



Kant's Typo, and the Limits of the Law

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Kant's Typo, and the Limits of the Law

A dissertation presented

by

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to

The Committee on Higher Degrees in Public Policy

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Kant's Typo, and the Limits of the Law

Abstract

This dissertation develops a Kantian philosophical framework for understanding our individual obligations under public law. Because we have a right to do anything that is not wrong, the best interpretation of Immanuel Kant's Universal Principle of Right tracks the two ways—material and formal—in which actions can be wrong. This interpretation yields surprising insights, most notably a novel formulation of Kant's standard for formal wrongdoing. Because the wrong-making property of a formally wrong action does not depend on whether or not the action in question has been prohibited by statute, Kant's legal philosophy is consistent with a natural law theory of public crime. Moreover, because the law can obligate us only by establishing a universal external incentive to obey its commands, statutes that impose only fines on nominal violators do not constrain our lawful options. Instead, if they are otherwise just, such statutes must be regarded as rightful permissive laws, according to which we may incur liabilities through our voluntary choices.

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*To my beloved husband,
Sean Newhouse, who has earned it.*

Introduction

At first glance, Kant's political thought can appear bafflingly inconsistent. On one hand, Kant holds that political authority is justified exclusively as a necessary precondition to our individual freedom. On the other hand, Kant seems at times to embrace a deeply repressive account of state power. He declares that the state's laws are necessarily consistent with our freedom, and yet he insists that we must not resist even the most unbearable injustices perpetrated by despotic regimes.

In the pages that follow, I will attempt to reconcile these seemingly conflicting aspects of Kant's political thought. Part of the trick involves noticing that, for Kant, there is no difference between law and justified political power. Kant's justification for political power is formal—and therefore legal—in nature. A formal account of political legitimacy entails a formal account of political obligation. This raises challenging questions about our specific obligations: if our obligations do not depend on anyone's actual intentions or material interests, then how can we know definitively what the state has obligated us to do? I will show that our legal obligations are exactly those actions that we are rationally required to undertake or refrain from undertaking as a result of the state's legitimate exercise of its coercive power.

In Chapter 1, I relate Kant's legal and political philosophy to his moral philosophy and describe the basic conceptual apparatus of Kant's legal and political thought. I begin by offering Arthur Ripstein's account of the nature of the relationship between the Categorical Imperative, Kant's foundational

principle of ethics, and Kant's Universal Principle of Right, in the context of Kant's account of the relationship between freedom and the moral law in *Critique of Practical Reason*. I then describe Kant's conception of external freedom— independence from constraint by the choice of another person—and explain why our freedom necessarily includes acquired rights of property, contract, and status. As Kant understands these rights, they are impossible in the state of nature. I then analyze Kant's argument that freedom under law is possible because state coercion can be thought of as having been authorized by those subject to it. I describe "the idea of the original contract," which for Kant is the regulative principle of the state, and the internal structure of the "three authorities" that together constitute it.

In Chapter 2, I answer the question: how do we know which actions are right? I begin by offering my own interpretation of Kant's Universal Principle of Right, according to which Kant establishes a dual test for the rightness of actions. I argue that my interpretation better accords with Kant's language than do alternative readings, according to which Kant establishes a single standard. My interpretation has the further advantage of tracking the two distinct types of wrong actions that Kant describes elsewhere: formal wrongs and material wrongs. Because we have a right to do anything that is not wrong, formal and material wrongs should exhaust the category of conduct that Universal Principle of Right excludes. Material wrongs are actions that violate the innate or acquired rights of another human being. Formal wrongs are actions that violate "the right of human beings as such" to live in a rightful condition. I draw on Kant's account of the difference between physical opposition and logical opposition in *Critique*

of Pure Reason to explain how material and formal wrongs give rise to different kinds of remedies. Finally, I explain how my analysis of wrongdoing supports my argument in favor of a two-standard interpretation of the Universal Principle of Right, and I suggest that the meaning of Kant's principle might be obscured by a typographical error.

In Chapter 3, I argue that the state's legislative authority is limited to enactments that do not logically contradict the concept of a rightful condition. Because legislation is a conceptual act, I argue that this limitation affects lawmakers as a disability—statutes that contradict the concept of a rightful condition simply fail to be laws. If I am correct, my analysis suggests that the state's criminal lawmaking authority is surprisingly limited—lawmakers can only criminalize conduct that is already formally wrong. Alternative, positivist interpretations of Kant's legal philosophy are mistaken, because they fail to attend to the distinction between the state's legislative authority and its executive authority. I reconcile my view with Kant's famous opposition to resistance and revolution by showing that these activities are inconsistent with the idea of the original contract, while mere passive disobedience of unlawful statutes is not wrong.

In Chapter 4, I distinguish permissive law from obligatory law, and I show that the state must establish an external incentive for us to comply with the terms of any obligatory law. I then argue that the state's external incentive must be one that we are rationally required to respond to by obeying the law. Because neither civil damages nor monetary fines can establish such a rational requirement, laws that impose only fines or damages on violators do not constrain our lawful

choices. I conclude that only criminal punishments can establish legal obligations, and that this requirement is really an application of the principle of equality under the law.

It is unfortunate that Kant's legal and political writings are so inaccessible, because his foundational commitments—that political authority is justified solely as a prerequisite to individual freedom, and that an individual can be obligated only by her own choices—are very appealing. My attempt to reconcile these appealing commitments with Kant's seemingly authoritarian remarks yields a pair of surprising results, which I believe demonstrate the theoretical consistency of his approach while simultaneously enhancing its intuitive appeal.

First, the state's legislative authority with respect to the imposition of criminal sanctions is far more limited than many Kantians believe to be the case. Second, the law can only constrain our lawful choices by providing us with an external incentive that we are rationally required to respond to by obeying the law. It follows that many common ordinances that appear by their terms to impose obligations on us—but which we may intuitively feel little or no obligation to obey—do not actually constrain our lawful conduct. I conclude that Kant's political philosophy is truly a philosophy of freedom.

Chapter 1: Rights, Freedom, and the State

Kant is best known for his moral philosophy, which grounds moral obligation in the concept of freedom of the will. Kant's political philosophy analogously grounds state authority in the concept of external freedom. This symmetry suggests an intimate relationship between Kant's moral and political principles, but the exact nature of that relationship is disputed. Because this project seeks to determine the manner in which public laws obligate individuals, a preliminary answer to this question is essential. In the first section of this chapter, I will explain Arthur Ripstein's account of this relationship in his recent book, *Force and Freedom*, in the context of Kant's argument in *Critique of Practical Reason* that it is a practical necessity for rational beings to act in accordance with the Categorical Imperative. I will adopt Ripstein's account of the relationship between Kant's moral and political thought as a working hypothesis in order to explore more specific questions about the nature of our obligations under public laws.

I next offer a taxonomy of our individual rights as Kant understood them. Every individual, Kant argues, has an innate right to freedom—independence from being constrained by the choice of another—insofar as it can coexist with the freedom of all under a universal law. Because human beings coexist in a world full of objects that they can use, a condition of equal freedom is impossible without a system of acquired rights defined by the three ancient categories of property, contract, and status. Rights, as Kant conceived of them, are impossible in the state of nature, because essential features of the concept of a right—

reciprocity, objectivity, and assurance—presuppose the existence of a state. The state’s coercive powers can therefore be justified as a necessary precondition to our freedom. The three authorities that a state must have in order to secure our freedom are collectively called “idea of the original contract.”

What is Right?

The word “right” (*recht*, or *Recht*), as it is used in Kant’s political writings, has at least three closely related meanings.¹ First, “right” is an adjective denoting a property of a certain set of actions: “right actions.” Second, “right” is a noun used to refer to an individual entitlement to engage in some action without interference, for example, “a right to practice my religion.” Finally, “right” can refer to a system of justice as a whole. What follows is a brief description of these three senses of “right,” and of the relationships between them.

Kant’s Universal Principle of Right uses “right” in the first sense, to denote a property of actions:

Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.²

If my action is right by this standard, Kant argues, then “whoever hinders me in it does me wrong; for this hindrance (resistance) cannot coexist with

¹ I am grateful to Daniel Viehoff for advice regarding German grammatical conventions. Any remaining errors are my own.

² Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), p. 24. (hereafter *Metaphysics of Morals*) As is customary, I give page references to the Prussian Academy pagination (Ak. 6:230), for all of Kant’s works in addition to the cited translation.

freedom in accordance with a universal law.”³ Kant therefore believed that we each have a right (in the second sense) to engage in any action that is right (in the first sense). Moreover, coercive actions that hinder wrong actions (such as self-defense) are right even though they are coercive, because “hindering a hindrance to freedom” is consistent with freedom.⁴ This means that all rights are, by definition, coercively enforceable. As Kant concludes, “Right and authorization to use coercion therefore mean one and the same thing.”⁵

Because Kantian rights have this reflexive structure (i.e. I have a right to do anything that doesn’t hinder anyone else’s right to do anything that doesn’t hinder my right, etc.) our rights can be thought of (at least ideally) as a single, integrated system: “a fully reciprocal use of coercion that is consistent with everyone’s freedom in accordance with universal laws.”⁶ Kant refers to the preconditions for such an integrated system of rights collectively as “right” in the third sense: “Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”⁷ “Right” in this third sense is also called “a rightful condition.”⁸

So far, I have only summarized how Kant’s various senses of “right” relate to each other. I have not yet explained why Kant believed that human beings actually have rights or why he thought that we are obligated to respect each

³ Ibid. (Ak. 6:230-1)

⁴ *Metaphysics of Morals*, p. 25. (Ak. 6:231) (Italics omitted)

⁵ *Metaphysics of Morals*, p.26. (Ak. 6:232)

⁶ *Metaphysics of Morals*, p. 25. (Ak. 6:232)

⁷ *Metaphysics of Morals*, p. 24. (Ak. 6:231)

⁸ See for example *Metaphysics of Morals*, p. 45. (Ak. 6:256)

other's rights. Kant's arguments for these two claims are notoriously hard to parse, and a lively debate about their proper interpretation persists to this day.⁹ Arthur Ripstein has argued that the Universal Principle of Right is best understood as a postulate of the Categorical Imperative.¹⁰ Following a brief review of the Kantian conception of freedom and its relationship to morality, I will explain and adopt Ripstein's analysis of this relationship as a working hypothesis for my subsequent analysis of our rights and corresponding obligations under the law.

Kant has two conceptions of freedom: internal freedom and external freedom.¹¹ Internal freedom, or "free will," is understood by Kant as the capacity to make choices independently of "pathological" influences, such as passions and inclinations.¹² Internal freedom is thus "a negative property in us, namely that of not being necessitated to act through any sensible determining grounds."¹³ When a person exercises internal freedom, she is, by definition, willing "autonomously," meaning that she acting on the basis of a self-given law of reason: the Categorical

⁹ For a good overview of relevant literature, see Robert B. Pippin, "Mine and Thine? The Kantian State," *Kant and Modern Philosophy* (Cambridge: Cambridge University Press, 2007), pp. 416-446.

