antiquated, a general rule can be synthesized from them; the examples Jakobs uses are homosexuality in the military and incest. The criminalization of homosexuality in the military according to Jakobs can be traced to the male hierarchy that dominates the social structure and if this male hierarchy is threatened, the social structure is threatened, and if the social structure of the military is threatened, society is

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[63] Gunther Jakobs, Rechtguterschutz? Zur Legitimation des Strafrechts 24-29 (2012).
[64] *Id.* at 25-26
[65] *Id.* at 28-29.
[66] *Id.* at 28.
[67] *Id.* at 28-29.

threatened.[68] As for incest, as long as the social structure is based on families, and the conditions for the existence of the family are dependent on the roles of the individual family members, anything that threatens the roles of the individual family members would threaten the existence of families which would threaten the social structure, which would threaten the existence of society.[69] Despite the outdated nature of his examples, the idea that these offenses are about avoiding socially harmful consequences which are seen as threats to the existence of society is clear.

There are two other types of crimes that need clarification under Jakobs' Functional Moralism. The first group of crimes are what fall under the umbrella of "disputed facts".[70] The first under this umbrella is environmental crimes; Jakobs claims that the preservation of an intact environment may be of no concern to many living people today, but it is obviously not so for the continued existence of society.[71] The second is animal welfare crimes. There are two different explanations that Jakobs offers: (1) animals are like people in that they have certain rights which, if violated, constitute injustice to them; (2) the gross immorality or to the hurt feelings of those people faced with such an act based on the Kantian thought that animal cruelty violates a virtuous duty towards oneself.[72] The third is on the criminalization of speech. To Jakobs treating parts of the population as contemptible and not worthy of protection is directed against attacks the center of every legally constituted society, namely on the applicable guarantee of recognition as a person in the law (relating back to rights guaranteed under the constitution).[73] The second

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[68] *Id.* at 23-24.
[69] *Id.* at 24.
[70] *Id.* at 29.
[71] *Id.*
[72] *Id.* at 29-30.
[73] *Id.* at 30-31.

group of crimes are what fall under the umbrella of "paternalism".[74] The chief example that Jakobs used are road safety laws – not all laws relating to road safety are criminal in nature but the idea behind the use of seatbelts or speed limits is what is practically useful – which offer great advantages with rather small disadvantages and make the institution of "road traffic" intelligently organized.[75] In this way "paternalistic" crimes are closer to the second condition for the continued existence of society in that the legal interest being protected are the collective interests of the state in its functioning infrastructure. Jakobs also offers an explanation for the criminalization of the possession of narcotics, even minimal amounts, in that it is not about public health but rather the perversion of an individual's sense of freedom and thus the basis of a free society (referencing the first condition necessary for the continued existence of society).[76] Is this the most persuasive answer? No. Is this answer internally consistent with Functional Moralism? Yes. For Jakobs and his Functional Moralism, it all comes back to if the particular activity threatening the existence of society.

1. Why Jakobs' Functional Moralism Works On a theoretical level

Jakobs' Functional Moralism is a deontological criminalization theory. It establishes a clear rule that something threatens the existence of society if that thing either: (1) impedes the ability of the people to act without fear, to be fearful in the exercising of their rights, and or these rights are not supported by a strong constitution or (2) threatens the infrastructure necessary for society to be run smoothly. What threatens of the existence of society is then criminalized or is deserving of being criminalized as it pertains to individual or collective legal interests. This a clear example of not only a rule but a deontological philosophy. One is not left to wonder what

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[74] *Id.* at 31.
[75] *Id.* at 31-33.
[76] *Id.* at 33-34.

exactly counts as threatening the existence of society, one is not left to wonder what is necessary for citizens to exercise their rights and be free of fear from exercising those rights, one is not left to wonder what the purpose of the criminal law is, one is not left to wonder what types of actions are deserving of harsher punishments than others, and one is not left to wonder what types of interest criminal law is designed to address.

