

# Legal Obligation, Criminal Wrongdoing, and Necessity

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## Abstract

Individuals sometimes do things that they know will violate the terms of a statute. Most scholars deny that such actions are always morally wrong, but a coherent theoretical account of the relationships between 1) moral obligation, 2) legal obligation, and 3) criminal wrongdoing that can robustly classify hard cases has been elusive. This article starts with a Kantian account of the relationship between law and morality, and it proposes two closely related standards: one for legal obligation, and another for criminal wrongdoing. It then tests the plausibility and resilience of these standards by using them to generate illuminating new analyses of classic hypothetical cases involving alleged crimes committed under circumstances of necessity. These analyses offer reason to believe that the standards proposed in this article can anchor a Kantian theory of criminal responsibility that is simultaneously rigorous and humane.

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Keywords: *Legal Philosophy; Criminal Law; Legal Obligation; Immanuel Kant; Necessity*

## Introduction

Over half a century ago, H.L.A. Hart identified three central yet unresolved questions in legal philosophy: “How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?”<sup>1</sup> Hart identified important shortcomings in theories advanced by Austin, Kelsen, and others—for example, he was right to point out that any correct legal theory must be able to distinguish between law and private coercion<sup>2</sup>—and his alternative approach catalyzed a larger movement. But 20th century positivism has since proved itself vulnerable to the intractable questions Hart undertook to sidestep or resolve.<sup>3</sup>

Hart conceived of legal obligation as a *sui generis* form of obligation, irreducible to moral or prudential parts. But when subsequent scholars have tried to

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1. HLA Hart, *The Concept of Law*, 2d ed by Penelope A Bulloch & Joseph Raz (Oxford University Press, 1994) at 13.

2. *Ibid* at 19.

3. Brian Bix, for example, has diagnosed positivism’s persistent difficulties with these key questions. See Brian H Bix, “Some Heretical Thoughts on Legal Normativity” in Stefano Bertea, ed, *Contemporary Perspectives on Legal Obligation* (Routledge, 2021) 68.

explain what that means, they exhume the old questions. Some commit themselves to understanding law as a separate, robustly normative system, like aesthetics or epistemology. Yet this approach makes it difficult to explain the inherent moral quality that most participants in legal systems take them to have, or to morally justify the imposition of coercive punishments on those who disobey the law.<sup>4</sup>

Raz and others have maintained that, whilst legal claims involve normative-sounding terminology they are not robustly normative in themselves. Rather, “legal obligations” amount to claims to put us under moral obligations.<sup>5</sup> This raises the question of when such claims are morally authoritative, and answers tend to hinge on whether the law is thought an effective tool for bringing about a morally valuable state of affairs that can be specified independently of the law.<sup>6</sup> But conceiving of the law as a tool for the achievement of goals that can be understood apart from it leaves the field wide open for continued disputation concerning the nature of the morally valuable ends for which the law may be justified as a means.

This article develops an alternative, Kantian account of legal obligation, according to which the law is neither an independent normative system nor a tool for advancing morally valuable non-legal ends.<sup>7</sup> Instead, Kant conceived of ethics and law as co-equal moral domains that fit together seamlessly to provide a roadmap for living a life of integrity. To preserve the unity of this system, he used identical building-block concepts—law, duty, and obligation—in both domains.<sup>8</sup> The result is a very uncompromising account of the nature of legal obligation. Juridical (that is, coercively enforceable) law and ethical law are simply two different sub-types of moral law.<sup>9</sup> Statutory laws are therefore “categorical imperatives” for us: unconditionally binding commands.<sup>10</sup>

This unusual theoretical commitment can threaten to lead either to authoritarianism or to anarchy, depending on one’s views about the nature of state authority.<sup>11</sup> For example, Jeremy Waldron thinks that all procedurally adequate

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4. See Wesley Cragg, “HLA Hart and the Justification of Punishment” (1992) 5:1 *Can JL & Jur* 43 at 44.
  5. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) at 30.
  6. Raz refers to these as the ‘functions of law’. *Ibid* at 165-79.
  7. I owe this clear summary of how Kant’s legal philosophy differs from recently dominant approaches to Arthur Ripstein’s seminal work. See Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard University Press, 2009) at 9.
  8. See Immanuel Kant, “The metaphysics of morals” in Mary J Gregor, ed and trans, *Practical Philosophy* (Cambridge University Press, 1996) 353 at 377-82. As is customary, page references to the Prussian Academy edition (6:222-28) are provided in addition to the cited translation for all of Kant’s works.
  9. See *ibid* at 375, 381 (6:214, 6:227).
  10. *Ibid* at 377 (6:222). An obligation under either type of law is by definition “the necessity of a free action under a categorical imperative of reason.” *Ibid*. Obedience to the state’s legislative authority is “rightfully unconditional.” *Ibid* at 504 (6:371).
  11. See Jacob Weinrib, “Sovereignty as a Right and as a Duty: Kant’s Theory of the State” in Claire Finkelstein & Michael Skerker, eds, *Sovereignty and the New Executive Authority* (Oxford University Press, 2019) 21 at 22.

enactments by legitimate states count as laws, and he therefore characterizes Kant's philosophy as authoritarian.<sup>12</sup> By contrast, Robert P. Wolff concludes that statutes can obligate us as laws only if they accord with the judgments of individuals upon whom they are imposed—an account in tension with Kant's examples, and one that seems to undermine the law's authority to resolve disagreements about rights.<sup>13</sup>

Some scholars seek middle ground by sanding down the uncompromising angles of Kant's moral concepts in the legal domain. Thomas Hill, for example, argues that our moral obligations to obey juridical laws need not have the same "content and stringency" as the laws themselves, that juridical laws merely have "weight" in moral deliberations, and that they may be morally disobeyed if an agent does so respectfully.<sup>14</sup> But this account cannot be reconciled with the basic features of Kant's conceptual apparatus. First, morality is not an external perspective from which we can weigh juridical laws. Juridical laws are—by definition—moral laws.<sup>15</sup> Moreover, our duties under juridical laws are 'perfect duties', which identify specific acts or omissions as unconditionally obligatory.<sup>16</sup> By contrast, ethical laws unconditionally require us to have certain ends—our own moral perfection and the happiness of others—but we must pursue those ends only through actions that do not violate our perfect duties, including those under juridical laws.<sup>17</sup> Fidelity to Kant's basic conceptual architecture thus requires roughly the opposite of Hill's approach.

Without the shared concepts that unite the ethical and legal domains, Kantian moral philosophy would have no more structural integrity than an engine built out of parts calibrated to two different systems of measurement. Therefore, to preserve the possibility of a truly unified theory of law and ethics, this article embraces the unconditionality of Kant's basic moral concepts. It then goes on to prove that they do not preclude nuanced and plausible resolutions in hard cases.<sup>18</sup>

12. He does, however, gamely offer some considerations in Kant's defense. See Jeremy Waldron, "Kant's Legal Positivism" (1996) 109:7 Harv L Rev 1535 at 1544. See also Jenna Zhang, "Unethical Laws and Lawless Ethics: Right and Virtue in Kant's Rechtslehre" (2017) 4:2 De Ethica 21.

13. See generally Robert Paul Wolff, *In Defense of Anarchism* (Harper & Row, 1970).

14. Thomas E Hill Jr, "Questions about Kant's Opposition to Revolution" (2002) 36 Journal of Value Inquiry 283 at 291.

15. Hill focuses on Kant's claim that all of our juridical obligations are "indirectly ethical" as well, by which Kant means that we have an ethical obligation to obey juridical laws from the motive of duty alone. Kant, *supra* note 8 at 385 (6:221). But this is not a juridical law's only connection to morality in Kant's system.

16. See *ibid* at 395 (6:239-40).

17. See Jens Timmermann, "Kantian Dilemmas? Moral Conflict in Kant's Ethical Theory" (2013) 95:1 Archiv für Geschichte der Philosophie 36 at 45.

18. As such, it is part of a growing Kantian literature devoted to plotting a course between the twin threats that Jacob Weinrib has dubbed "anarchism and quietism" without sacrificing conceptual rigor, and with it the unique promise of Kantian theory when it comes to the coherent integration of our public and private duties. Weinrib, *supra* note 11 at 22. Charles Fried, for example, recently argued that judicial review transmutes the public use of reason Kant thought essential into boundaries within which a state's authority remains supreme. See Charles Fried, "Defining and Constraining the Sovereign: 'The Most Difficult of All Tasks'" in Finkelstein & Skerker, *supra* note 11 at 81. Robert Alexy has lately characterised Kant as an inclusive legal non-positivist for whom "extreme injustice is no law." Robert Alexy,

A novel interpretation of Kant's theory of legal obligation is at the heart of this article. While Kantians broadly agree that individuals are legally bound by the exercise of the state's legislative authority, fewer have addressed the question of what exactly constitutes an exercise of that authority. I will aim to show that the legislative authority is the authority to create new *laws*—categorical imperatives—and that this is not the same thing as the authority to obligate us with words alone. In most cases, lawmakers can create new laws by linking their legislative commands to threatened punishments for disobedience. Such legislation presents individuals with two alternatives: freedom under laws and the loss of freedom. Faced with these alternatives, individuals are rationally required to preserve their freedom regardless of their personal preferences. I will aim to show that only my proposed account of legal obligation can ensure that we are all equally bound by laws. It also has a fruitful further implication: legislation fails to establish new legal duties in circumstances in which freedom under laws is not an available alternative for an agent.