¹⁰ Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), pp. 355-88. (hereafter *Force and Freedom*) (Appendix)

¹¹ *Metaphysics of Morals*, p. 165. (Ak. 6:406-7)

¹² As Mary Gregor writes, "Kant uses 'pathological' in the sense of 'dependent upon sensibility.'" Immanuel Kant, *Critique of Practical Reason*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1997), p. 17. (footnote) (Ak. 5:19)

¹³ *Metaphysics of Morals*, p. 18. (Ak. 6:226)

Imperative.¹⁴ External freedom (i.e. “outer freedom”) is a related but distinct idea: physical “independence from being constrained by another’s choice.”¹⁵

The Categorical Imperative commands: “act only in accordance with that maxim through which you can at the same time will that it become a universal law.”¹⁶ Kant explains that our direct apprehension of the moral law shows us that we have free will (i.e. internal freedom), even though we live in a world that appears to be causally determined.¹⁷ The Categorical Imperative demonstrates our freedom to us because it presents as normative a ground of action—the form of universal law—which by definition abstracts away from all circumstances other than our status as “rational beings.”¹⁸ If a law can hold for all rational beings as such, then our ability to act on it is proof that we are “not being necessitated to act through any sensible determining grounds,” since no such grounds are included in the concept of a rational being as such.

In this way, Kant argues, internal freedom and the moral law “reciprocally imply each other.”¹⁹ Our possession of free will is what makes it the case that we

¹⁴ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1997), p. 52. (Ak 4:446-7) (hereafter *Groundwork*) A person who instead acts directly on the basis of non-rational inclinations, such as desires and fears, is exhibiting “heteronomy” of the will.

¹⁵ *Metaphysics of Morals*, p. 30. (Ak. 6:237)

¹⁶ *Groundwork*, p. 31. (Ak. 4:421) See also *Metaphysics of Morals*, p. 18. (Ak. 6:226)

¹⁷ *Critique of Practical Reason*, p. 27. (Ak. 5:29-30)

¹⁸ Kant writes, “a law, as objective, must contain the very same determining ground of the will in all cases and for all rational beings.” *Critique of Practical Reason*, p. 23. (Ak. 5:25)

¹⁹ *Critique of Practical Reason*, p. 26. (Ak. 5:29)

are obligated to obey the moral law, but it is our apprehension of our obligation to obey the moral law that first shows us that we have free will.²⁰ Kant argues that even a morally weak person, who fails to act on the moral law, nonetheless knows that she is free if she perceives her obligation to act morally.²¹ By failing to act morally, such a person knowingly surrenders her freedom, allowing her will to be heteronomously determined by sensible impulses such as desire or fear.

Recall that Kant defines external “freedom” as “independence from being constrained by another’s choice.”²² The analogy between his two conceptions of freedom is now clear: in both cases, “freedom” refers to the exercise of choice unconstrained by forces outside of the will. Internal freedom is freedom from constraint by “sensible” inclinations, and external freedom is freedom from constraint by other people’s choices. Just as a principle of action must apply to “all rational beings” in order to qualify as a moral law, so any political principle that defines which actions are “right” must apply to all embodied rational beings with whom we coexist in order to qualify as an external law—a moral license to coerce. The Universal Principle of Right has this reciprocal structure, which

²⁰ “[W]hereas freedom is indeed, the *ratio essendi* of the moral law, the moral law is the *ratio cognoscendi* of freedom. For, had not the moral law *already* been distinctly thought in our reason, we should never consider ourselves justified in assuming such a thing as freedom.” *Critique of Practical Reason*, p. 4. (footnote) (Ak. 5:5)

²¹ Offering a famous hypothetical concerning a person who is ordered, on pain of execution, to give false testimony against his neighbor, Kant argues that even when we doubt whether we *would* act in accordance with the moral law at great personal cost, we are conscious that we *could* do so. See *Critique of Practical Reason*, p. 27. (Ak. 5:30)

²² *Metaphysics of Morals*, p. 30. (Ak. 6:237)

makes freedom possible by defining rights in such a way that each person's rights are compatible with everyone else's rights.

Because external freedom is analogous to internal freedom except that it presupposes our physical coexistence with others, and therefore the possibility of coercion, Arthur Ripstein characterizes the Universal Principle of Right as a “postulate” of the Categorical Imperative: an “extension” of the idea of freedom to a new set of empirical conditions.²³ Because my body and your body are both solid objects that exist in the same world, Ripstein explains, we cannot both occupy the same location at the same time; any effort along these lines would, at a minimum, result in my body moving your body out of the way or vice-versa.²⁴ Because some of my possible actions are physically incompatible with some of yours, some of my possible choices are inconsistent with yours in the sense that they cannot be simultaneously instantiated.

This kind of interpersonal constraint on choice is not directly contemplated by the Categorical Imperative's test for maxims.²⁵ We regard ourselves as “free agents”—rational beings with the capacity to choose what ends we pursue.²⁶ As free agents, potential incompatibilities in space pose a novel

²³ “[R]ight governs the relations between free and rational beings who occupy space.” *Force and Freedom*, p. 358.

²⁴ See *Force and Freedom*, p. 370-1.

²⁵ Of course, if your maxims refer to other people, the Categorical Imperative will constrain the ways in which you may act towards them, but this is only an internal requirement of morality. The Categorical Imperative has nothing to say on its own about when others may physically coerce us. See *Force and Freedom*, p. 368.

²⁶ Ripstein uses the term “purposiveness” to refer to “your capacity to choose the ends you will use your means to pursue.” *Force and Freedom*, p. 34. He refers to beings that have this capacity as “purposive beings.” See for example *Force and*

threat to our freedom: physical coercion. To preserve the possibility of freedom, we need a postulate that extends the idea of freedom to resolve potential physical conflicts between my possible choices and yours. Because space is “the form of all appearances of outer sense,”²⁷ Ripstein maintains that the Universal Principle of Right involves a strictly external conception of freedom, limiting only actions, not thoughts or purposes, and relying only on the external incentive of state coercion to secure our compliance.²⁸ Thus conceived, the Universal Principle of Right is the Categorical Imperative’s mirror image: an external representation of the internal law of rational beings.²⁹

Because the Universal Principle of Right applies an *a priori* concept—freedom—to a set of empirical conditions—a plurality of embodied beings who occupy space—it cannot be logically derived from the Categorical Imperative, nor can it be empirically demonstrated. The Universal Principle of Right is, therefore, “a postulate that is incapable of further proof.”³⁰

Freedom, p. 58. I consider the terms “free agency” and “free agent” more intuitive and use them herein. No difference in meaning is intended.

²⁷ Immanuel Kant, *Critique of Pure Reason*, in *The Cambridge Edition of the Works of Immanuel Kant: Critique of Pure Reason* Vol. II, trans. Paul Guyer & Allen W. Wood (Cambridge: Cambridge University Press, 1998), p. 159. (A26/B42) (hereafter *Critique of Pure Reason*)

²⁸ *Metaphysics of Morals*, p. 24. (Ak. 6:231) In order to be an “action,” a movement must be voluntary—it must be the manifestation of a choice. If a sudden gust of wind blows me into you, your freedom is not thereby violated because my unchosen physical movement was not an action. This limitation reflects the interpersonal nature of Kant’s conception of external freedom. See, *infra*, pp. 51-2.

²⁹ Ripstein writes, “[S]pace is, for Kant, the form of outer sense, and the Universal Principle of Right is the law of outer (external) freedom.” *Force and Freedom*, p. 369.

³⁰ *Metaphysics of Morals*, p. 25. (Ak. 6:231)

Nonetheless, Ripstein concludes, we must accept the Universal Principle of Right as a normative principle because it alone reconciles otherwise conflicting self-perceptions: I cannot help seeing myself both 1) as a free agent, and also 2) as one among a plurality of free agents who occupy space, and are therefore mutually subject to coercion.³¹ It is thus a “practical necessity” for me to regard myself as having rights. Moreover, because “right” is by definition a universal principle applicable to all embodied free agents, it follows that I am rationally required to regard other people as having rights also.

A Taxonomy of Individual Rights

In his introduction to the *Doctrine of Right*, Kant defines “juridical science” as “*systematic* knowledge of the doctrine of natural right,” which “must supply the immutable principles for any giving of positive law.”³² Kant’s principles of natural right constitute the essential framework of the law of private right.³³ Recall that Kant conceives of “right” in terms of equal freedom: I have a right to do anything that does not interfere with your freedom, and you have the right to do anything that does not interfere with mine. At the most abstract level, then, the thing that we each have “a right to” is freedom itself. Kant writes:

Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every

³¹ *Force and Freedom*, p. 361.

³² *Metaphysics of Morals*, p. 23. (Ak. 6:229)

³³ Kant’s doctrine of right is divided into two parts: natural right and public (i.e. “civil”) right. See *Metaphysics of Morals*, p. 34. (Ak. 6:242)

other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.³⁴

Kant refers to this right as “innate freedom.”³⁵

Our innate freedom includes, at a minimum, the right to be free of direct bodily attack. Kant believed this to be the case because he conceived of a person as “an absolute unity.”³⁶ That is, he believed that we do not merely possess our bodies. Rather, our bodies, like our rational consciousness, are constitutive of us.³⁷ At first, this appears to be an outdated metaphysical view of the nature of persons, decreasingly plausible in a world in which, for example, organ donation is possible.³⁸ In the context of donation, my kidney appears to be only contingently mine rather than constitutively mine, and therefore alienable.

However, Kant’s account is more flexible and plausible if it is understood as a specific application of his more general view that the individuation of objects considered noumenally (that is, the individuation of objects insofar as rights attach to them) is a function of practical reason. Kant believed that a portion of the external world can become a distinct “object of choice” to which rights may attach only if a person takes herself to have the power to use it as a distinct

³⁴ *Metaphysics of Morals*, p. 30. (Ak. 6:237)

³⁵ *Metaphysics of Morals*, p. 30. (Ak. 6:237)

³⁶ *Metaphysics of Morals*, p. 62. (Ak. 6:278)

³⁷ Kant writes, “a human being cannot have property in himself, much less in another person.” *Metaphysics of Morals*, p. 127. (Ak. 6:359)

³⁸ I am grateful to Frances Kamm for helpful comments regarding Kant’s metaphysics of identity.

object.³⁹ Analogously, my body must be conceived of as a whole except insofar as I perceive myself to have the power to make separate use of its parts.

Because no person took herself to have the power to make separate use of her kidney in Kant's time, his conception of a person as "a complete unity" made sense in the context of his practical philosophy. In our time, my kidney *can* be thought of as "an object *distinct* from me," because I take myself to have the power to use it as a separate "object of choice" by donating it.⁴⁰ Because my relationship to my body as a whole is not (yet) a contingent one, and because our bodies are the unitary "objects of choice" that we begin our adult lives with insofar as we control our own bodily movements, I believe it remains the case that our right to be free of bodily attack is the appropriate starting place for any theory of rights. My body is an inseparable whole to which I am entitled until I choose to make some separate use of any part of it.

Another aspect of our innate right is our ability to acquire land and certain other things in the external world. Kant calls the principle that authorizes such acquisitions "the postulate of practical reason with regard to rights."⁴¹ It is sometimes called the "*lex permissiva*" for short, because it holds that we are permitted but not required to acquire additional rightful possessions defined by the three ancient categories of property, contract, and status.⁴² Like all

³⁹ I take this subject up at somewhat more length in my discussion of property acquisition. See, *infra*, p. 16-17.