What is unique to Jakobs' Functional Moralism is its ability to predict the constitutional challenges brought against cybercrimes. This ability to predict the constitutional challenges brought against cybercrimes is not one that is merely implicated by the criminalization theory but one that is explicitly given. In Jakobs' Functional Moralism, in order for an individual to be without fear of exercising their rights or to act without fear more generally, there needs to be a strong constitution. Given that both conditions need to be present in order for society not to be threatened, the sanctity and strength of the government's constitution is important above all else. In the United States, the Supremacy Clause, as outlined in Article VI of the constitution, establishes that the authority of the constitution is supreme over any other law that may be established except for constitutional amendments. By placing the sanctity and strength of a constitution as the first necessary predicate for the existence of society, Jakobs' Functional Moralism parallels the structure of the system of law of the United States. Challenges to cybercrimes arise when the challengers believe those cybercrimes do not conform to the authority of the constitution and those challenges, if their merit is proven, conforms to Functional Moralism because Functional Moralism places the constitution above the laws that are aimed at protecting society.

2. Why Jakobs' Functional Moralism works on a practical level

With the understanding that Jakobs' Functional Moralism best matches the criteria of that was set forth at the beginning of this paper, it is now time to turn to its practical application to existing cybercrimes. The three cybercrimes that will be used for this practical evaluation are the Violence Against Women and Department of Justice Reauthorization Act, the Interstate Communications Act, and the Computer Fraud and Abuse Act.[77] These three cybercrimes were chosen because they best demonstrate how the different portions of Jakobs' functional moralism are found in contemporary cybercrimes in the United States. Rather than looking at the terms of the statutes themselves, the statutes will be looked at as they appear in court cases. Challenges to these statutes that make it to the federal level or even to the Supreme Court itself suggests that the purposes of these statutes, meaning the acts they are criminalizing, and their legitimacy (their constitutionality) are front and center. For the purposes of convenience, here is a reminder of the purposes criminal law is supposed to serve: (1) enabling people to act without fear and to be fearless when it comes to the realization of their rights and their well-being predicated on a strong constitution; (2) promote a functioning infrastructure such that the collective legal interests of the state are preserved.

The Violence Against Women and Department of Justice Reauthorization Act falls within the first purpose of Jakobs' Functional Moralism. The first case that will be analyzed is U.S. v. Sayer. Sayer conducted an extensive campaign of harassment against Jane Doe from July 2009 until about one year later in July 2010 when state police arrested him for violating a protection order she had against him.[78] "As a result of new fraudulent accounts Sayer posted in Jane Doe's name soliciting sex from strangers, as many as six different men per night showed up

[77] Violence Against Women And Dep't of Justice Reauthorization Act, 18 U.S.C. §2261; Interstate Communications Act, 18 U.S.C. §875(c); Computer Fraud and Abuse Act, 18 U.S.C. §1030.
[78] *United States v. Sayer*, 748 F.3d 425, 428-429 (1st Cir. 2014).

at her home in June 2010."[79] In these profiles were "sexually suggestive or explicit pictures of Jane Doe and in many cases directed viewers to sex videos of her on adult pornography sites. In many instances, Sayer, posing as Jane Doe, chatted with men online and encouraged them to visit Jane Doe at her home in Louisiana."[80] As a result of this conduct Sayer was charged with a violation of the statute. The statute here is designed to protect against and punish individuals who commit acts like Sayer that prevent women from being able to enjoy the use of the Internet and prevent the myriad of things that happened as a result of Sayer posing as Jane Doe. This clearly falls within the first purpose of the criminal law; the statute at issue in this case was designed for individuals to be on the Internet without fear that something like this would happen to them. Sayer's assertion that the statute violated the First Amendment was defeated for two reasons: (1) "speech integral to criminal conduct is now recognized as a long establish category of unprotected speech"; (2) the statute is not overbroad because §2261(A)(2)(a) "clearly targets conduct performed with serious criminal intent, not just speech that happens to cause annoyance or insult."[81] This type of challenge is accounted for by that first purpose of the criminal law because the constitutionality of a criminal statute comes before the protections that statute offers and here that condition was proved to be present.