Part I of this article outlines two foundational ideas in Kant's legal philosophy—*freedom* and *a civil condition*—and briefly describes the way in which they justify and limit the state's authority to establish new legal duties. Part II proposes a Kantian standard for legal obligation: lawmakers can impose new legal duties on us only by providing a universally dispositive reason to obey. Part III proposes a Kantian standard for criminal wrongdoing that operationalizes the intuitive Kantian idea that criminals choose to exempt themselves from the general requirements of public law, and then illustrates its application to simple cases. Finally, Part IV applies these proposed standards to a pair of classic hypothetical cases involving alleged crimes committed under conditions of necessity. The nuanced and plausible new analyses that result from this exercise offer good reason to believe that the pair of standards proposed in this article can anchor a Kantian theory of criminal law that is simultaneously rigorous and humane.

## I. Freedom and a Civil condition

Two key ideas in Kant's legal philosophy underpin the argument of this article: 1) *freedom*, and 2) *a civil condition*. Freedom is “independence from being constrained by another's choice.”<sup>19</sup> As Arthur Ripstein has explained, this conception of freedom differs from those according to which individuals are freer just in case they can do a larger number of things, or pursue their happiness more effectively.<sup>20</sup> Instead, Kantian freedom is fundamentally interpersonal: a person is free just in

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“Kant's Non-Positivist Concept of Law” (2019) 24:4 *Kantian Review* 497 at 504. Arthur Ripstein has developed a sweeping and mostly persuasive account of private law that successfully integrates Kant's *a priori* legal principles with the authority of lawmakers and courts to make binding empirical judgments. See Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016).

19. Kant, *supra* note 8 at 393 (6:237). Unless otherwise specified, I will always use the word ‘freedom’ to refer to external freedom rather than to the complementary Kantian concept of internal freedom of the will.

20. See Ripstein, *supra* note 7 at 32-33.

case no other person or group can use that person's body or any other resources that belong to that person for another's purposes.<sup>21</sup>

The premise of Kant's argument for state authority is that we have a pair of natural duties in a state of nature. First, we each have an internal duty (that is, a duty that we owe to ourselves) of "rightful honor": we must not allow others to use us as mere means to their ends.<sup>22</sup> In the context of Kant's legal philosophy, this means that we have a duty not to permit others to deprive us of our freedom. We likewise have an external duty (owed to others) not to wrong others by depriving them of their freedom.<sup>23</sup> Taken together, these two duties amount to a universal "innate right" of freedom, to the extent that it can coexist with the equal freedom of others.<sup>24</sup>

Because freedom is understood as independence, our innate right of freedom amounts to a Hohfeldian right that others refrain from engaging in actions that 'coerce' us, meaning actions that override our independence with respect to our bodies or anything else that belongs to us. We also have a strictly correlative duty not to engage in actions that violate the innate right of any other person. Unlike specific property rights or contractual expectations, which we must choose to acquire, we have our innate right of freedom simply because we are human.<sup>25</sup> Kant then writes that our innate right of freedom "already involves the following authorisations, which are not really distinct from it (as if they were members of the division of some higher concept of a right)":<sup>26</sup>

- 1) **equality** (independence from non-reciprocal obligations);
- 2) **independence** (being one's 'own master' so long as one does not wrong others);
- 3) **association** (interacting with others so long as others are not thereby wronged).<sup>27</sup>

These "authorisations" can likewise be redescribed in terms of Hohfeld's fundamental legal concepts.<sup>28</sup> Independence and association are best understood as domains of Hohfeldian liberty: action types that do not violate the rights of others.<sup>29</sup> So long as we do only what we are at liberty to do, our actions are effectively shielded by our innate right that others not coerce us. Equality is best

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21. *Ibid.*

22. Kant, *supra* note 8 at 392 (6:236)

23. *Ibid.*

24. *Ibid.* at 393 (6:237).

25. *Ibid.*

26. *Ibid.*

27. See *ibid.* at 393-94 (6:237-8).

28. See generally Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 at 30-32.

29. Like Matthew Kramer and several other legal theorists, I consider the term 'liberty' less misleading than Hohfeld's proffered alternative of 'privilege', especially in the context of Kant's legal philosophy. No difference in meaning is intended. See Matthew H Kramer, "Rights Without Trimmings" in Matthew H Kramer, NE Simmonds & Hillel Steiner, eds, *A Debate Over Rights: Philosophical Enquiries* (Oxford University Press, 1998) 7 at 10.

understood as a Hohfeldian immunity: we are each immune to attempted exercises of power that would impose non-reciprocal obligations on us, and we each have a correlative disability with respect to imposing such non-reciprocal obligations. Importantly, this immunity is (like all aspects of our innate right of freedom) inalienable: my duty of rightful honor makes me legally incapable of “throw[ing] myself away” by choosing to take on new legal duties that do not equally bind others.<sup>30</sup>

In a state of nature, our innate right can extend only as far as our own bodies. For example, individuals in a state of nature have a correlative duty not to wrest an object from a non-threatening person’s grasp or displace that person, since these acts would violate another’s innate right.<sup>31</sup> But although we each have a right to be free of bodily coercion in a state of nature, we are necessarily insecure in our enjoyment of it, since we have no assurance that others nearby will not choose to coerce us. Perhaps worse, in a state of nature our mere proximity to others can wrong them by physically threatening them in a way that is inconsistent with their innate right, which will at best limit our domain of liberty with respect to association.<sup>32</sup>

While John Locke thought the state of nature was merely inconvenient because rights were difficult to defend, Kant argues that the very features of the concept of a right make it the case that acquired rights of property, contract, and status are impossible without a state. First, a person can acquire a right to an external thing only by making a choice, and our innate equality disables any person from unilaterally imposing new correlative duties on others.<sup>33</sup> Second, disputes about the boundaries of acquired rights necessarily arise, and in a state of nature they cannot be resolved because no one is obligated to defer to anyone else’s judgment.<sup>34</sup> Third, we lack equal assurance that others will respect our rights in a state of nature, and we are not truly independent of the choices of others—and therefore have no acquired rights, properly speaking—if our enjoyment of our putative rights depends on others’ discretionary self-restraint.

Because individuals in a state of nature therefore cannot acquire property rights, they are unable to rightfully pursue many projects that they could physically pursue. A farmer who attempts to grow a crop of corn on a field, for example, is not independent of the choices of others in this pursuit, because the farmer’s neighbors remain at liberty to uproot the growing crop. Our incapacity to constrain others from interfering with projects that involve large external objects or long periods of time effectively “put[s] *usable* objects beyond any possibility of being *used*.”<sup>35</sup> For this reason, and also because our innate right to be free of bodily coercion is otherwise insecure, Kant argues that we have a duty to

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30. Kant, *supra* note 8 at 444 (6:298).

31. See *ibid* at 401-12, 414 (6:247-8, 6:262).

32. See *ibid* at 452 (6:307).

33. See *ibid* at 413 (6:261).

34. See *ibid* at 456 (6:312).

35. *Ibid* at 405 (6:250) [emphasis in original].

ourselves and to those around us to become members of a state.<sup>36</sup> Only as members of a state is it possible for us to enjoy our equal freedom to rightfully pursue the range of projects that we are capable of pursuing without wronging others.

A state can create the necessary conditions for our enjoyment of equal freedom by exercising its “three authorities”—legislative, executive, and judicial—each of which are logically necessary to eliminate one of the three barriers to acquiring rights in a state of nature that Kant earlier identified.<sup>37</sup> The legislative authority is the capacity to enact laws that empower individuals to acquire property, contract, and status rights under uniform rules, as well as those laws necessary to establish and maintain state institutions. The judicial authority is the capacity to exercise judgment to authoritatively resolve disputes about rights.<sup>38</sup> The executive authority is the capacity to coerce us in accordance with the law, thus providing us with independent assurance that our rights are secure, and that we are all equally bound by the laws.<sup>39</sup>

The state’s three authorities, together with the innate right of freedom and certain fundamental principles of acquired right, constitute the idea of a *civil condition*.<sup>40</sup> Because the state’s authorities are necessary prerequisites to our enjoyment of our rights, Kant’s argument goes, we must see ourselves as having authorised the state to exercise these authorities by means of the “omnilateral” will—a constructive group agent comprised of the united wills of those individuals subject to the same laws in virtue of their identical purpose of enjoying their rightful freedom.<sup>41</sup> In a civil condition, we can see ourselves as free under neutral laws that reciprocally constrain the sets of actions that we are each at liberty to undertake, because we are rationally required to endorse the state’s authority to promulgate, apply, and enforce those laws.<sup>42</sup>

A state enables individuals to extend their independence to include acquired rights, such as property, but so long as we do not wrong others, no state has the authority to strip us of our original innate right of freedom, including its authorisations: equality under law, independence, and association. This is the case because the innate right of freedom justifies state authority in the first place, including the authority to create a system of legal property rights.<sup>43</sup> The foundational status of the innate right of freedom relative to acquired rights plays an important part in the arguments that follow, because it means that the “burden of proof” concerning the existence of an acquired right falls on the legal claimant who asserts its existence.<sup>44</sup> A defendant who denies that an alleged acquired right

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36. See *ibid* at 392 (6:237).