⁴⁰ *Metaphysics of Morals*, p. 43. (Ak. 6:253)

⁴¹ *Metaphysics of Morals*, p. 40. (Ak. 6:246) (capitalization omitted)

⁴² See, for example, Katrin Flikschuh, "Freedom and Constraint in Kant's *Metaphysical Elements of Justice*," *History of Political Thought* 20 (1999): 250-

postulates, the *lex permissiva* is not conceptually contained in a prior principle, nor can it be empirically demonstrated. Rather, Kant connects this postulate to the Universal Principle of Right in the same way that Ripstein connects the Universal Principle of Right to the Categorical Imperative: the *lex permissiva* is a further extension of the idea of freedom to a situation in which a plurality of embodied free agents coexist with physical objects that they can use in order to achieve their purposes.

Kant's initial argument establishing the *lex permissiva* in the context of property is notoriously hard to parse, and what follows is my best understanding of this difficult passage.⁴³ Kant first observes that human beings can use land and other external objects in order to achieve their purposes. Anything that a person takes herself to have the physical power to use as a distinct object is what Kant calls "an object of choice."⁴⁴ My right to be free from bodily constraint incidentally establishes my right to use some, though not all, external objects of choice, but only while I am in physical contact with them. For example, in a world without property rights, I am always entitled to be in whatever space on the earth's surface I happen to occupy, because it would violate my innate right to forcibly move my body elsewhere.⁴⁵ Similarly, I have a right to use an external

271. Kant uses the Latin phrase *lex permissiva* to refer to permissive laws in general. See, for example, *Metaphysics of Morals*, p. 16. (Ak. 6:223)

⁴³ See *Metaphysics of Morals*, pp. 40-2. (Ak. 6:246-252) I am grateful to Arthur Applbaum for illuminating discussions about this passage.

⁴⁴ *Metaphysics of Morals*, p. 41. (Ak. 6:246)

⁴⁵ *Metaphysics of Morals*, p. 38. (Ak. 6:248)

object if I am holding it in my hands, because it would violate my innate right to loosen my physical grasp.⁴⁶

But mere innate freedom cannot directly establish my right to use objects that are much larger than the human body itself.⁴⁷ For example, an entire field can be an “object of choice” if I take myself to have the physical power to grow a crop on it, but my choice to grow sugar on a given field is physically incompatible with your choice to grow wheat on the same field at the same time. Either choice is compatible with everyone’s right to be free of bodily constraint (assuming a crowd is not standing on the field in question), even each other’s: I can plant sugar while you busily uproot my completed work a few feet behind me without ever touching me. In a world without property rights, therefore, I might be tempted to conclude that we *both* have a right to choose to grow our preferred crop. Yet, such conflicting “rights” are logically contradictory: your exercise of a right cannot prevent my exercise of a right, because any action that hinders a right action is, by definition, wrong, which just means “not right.” No action can simultaneously be right and wrong. The right to acquire property is a necessary extension of the idea of freedom because my possible choices—including possible actions on maxims that extend over a period of time, such as “I will grow a crop of wheat in order to bake bread”—must be compatible with your possible choices. Property rights reconcile our sets of possible choices by giving individuals exclusive rightful access to specific objects of choice. The question of who may

⁴⁶ *Metaphysics of Morals*, p. 38. (Ak. 6:248)

⁴⁷ *Metaphysics of Morals*, p. 40. (Ak. 6:246)

rightfully grow her preferred crop on a given field can now be answered by determining to whom the field belongs.⁴⁸

The *lex permissiva* also licenses us to make binding contracts with others. Kant describes a contract as “an act of the united choice of two persons by which anything at all that belongs to one passes to the other.”⁴⁹ Ripstein explains why the idea of uniting two wills is essential to the notion of contract by considering the simple case of making a gift.⁵⁰ Simply handing you my watch would not be enough to change its ownership, he points out, because Kant’s argument establishing the *lex permissiva* in the context of property demonstrates that ownership (which Kant variously calls “noumenal possession,” “intelligible possession,” and “merely rightful possession”) must be distinct from physical possession.⁵¹ Nor can any other unilateral act of mine cause the watch to belong to you, because that would alter your normative situation without your consent.⁵² (Perhaps it contains gemstones mined by mistreated foreign workers, and you therefore do not want to own it. Surely you can prevent something from becoming even momentarily yours by choosing not to accept it.) As Ripstein observes, even if I wish to give you the watch and you wish to receive it, we can’t quite accomplish this in two separate acts, because if I unilaterally cede

⁴⁸ Of course, Kant must also establish the conditions under which property can be acquired without violating anyone’s innate right. See, *infra*, pp. 25-8.

⁴⁹ *Metaphysics of Morals*, p. 57. (Ak. 6:271)

⁵⁰ *Force and Freedom*, p. 113. The giving of a gift is an example of what Kant calls a “gratuitous contract.” *Metaphysics of morals*, p. 67. (Ak. 6:285)

⁵¹ *Ibid.* See also *Metaphysics of Morals*, p. 42. (Ak. 6:252)

⁵² See, *infra*, pp. 28.

possession of the watch, it becomes, however momentarily, *res nullius*.⁵³ At that point, your claim to it is no better than anyone else's, despite my wishes.

It must, therefore, be the case that two people unite their wills in order to alter their respective rights and obligations simultaneously. A contract just is a union of the choices of two (or more) people, which is why courts construe the ambiguous terms of a contract by reference to "the meeting of the minds" between contracting parties.⁵⁴ As parties to a private contract, our united wills alter our rights, while everyone else's rights (or lack thereof) with respect to the transferred property remain unaltered. Similarly, the right to contract allows me to alienate some of my future labor to you by means of our united choice. A contract for a future performance of this sort can be thought of formally as establishing one person's possession of another's future choice. As Kant writes, "the other's promise is included in my belongings and goods."⁵⁵

Kant's rationale for the right to contract is essentially the same as his rationale for property: conflicting rights are impossible, so contracts are necessary to ensure that all rights are mutually compatible, and therefore possible. Suppose I want to sell my house, and both Smith and Jones wish to own it. Neither Smith nor Jones has an existing right to possess my house, because it belongs to me. If I transfer a right to Smith to possess the house, I am

⁵³ See *Force and Freedom*, p. 114.

⁵⁴ See for example Raffles v. Wichelhaus, 2 Hurl. & C. 906 (Court of Exchequer 1864).

⁵⁵ *Metaphysics of Morals*, p. 38. (Ak. 6:248) The nature of a contract for personal labor, and how it can be distinguished from an agreement to alienate one's freedom, are complicated matters not profitable to delve into here.

legally disabled by the law of contract from transferring that same right a second time to Jones, or from continuing to possess it myself.

Finally, Kant argues that a “natural permissive law” establishes the right to acquire a domestic relationship, understood as a set of rights and obligations between members of a household (i.e. “the domestic condition”).⁵⁶ Kant divides these relationships into three types: 1) the marital relationship, 2) the parent-child relationship, and 3) the householder-servant relationship.⁵⁷ Unlike a merely contractual relationship, by which I might acquire your *promise*, but not *you*, Kant conceives of a domestic relationship as a way of possessing a person.⁵⁸ The feature that makes a Kantian domestic relationship possessory is the legal right (at that time) to compel members of the household to physically return to the household, and the related right to compel any other person to relinquish physical custody of a household member.⁵⁹ Kant characterizes the marital relationship as one of mutual possession, such that either partner can rightfully demand the other’s presence in the marital home, although he also writes that a man’s “natural superiority” justifies a law requiring wives to obey their husbands.⁶⁰ In the other two cases, possession is explicitly unilateral: parents are

⁵⁶ *Metaphysics of Morals*, p. 61. (Ak. 6:276)

⁵⁷ See *Metaphysics of Morals*, p. 61. (Ak. 6:277)

⁵⁸ See *Metaphysics of Morals*, p. 126. (Ak. 6:358)

⁵⁹ Kant writes, “there is a right to persons akin to a right to things (of the head of the house over servants); for he can fetch servants back and demand them from anyone in possession of them, as what is externally his, even before the reasons that may have led them to run away and their rights have been investigated.” *Metaphysics of Morals*, p. 66. (Ak. 6:284)

⁶⁰ *Metaphysics of Morals*, p. 62-3. (Ak. 6:278-9)

thought to possess their children and householders are thought to possess their servants.

Domestic relationships are characterized by Kant as a kind of rightful possession because “possessing something is a precondition of its being possible to use it.” Kant’s domestic relationships include certain limited rights to “make direct use of a person *as of* a thing, as a means to my end, but still without infringing on his personality.”⁶¹ Because these relationships involve the “direct use” of household members (rather than the exchange of means enabled merely by contract), Kant writes that domestic relationships are formed “neither by deed on one’s own initiative (*facto*) nor by a contract (*pacto*) alone but by law (*lege*).”⁶² Kant is referring to natural law, not positive law: “the right of humanity in our own person, from which there follows a natural permissive law, by the favor of which this sort of acquisition is possible for us.”⁶³

Because Kantian domestic relationships involve the possession and use of another person, they must be justified as a prerequisite to a “morally necessary end.”⁶⁴ However, this morally necessary end need not be the subjective purpose of either party in the relationship. For example, Kant believed that marriage

⁶¹ *Metaphysics of Morals*, p. 127. (Ak. 6:359) Elsewhere Kant uses the word “personality” to refer to “a human being represented in terms of his capacity for freedom...independent of his physical attributes.” *Metaphysics of Morals*, p. 32. (Ak. 6:239) I therefore take Kant to mean here that domestic relationships involve possession of another person that is not contrary to that person’s capacity for freedom. I am grateful to Michael Joel Kessler for helpful comments on this point.

⁶² *Metaphysics of Morals*, p. 61. (Ak. 6:276)

⁶³ *Metaphysics of Morals*, p. 61. (Ak. 6:276)

⁶⁴ *Metaphysics of Morals*, p. 127. (Ak. 6:359)

required natural law authority because the act of sexual intercourse was a (mutual) instance of using another person as a means to one's own enjoyment.⁶⁵ According to Kant, the preservation of humanity through procreation is the morally necessary end of sex,⁶⁶ but Kant did not consider it wrong for a married couple to have sex for the subjective purpose of pleasure.⁶⁷ The development of children's free agency is the morally necessary purpose of coercion within the parent-child relationship, but Kant thought that parents could rightfully "constrain [a child] to carry out and comply with any of their directions that are not contrary to a possible lawful freedom."⁶⁸ I take Kant to mean that a parent may rightfully coerce her child to perform personal services for her, thereby using her child "as of a thing, as a means to my end,"⁶⁹ so long as the parent's actions do not prevent her child from developing into a free agent.⁷⁰

⁶⁵ See *Metaphysics of Morals*, p. 62. (Ak. 6:278) Kant writes, "if one were to make oneself such a thing [an object of sexual enjoyment] by contract, the contract would be contrary to law." *Metaphysics of Morals*, p. 128. (Ak. 6:360) Kant doesn't weigh in on the question of whether marital rape is wrong, but on a sympathetic reading, the mutually of possession which characterizes Kant's conception of marriage supports that conclusion: in a case of mutual possession, one party's choice not to have sex would neutralize another party's choice to have sex, which would amount to a veto.