The First Circuit revisited the statute in U.S. v. Ackell four years later after the statute had been changed.[82] There were two key changes to the statute: (1) "the intent to "intimidate" is now listed among the offense's various possible mental states"; (2) the statute now proscribes engaging, with the requisite intent, in a course of conduct that "causes, attempts to cause, or

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[79] *Id.* at 429.
[80] *Id.*
[81] *Id.* at 433-436.
[82] *United States v. Ackell*, 907 F.3d 67 (2018).

would be reasonably expected to cause substantial emotional distress."[83] Ackell engaged R.R. a minor, beginning in R.R.'s sophomore year of high school on a social website called MyYearbook.com.[84] "Ackell [received] photos of herself partially clothed. She testified, though, that despite providing Ackell with a P.O. Box address, he never sent her money." Things escalated after a period of time as "Ackell proposed that they enter into a "dominant-submissive" relationship, in which R.R. would be "the submissive." R.R., who was now seventeen".[85] During the trial, R.R. testified that Ackell's behavior again escalated and "informed R.R. that she could not opt out of the relationship because she was "caged." Ackell also warned R.R. that if she stopped sending him photos, he would disseminate photos of her that he had saved among her friends, classmates, and family."[86] It was only through some luck in 2014 that R.R. was able to escape this relationship.[87] This conduct shares many of the characteristics of the kind of behavior described in Sayer and as such points to the statute protecting the ability of women to operate online without fear that they would be engaged with in such a way. The statute was again challenged under the First Amendment for being overbroad and a content-based restriction on speech.[88] The court concluded that the challenged failed because the statute is no longer written in such a way that even implicates the over the overbreadth interest and that "Ackell has not met his burden of demonstrating that factually, the statute could apply to a substantial amount of protected speech, in an absolute sense and in relation to its many legitimate applications."[89] Once more, we see that this statute promotes the ability of women to act without fear on the internet

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[83] *Id.* at 73.
[84] *Id.* at 70.
[85] *Id.*
[86] *Id.* at 71.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 74.

and is supported by a strong constitution. It is repeatedly the case that courts uphold this statute against First Amendment challenges in similar circumstances.[90]

Similar to the Violence Against Women and Department of Justice Reauthorization Act, the Interstate Communications Act also falls within the first purpose of criminal law under Functional Moralism. A rather famous case is Elonis v. U.S. "A grand jury indicted Elonis for making threats to injure patrons and employees of the park, his estranged wife, police officers, a kindergarten class, and an FBI agent, all in violation of 18 U.S.C. § 875(c) via repeated postings to facebook and extremely concerning songs that he posted."[91] The majority found that the mens rea standard used by the act, the "reasonable person" standard, was the incorrect standard to apply because it "is inconsistent with 'the conventional requirement for criminal conduct—awareness of some wrongdoing".[92] Here, although as much as one would have liked for the statue to be upheld and prevent individuals from fearing being faced with the type of behavior Elonis demonstrated, the statute was not above its constitutional requirements. This is perfectly in line with the stipulation from Functional Moralism that what statute allows individuals to act without fear or exercise their rights without fear is predicated on a strong constitution; the constitution and its requirements must come first. U.S. v. Khan is a more extreme fact pattern with a more desirable result. Simply put, "[o]ver a seven-week span, Mohammad Khan used Facebook and his job as an Uber driver to threaten and prepare for mass murder."[93] The court easily found that the elements required by 875(c) were met even though a "true threat does not

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[90] See, e.g., *United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015); *United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014); *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012); *United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004), judgment vacated on other grounds, 543 U.S. 1182, 125 S. Ct. 1420, 161 L. Ed. 2d 181 (2005), reinstated in relevant part, 125 Fed. App'x 701 (6th Cir. 2005).
[91] *Elonis v. U.S.*, 575 U.S. 723, 731 (2015).
[92] *Id.* at 738.
[93] *United States v. Khan*, 937 F.3d 1042, 1046 (7th Cir. 2019).

need to be communicated directly to the intended victim" nor "require proof that the victim felt threatened" because "Khan posted increasingly aggressive promises to "murder" at least six specified "target" groups in a defined area of Chicago "well before" his dwindling deadline."[94] Unlike Elonis, because the statute passed constitutional muster, the statute was able to protect the citizens who saw Khan's posts from living with the fear that such things would be carried out.