37. *Ibid* at 457 (6:313).

38. See *ibid* at 461 (6:317).

39. See *ibid* at 460 (6:317).

40. Kant often refers to the concept of a civil condition as “a rightful condition.” *Ibid* at 409 (6:255). A civil condition may deviate greatly from the ideal Kantian state without losing its ability to exercise the three authorities. *Ibid* at 505 (6:372).

41. *Ibid* at 415 (6:263).

42. See *ibid* at 459 (6:316).

43. See *ibid* at 409 (6:256).

44. *Ibid* at 394 (6:238).

exists can “appeal methodically to [the] innate right to freedom” to defend against a charge of wrongdoing until the claimant demonstrates that the acquired right in question has indeed been established by law.<sup>45</sup>

## II. A Standard for Legal Obligation

In Kantian terms, a crime is by definition a knowing transgression of a duty.<sup>46</sup> In order to evaluate potential examples of criminal wrongdoing, therefore, we must first identify an agent’s relevant duties under juridical laws. Kant argued that law-makers can create new legal duties for us only by supplying the following two ingredients: 1) a legislative command, and 2) an external incentive to obey that command in the form of a coercive response to disobedience.<sup>47</sup> An external incentive is necessary because it provides us with “equal assurance that [others] will observe the same restraint” that we observe when we obey.<sup>48</sup> Without such assurance, our duty of rightful honor would prevent us from acquiring a new legal duty that others might freely choose to disregard.

The necessary and sufficient conditions of equal assurance remain a matter of debate, but Arthur Ripstein’s account is particularly influential. Ripstein acknowledges that assurance is an essential prerequisite to legal obligation in both public and private law. In the domain of private right, a lack of assurance entails that “nobody is under any obligations with respect to external objects,” and therefore “neither [party to a property dispute] has any rights, properly speaking.”<sup>49</sup> In the context of public right, “a parallel point applies”: assurance is necessary to make an obligatory public law “effective.”<sup>50</sup> I will summarize his account of how the law provides this assurance in both domains and then explain how my own proposal improves on it. I will aim to show, first, that Ripstein is misguided to look to civil remedies to provide the equal assurance necessary to establish property rights. Moreover, although Ripstein later correctly concludes that criminal penalties supply the essential form of assurance necessary to create new legal duties of all types, he fails to identify a key feature of such penalties that makes this possible: their inconsistency with our innate freedom. Without this key insight, Ripstein’s account of equal assurance cannot enable us to accurately identify our legal duties.

Ripstein argues that there are two dimensions along which civil remedies provide the assurance necessary to create a duty to refrain from encroaching on the acquired rights of others. First, these remedies assure individuals that if they become victims of wrongdoing, their resources will be restored to them, as nearly as possible. Second, these remedies may discourage potential wrongdoers by

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45. *Ibid* at 394 (6:238).

46. See *ibid* at 378 (6:224).

47. See *ibid* at 383-84 (6:218-19). Assurance must be provided by means of “a general (i.e., public) external lawgiving accompanied with power” (*ibid* at 409 (6:256)).

48. *Ibid* at 452 (6:307).

49. Ripstein, *supra* note 7 at 165.

50. *Ibid* at 307.

ensuring that any rights violation “carries potential disadvantages.”<sup>51</sup> Ripstein thinks that this deterrent effect is “secondary, but supports the assurance provided by the remedy itself.”<sup>52</sup> Deterrence is deemed secondary because “the remedial aspect of [civil] enforcement gives you all the assurance you need: you have what is yours, because if another wrongs you, you will be able to get it back.”<sup>53</sup>

Ripstein’s later remarks on criminal punishment seem in tension with his earlier conclusion that civil remedies provide all the assurance we need. Because a wronged party can choose whether to “stand on his or her own rights,” Ripstein concludes that civil liability is not “systematically” imposed.<sup>54</sup> He infers from this fact that criminal penalties are a necessary form of assurance for acquired rights after all, because the state is empowered to impose them on all knowing wrongdoers regardless of the private choices of victims. Only this systematic assurance, he concludes, can satisfy our duty of rightful honor and therefore conclusively establish acquired rights.<sup>55</sup> Notably, however, Ripstein does not suggest that these systematically threatened punishments provide anyone, much less everyone, with a *dispositive* reason to obey the law. Instead, they merely “compete with the criminal’s other incentives,” on his view, and presumably are sometimes outweighed by them.<sup>56</sup>

I believe that neither of these arguments accurately describes the ‘equal assurance’ that lawmakers must supply in order to create new legal duties. Ripstein is correct to view civil remedies as essential logical extensions of acquired rights in cases in which they are violated. He is also correct to characterise deterrence as a ‘secondary’ effect of these remedies. *But this is not because deterrence is a merely secondary form of assurance.* As an analysis of Kant’s equal assurance requirement, this discussion grasps the wrong end of the stick: equal assurance addresses us in our capacity as potential wrongdoers, not as potential victims. As potential wrongdoers, we have a duty to refrain from encroaching on the property of others only because we are assured that all other potential wrongdoers are equally constrained. This is not at all the same thing as assuring us, in our capacity as potential victims, that our resources will subsequently be restored to us if we are wronged. Civil remedies have an important legal function: they preserve private rights over time by creating legal powers and liabilities for parties to a rights violation that has already occurred. But such remedies have neither the purpose nor the effect of supplying the kind of equal assurance that creates new legal duties.

Ripstein later rightly concludes that threatened criminal punishments supply the critical form of assurance, and when he describes them as “systematic,” he identifies one of the key features that enable punishments to serve this function.<sup>57</sup> However, when Ripstein suggests that these threats merely “compete with the

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51. *Ibid* 7 at 167.

52. *Ibid.*

53. *Ibid.*

54. *Ibid* at 319-20.

55. See *ibid* at 320.

56. *Ibid* at 319.

57. Arthur Ripstein, “Hindering a Hindrance to Freedom” (2008) 16 *Jahrbuch für Recht und Ethik* 227 at 247.

criminal's other incentives," he gives the impression that it is the discomfort or inconvenience occasioned by criminal penalties that constitutes the necessary equal assurance.<sup>58</sup> If that is indeed what Ripstein means, it would be a problem for his account, because it is the assurance, and not the punishment itself, that must be "equal" if any new legal duties are to be created. Any theory of assurance that relies only on those features of punishment that might be outweighed by other considerations cannot explain how such assurance can be equal, because no incentive that depends on personal preferences for its effectiveness can motivate all individuals to obey, even if it is systematically provided.<sup>59</sup>

By contrast, I will aim to show that the state *can* provide equal assurance by threatening to impose criminal punishments that deprive us of our bodily independence, because bodily independence is an element of our innate freedom.<sup>60</sup> Recall from Part I that a *civil condition* is a system of equal freedom under law, and *freedom* is independence from being subject to the choices of others. Such a system cannot function over time unless it distinguishes between objects of choice—things that are external to us and can therefore be freely acquired and discarded—and the bodily sovereignty that enables individuals to acquire external rights in the first place. Individuals can rationally give up property, contract, or status rights without compromising their innate freedom, but the duty of rightful honor disables any person from legally choosing to surrender bodily independence, since that would *ipso facto* make that person a mere means for others.<sup>61</sup>

The inalienability of our innate freedom justifies many existing legal doctrines according to which individuals are legally disabled from consenting to certain kinds of treatment, such as destructive physical violence.<sup>62</sup> In contract law, terms that purport to limit one party's future bodily independence, such as those for slavery or indentured servitude, are legal nullities because they are inconsistent with our innate freedom.<sup>63</sup> Courts decline to order specific performance of more

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58. Ripstein, *supra* note 7 at 319.

59. On persuasive account of the nature and scope of Kantian transcendental freedom, we lack the *ability* to freely choose an end toward which we are weakly inclined over an alternative toward which we are more inclined on any non-moral basis. See Ralf Bader, "Kant on Freedom and Practical Irrationality" in Ralf Bader, ed, *The Idea of Freedom: New Essays on the Kantian Theory of Freedom* (Oxford University Press) [forthcoming]. In other words, unless an individual's disinclination toward punishment happens to outweigh that individual's inclination to commit a contemplated crime, the threat of punishment can have *no impact at all* on the decision about whether or not to obey the law unless it creates a moral reason.