⁶⁶ See *Metaphysics of Morals*, p. 179. (Ak. 6:426)

⁶⁷ Kant writes, "The end of begetting and bringing up children may be the end of nature, for which it implanted the inclinations of the sexes for each other; but it is not requisite for human being who marry to make this their end in order for their union to be compatible with rights, for otherwise marriage would be dissolved when procreation ceases." *Metaphysics of Morals*, p. 62. (Ak. 6:277)

⁶⁸ *Metaphysics of Morals*, p. 128. (Ak. 6:360)

⁶⁹ *Metaphysics of Morals*, p. 127. (Ak. 6:359)

⁷⁰ Arthur Ripstein appears to disagree with my interpretation of these passages. Indicating that his view on this point is identical to Kant's view, Ripstein writes: "Precisely because the children are nonconsenting parties, parents may not use their children in pursuit of their own ends." *Force and Freedom*, p. 71.

It is less intuitively obvious what the morally necessary end of the householder-servant relationship could be, and Kant does not make this explicit. What follows is my best guess. Kant's discussions of marriage and parenthood establish that he considered familial relations, and therefore households, essential to the survival of humanity. Moreover, Kant conceived of a household as "a community of free beings who form a society of members of a whole."⁷¹ Because Kant viewed a household as a mini-society, he may have thought that a household required a unifying principle of governance—an unwritten domestic constitution that defines household relationships and vests final executive authority in the head of the household.⁷²

Kant distinguishes a mere hired hand from a servant who is also a household member by the nature of the employment contract: a domestic servant's contract is effectively a lease of herself, because "the servant agrees *to do whatever is permissible* for the welfare of the household" during her employment.⁷³ By contrast, a hired hand—even if she resides within the house—is hired for a set of defined tasks, and is therefore not a member of the household.⁷⁴ Although Kant believed that householders might "use" the powers of servants while they remain in the household, servants' contracts "cannot be

⁷¹ *Metaphysics of Morals*, p. 61. (Ak. 6:276)

⁷² Indeed, Kant in a footnote refers to the relationship between a head of household and one of its members as that of "domestic ruler and subject." *Metaphysics of Morals*, p. 66. (Ak. 6:283) (footnote)

⁷³ *Metaphysics of Morals*, p. 128. (Ak. 6:360-1)

⁷⁴ *Ibid.*

concluded for life but at most only for an unspecified time, within which one party may give the other notice.”⁷⁵

Natural law authority is one of the prerequisites for the formation of each type of Kantian domestic relationship, but it is not the sole prerequisite for any of them. Two of the three domestic relationships that Kant describes, marriage and the householder-servant relationship, require both natural law authority and contract. A Kantian marital relationship requires a deed for its formation as well—the act of consummation.⁷⁶ The third kind of Kantian domestic relationship, that between parent and child, has two of these three preconditions: natural law and the deed of procreation.⁷⁷

Kant emphasizes that the unusual possessory power that characterizes domestic relationships does not amount to a property interest. One respect in which these interests differ is that, while property can be alienated, a domestic relationship cannot be sold or otherwise freely transferred, although it may be dissolved under certain conditions.⁷⁸ The manner in which Kant believed that household members may “use” each other is also limited by the natural law authority which makes them rightful: spouses may only “use” each other’s sexual attributes; parents may only use children in ways consistent with their attainment of free agency; householders may only use servants in a manner

⁷⁵ Ibid.

⁷⁶ See *Metaphysics of Morals*, p. 63. (Ak. 6:279)

⁷⁷ See *Metaphysics of Morals*, p. 64. (Ak. 6:281)

⁷⁸ See *Metaphysics of Morals*, p. 61. (Ak. 6:277)

consistent with their inner morality.⁷⁹ Note that the test for permissible “use” in the marital relationship is one of inclusion: only the specifically necessary kind of use is justified. By contrast, the acceptable uses in the parent-child and householder-servant relationships are defined only by a side constraint: all uses are permissible unless they are inconsistent with the natural law purpose that makes the relationship permissible.

The foregoing is my best reading of Kant’s view of the nature of domestic relationships. I can personally endorse his characterization of such relationships as “possession of a person” only with respect to the parent-child relationship, because the person possessed in the context of that relationship is not yet a free agent. By contrast, Kant’s characterization of the marital relationship as one of mutual physical possession is driven by his implausible account of consensual sex as a mutual instance of each partner’s use of another person “as a thing.” If consensual sex is better characterized as a cooperative activity, and if households need not be conceived of as miniature republics led by a single executive, then marriage and householder-servant relationships are really contractual, rather than possessory in nature. While a full exploration of the nature of domestic relationships is beyond the scope of this project, I suspect that these are cases in which Kant made a mistake, albeit a historically understandable one.

The Impossibility of Rights in a State of Nature

Our rights to acquire property, make binding contracts, and enter into status relationships are constitutive of our equal external freedom, but these

⁷⁹ *Metaphysics of Morals*, p. 128. (Ak. 6:360-1)

acquired rights can't exist without a state. Kant conceives of external freedom as "independence from being constrained by another's choice."⁸⁰ It follows that someone who lives in total isolation is free despite any natural hardships she may encounter.⁸¹ When people live near each other, however, we can be free only if we can have acquired rights, because these legal frameworks make our sets of possible choices mutually consistent. Kant offers three closely-related reasons why conclusive acquired rights cannot exist outside the context of a civil condition.

When I claim to have a right to an external object of choice, Kant observes, I am really declaring that everyone else is obligated to refrain from interfering with my possession of that object.⁸² Because the concept of a right is limited to that which can be acquired under the terms of a universal law, my declaration contains an acknowledgment that others can obligate me in the same way that I am claiming to obligate them.⁸³ Rights, therefore, are reciprocal in the specific sense that they are necessarily created by universal rules applicable equally to all free agents.

Such reciprocal external obligations, Kant argues, require a guarantee in order to be normatively effective: you are not obligated to honor my rights-claims (that is, my claims do refer to actual rights) unless I can provide you with

⁸⁰ *Metaphysics of Morals*, p. 30. (Ak. 6:237) From now on, where I believe that context makes my meaning clear, I refer simply to "freedom," by which I will generally mean external freedom.

⁸¹ *Force and Freedom*, p. 36.

⁸² *Metaphysics of Morals*, p. 44. (Ak. 6:255)

⁸³ *Ibid.*

“assurance” that I will honor your rights-claims in turn.⁸⁴ Because external freedom is “independence from being constrained by another’s choice,” the required “assurance” must be something more than each person’s voluntary choice to respect the rights-claims of her neighbors. Only an “external constraint” in the form of coercive enforcement of rights-claims by a third party (so that you need not depend on my good nature in order to be secure in what is yours and vice-versa) makes acquired rights possible.⁸⁵ Kant concludes that “assurance...is already contained in the concept of an obligation corresponding to an external right.”⁸⁶

Rights are impossible in a state of nature for a second reason as well: rights-claims are frequently underdetermined until they are enforced. Kant has explained that all practical principles require judgment in order to apply them to particular situations.⁸⁷ As a result, people often reasonably disagree about what their rights are in specific instances: when I sold you my field, did our contract

⁸⁴ “I am...not under an obligation to leave external objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine.” *Metaphysics of Morals*, p. 44. (Ak. 6:255-6)

⁸⁵ *Metaphysics of Morals*, p. 21. (Ak. 6:220)

⁸⁶ *Metaphysics of Morals*, p. 45. (Ak. 6:256) As Mulholland writes, “The test of whether an action can be prescribed or prohibited by the principle of rights is whether it or its omission can be rightly coerced.” See *Kant’s System of Rights*, p. 175.

⁸⁷ Kant writes, “To show generally how one ought to subsume under these rules, i.e., distinguish whether something stands under them or not, this could not happen except once again through a rule. But just because this is a rule, it would demand another instruction for the power of judgment, and so it becomes clear that although the understanding is certainly capable of being instructed and equipped through rules, the power of judgment is a special talent that cannot be taught but only practiced.” *Critique of Pure Reason*, p. 268. (A133/B172)

transfer the water rights in the river that borders it? Do your loud parties interfere with my quiet enjoyment of my home? Kant's insight about the application of principles to particulars means that such questions may sometimes have two equally formally correct answers. In a state of nature, such conflicting judgments make well-defined rights impossible, because each individual retains the right to do "whatever seems right and good" in her own judgment. Only a single definitive mechanism for deciding between two reasonable applications of the abstract principles of right can render our rights mutually consistent.

Finally, Kant argues that property rights cannot exist in a state of nature because the unilateral acquisition of property would change the normative situation of others without their consent, which is conceptually impossible.⁸⁸ To say that I have a right to the exclusive possession and use of something is just to say that no other person may rightfully possess or use it.⁸⁹ No obligation can be imposed on a free agent by anyone else, because autonomy—the state of being governed only by self-given laws—is the necessary condition of a free will.⁹⁰ Rights are a precondition of our external freedom, but external freedom itself is "independence from being constrained by another's choice."⁹¹ Acquired rights, therefore, cannot exist in a state of nature because no individual person can, by her unilateral choice, impose obligations on others.

⁸⁸ *Metaphysics of Morals*, p. 45. (Ak. 6:256)

⁸⁹ Kant writes, "[A] right against every possessor of the thing...is what constitutes any right to a thing." *Metaphysics of Morals*, p. 59. (Ak. 6:274) (italics omitted)

⁹⁰ Kant writes, "From [internal freedom] it follows that a person is subject to no other laws than those he gives to himself (either alone or at least along with others)." *Metaphysics of Morals*, p. 16. (Ak. 6:223)

Justifying the State

Kant has shown that we each have a right to external freedom, but that freedom is impossible for a plurality of embodied free agents who coexist in a state of nature. His next task is to reconcile his conception of freedom with the Kantian state's coercive powers in order to show that freedom is possible in a civil condition.⁹² In short, our possible choices must be limited to those choices that are consistent with the equal freedom of all. But, because freedom is "independence from being constrained by another's choice," our possible choices must not be constrained by the choice of anyone other than ourselves.

The solution to this problem lies in the fact that we are each rationally required to have our own external freedom as an end.⁹³ Because state authority is the only means to our end, we are rationally required to regard the state's necessary powers as having been authorized by our own will, united with the wills of our fellow subjects: "a collective general (*common*) and powerful will."⁹⁴ The state imposes legal obligations on us, constraining our choices to those that are compatible with the equal freedom of all. In doing so, however, it does not make us unfree, because we are not constrained by anyone else's choice. Instead, we

⁹¹ *Metaphysics of Morals*, p. 30. (Ak. 6:237)

⁹² Natural law principles must "establish the authority of the lawgiver (i.e., his authorization to bind others by his mere *choice*)." *Metaphysics of Morals*, p. 17. (Ak. 6:224)

⁹³ Kant writes that a rightful condition is "that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive for." *Metaphysics of Morals*, p. 95. (Ak. 6: 318)

⁹⁴ *Metaphysics of Morals*, p. 45. (Ak. 6:256)

are rationally required to regard our state's laws as constraints that we have chosen to impose on ourselves.

How does such a legitimate state come about? Unlike some traditional social contract theorists, Kant cannot condition state legitimacy on the consent of the people, because the Kantian state establishes the independence that makes consent normatively effective.⁹⁵ Any attempt to establish the preconditions of consent *through* consent would be circular, so consent is neither a necessary nor a sufficient condition for state legitimacy.⁹⁶

Kant believed, therefore, that all states are established coercively, even if individuals appear to consent to a new regime:

Unconditional submission of the people's will (which in itself is not united and is therefore without law) to a *sovereign* will (uniting all by means of *one* law) is a *fact* that can begin only by seizing supreme power and so first establishing public right.⁹⁷

⁹⁵ Kant writes that a civil constitution "is the supreme formal condition of all other external duty." Immanuel Kant, "On the Common Saying: This May Be True in Theory, but It Does Not Hold in Practice," in Pauline Kleingeld, Ed., *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Trans. David L. Colclasure (New Haven: Yale University Press, 2006) p. 44. (hereafter *Theory and Practice*) (Ak. 8:289) See also *Kant's System of Rights*, p. 290.