Unlike the previous criminal laws, the Computer Fraud and Abuse Act (hereinafter "CFAA") is representative of the fulfillment of the second purpose of criminal law under Functional Moralism: the protection of functioning infrastructure in line with the collective legal interests of the state. A case that demonstrates this clearest is U.S. v. Morris from 1991. For some background, the section of the statute at issue in this case section (a)(5)(A), "would be aimed at 'outsiders,' *i.e.,* those lacking authorization to access any Federal interest computer."[95] But the Report also stated, in concluding its discussion on the scope of section 1030(a)(3), that it applies "where the offender is completely outside the Government, ... *or where the offender's act of trespass is interdepartmental in nature.*""[96] The circumstances of the case originate from the release of one of the first worm viruses in computer history which was released by Morris from a computer at MIT. "Computers were affected at numerous installations, including leading universities, military sites, and medical research facilities. The estimated cost of dealing with the worm at each installation ranged from $200 to more than $53,000."[97] Leading universities, military sites, and medical research facilities are the types of infrastructure, or at least things the state would have a collective legal interest in protecting because of the vital role they play for the nation as a whole. The court Concluded that between section (a)(3) and (a)(5), "Congress was

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[94] *Id.* at 1051-1052.
[95] *United States* v. Morris, 928 F.2d 504, 510 (2nd Cir. 1991).
[96] *Id.*
[97] *Id.* at 506.

punishing those, like Morris, who, with access to some computers that enable them to communicate on a network linking other computers, gain access to other computers to which they lack authorization and either trespass . . . or cause damage or loss of $1,000 or more . . .”[98] More recently, the purpose of this statute was highlighted by the dissenting opinion in Van Buren v. U.S. “Nathan Van Buren, a former police sergeant, ran a license plate search in a law enforcement computer database in exchange for money. Van Buren’s conduct plainly flouted his department’s policy, which authorized him to obtain database information only for law enforcement purposes.”[99] The majority opinion found that Van Buren did not violate the act because the act only “covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them.”[100] The authors of the dissenting opinion, Chief Justice Robers, Thomas, and Alito, comment that “[u]nder the majority’s reading, so long as a scientist may obtain blueprints for atomic weapons in at least one circumstance, he would be immune if he obtained that data for the improper purpose of helping an unfriendly nation build a nuclear arsenal.”[101] They question what the purpose of the act would be if this interpretation were true and the danger it poses if the majority’s interpretation is indeed the case and comment that “an ordinary reader of the English language” would have understood Van Buren to have exceeded authorized access.[102] Despite the majority’s conclusion, it is more persuasive to conclude that the purpose of the CFAA is to prevent the unauthorized access of computers which has any number

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[98] *Id.* at 511.
[99] *United States* v. Van Buren, 141 S. Ct. 1648, 1652 (2021).
[100] *Id.*
[101] *Id.* at 1666-1667.
[102] *Id.* at 1663.

of disastrous consequences for society as a whole. Once more it is seen that the CFAA is designed to promote collective legal interests and preserve the infrastructure of the U.S and falls squarely within Functional Moralism's design.

IV. Conclusion

Gunther Jakobs' Functional Moralism criminalization theory possesses the best ability to not only explain current cybercrimes statutes but also to explain the current constitutional challenges existing cybercrime statutes are facing. As such, it provides the most reliable, predictable, and consistent method of developing cybercrimes for Congress if applied correctly. Of course, even if we have this theory, does that really change the status quo? Is it not the goal to always make policies that are effective in accomplishing what they set out to accomplish and for those policies to have as few constitutional challenges as possible? The answer to both questions is yes; Jakobs' Functional Moralism changes the status quo of the development of cybercrime legislation, and it is the goal to make cybercrime policies that are effective in combating the behaviors they are punishing. Jakobs' Functional Moralism and its framework should now serve as the "Step 0" when developing cybercrime policies which is a step that previously did not exist. Moving forward, applying this "Step 0" would help to produce more reliable, predictable, and consistent cybercrimes.