60. For a detailed textual defense of this claim, see ME Newhouse, "Juridical Law as a Categorical Imperative" in Alice Pinheiro Walla & Mehmet Ruhi Demiray, eds, *Reason, Normativity and Law: New Essays on Kantian Philosophy* (University of Wales Press, 2020) 105.

61. See Kant, *supra* note 8 at 471 (6:329).

62. See Vera Bergelson, "Consent to Harm" (2008) 28:4 Pace L Rev 683 at 684 citing *People v Jovanovic*, 700 NYS (2d) 156 at 168, n 5 (App Div 1999) ("just as a person cannot consent to his or her own murder, as a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm, even if the victim asked for or consented to the act") [citations omitted]. Robert Alexy suggests that Kant's comments on unenforceable contract terms support an inference that Kant is committed to a non-positivist conception of law in other domains. See Alexy, *supra* note 18 at 508.

63. See James Gray Pope, "Contract, Race, and Freedom of Labor in the Constitutional Law of 'Involuntary Servitude'" (2010) 119:7 Yale LJ 1474 at 1488-89 citing *Bailey v Alabama*, 219 US 219 (1911). See also Kant, *supra* note 8 at 431-32, 471-72 (6:283, 6:329-30). See also

conventional employment contracts for the same reason.<sup>64</sup> The state cannot empower individuals to legally alienate their innate freedom, because the state's authority is justified in the first place as the sole means by which individuals can secure their innate freedom.

But although our innate freedom is inalienable, our legal right to it—which Kant refers to as our “dignity [as] a citizen”—is not absolute.<sup>65</sup> We can never throw away our innate freedom by signing a contract, but we will be stripped of it, at least temporarily, if we commit a crime.<sup>66</sup> Convicts are transformed into “mere tool[s] of another's choice” by punishments that are inconsistent with bodily independence.<sup>67</sup> When Kant writes that “it is impossible *to will* to be punished,” he means that a criminal punishment is by definition the kind of treatment to which an individual could not consent because it is inconsistent with innate freedom.<sup>68</sup> Ripstein aptly describes punishment as “exclusion from the system of freedom,” but he never identifies the key role that this insight must play in a successful account of equal assurance.<sup>69</sup>

Our duty of rightful honor obligates us to preserve our innate freedom at the cost of any personal preference or private purpose that we may have.<sup>70</sup> We are therefore each *morally obligated* to avoid a punishment that is inconsistent with our external freedom if, by obeying the law, we can continue to see ourselves as free under laws that we have given to ourselves. Because people are often irrational, no law can empirically guarantee universal obedience. But for assurance to be ‘equal’ in any sense at all, lawmakers must at least give everyone a dispositive reason to obey—a reason that does not depend on our contingent personal preferences or purposes.

Criminal punishments can accomplish this goal, because rational agents who are presented with the alternatives of freedom, on one hand, and the loss of freedom, on the other, have a duty to preserve their freedom. My proposed standard for legal obligation is therefore as follows:

The legislative authority creates a legal duty to obey its command by presenting individuals with two alternatives:

- 1) Obey the legislative command and continue to see yourself as free under laws you have given yourself by means of the omnilateral will; or
- 2) Disobey and become liable for a punishment that is inconsistent with your innate freedom.<sup>71</sup>

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Immanuel Kant, “On the Common Saying: That It May be Correct in Theory, But It Is of No Use in Practice” in Gregor, *supra* note 8, 273 at 302 (8:304).

64. See Basil M Loeb, “Deterring Player Holdouts: Who Should Do It, How To Do It, and Why It Has to Be Done” (2001) 11:2 Marq Sports L Rev 275 at 278.

65. Kant, *supra* note 8 at 471-72 (6:329-30).

66. *Ibid.*

67. *Ibid* at 471 (6:330).

68. *Ibid* at 476 (6:335) [emphasis in original].

69. Ripstein, *supra* note 7 at 317.

70. See Kant, *supra* note 8 at 392 (6:236). Our external freedom is an end that we are rationally required to have. *Ibid* at 461 (6:318).

71. See Newhouse, *supra* note 60 at 115.

When this standard is met, individuals have a duty to obey the legislative command even when the chances of arrest and prosecution are small, because lawbreakers surrender their right to be “beyond reproach,” meaning that their innate freedom is no longer legally protected.<sup>72</sup>

This proposed interpretation can make sense of Kant’s claim that “[t]he law of punishment is a categorical imperative”—in other words, that state officials are legally obligated to deprive criminals of some aspect of their innate freedom.<sup>73</sup> Why did Kant think that state officials have a *duty*, rather than just a Hohfeldian power, to punish crime? I believe the correct answer has two parts: 1) the state must have previously specified a punishment of this type in order to supply the equal assurance necessary to create the very legal duty that the criminal knowingly transgressed; and 2) because our innate equality requires punishments to be systematically imposed, the same law that obligates citizens to obey *ipso facto* obligates state officials to punish those who disobey.<sup>74</sup>

If we want to know whether a statute has created a legal duty, on this view, we must initially determine whether its prescribed penalty is a consequence that we could rationally choose, “for it is no punishment if what is done to someone is something he wills.”<sup>75</sup> Some criminal punishments that meet this standard, such as the death penalty and lengthy incarceration, are very harmful to those on whom they are imposed, but less harmful punishments exist that are inconsistent with our bodily independence. Punishments such as house arrest, curfews, community service work, and/or mandatory in-person instruction are more appropriate punishments for less serious forms of criminal wrongdoing.<sup>76</sup> As legally specified responses to violations of the terms of statutes, all of these punishments are adequate to create legal duties, because they all conflict with our bodily independence and therefore with our innate freedom.<sup>77</sup> As Ripstein has correctly observed, “Kant cannot accept the idea that the criminal law is a series of [contractual] offers, because these are not offers that anyone could rightfully make.”<sup>78</sup>

To some readers, my proposed standard for legal obligation may appear objectionably Hobbesian. What about the distinctively Kantian ethical obligation to obey the law out of respect for law as such?<sup>79</sup> We indeed have such an ethical

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72. Kant, *supra* note 8 at 394 (6:238) [emphasis removed].

73. *Ibid* at 473 (6:331).

74. Although no one can prevent a sovereign from granting clemency to a convicted criminal, Kant characterizes this behavior as “injustice in the highest degree” because it violates the sovereign’s legal duty to impose the punishment threatened by statute (*ibid* at 477 (6:337)).

75. *Ibid* at 476 (6:335).

76. I am grateful to Amy E Phillips, a public defense attorney, for drawing my attention to the importance of identifying punishments that are adequate to create legal duties yet less harmful to those punished than conventional incarceration.

77. This conflict is more vivid when we imagine analogous arrangements between private parties: a corporation that has employees arrested if they do not show up for work on time, or a marriage contract that authorizes a woman’s husband to prevent her from leaving the house until she has completed certain domestic tasks. Such arrangements are not identical to long-term imprisonment, but they are unlawful because they are incompatible with equal human freedom.

78. Arthur Ripstein, “In Extremis” (2005) 2:2 *Ohio State Journal of Criminal Law* 415.

79. See Immanuel Kant, “Groundwork of the Metaphysics of Morals” in Gregor, *supra* note 8 at 56 (4:401). For a fuller explanation, see Newhouse, *supra* note 60 at 110-12.

obligation, and it is therefore not maximally virtuous to obey the law merely to preserve our own individual external freedom—even though preserving our freedom is itself an end that we are morally obligated to uphold.<sup>80</sup> But we can obey a legislative enactment out of respect for law as such only if that enactment *qualifies as a law in the first place*.

Recall that a law is by definition a categorical imperative: a command that unconditionally binds an agent.<sup>81</sup> This is true whether the law in question happens to be ethical or juridical in nature. Kantian ‘respect’ is, by definition, our subjective response when we apprehend a law, and it can move us to obey the law on ethical grounds alone.<sup>82</sup> We can therefore only respond with respect to something that *already is* a law. Any attempt to elevate a mere hypothetical imperative, such as a desire to avoid the pain and inconvenience of prison, into categorical status by means of the very respect that definitionally constitutes our *response* to a categorical imperative is akin to pulling oneself up by one’s shoelaces.<sup>83</sup> Only if we are each morally—and thus equally—obligated to obey a legislative command in order to preserve our own individual freedom can we be universally *legally* obligated to obey it as a new juridical law.<sup>84</sup> Once a new law has been successfully created in this way, we each have an ethical duty to obey it out of respect for law as such.

My proposed standard for legal obligation is not inconsistent with the exclusivity of the state’s legislative authority. Only the state can create new duties by threatening to punish disobedience, because its exclusive possession of the legislative authority is what enables us to see ourselves as free under laws that we give to ourselves. This freedom under laws is what we are rationally required to preserve through our obedience. By contrast, if a burglar threatens to lock me in a closet until I open my safe for them, there is no alternative open to me that will allow me to regard myself as free. The burglar is simply threatening to violate my independence in two qualitatively different ways, and a Hobson’s choice of this sort cannot create a duty to obey them.