⁹⁶ See *Kant's System of Rights*, p. 289. Even if you appear to consent to a state while in the state of nature, your consent cannot be normatively effective due to the lack of what Rawls would call the "background conditions" for consent. Although Kant's own idea about what constitutes fair background conditions for bargaining differs from Rawls' view, the two philosophers agree that bargaining in the state of nature is inherently coercive.

⁹⁷ *Metaphysics of Morals*, p. 137. (Ak. 6:372) Kant writes elsewhere of the general will: "the implementation of this idea in practice can rely on nothing but violence to establish the juridical condition." Immanuel Kant, "Toward Perpetual Peace: A Philosophical Sketch," in Pauline Kleingeld, Ed., *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Trans. David L.

How does Kant justify the act of “seizing supreme power,” and subsequent law enforcement by those who came to power in this way? His answer is contained in an important “corollary” to his argument against the possibility of unilaterally authorized property rights:

If it must be possible, in terms of rights, to have an external object as one’s own, the subject must also be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another’s to enter along with him into a civil condition.⁹⁸

In a state of nature, I do not yet have a functioning state to insist that others join, so I cannot simply ask the state to enforce existing law with respect to my recalcitrant neighbors. Rather, I may permissibly coerce others in an effort to establish a civil condition.⁹⁹ Such permissible coercion includes a coercive defense of what Kant calls “provisionally rightful possession” of land that is unilaterally claimed “in anticipation of and preparation for the civil condition.”¹⁰⁰

The ongoing coercive authority of a mature state is justified in the same way that these individual coercive actions are justified in the state of nature: as a

Colclasure (New Haven: Yale University Press, 2006), p. 95. (hereafter *Perpetual Peace*) (Ak. 8:371) The impossibility of consent is why Kant argues that a state’s pedigree is irrelevant to the question of its legitimacy. All states come into existence through force, and there is no good reason why legitimacy should depend on whether forceful seizure of power first occurred ten years ago or a hundred. *Metaphysics of Morals*, p. 95. (Ak. 6:318)

⁹⁸ *Metaphysics of Morals*, p. 45, 90. (Ak. 6:256, 6:312)

⁹⁹ Kant writes that the deed of “taking control” is “the condition and the basis” for public authority. *Metaphysics of Morals*, p. 137. (Ak. 6:371)

¹⁰⁰ *Metaphysics of Morals*, p. 45. (Ak. 6:256-7) Kant writes, “Prior to entering [a civil] condition, a subject who is ready for [a state] resists with right those who are not willing to submit to it and who want to interfere with his present possession.” Ibid. See also MM 6:267, Gregor p. 54.

necessary precondition to our ability to acquire rights, without which none of us can enjoy external freedom. Indeed, within the territory of an existing state, I believe that the Kantian right to coerce someone to enter into a civil condition is *exactly the same thing* as the authority to enforce the law: if you are acting lawlessly within the territory of a state, what else could a right to coerce you to join the state entail but the enforcement of its laws against you? It cannot mean that I can force you to give your consent, since that is a contradiction. It cannot mean that I can require you to recognize your obligation to obey the law, since it is impossible for one person to coerce another to adopt any principle of action. In the context of a modern nation state, therefore, the authority to coerce someone to enter into a civil condition just is the state's authority to enforce its law against anyone within its territory.

While no other person can force me to recognize an obligation to respect the rights of others, Kant argues that I am rationally required to do so insofar as my choices presuppose my own secure rights to person and property. Leslie Mulholland summarizes:

[T]he general will is already contained in the claim to an acquired right, not because it is necessary to submit to the general will in order to achieve one's end, but because a moral being, a person, is unavoidably bound by laws in relations with others concerning the use of external objects.¹⁰¹

To understand Mulholland's point, recall the distinction that Kant makes between a choice and a mere wish: both are activities of the will, but to *choose* an end, I must set myself to the task of achieving it, which involves taking myself to

have the means to achieve it.¹⁰² External freedom is the ability to make choices independently from constraint by the choices of others. Therefore, if I choose to grow a crop, I must take myself to have the necessary means to my end: rightful access to the field on which I intend to grow it. In other words, I must take myself to have a property right.¹⁰³

Because laws, whether internal or external, are universal by definition, it follows that, if I acquire a property right in a particular field, my right is made possible by a universal principle that equally enables others to acquire property rights. My claim to own property therefore contains the claim that everyone can acquire property according to the same principle. The state is thus authorized by each of us to impose “the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”¹⁰⁴

The Idea of The Original Contract

The Kantian state is the concept of the “three authorities” that are *a priori* necessary to establish a rightful condition by rendering the possible choices of each individual consistent with the freedom of all.¹⁰⁵ Because we are each rationally required to have our external freedom as an end, the state must be

¹⁰¹ *Kant’s System of Rights*, p. 304.

¹⁰² *Metaphysics of Morals*, p. 13. (Ak. 6:213)

¹⁰³ Alternatively, I must take myself to have a lease or permission from the person who *does* have a property right.

¹⁰⁴ *Metaphysics of Morals*, p. 24. (Ak. 6:230)

¹⁰⁵ *Metaphysics of Morals*, p. 90. (Ak. 6:313)

regarded as having been authorized by the “general united will” of the people.¹⁰⁶ Kant refers to the three authorities as “necessary” laws that “follow of themselves from concepts of external right as such (are not statutory).”¹⁰⁷ They are “the form of a state as such, that is, of *the state in idea*, as it ought to be in accordance with pure principles of right.”¹⁰⁸ Kant refers to this ideal state as “the original contract,” but he emphasizes that he does not mean that any actual agreement was or must be made.¹⁰⁹ Rather, the state reflects only “the idea of this act, in terms of which alone we can think of the legitimacy of a state.”¹¹⁰

Kant develops the idea of the original contract by considering what authorities a state must have in order to solve the problems—assurance, indeterminacy, and unilateral choice—that make acquired rights impossible in the state of nature. He concludes:

Every state contains three authorities within it, that is, the general united will consists of three persons: the *sovereign authority* in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge.¹¹¹

The sovereign, or legislative, authority is the authority to make laws on behalf of all subjects, thus avoiding a situation in which the unilateral choices of some infringe on the freedom of others. The judicial authority is the authority to

¹⁰⁶ *Metaphysics of Morals*, p. 90-1. (Ak. 6:313)

¹⁰⁷ *Metaphysics of Morals*, p. 90. (Ak. 6:313)

¹⁰⁸ *Ibid.*

¹⁰⁹ *Metaphysics of Morals*, p. 92. (Ak. 6:315)

¹¹⁰ *Metaphysics of Morals*, p. 93. (Ak. 6:313)

¹¹¹ *Metaphysics of Morals*, p. 91. (Ak. 6:313) (latin omitted)

conclusively resolve disputes about rights by establishing an objective procedure for resolving the residual indeterminacy that is always possible when principles are applied to particulars. The executive authority is the authority to enforce the law, so that everyone will have adequate assurance that her rights are secure.

Kant writes that these three authorities may not usurp each other's functions.¹¹² For example, "a people's sovereign (legislator) cannot also be its *ruler* [the executive authority], since the ruler is subject to the law and so is put under obligation through the law by *another*, namely the sovereign."¹¹³ Kant describes the injustice that occurs when one of the state's three authorities usurps the role of another as "despotism." For example, a legislative body that directly arrests those whose actions its members wish to outlaw instead of passing legislation acts despotically. Similarly an executive branch official who illegally arrests a subject acts despotically.

Kant does not mean that the three authorities—which he conceives of as "moral persons"—must necessarily be exercised by different human beings. Indeed, he believed that the idea of the original contract could, in principle, be fully instantiated by an autocrat: a single natural person who holds all three of the state's authorities. An autocratic government "is the most dangerous for a people, in view of how conducive it is to despotism," but it is not despotic by definition.¹¹⁴ An autocrat can avoid governing despotically by exercising her

¹¹² Kant writes of the three authorities, "one of them, in assisting another, cannot also usurp its function; instead, each has its own principle." *Metaphysics of Morals*, p. 93. (Ak. 6:316)

¹¹³ *Metaphysics of Morals*, p. 94. (Ak. 6:317)

¹¹⁴ *Metaphysics of Morals*, p. 111. (Ak. 6:339)

legislative authority separately and prior to any exercise of her judicial authority, which applies legislative principles to particulars, or her executive authority, which enforces the law. Surprisingly, Kant claims that an autocrat cannot rightfully give away her right to legislate on behalf of the people, since the legislative authority does not contain the right to alienate itself. Instead, she should “reform” her government until it “harmonizes *in its effect*” with the idea of the original contract, by establishing separate executive and judicial branches.¹¹⁵

I believe that the state’s three authorities must, in principle, be exercised independently in order to be exercised at all, because they involve three metaphysically distinct activities. Legislation, understood as the creation of a law, is a conceptual activity. Judgment is the application of legal concepts to particular physical objects. Executive law enforcement is physically coercive, is authorized by legislation, and is constrained by the judgments of the judicial authority. The principle of non-usurpation makes each authority supreme within its own distinct sphere:

[T]he will of the *legislator* with regard to what is externally mine or yours is *irreproachable*; that the executive power of the *supreme ruler* is *irresistible*; and that the verdict of the highest *judge* is *irreversible* (cannot be appealed).¹¹⁶

All three of these distinctive activities are essential and interdependent aspects of a rightful condition: “each complements the others to complete the constitution of a state.”¹¹⁷

¹¹⁵ *Metaphysics of Morals*, p. 112. (Ak. 6:340)

¹¹⁶ *Metaphysics of Morals*, p. 93. (Ak. 6:316)

¹¹⁷ *Metaphysics of Morals*, p. 93. (Ak. 6:316) (latin omitted)

The state must also be regarded as the “supreme proprietor” of the land within its territory.¹¹⁸ Kant describes this proprietorship as “an idea of the civil union needed to make conceivable” the totality of a state’s territory for the purpose of dividing it rightfully among the citizens.¹¹⁹ While a state supervenes on its territory, its proprietorship should not be mistaken for a property right. On the contrary, such rights are impossible:

“In accordance with concepts of right, the supreme proprietor cannot have any land at all as his private property (for otherwise he would make himself a private person). All land belongs only to the people (and indeed to the people taken distributively, not collectively).”¹²⁰

Recall that the concept of acquired property includes the concept of an independent forum for the resolution of disputes between competing claimants. State ownership is therefore conceptually impossible, because “if [the sovereign] had something of [its] own alongside others in the state, a dispute could arise between them and there would be no judge to settle it.”¹²¹ Katrin Flickshuh explains:

[N]o private rights claimant, in raising a valid entitlement claim against others, can legitimately enforce this claim against them while remaining a constituent member of the rights relation. Only an omnilateral public will—a will that is itself party to no rights relations—can act as authoritative

¹¹⁸ *Metaphysics of Morals*, p. 99. (Ak. 6:323)

¹¹⁹ *Metaphysics of Morals*, p. 122. (Ak. 6:324) This somewhat opaque argument follows from Kant’s metaphysical view that space, as such, must be conceived of as a whole that may be divided rather than as an infinite number of parts that may be aggregated. See *Critique of Pure Reason*, p. 528. (A524/B552)

¹²⁰ *Metaphysics of Morals*, p. 99. (Ak. 6:324)

¹²¹ *Metaphysics of Morals*, p. 99. (Ak. 6:324)

enforcer of coercive universal law in relation to all claimants simultaneously.¹²²

While the state can have no private rights, it has instead public right: “the right of command over the people, to whom all external things belong (the right to assign to each what is his).”¹²³ As proprietor of the land, the Kantian state divides territory that was previously united by its authority into private spaces, but it also retains residual spaces that are not private. The state’s right with respect to these spaces is not that of a property owner, who has “a right to a thing.” Rather, the “right of command” is a right to make laws regulating the conduct of persons.¹²⁴

The state’s status as supreme proprietor of the land authorizes it to enact laws that impose taxes on private ownership of land, excise taxes, and import duties. The state is also thus authorized to “administer the state’s economy, finances, and police.”¹²⁵ The state’s police power includes the power to regulate conduct in public spaces for the purpose of securing “public *security*, *convenience*, and *decency*; for the government’s business of guiding people by laws is made easier when the feeling for decency, as negative taste, is not deadened by what offends the moral sense, such as begging, uproar on the streets, stench, and public prostitution.”¹²⁶

¹²² Katrin Flikschuh, “Reason, Right, and Revolution: Kant and Locke,” *Philosophy & Public Affairs* 36 (2008): 375-404, p. 392.