We each have a duty to obey exercises of the legislative authority, but the legislative authority is the authority to enact *laws*—categorical imperatives—one at a time. It is not some generalised authority to bind us with words alone. If the legislative authority could bind us with words alone, then an ‘external

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80. Virtue requires us to do the right thing for the right reason. What I mean to say here is that an individual who obeys the law only to preserve that individual’s own freedom is not acting on the correct unitary moral reason: universal freedom, of which the individual’s personal freedom is a wholly included part.

81. See Kant, *supra* note 8 at 376 (6:221).

82. The Kantian concept of respect just is our subjective response to our apprehension of a law. See Kant, *supra* note 79 at 56 (4:401). This is the way in which all of our juridical duties are “indirectly ethical” as well. Kant, *supra* note 8 at 385 (6:221).

83. For a valiant and thought-provoking attempt along these lines, see Marcus Willaschek, “Which Imperatives for Right? On the Non-Prescriptive Character of Juridical Laws in Kant’s *Metaphysics of Morals*” in Mark Timmons, ed, *Kant’s Metaphysics of Morals: Interpretive Essays* (Clarendon Press, 2002) 65.

84. For a much more detailed textual defense of this argument, see Newhouse, *supra* note 60 at 110-12.

incentive' might be a useful or prudent tool for motivating citizens to obey, but it is hard to see why it would be an essential prerequisite to legal obligation, as Kant explicitly insists that it is.<sup>85</sup> The foregoing argument resolves this textual mystery by explaining exactly how punishments can create new legal duties. It also helpfully clarifies what kind of response to wrongdoing is adequate to serve this function: one that is inconsistent with our innate freedom.<sup>86</sup> Most importantly, it ensures meaningful equality under law, which our duty of rightful honor demands.

### III. A Standard for Criminal Wrongdoing

From a Kantian perspective, the distinction between civil and criminal wrongdoing arises from the fact that every external<sup>87</sup> action has a dual nature: a physical manifestation (the 'act') and its conjoined principle of action (the 'maxim').<sup>88</sup> Arthur Ripstein has shown that an action is civilly wrong in virtue of a property of its act: the physical incompatibility of one person's conduct with the freedom of others.<sup>89</sup> Some agents who commit civil wrongs act on unobjectionable maxims, in which case those wrongs are "mere faults" that should not give rise to criminal liability.<sup>90</sup> Civil wrongs legally entitle wronged parties to remedies that restore their acquired rights to them insofar as that is possible.

By contrast, a crime is a knowing transgression of a duty.<sup>91</sup> Because knowledge of an act's wrongful nature is what makes it criminal, an action can be considered criminally wrong only on the basis of a property of its maxim, the principle of action that an individual adopts when choosing to undertake it.<sup>92</sup> The criminal law targets maxims because its purpose is to provide equal assurance by constraining our conduct prospectively.<sup>93</sup> In order to function as a deterrent, it must prohibit conduct that individuals can identify in advance by evaluating the maxim on which they are contemplating acting.<sup>94</sup>

Arthur Ripstein aptly describes a criminal act as one by which "the criminal seeks to exempt himself from the law" by violating the same binding rules of

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85. See Kant, *supra* note 8 at 383 (6:218-19).

86. Kenneth Westphal has observed in conversation that my argument implies that monetary fines cannot establish new legal duties. He is correct, though a complete exposition of this implication is beyond the scope of the present article.

87. The law concerns itself exclusively with actions that have an external (that is, broadly physical) component.

88. A physical event that lacks a conjoined maxim is a mere event for which no agent can be held legally responsible. See Joachim Hruschka, "Imputation" (1986) *BYUL Rev* 669 at 672.

89. See Ripstein, *supra* note 18 at 8-9.

90. Kant, *supra* note 8 at 378 (6:224) [emphasis removed].

91. A "crime" is by definition an "intentional transgression (i.e., one accompanied by consciousness of its being a transgression)" of an external duty. *Ibid* at 378 (6:224).

92. See *ibid* at 464, n\*(6:321).

93. See B Sharon Byrd, "Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in its Execution" (1989) 8:2 *Law & Phil* 151.

94. See Mary J Gregor, *The Laws of Freedom: A Study of Kant's Method of Applying the Categorical Imperative in the Metaphysik der Sitten* (Basil Blackwell, 1963) at 41.

conduct that the criminal is rationally required to endorse for others.<sup>95</sup> This characterisation of criminal wrongdoing is both straightforward and accurate, but it can be tricky to apply in complex cases. In this section, I will propose a standard for criminal wrongdoing that encapsulates the notion of self-exemption and can be operationalized to evaluate test cases. I initially arrived at this standard by means of a close textual analysis of Kant's keystone legal principle: the Universal Principle of Right.<sup>96</sup> But as a potential action-guiding standard, it is worth endorsing only if it can successfully identify conduct that is justly punishable:

Any action A is criminally wrong if the legality of actions on A's maxim is incompatible with the possibility of everyone's freedom in a civil condition.<sup>97</sup>

This standard asks whether two hypothetical states of affairs could coexist: 1) the legality of actions on A's maxim, and 2) everyone's freedom in a civil condition.<sup>98</sup> In other words: Could everyone possibly be free in a civil condition if actions on A's maxim were legal? If the answer is "no," then individuals who act on the maxim of A are seeking to exempt themselves from the necessary preconditions of equal freedom that they are rationally required to endorse for others. Any action on A's maxim is for this reason criminally wrong.

Some readers may wonder why this standard compares the *legality* of actions on certain maxims, rather than the maxims themselves, to the concept of everyone's freedom in a civil condition. This question has three answers, one textual, and two philosophical. As an interpretation of the second prong of Kant's Universal Principle of Right, this standard accounts for Kant's stipulation that an action is right (meaning that it is not contrary to any legal duty) if "under its maxim *the freedom of choice of each* can coexist with everyone's freedom" in a civil condition.<sup>99</sup> In the context of an existing legal system, to say that an action is 'legal' just means that everyone is free to choose it. Philosophically, sticking closely to Kant's language turns out to be important for two reasons. First, it is metaphysically impossible for a maxim itself to be inconsistent with the external freedom of others. Freedom, understood as physical independence, can never be violated by an abstract principle. But, secondly, we cannot overcome this objection by assuming that an individual's external conduct will necessarily track the subjective principle on which they are acting in order to

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<sup>95</sup> Ripstein, *supra* note 57 at 228.

<sup>96</sup> See generally ME Newhouse, "Two Types of Legal Wrongdoing" (2016) 22:1 Leg Theory 59.

<sup>97</sup> This is an inverted form of my previously published interpretation of the second clause of the Universal Principle of Right. *Ibid* at 62.

<sup>98</sup> Because we will be comparing two concepts, we are looking for a logical contradiction (i.e. negation). See Immanuel Kant, *Critique of Pure Reason*, ed and translated by Paul Guyer & Allen Wood (Cambridge University Press, 1998) at 369 (A265/B321). Unlike Kant's famous Formula of Universal Law, this standard does not require us to 'universalize' an agent's maxim. We need not imagine anyone, much less everyone, actually acting on the maxim of A.

<sup>99</sup> Kant, *supra* note 8 at 387 (6:230) [emphasis added].

evaluate that package as a whole. Maxims can include mistakes about the world, or can describe conduct that an agent tries, but fails, to undertake.

Suppose, for example, that an Envious Job Seeker acts on the maxim: “I will remove the sparkplugs from my more qualified neighbor’s car in the dark of night, so that my neighbor cannot drive to the job interview tomorrow.”<sup>100</sup> Suppose also that the Envious Job Seeker is disoriented in the dark and therefore mistakenly removes the sparkplugs from the envious jobseeker’s own, very similar car instead. The Envious Job Seeker’s external conduct can coexist with everyone’s freedom—nothing that belongs to anyone else has been touched—and so can the Envious Job Seeker’s maxim, since the maxim itself is just an abstract principle. However, the *legality* of actions on the Envious Job Seeker’s maxim could not coexist with everyone’s freedom in a civil condition: if theft were legal, no one would be capable of acquiring property rights. My proposed standard for criminal wrongdoing can therefore accurately identify attempted crimes as crimes themselves: actions by which wrongdoers seek to exempt themselves from the same legal duties that they are rationally required to endorse for others.

To apply this standard to cases, one must first formulate appropriate maxims. The criminal law punishes only actions involving external conduct (although its criminality will depend on an agent’s mental state), so the maxims relevant to this inquiry are “very specific first-order principle[s] of volition and consequently action”<sup>101</sup> with the following structure:

I will [act] when [circumstances] in order to [end].<sup>102</sup>

The ends specified in these maxims are what criminal law doctrines refer to as ‘motives’: desired states of affairs that move an agent to act.<sup>103</sup> Unlike intentions—results that an agent undertakes to cause in the doctrinal sense<sup>104</sup>—motives as such have no impact on the legal status of an action.<sup>105</sup> Consider

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**100.** This is a modified version of a hypothetical I have previously analysed. See Newhouse, *supra* note 96 at 66-67.