¹²³ *Metaphysics of Morals*, p. 99. (Ak. 6:324)

¹²⁴ *Metaphysics of Morals*, p. 99. (Ak. 6:324)

¹²⁵ *Metaphysics of Morals*, p. 100. (Ak. 6:325)

¹²⁶ *Metaphysics of Morals*, p. 100. (Ak. 6:325)

In this chapter, I have described what I take to be the conceptual skeleton of Kant's political philosophy. Its key elements include Kant's conceptual claim about the reflexivity of rights (i.e. we each have a right to engage in any action that is not wrong), the conception of the state's three authorities as *a priori* necessary solutions to the problem of establishing acquired rights, and the state's status as supreme proprietor of the land. In chapter 2, I will offer a new interpretation of Kant's keystone political principle, the Universal Principle of Right, which depends crucially on Kant's conception of rights as reflexive. I argue that any action is right if it is not wrong in either of two ways—material or formal—that Kant establishes elsewhere as the ways in which an action may be wrong. My analysis in chapter 2 yields a novel formulation of Kant's standard for formal wrongdoing. In chapter 3, I show that, if correct, my proposed formulation of the standard for formal wrongdoing functions as a limiting principle on the criminal lawmaking authority of the state. In chapter 4, I apply my conclusions in chapters 2 and 3 to the task of analyzing the state's exercise of its regulatory authority in public spaces, which is predicated on the state's status as supreme proprietor of the land. I conclude that many common ordinances that nominally prohibit certain categories of conduct in fact function as rightful permissive laws, which impose taxes or fees on lawful conduct.

Chapter 2: Acting Rightly

How can we tell right actions from wrong ones? I believe that Kant's Universal Principle of Right establishes a dual test for the rightness of actions, corresponding to the two distinct types of wrong actions that Kant describes elsewhere: formal wrongs and material wrongs.¹²⁷ I will show that my interpretation better accords with Kant's language than do alternative readings according to which Kant establishes a single standard, and I will argue that it is also more consistent with closely related elements of Kant's political thought.

Because we have a right to do anything that is not wrong,¹²⁸ I will analyze formal and material wrongs, which should collectively exhaust the category of conduct that the Universal Principle of Right excludes. Material wrongs are actions that violate the innate or acquired rights of another free agent. Formal wrongs are actions that violate "the right of human beings as such" to live in a rightful condition.¹²⁹ I will show that the wrong-making property of a material wrong is a property of an action's "outer form," while the wrong-making property of a formal wrong is a property of the action's maxim—its principle of inner determination.

I will draw an analogy to Kant's account of the difference between physical opposition and logical opposition in *Critique of Pure Reason* in order to show that material and formal wrongs must be remedied differently. The dual nature

¹²⁷ Kant writes, "This distinction between what is merely formally wrong and what is also materially wrong has many applications in the doctrine of right." *Metaphysics of Morals*, p. 86. (Ak. 6:308) (footnote)

¹²⁸ See, *supra*, p. 7.

of wrongdoing complements my textual argument in favor of a two-standard interpretation of the Universal Principle of Right. Finally, I will suggest that the meaning of Kant's principle may be obscured by a typographical error.

The Universal Principle of Right

Kant presents his Universal Principle of Right as the keystone of his political philosophy. By its terms, the principle articulates the standard (or standards) according to which actions are "right." Philosophers have struggled with its awkward and ambiguous language.¹³⁰ In Mary Gregor's popular English translation of *The Metaphysics of Morals*, the Universal Principle of Right states:

Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.¹³¹

Translated thus, the principle appears to offer two separate standards according to which actions are right. In fact, this is a contested point; some Kantians read the principle as articulating a single standard for right conduct, in which Kant simply chose to rephrase a portion of his principle.¹³²

¹²⁹ *Metaphysics of Morals*, p. 86. (Ak. 6:308) (footnote)

¹³⁰ Indeed, leading Kantians sometimes tacitly omit the principle's second clause, perhaps because its language introduces confusion that they are uncertain how to resolve. See for example Allen W. Wood, *Kantian Ethics* (Cambridge: Cambridge University Press, 2008), p. 215.

¹³¹ *Metaphysics of Morals*, p. 24. (Ak. 6:230)

¹³² Gregor's translation may exaggerate the principle's appearance of articulating two standards because it features a compound sentence form not found in the original German text:

Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann.

Ripstein is among those who favor a unitary reading.¹³³ He interprets the Universal Principle of Right like this:

The universal principle of right demands that each person exercise his or her choice in ways that are consistent with the freedom of all others to exercise their choice.¹³⁴

Ripstein offers another, very similar formulation elsewhere:

The Universal Principle of Right focuses only on whether a particular person uses external means—objects in space and time—in ways consistent with the freedom of others to use their means.¹³⁵

If, as Ripstein believes, the principle should be read to articulate one standard rather than two, it must be the case that the words “if [the action] can” can be understood to have the same meaning as the words “if on [the action’s] maxim the freedom of choice of each can.” Ideally, it should also be possible to identify a reason why Kant would have chosen to articulate a portion of the Universal Principle of Right in two different ways.

On the issue of Kant’s possible motivation to rephrase, Ripstein offers that Kant may have re-phrased a principle about actions in terms of maxims because

Immanuel Kant, *Die Metaphysik der Sitten*, (Kronigsberg: Friedrich Nicolovius, 1798). German grammatical conventions “permit much more unity” between the word that is translated to “action” and the words that are translated to “on its maxim the freedom of choice of each” than Gregor’s translation suggests. Interview with Marcus Wilczek, Assistant Professor of Germanic Languages and Literatures, Harvard University, February 14, 2012. Indeed, those words appear right next to each other in the original German, and the words that translate to “coexist with everyone’s freedom in accordance with a universal law” only appear once, near the end of the sentence.

¹³³ Arthur Ripstein writes, “I’ve always been a proponent of the one standard approach.” Personal email, February 17, 2012.

¹³⁴ *Force and Freedom*, p. 35-6.

¹³⁵ *Force and Freedom*, p. 384.

“actions are always individuated by their maxims.”¹³⁶ He means that it is not possible to identify a unitary “action” in the context of an agent’s ongoing activities except by reference to the agent’s maxim, because a maxim adopts specific means (e.g. “walk across the field”) to further a chosen end (e.g. “to see the sunset over the ocean”). Kantian maxims are usually formulated thus: “I will do act (A) under circumstances (C) in order to achieve end (E).” Because the doctrine of right concerns only external conduct, the rightfulness of an action will never depend on the part of a maxim that refers only to our internal rational freedom: our end (E). Ripstein is nonetheless correct that, in my continual ebb and flow of activity, my entire maxim, including its end, identifies a subset of my activity—walking across a field, for example—to evaluate, as a single action, for rightness or wrongness.

Ripstein’s explanation seems plausible because his substantive point about the individuation of actions is correct. However, as an interpretation of the Universal Principle of Right, Ripstein’s account does not explain Kant’s inclusion of the additional words, “the freedom of choice of each,” in his second formulation. Kant’s second alternative does not merely ask whether my action, uniquely picked out by my maxim, can itself coexist with everyone’s freedom. It asks whether “*on [my] maxim the freedom of choice of each* can coexist with everyone’s freedom in accordance with a universal law.”¹³⁷ I believe that it makes more textual sense to read these words as establishing this standard: can the

¹³⁶ Personal email from Arthur Ripstein, received February 17, 2012. Elsewhere, Ripstein writes, “What I *do* is individuated by my maxim”. *Force and Freedom*, p. 381.

¹³⁷ *Metaphysics of Morals*, p. 24. (Ak. 6:230) (italics added)

freedom of each person to choose to act on my maxim coexist with everyone's freedom in accordance with a universal law? More succinctly: could everyone be free if acting on my maxim was legal?

My two-pronged interpretation of the Universal Principle of Right can thus be summarized as follows:

Any action is right if 1) it can coexist with everyone's freedom in accordance with a universal law, or 2) the legality of an action on its maxim can coexist with everyone's freedom in accordance with a universal law.

I believe that the Universal Principle of Right can be treated as a single standard only if these two alternatives mean the same thing, or at least generate the same set of right actions.

In the remaining sections of this chapter, I will argue that closely related elements of Kant's political thought are inconsistent with the possibility of a single-standard interpretation. Instead, I believe that the Universal Principle of Right establishes two standards that track the two different ways—material and formal—in which actions can be wrong. Its first prong articulates, in inverse form, Kant's standard for material wrongs: "Any action is right if it can coexist with everyone's freedom in accordance with a universal law." Material wrongs involve actions that, as Ripstein points out, are individuated by their maxims. Nonetheless, I will show that Ripstein's work elsewhere proves that maxims are otherwise irrelevant to whether an action is a material wrong.¹³⁸ It is possible to commit a material wrong by acting on an entirely innocent maxim.

¹³⁸ See, *infra*, pp. 50-1.