**101.** Jens Timmermann, “Kant’s Puzzling Ethics of Maxims” (2000) 8:1 *Harvard Review of Philosophy* 39 at 40. As Timmerman notes, Kant has described this type of maxim as “the subjective principle of willing” or “the principle on which a person acts.” Kant, *supra* note 79 at 55, 72 (4:400, 4:420). Such maxims should not be confused with higher-order maxims, which reflect more general policy commitments, and about which there is considerable controversy. See Rob Gressis, “Recent Work on Kantian Maxims I: Established Approaches” (2010) 5:3 *Philosophy Compass* 216. Cf Henry E Allison, *Kant’s Theory of Freedom* (Cambridge University Press, 1990); Ralf Bader, “Kant on Freedom and Practical Irrationality” in Ralf Bader, ed, *The Idea of Freedom: New Essays on the Kantian Theory of Freedom* (Oxford University Press) [forthcoming].

**102.** This format is adapted from Onora O’Neill, *Acting on a Principle: An Essay on Kantian Ethics* (Columbia University Press, 1975) at 37.

**103.** See Kant, *supra* note 8 at 387 (6:230). See also Arthur Ripstein, “Means and Ends” (2015) 6:1 *Jurisprudence* 1 at 2; O’Neill, *supra* note 102 at 38.

**104.** A Kantian account of the prerequisites for legal causation is beyond the scope of this article, which will conservatively presuppose the adequacy of prevailing legal doctrines.

**105.** In the juridical context, “no account at all is taken of the matter of choice, that is, of the end each has in mind with the object he wants.” Kant, *supra* note 8 at 387 (6:230). Some philosophers read passages like this one too broadly and take Kant to be saying that entire maxims are

the example of a potential organ donor who refuses to donate a kidney to a nephew because the potential donor actively dislikes the nephew and wishes him dead. This is an evil motive for refusing, but a mere motive, even if it is the death of another, cannot transform a choice into a crime, any more than the possession of an admirable motive can transform a crime into a legal action.<sup>106</sup>

Whether or not an action is criminally wrong will instead depend on the agent's intended physical conduct and any results the agent intends to bring about as well as certain relevant circumstances. For example, it is not criminally wrong for an assault victim to coercively defend against an attacker, because the attack is a circumstance that justifies defensive coercion.<sup>107</sup> This is true even if the assault victim is privately motivated by a desire to harm the attacker, so long as the victim's use of force objectively amounts to a proportionate defense.<sup>108</sup> To distinguish intentions from motives, intended results that are imputable to an agent by causation doctrines must be incorporated into a maxim's description of the agent's act. For example, both surgeons and murderers cut people with knives, but the surgeon's intended act can be accurately described as 'operating', while the murderer's intended act should be described as 'killing'. These examples show that a person who formulates maxims for analysis must do so in light of the content of the law, because maxims would be hopelessly complex if they included every detail of an agent's subjectively intended conduct and known circumstances. Only by consulting legal standards is it possible to generate succinct maxims by selecting the legally relevant features of an action.<sup>109</sup>

After a maxim is formulated, it must be converted into a 'Legality Proposition', because my proposed standard for criminal wrongdoing compares the legality of actions on an agent's maxim, rather than the maxim itself, to the concept of everyone's freedom in a civil condition. Legality Propositions omit the ends specified in maxims, since these private motives are legally irrelevant (recall that results the agent intends to legally cause are folded into the act definition) and they also abstract from the specific identities of individuals referenced in maxims. Legality Propositions therefore take the following form:

It is legal to [act] when [circumstances].

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irrelevant to legal determinations. See for example Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge University Press, 2000) at 96.

**106.** See Byrd, *supra* note 93 at 166-67.

**107.** See Kant, *supra* note 8 at 391 (6:235). Self-defense is rightful because it hinders a hindrance to freedom. See *ibid* at 388 (6:231).

**108.** Kant writes, "anyone can be free so long as I do not impair his freedom by my *external action*, even though I am quite indifferent to his freedom and would like in my heart to infringe upon it." *Ibid* at 388 (6:231) [emphasis in original].

**109.** Joachim Hruschka characterizes the maxim-formulation process as an aspect of "first level imputation," which also includes a description of the agent's external act. Hruschka, *supra* note 88 at 682. This process must take place before any action can be legally evaluated even for civil wrongdoing, since it is only by reference to maxims that we can individuate an action in the context of an ongoing stream of activity by an agent. See Arthur Ripstein, *supra* note 7 at 381. This process does not render the subsequent application of legal standards trivial, because the status of an action as criminally wrong will often depend on a maxim's combination of legally relevant features.

In the context of a Legality Proposition, the claim that an action is ‘legal’ is a claim that it does not violate any legal duties, including our natural law duty not to violate others’ innate right of freedom. Once formulated, a Legality Proposition must be compared to the concept of everyone’s freedom in a civil condition.<sup>110</sup> A conflict between these two ideas shows that these states of affairs could not simultaneously obtain in the world and therefore indicates that actions on the underlying maxim are criminally wrong.

For example, consider a Malicious Assailant who acts on the maxim: “I will hit my neighbor’s child, who is playing on the sidewalk, with a rock in order to amuse myself.” After eliminating the legally irrelevant motive, one can derive this corresponding Legality Proposition:

It is legal to hit others with rocks when they play on the sidewalk.

This proposition conflicts with the concept of everyone’s freedom in a civil condition because that concept includes the innate right of freedom, which puts us all under a legal duty not to physically coerce others who are not themselves violating the rights of others. The Malicious Assailant’s action is therefore criminally wrong, and the assailant can be justly punished if the relevant legal jurisdiction imposes a criminal penalty for battery.<sup>111</sup>

Next, consider the case of a Regulatory Scofflaw, who knowingly violates the terms of a *malum prohibitum* penal statute.<sup>112</sup> The Scofflaw might adopt the following maxim: “I will open a restaurant when I have not obtained a licence and doing so will contravene a penal statute in order to make money.” This maxim yields the following Legality Proposition:

It is legal to open a restaurant when one lacks a licence and doing so contravenes the terms of a penal statute.<sup>113</sup>

Comparing this proposition to the concept of everyone’s freedom in a civil condition reveals no necessary conflict with any individual right, because restaurant licensure is just one possible strategy a state might adopt to minimise the risk of

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**110.** Recall that a civil condition is a set of necessary laws: innate right, the *a priori* principles of private right, and the state’s three authorities. The concept of a civil condition does not presuppose that individuals always act justly.

**111.** See for example NY Penal Law §120.00, 70.15. In jurisdictions in which criminal law is exclusively statutory, lawmakers have a duty to protect our innate right of freedom by means of a penal statute, but the test for criminal wrongdoing does not presuppose that an agent lives in a fully just legal order. Nothing in this article precludes the possibility of a system of common law enforcement of *malum in se* offenses, though I will generally discuss penal statutes rather than common law criminal doctrines.

**112.** A valid penal statute is a *malum prohibitum* law if its content does not track a natural law principle of private or public right.

**113.** This Legality Proposition may at first appear *internally* incoherent, but that is not the case. An action that contravenes a penal statute is not illegal (i.e., contrary to a legal duty) merely by definition or by logical implication. I will demonstrate later that penal statutes fail to create legal duties in cases involving necessity.

food poisoning.<sup>114</sup> However, a conflict appears when we focus on the concept of the legislative authority, which is part of the larger idea of a civil condition. The legislative authority includes the capacity to enact positive laws, including penal laws, on the basis of lawmakers' empirical judgments about how to best secure conditions of equal freedom.<sup>115</sup>

If it is logically possible that a *malum prohibitum* penal statute serves the state's purpose of securing everyone's freedom in a civil condition, then individuals must regard it as a product of the omnilateral will even if they personally consider it misguided.<sup>116</sup> In this example, it is logically possible that a restaurant licensing law prevents restauranteurs from wrongfully endangering their patrons' health. As we saw in Part II, illegality is necessarily the effect of a penal statute so long as agents who obey it can continue to regard themselves as free under laws. The Regulatory Scofflaw's Legality Proposition therefore conflicts with the possibility of everyone's freedom in a civil condition because it is inconsistent with the nature of the legislative authority, and the Scofflaw can be justly punished under an applicable law so long as the punishment prescribed is proportionate to the gravity of the offence.<sup>117</sup>

#### IV. Application to Necessity Cases

Part II of this article argued that lawmakers can create new legal duties for us only by providing us with a dispositive reason to obey: one that does not depend on our personal preferences or purposes. The resulting standard for legal obligation can operate in combination with the standard for criminal wrongdoing from Part III to make sense of Kant's famous analysis of a shipwrecked sailor who commits a murder in circumstances of necessity. More importantly, these twin standards underpin an appealing new analysis of a more controversial class of necessity cases involving alleged violations of property rights.

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114. For this reason, only knowing violations of *malum prohibitum* statutes can be shown to be criminally wrong.

115. In addition to penal laws, the legislative authority includes the capacity to enact "permissive laws," which empower us to alter our legal rights and obligations by choice. Joachim Hruschka, "The Permissive Law of Practical Reason in Kant's Metaphysics of Morals" (2004) 23:1 Law & Phil 45 at 58. Examples of permissive laws include those establishing procedures for the acquisition or transfer of property, or for election or appointment to public office.

116. For example, subjects "could not, because they found [a war tax] oppressive, say that it was unjust because in their opinion the war may be unnecessary; for they are not entitled to appraise this but instead, because it is always still possible that the war is unavoidable and the tax indispensable, the tax must hold in a subject's judgment as in conformity with right." Kant, *supra* note 63 at 297 (8:298).

117. See for example NYC Admin Code §17-325. Kant was committed to the view that punishments must be proportional to the seriousness of a defendant's wrongdoing in order to be just, and a large literature is devoted to the question of how this proportionality requirement works in practice. See for example Stephen Kershnar, "Kant on Freedom and the Appropriate Punishment" (1995) 3 Jahrbuch für Recht und Ethik 309. The issue of proportionality in punishment is beyond the scope of this article.

The argument that follows depends on an important distinction between an *unconditional* duty and a duty that applies *in all circumstances*. In Kantian terms, all duties created by statutes are “unconditional” in a specific sense: they apply to all individuals regardless of their personal preferences or purposes.<sup>118</sup> An unconditional duty may or may not apply to individuals in all circumstances, however. Sometimes, the same statute that creates a new legal duty specifies circumstances under which it does not apply. For example, U.S. law requires all individuals to file federal income tax returns every year, unless they have an annual gross income below the exemption amount, or unless they are in one of several other sets of circumstances stipulated by law.<sup>119</sup> The fact that individuals have different duties under tax law owing to their different circumstances is not inconsistent with our innate equality under law, because our external circumstances are not personal attributes. When legal duties apply only to those in certain external circumstances, we can—at least potentially—claim that the law applies equally ‘to all those similarly situated’ and can therefore bind them unconditionally.

I will aim to show that necessity cases are best understood as a class of cases in which individuals’ external circumstances are such that penal statutes fail to present individuals with the usual alternative between freedom under laws and the loss of freedom. Because no statute can provide the equal assurance necessary to create a legal duty to obey a legislative command in circumstances of necessity, duties created by statutes do not extend to those circumstances. If necessity is properly understood as a circumstance-defined limitation on the scope of duties created by legislation, it is fully consistent with the law’s essential impartiality, because it takes no account of individuals’ preferences or purposes, or of any other personal attribute.

In Kant’s most famous criminal law example, a Drowning Sailor bent on self-preservation kills a non-threatening victim by pushing that victim off a floating plank.<sup>120</sup> The Drowning Sailor’s maxim might be formulated as follows: “I will kill a non-threatening person when doing so is my only chance of survival in order to live.” The associated Legality Proposition is:

It is legal to kill a non-threatening person when doing so is the killer’s only chance of survival, and when doing so contravenes the terms of a penal statute.

This proposition, like that of the Malicious Assailant, conflicts with the victim’s innate right of freedom. In Kant’s words, the doctrine of right would “be in contradiction with itself” if our innate right had no correlative legal duty.<sup>121</sup> We therefore always have a natural law duty not to physically coerce non-threatening others, whether or not this conduct has been forbidden by statute. The Drowning Sailor’s natural law duty should have inspired respect for law, and that respect could have moved the Drowning Sailor to refrain from murdering the victim,

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118. Kant, *supra* note 79 at 76 (4:425).

119. See 26 USC §6012(a)(1)(A).

120. See Kant, *supra* note 8 at 392 (6:235).

121. *Ibid* at 391 (6:235).

even at the cost of life itself. Because the Drowning Sailor chose instead to violate the victim's innate right, the Drowning Sailor is guilty of criminal wrongdoing.

Kant nonetheless concludes that no penal statute can empower the state to punish the Drowning Sailor, because "a penal law of this type could not have the effect intended."<sup>122</sup> If the argument of Part II is correct, then the "effect intended" by a penal statute is the creation of a legal duty to obey a legislative command, and lawmakers can only accomplish this by supplying equal assurance: an external incentive that creates a dispositive reason to obey. In most circumstances, lawmakers can supply equal assurance by threatening a punishment that is inconsistent with our innate freedom, which our duty of rightful honor obligates us to preserve at the cost of any amount of discomfort or heartbreak that our obedience might entail.

In the Drowning Sailor's circumstances, however, a threatened criminal penalty cannot set up an alternative between freedom under laws, on one hand, and the loss of freedom on the other. Instead, the relevant legislation in Kant's era would (if applicable to the sailor's case) have presented individuals with a different set of alternatives: death by drowning, on one hand, and the death penalty, on the other. The death penalty is the most complete deprivation of freedom that an individual can suffer at the hands of the state. The question, then, is whether the sailor's alternative, death by drowning, is one that they are rationally required to prefer. Kant himself answers this question in the negative, but why would that be the case?

I think the answer lies in the fact that the freedom that we can usually preserve by avoiding a threatened criminal punishment is specifically our *external* freedom: our physical independence. The Drowning Sailor would have no remaining physical independence after drowning at sea, and likewise no remaining physical independence after being put to death by the state. The Drowning Sailor's good moral character should be worth more to them than life itself. But no external incentive of the type that the state can provide can generate a dispositive reason for them to obey a statutory command against murder, because with respect to external freedom, the outcome is identical under the alternatives that such a statute could generate.

A general penal law against murder therefore does not apply to murders committed in circumstances of necessity, whether this limitation is reflected in the language of the statute or not. Because the statute does not apply in such cases, it cannot empower the state to punish the Drowning Sailor. Such a circumstance-defined limitation on a statute's scope of application does not undermine the essential impartiality of the penal law: it applies equally to all similarly situated individuals regardless of their preferences or purposes. Indeed, a suicidal sociopath, who pushed the victim off the plank out of curiosity, would likewise be unpunishable so long as the sociopath understood the external circumstances to be such that the sociopath's only alternative was certain death.

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122. *Ibid* at 392 (6:235).

Next, consider a more controversial case of necessity that arises in the context of an acquired property right. Arthur Ripstein describes a hiker who breaks into an unoccupied cabin in the woods to escape a sudden storm in which the hiker would otherwise perish. As a threshold matter, Ripstein claims without analysis that the “hiker commits a wrong against the owner of the cabin: he uses another person’s property without his consent.”<sup>123</sup> Ripstein then considers the “harder question” of whether the hiker’s conduct is a crime in the Kantian sense of being a knowing wrong.<sup>124</sup> He correctly explains that Kant’s unconditional moral concepts preclude us from characterising the hiker’s conduct as an example of justified coercion.<sup>125</sup> It would be incoherent to claim that the hiker has a ‘right to life’ that overrides (or outweighs) the cabin owner’s property right, because Kantian rights are “rights to independence, not [rights] to existence,” and our reciprocal rights and duties are by definition incapable of coming into conflict.<sup>126</sup> To say that someone has a legal right is just to say that others have an unconditional duty not to violate it. Coercion is only justified (that is, consistent with rights) insofar as it “hinder[s] . . . a hindrance to freedom,” and in this case the cabin owner is doing nothing to impair the freedom of the hiker.<sup>127</sup> On the basis of these arguments, Ripstein concludes that the hiker is, like the Drowning Sailor, a criminal wrongdoer who escapes punishment only because the relevant penal statute could not guide the hiker’s conduct prospectively.<sup>128</sup> In other words, Ripstein concludes that the hiker has a legal excuse for his crime. Unlike a justification, which “changes legal relationships between persons,” he explains, “an excuse is personal to the person excused and cannot change the rights of others.”<sup>129</sup>

Although superficially plausible, Ripstein’s conclusion has an unsettling implication: that *a freezing hiker has a moral obligation to die rather than take shelter in someone else’s cabin*. This implication arises because our legal duties *are* moral duties: categorical imperatives, just like the ethical ones.<sup>130</sup> Results like this one are worth reconsidering. They make the most attractive feature of Kant’s moral philosophy—its unity—look like a defect instead. I will aim to show that Ripstein reaches the wrong conclusion because he starts with a faulty premise. Ripstein is mistaken to assume without analysis that the Freezing Hiker’s use of the cabin violated the cabin owner’s property right, and this mistake ensnares him in a false dichotomy of justification or excuse. If the hiker’s conduct does not

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123. Ripstein, *supra* note 78 at 425.

124. *Ibid.*

125. *Ibid.*

126. *Ibid* at 427. See also Kant, *supra* note 8 at 379 (6:224): “since duty and obligation are concepts that express the objective practical necessity of certain actions . . . a *collision of duties* and obligations is inconceivable” [emphasis in original].

127. Kant, *supra* note 8 at 388 (6:231) [emphasis removed].

128. See Ripstein, *supra* note 78 at 421. Ripstein is able to conclude this even on the basis of his less demanding account of what Kantian deterrence requires, because a person whose life is at stake is rationally required to prefer life to the satisfaction of any desire, such as a desire to avoid the unpleasant conditions of prison.