The second prong of the Universal Principle of Right articulates, in inverse form, Kant's standard for formal wrongs: "Any action is right...if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law." I understand Kant to mean that any action is right if the legality of an action on its maxim (i.e. the "freedom of choice of each" to act "on its maxim") could coexist with everyone's freedom in accordance with a universal law (i.e. the concept of a rightful condition). As Kant explains in *Critique of Pure Reason*, logical opposition—negation—is the only kind of opposition that can exist between two concepts.¹³⁹ Therefore, because this standard compares two concepts, an action will fail to meet it just in case there is a logical contradiction between them.¹⁴⁰ I will show that my interpretation better accords with Ripstein's correct view that attempted wrongs against others may be public crimes, even if they violate no individual's rights, than does a unitary interpretation.¹⁴¹

The Nature of Material Wrongs

Material wrongs are actions that are inconsistent with the rights of one or more individuals. For Kant, a rightful condition is the state in which my possible

¹³⁹ *Critique of Pure Reason*, p. 369. (A265/B321)

¹⁴⁰ There is no necessary conflict between my interpretation of the Universal Principle of Right's second prong and, for example, Korsgaard's "practical contradiction interpretation" of the Categorical Imperative as it appears in Kant's formula of universal law. Christine Korsgaard, *Creating the Kingdom of Ends*, (Cambridge: Cambridge University Press, 1996), p. 78. On Korsgaard's interpretation of the formula of universal law, an agent must look for a contradiction between the instrumental principle, which is a concept, and the contemplated action itself, which is an object, in the context of a world in which the maxim of the contemplated action is universally adopted.

choices and your possible choices are rendered consistent with each other. Our private rights must therefore be established by a careful demarkation of the physical world into “mine and thine.”¹⁴² We each have an innate right to our own bodies, and we each may also have rights of property, contract, and status that are specified and secured by the state. The sum of what is rightfully yours constitutes the means that you have at your disposal when you exercise your free agency by choosing your ends. Mulholland explains that a material wrong is essentially an interference with what belongs to others: “[P]ersons have certain things under the control of their wills (e.g., body, physical possessions, etc.). To use these in a way which interferes with what others have under control of their wills is to coerce others.”¹⁴³

Ripstein observes that there are two ways in which I can wrong you: I can interfere with your use of your means, or I can use your means without your authorization. The exact nature of the second kind of material wrongdoing is hard to describe, because the victim is often unharmed and may even be unaware that she has been wronged. For example, a stranger who touches you while you sleep wrongs you, even though he does not harm you. Ripstein specifies the wrong-making property of the action in this way: “the person who touches you without your authorization uses you for a purpose that is his but not yours.”¹⁴⁴ He restates the same point more generally elsewhere: “The problem is not that I

¹⁴¹ *Force and Freedom*, p. 374. (footnote)

¹⁴² Pippin, p. 416.

¹⁴³ *Kant’s System of Rights*, p. 184.

¹⁴⁴ *Force and Freedom*, p. 47.

interfere with your use of your person or powers, but that I violate your independence by using your powers for my purposes.”¹⁴⁵

According to Ripstein’s formulation, the wrong-making property of a materially wrong action is the tortfeasor’s possession of a purpose—a purpose for which he uses his victim’s means—that does not also belong to the victim.¹⁴⁶ In order to avoid philosophical error, it is essential to understand the way in which Ripstein must intend to claim that the parties to a rightful interaction must have the same purpose, as well as the scope of this requirement. I will show that the parties to a rightful interaction must have the same purpose in a very demanding sense of the word “same,” but that the scope of this demanding requirement is quite narrow.

There are at least two different senses in which the purposes of two people can be considered identical, corresponding to two ways in which, as Kant explains in *Critique of Pure Reason*, objects can be identical: conceptual and numerical.¹⁴⁷ Kant illustrates this distinction with the example of two drops of water that are identical in shape, size, and chemical composition. These drops are conceptually identical, but insofar as they exist in two different places at the same time, they are numerically distinct. A single drop of water is both

¹⁴⁵ *Force and Freedom*, p. 46.

¹⁴⁶ As Kant himself does, Ripstein uses the word “purpose” as a synonym for the more technical Kantian term, “end”—the goal (i.e. “object” or “effect”) that an agent acts to bring about. Ripstein elsewhere elaborates: “In this sense, having means with which to pursue purposes is conceptually prior to setting those purposes. In the first instance, your capacity to set your own purposes just is your own person: your ability to conceive of ends, and whatever bodily abilities you have with which to pursue them. You are independent if you are the one who decides which purposes you will pursue.” *Force and Freedom*, p. 14.

conceptually and numerically identical with itself. Ripstein's identification of the wrong-making property of a material wrong as "a purpose that is [the tortfeasor's] but not [the victim's]" must be understood to refer to an absence of something like numerical identity, and not merely to an absence of conceptual identity.

To illustrate this point, suppose that Juliet becomes secretly infatuated with Romeo, a handsome stranger, and she resolves to ask him to come over and cuddle her. She tries to send him an invitation before bedtime, but her nurse is unable to find Romeo in order to deliver it. Meanwhile, Romeo, unbeknownst to Juliet, forms a resolution to cuddle her as soon as possible. Because Romeo is extremely shy, however, he does not ask Juliet to cuddle. Instead, he waits until she has fallen asleep, climbs through her window, and cuddles her gently.

Romeo thereby commits the tort of battery.¹⁴⁸ Battery is a material wrong even though the tortfeasor and victim in this case have conceptually identical purposes, because their purposes remain, metaphorically speaking, numerically distinct. Romeo wrongs Juliet because the two of them did not "unite their wills" in the manner described in Chapter 1 as the form of a rightful voluntary transaction between individuals.¹⁴⁹

The strength of this requirement is not matched by its breadth, however. The "purpose" that Romeo and Juliet must share in order to form a "united will" is no broader than the terms of Juliet's consent to the interaction itself. This is an

¹⁴⁷ *Critique of Pure Reason*, p. 368. (A263-4/B319-20)

¹⁴⁸ Restatement (Second) of Torts § 18 (1965).

¹⁴⁹ See, *supra*, p. 18-9.

important point, because purposes are iterative. Our participation in the causal order always has more and less immediate consequences, intended and unintended, as the following proverb illustrates:

For want of a nail the shoe was lost.
For want of a shoe the horse was lost.
For want of a horse the rider was lost.
For want of a rider the message was lost.
For want of a message the battle was lost.
For want of a battle the kingdom was lost.
And all for the want of a horseshoe nail.

For a patriotic groom, consciously determined to avoid this unfortunate sequence of events, the status of the activity of “shoeing the horse” as a means or end is relative. Relative to saving the kingdom, shoeing the horse is a means. Relative to finding a nail, however, shoeing the horse can correctly be characterized as an “end” or “purpose” for which the groom acts. Moreover, any activity characterized as a means is likely to be associated with multiple ends: the patriotic groom seeks a nail for the purpose of shoeing the horse, but it is also correct to say that he seeks a nail for the purpose of saving the kingdom.

The many private purposes of participants in a rightful interaction need not be identical in any way. Indeed, they may even conflict: a patriotic groom does no wrong by purchasing a nail from an enemy sympathizer, so long as he tells no lies. Kant explains:

[I]n this reciprocal relation of choice 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; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is

in question is the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*.¹⁵⁰

Returning to the Veronese example, suppose that Juliet's message was timely delivered, and that Romeo accepted her invitation to cuddle. However, he did so with an ulterior motive. While Juliet cuddled Romeo for the private purpose of making him want to marry her, Romeo cuddled Juliet for the private purpose of making Rosaline jealous enough to agree to marry *him*. The cuddling couple's mutually contradictory private purposes make it the case that this version of Romeo is a cad, but he is not a tortfeasor.¹⁵¹ Although it is literally true that the caddish Romeo acts for "a purpose that is his but not [Juliet's],"¹⁵² a correct reading of Ripstein's formulation must specify that private purposes—which determine whether the parties "will gain by the transaction or not"—need not be shared in order for an interaction to be rightful. In Kant's parlance, the parties' personal goals are the "matter" of any interpersonal agreement, while only the terms of the agreement are its objective "form."

So far, we have seen that using another person's means is a material wrong unless a certain kind of mutual intent—authorization—makes the use rightful. Wrongful intentions, on the other hand, are neither necessary nor sufficient to make any action a material wrong. I may act with the intention of wronging you and yet fail to do so. For example, suppose that I decide to prevent you from

¹⁵⁰ *Metaphysics of Morals*, p. 24. (Ak. 6:230)

¹⁵¹ Romeo's behavior indicates a morally objectionable indifference to Juliet's happiness. The happiness of others is an end that we are morally required to have. See *Metaphysics of Morals*, p. 151. (Ak. 6:388)

¹⁵² *Force and Freedom*, p. 47.

interviewing for a job I want by stealing the spark plugs from your car, so that you cannot drive to the interview. Fortunately for you, I misread my license plate in the dark and mistakenly remove the spark plugs from my own car instead. Despite my best efforts, I have not wronged you because I have not interfered with your use of your means, nor have I used your means without your consent.¹⁵³

Conversely, I can wrong you quite by accident if I fail to realize that the means that I am using belong to you. As Ripstein explains, the tort of innocent trespass is an example of a private wrong that no one undertakes to commit.¹⁵⁴ I may intend to build a treehouse on my own property, but because I am misreading my map, it happens that I mistakenly build it on your land instead. By doing so, I have wronged you even though I had no idea that the land on which I built my treehouse was yours. All that I must do in order to wrong you is interfere with your use of your means, or use your means without your consent.

There is one limitation on inadvertent material wrongdoing involving another person's means: in order to wrong you, I must *do* something. In other words, I must take some *action*.¹⁵⁵ Building a treehouse is an action, defined as something that I, considered as an agent, cause. It can therefore be a material wrong even if I am unaware of the facts that make my action wrong. By contrast, if I build my treehouse on my own land, but then a large bear escapes from the local zoo and pushes my treehouse off its perch and onto your property, I have

¹⁵³ Crimes of attempt are not material wrongs, but I will show that they are formal wrongs. See, *infra*, p. 54-6.

¹⁵⁴ See Arthur Ripstein, "As If It Had Never Happened," 48 *William & Mary Law Review* 48 (2007): 1957, p. 1991. (hereafter *As If It Never Happened*)

¹⁵⁵ See *Force and Freedom*, p. 381.

not wronged you, because I have not “used” anything of yours without your permission. Your property right just is the exclusive right to choose whether and how your means are used, and the concept of “use” contains the idea of an agent operating as a cause. Because my agency was not active in the escaped bear case, I did not violate your rights.¹⁵⁶

The Nature of Formal Wrongs

Formal wrongs are not, *per se*, wrongs against other individuals, although many wrong actions are both formally and materially wrong. Rather, formal wrongs violate “the right of human beings as such” to live in a rightful condition. In the state of nature, we commit a formal wrong (which Kant colorfully characterizes as “wrong in the highest degree”) by “willing to be and to remain in a condition that is not rightful.”¹⁵⁷ In a civil condition, formal wrongs are called “public crimes.”¹⁵⁸ A public crime is “a transgression of public law that makes someone who commits it unfit to be a citizen...because they endanger the commonwealth and not just an individual citizen.”¹⁵⁹

Formal wrongs require a type of intentionality that material wrongs do not, which is reflected in the maxim of the action. Kant writes that any “deed contrary to duty is called a *transgression*,” a category that includes both material and formal wrongs, but an “*unintentional* transgression which can still be

¹⁵⁶ In legal terms, this is the difference between “strict liability” and “absolute liability.”