129. *Ibid* at 427.

130. See Kant, *supra* note 8 at 381 (6:227).

violate the cabin owner's property right in the first place, then the hiker requires neither a justification nor an excuse.

A Freezing Hiker might act on the maxim: "I will break into a cabin when I lack permission from the owner, when doing so is my only chance of survival, and when doing so contravenes the terms of a penal statute in order to live." After removing the legally irrelevant motive, the associated Legality Proposition is:

It is legal to break into a cabin when one lacks permission from the owner, doing so is one's only chance of survival, and doing so contravenes the terms of a penal statute.

No threatened punishment can generate a dispositive reason to obey a penal statute in the Freezing Hiker's circumstances, because no punishment will leave the hiker with less physical independence than they will have after death. But this case differs from that of the Drowning Sailor in that the Freezing Hiker's conduct does not violate anyone's innate right. The question, then, is whether the cabin owner's property right—which is established by positive law—can be violated by specific uses that fall within a class of uses against which lawmakers can provide us with no equal assurance.

Recall that we each have an innate right to be free from bodily coercion if we do not wrong others. In a state of nature, we are therefore at liberty, in the Hohfeldian sense, to engage in any action that does not violate the bodily independence of any other person. In a civil condition, the state can reduce this domain of pre-existing liberty in accordance with a set of neutral laws that enable the acquisition and transfer of property rights. But as I have argued in Part II, our innate equality makes it the case that lawmakers can only put us under new legal duties by supplying equal assurance in the form of a dispositive reason to obey.

An important implication of the foundational status of innate right is that, in any dispute about the extent of a property right, the burden of proof belongs to the party asserting it:

[W]hen a dispute arises about an acquired right and the question comes up, on whom does the burden of proof (*onus probandi*) fall, either about a controversial fact or, if this is settled, about a controversial right, someone who refuses to accept this obligation can appeal methodically to his innate right to freedom (which is now specified in its various relations), as if he were appealing to various bases for rights.<sup>131</sup>

Applying this approach to the present case yields the conclusion that the cabin owner's property right has not been violated. Because all legal rights are strictly correlative to legal duties, a legal system of property rights cannot eliminate those pre-existing liberties that fall outside the scope of the equal assurance that underwrites the duties created by that system.

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131. *Ibid* at 394 (6:238).

Ripstein erred by conceptualizing necessity as a subsequent carve-out in pre-existing legal right. Necessity is more accurately understood as a domain of residual liberty that is shielded by our innate right to bodily independence. This residual domain of liberty has never been, and cannot be, eliminated by positive law, because lawmakers are incapable of supplying the equal assurance necessary to create new duties in circumstances of necessity. If this is correct, then property rights simply do not include the right to exclude uses by others in circumstances of necessity, the Freezing Hiker's Legality Proposition does not conflict with the concept of everyone's freedom in a civil condition, and the Hiker's conduct is not criminally wrong.<sup>132</sup>

This intuitively sound conclusion is not inconsistent with any fundamental feature of property rights. The purpose of a system of property rights is to enable the rightful pursuit of projects by equally constraining our conduct in accordance with a set of uniform rules. It is important that these rules be neutral in the sense that they do not take any account of the "matter of choice"—the preferences or purposes of individuals—and that they can be applied by an independent judge to definitively resolve any property-related dispute. Understood as a circumstance-defined limitation on the possible extent of property rights, necessity constitutes an equal and reciprocal domain of residual liberty, and disputes about whether some particular action falls within that domain can be readily adjudicated by a neutral judge without reference to individual preferences or purposes. Suppose, for example, that the Freezing Hiker was suicidal, entered the cabin only to look at the pictures on the walls, and survived due to accidentally falling asleep there until the storm had passed. If the hiker understood the circumstances to be such that entering the cabin was necessary to survival, then doing so would fall within the ambit of our equal and reciprocal domain of residual liberty regardless of the hiker's private purposes.

Perhaps some property owners could rightfully pursue an even wider range of possible projects if the boundaries of their property interests were defined solely in spatial terms, but the above argument indicates that this is not a result that lawmakers could bring about, even if they tried. Moreover, it is implausible that

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132. I do not address here the question of whether a scheme of financial reimbursement akin to the civil remedies available under current law is justifiable in such cases. I do not rule out the possibility that such a scheme could conform to the requirements of justice. My argument shows only that the claim that property uses in circumstances of necessity wrong property owners could not do any work in a successful justification for such a scheme. Note also: my analysis does not extend to a different set of cases that Ripstein considers elsewhere, in which the owner of a chattel makes unauthorized use of real property under circumstances when doing so is necessary to retrieve or retain possession of that chattel. See Ripstein, *supra* note 18 at 130-55. In such cases, the relevant rights of all parties are statutory rather than innate, and Ripstein's explanation of the 'partial privilege' rules adopted in those cases as essential to preserve the systematicity of rights in both realty and movables is plausible. However, his description of *Depue v Flatau*, 111 NW 1 (Minn Sup Ct 1907) (holding that a defendant may be liable for damages because he forced a gravely ill man out of his house during severe weather conditions) as an example of "[p]arallel reasoning" is inapt. Ripstein, *supra* note 18 at 152. If I am correct, then Mr. Depue's continued presence in Mr. Flatau's home under the described circumstances fell within a domain of residual liberty and was not inconsistent with Mr. Flatau's property rights.

the limits of property interests must be defined exclusively by metes and bounds.<sup>133</sup> In practice, these acquired rights often have temporal or circumstantial boundaries as well as spatial ones. For example, the owner of a fee simple time-share interest in a condo has a right to exclude co-owners from the condo, but only at certain times each year.<sup>134</sup> The owner of a farm that is subject to an easement entitling the neighbors to traverse it to reach the local church cannot rightfully pursue projects that conflict with that use, regardless of what the neighbors' private purposes are for going to church. We do not usually think that non-spatial boundaries render property rights chimerical.

While it is true that property owners may not know the exact limits of their rights in advance of a legal judgment following a use for which necessity is claimed, such uncertainty is common in other property law contexts. For example, there may be doubt about the presence or absence of an easement until a judge has made an authoritative determination. In Kantian terms, a judge who determines that an easement exists has not concluded that one person's right overrides (or outweighs) that of another. Rather, the judge has concluded that the parcel owner's independence does not extend to uses that conflict with the easement holder's right. An easement holder who legally traverses a servient tenement is not engaged in justified coercion. Rather, this action is not coercive and therefore requires no justification.

If necessity is best understood as a residual domain of innate liberty rather than as a right in the Hohfeldian sense, a legal conclusion that the Freezing Hiker is innocent of wrongdoing would not, *pace* Ripstein, entail a correlative duty to rescue others in dire straits.<sup>135</sup> As a legal matter, a cabin owner who is at home in a locked cabin when the Freezing Hiker arrives at the door is at liberty to ignore the hiker's pleas for assistance. Should the hiker break into the occupied cabin in this revised hypothetical, the cabin owner will be entitled to respond coercively only if threatened with bodily harm by the hiker. While this might prove to be a factually complex legal case, it is imminently capable of authoritative judicial resolution by means of the application of neutral legal standards that impose no affirmative legal duties on the owner of the cabin in question.

## Conclusion

This article has proposed a pair of normative standards: one for criminal wrongdoing and another for legal obligation. Both standards have significant textual support as interpretations of Kant, but the primary work of this article has been to demonstrate their philosophical value. This article has shown that the proposed standard for criminal wrongdoing is clear and resilient, and that recognising the

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133. Metaphysically, a person is "an absolute unity." Kant *supra* note 8 at 427 (6:278). By contrast, objects in the natural world are individuated by means of practical reason and can therefore be divvied up for legal purposes in many ways.

134. See David A Bowen, "Timeshare Ownership: Regulation and Common Sense" (2006) 18:4 *Loyola Consumer Law Review* 459 at 465.

135. See Ripstein, *supra* note 78 at 433.

under-appreciated role of threatened punishments in the creation of legal obligations yields rigorous new analyses of a pair of classic necessity cases. To those who find themselves attracted to Kant's general vision of freedom in a civil condition, this article has also striven to prove that Kant's unconditional moral concepts do not invariably spell doom for broadly popular conclusions about justice in hard cases. Indeed, the standards proposed in this article appear well-suited to anchor a broader Kantian criminal law theory that is as nuanced and plausible as it is rigorous.

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**Acknowledgements:** I am grateful to Ralf Bader, Soren Baiasu, Ruhi Demiray, Kenneth M. Ehrenberg, Charles Fried, Barbara Herman, Sandra Marshall, Thomas Mertens, Sophie C. Moller, Sean Newhouse, Alessandro Pinzani, Christopher P. Taggart, Jens Timmermann, Alice Pinheiro Walla, Kenneth R. Westphal, Howard Williams, Allen W. Wood, Eva Wyrebska-Dermanovic, members of the Surrey Centre for Law & Philosophy, and many others for valuable advice and feedback at various stages of this project. All errors are my own.

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