¹⁵⁷ *Metaphysics of Morals*, p. 86. (Ak. 6:307-8)

¹⁵⁸ *Metaphysics of Morals*, p. 105. (Ak. 6:331)

¹⁵⁹ *Metaphysics of Morals*, p. 105. (Ak. 6:331)

imputed to an agent is a mere *fault*.¹⁶⁰ The tort of innocent trespass, which I committed when I mistakenly built my treehouse on your property, is an example of a “mere fault.” Material wrongs “can still be imputed to the agent” in a civil lawsuit if they are innocently committed, but such mistakes are not crimes, because their maxims—for example, “I will build a treehouse on my property in order to provide my children with a place to play and exercise”—are unobjectionable. As Kant writes, a material wrong “does not always presuppose that there is in the subject a principle for such an act.”¹⁶¹

By contrast, “an intentional transgression (i.e., one accompanied by consciousness of its being a transgression) is called a *crime*.”¹⁶² In the state of nature, it is “*willing* to be and to remain in” a non-rightful condition that constitutes a formal wrong.¹⁶³ Remaining in the state of nature because you can’t figure out how to exit it is not wrong, merely unfortunate. In a civil condition, a “guilty mind”—*mens rea*—is analogously a traditional element of any public crime. Kant explains that a common criminal can be distinguished from an anarchist by the different maxims on which they act, but that both commit formal wrongs. On the standard that I have proposed as the correct one, this is the case because the freedom to choose to act on either type of maxim (i.e. the legality of

¹⁶⁰ *Metaphysics of Morals*, p. 16. (Ak. 6:224) (Latin parenthetical omitted)

¹⁶¹ Immanuel Kant, “On a Supposed Right to Lie Because of Philanthropic Concerns,” in James W. Ellington, ed., *Grounding for the Metaphysics of Morals with On a Supposed Right to Lie Because of Philanthropic Concerns*, 3rd Edition (Indianapolis: Hackett Publishing Co., 1993), p. 67. (hereafter *Supposed Right to Lie*) (Ak. 429)

¹⁶² *Metaphysics of Morals*, p. 16. (Ak. 6:224) (Latin parenthetical omitted)

¹⁶³ *Metaphysics of Morals*, p. 86. (Ak. 6:307-8) (emphasis added)

an action on the maxim) would be incompatible with everyone's freedom in accordance with a universal law (i.e. the concept of a rightful condition). Kant writes:

The transgressor can commit his misdeed either according to a maxim of a presumed objective rule (as universally valid), or as an exception to the rule (as giving oneself dispensation from the rule on occasion). In the latter case he only deviates from the law (although intentionally). He can also detest his transgression and, without formally renouncing his obedience of the law, only wish to circumvent it. In the former case, by contrast, he rejects the authority of the law itself, the validity of which he cannot, however, reasonably deny, and he makes it into a rule that he act against it. His maxim is thus opposed to the law not merely as lacking (negatively), but rather as contrary to it or, as one says, diametrically opposed to it, as a contradiction (hostile to it, as it were). As far as we understand, the commission of such a transgression of a formal (completely fruitless) malice is impossible for human beings and yet not to be ignored in a system of morality (even though as the mere idea of the most extreme evil).¹⁶⁴

A common criminal merely “deviates from the law (although intentionally)” by making herself an exception to it. She might act on the maxim: “I will steal from others in order to increase my wealth.” Such a criminal does not wish to live in a lawless condition. Indeed, her purpose of increasing her own wealth presupposes the security of her own rights even as she violates the rights of others. When she acts on her criminal maxim, she commits a formal wrong because the concept of legal theft contradicts the concept of everyone's freedom in accordance with a universal law. This is the case because coercive enforcement

¹⁶⁴ *Metaphysics of Morals*, p. 97. (Ak. 6:320) (footnote)

is a constitutive element of any property right, and the concept of property rights is contained in the concept of a rightful condition.¹⁶⁵

The anarchist, by contrast, “rejects the authority of the law itself” because he does not count on the continued obedience of others in order to remain secure his own rights. He might act on the maxim, “I will use deadly force in order to defend myself from police officers who try to arrest me,” fully acknowledging that others may do the same, and perhaps hoping that they will.¹⁶⁶ When the anarchist acts on his maxim, he commits a formal wrong nonetheless, because the concept of legal resistance to executive branch officials contradicts the concept of a rightful condition.¹⁶⁷ Recall Kant’s *a priori* derivation of the state’s necessary powers: “the executive power of the *supreme ruler* is *irresistible*.”¹⁶⁸ Ripstein correctly treats this as a conceptual rather than empirical claim—it may be physically possible to resist executive branch officials, but it is not *legally* possible to do so in a rightful condition.¹⁶⁹ The concept of legal coercion of executive branch officials contradicts the concept of a rightful condition, because

¹⁶⁵ See, *supra*, pp. 16-8.

¹⁶⁶ At the level of personal morality, the anarchist’s maxim is immoral, not because it is internally contradictory, but because it creates a “contradiction in the will”: it is inconsistent with another purpose—external freedom—that the anarchist is rationally required to have, even if he doesn’t actually have it.

¹⁶⁷ The state’s executive authority supplies the element of “assurance” contained in the concept of an acquired right. See, *supra*, p. 26-7. I will argue later that Kant’s passionate condemnations of any “resistance” to the state should be read as condemnations of this type of formal wrong rather than as arguments in favor of a moral obligation to obey unjust statutes.

¹⁶⁸ *Metaphysics of Morals*, p. 93. (Ak. 6:316)

¹⁶⁹ *Force and Freedom*, p. 314.

the latter concept contains the irresistible coercive power of the executive. It is therefore a public crime to resist arrest.

The above examples focus on formally wrong actions that also violate the rights of individuals to property or physical safety, and therefore happen to be material wrongs as well. Not all formal wrongs are also material wrongs, however. Kant acknowledges this fact in his essay, “On a Supposed Right to Lie Because of Philanthropic Concerns” (hereafter *Supposed Right to Lie*), when he writes that an action “which avoids [civil liability] only by accident can also be condemned as wrong even by external [criminal] laws.”¹⁷⁰ In passing, Ripstein correctly indicates that crimes of attempt—such as attempted murder or attempted theft—may be crimes even when they do not succeed in violating anyone’s individual rights.¹⁷¹

I believe that such attempts are formal wrongs, because the concept of a legal action on the maxim of an attempted crime contradicts the concept of a rightful condition. For example, suppose that the above-described anarchist is nearsighted. When the police arrive, the anarchist mistakenly picks up his child’s bubble gun rather than his own firearm, points it at the police, and pulls the trigger. Only bubbles emerge from the gun, and even the bubbles don’t hit the arresting officers. Assuming that the officers either do not see the gun or immediately recognize it as a toy (otherwise gun wielding may be a tortious threat), the anarchist’s action is not a material wrong. Nonetheless, his

¹⁷⁰ *Supposed Right to Lie*, p. 65. (Ak. 426-7)

¹⁷¹ Ripstein writes, “If I attempt to wrong you but fail, I may commit a crime, but (unless your apprehension of a battery makes my act an assault) I do not commit a private wrong against you.” *Force and Freedom*, p. 374. (footnote)

attempted homicide is what Kant calls a “public crime”—a formal wrong—because his maxim is identical to what it would have been if he had actually shot the officers.

My failed attempt to prevent you from interviewing for a job I want by stealing your spark plugs is likewise a formal wrong.¹⁷² I accidentally removed the spark plugs from my own car instead, so I did not succeed in wronging *you*. I nonetheless committed the crime of attempted theft because, in Kant’s words, I failed to wrong you “only by accident.”¹⁷³ The maxim on which I acted was the same as it would have been had I succeeded: “I will steal my neighbor’s spark plugs in order to prevent her from interviewing for the job I want.” My action was wrong because the concept of legal spark plug theft from job market competitors logically contradicts the concept of a rightful condition.

Significantly, under the standard that I have articulated for a formal wrongs based on the language of the Universal Principle of Right, the legality of some act need result in a return to the state of nature in order for a criminal sanction to be justified. For example, a statute that specifically legalized the theft of spark plugs from job market competitors would not bring down the government. It would, however, be inconsistent with the concept of a rightful condition, of which the enforceability of property rights is a constitutive element. This feature of my interpretation reflects Kant’s commitment to the unconditionality of rights, regardless of empirical circumstances.

¹⁷² See, *supra*, pp. 50-1.

¹⁷³ *Supposed Right to Lie*, p. 65. (Ak. 426-7)

In this way, my formulation of Kant's standard for formal wrongs usefully differs from Jacob Weinrib's formulation, proffered in his essay, "The Juridical Significance of Kant's 'Supposed Right to Lie.'" Weinrib states that a formal wrong in a civil condition "consists of bringing about the dissolution of the rightful condition into the violence of the state of nature."¹⁷⁴ Dissolving the rightful condition, Weinrib points out, would eliminate the "totality" of the people as a whole, united under laws.¹⁷⁵ Weinrib's formulation is similar to some of Kant's own language. Most notably, Kant characterizes public crimes as those which "endanger the commonwealth." This could be taken to mean that formal wrongs are just those acts that threaten the ongoing existence of the government. Weinrib offers his formulation of Kant's standard for formal wrongs for the purpose of explaining Kant's notorious conclusion, in *Supposed Right to Lie*, that it is wrong to lie to a murderer in order to save the life of an innocent friend.

I agree with Weinrib that Kant's essay should be understood as an argument for the proposition that lying is a formal wrong. However, I believe that Weinrib's formulation of Kant's standard for formal wrongs imperfectly grounds his essentially correct thesis. Weinrib's version of this standard is nominally met just in case there is a causal relationship between a particular action and the ultimate dissolution of the state. One problem with this approach is that no one lie is remotely likely to actually trigger a descent into anarchy. Weinrib's standard can therefore be nominally met only by interpreting Kant's

¹⁷⁴ Jacob Weinrib, "The Juridical Significance of Kant's 'Supposed Right to Lie,'" *Kantian Review* 13 (2008):141-169, p. 150. (hereafter *Juridical Significance*)

¹⁷⁵ *Juridical Significance*, p. 148.

cryptic remarks as a series of conjectures about the possible cumulative effects of many lies: a fatally dysfunctional political process, or a collapse of confidence in legal contracts. Weinrib's imperfect formulation thus threatens to saddle him with, as Ripstein wrote in a different context, "the need to concoct remote harms to explain ordinary wrongs."¹⁷⁶

I do not believe that Weinrib intends to make a causal argument, but because his formulation of Kant's standard for formal wrongs evaluates actions themselves rather than the legality of actions on particular maxims, and because his formulation uses causal language, I am not sure what kind of contradiction, if not a practical contradiction, Weinrib means to identify. Fortunately, my proposed alternative formulation of Kant's standard for formal wrongs can adequately show how Kant reaches his implausible conclusion in *Supposed Right to Lie* that a lie is always a formal wrong. On my account, Kant can reach his result if he concludes that the concept of a legal action on the maxim "I will lie to a murderer in order to save my friend's life" logically contradicts the concept of a rightful condition. The best argument for this conclusion has several stages.

First, Kant argues that the law must impose civil liability on those who lie for any harm that results from their lies. Kant must therefore believe that a failure to impose civil liability in such cases would inadequately secure our private rights. Recall that freedom is "independence from being constrained by another's choice."¹⁷⁷ To preserve my independence, the question of what means I

¹⁷⁶ Arthur Ripstein, "In Extremis," *Ohio State Journal of Criminal Law* 2 (2005): 415-434, p. 417. (footnote) (hereafter *In Extremis*)

¹⁷⁷ *Metaphysics of Morals*, p. 30. (Ak. 6:237)

have available to me must be settled before I choose to act, since the amount and type of means that I have determine which choices I can rightfully make. This is why it is essential to my freedom that I have legal “assurance” that my private rights are secure. Both negligence and reckless endangerment are sometimes material wrongs, because both kinds of acts sometimes deprive others of their means. However, the circumstances under which these two kinds of acts—negligence and reckless endangerment—are material wrongs differ. Relatedly, reckless endangerment is also a formal wrong, while mere negligence is not. Explaining these differences will illuminate the analogy that I will subsequently draw between lies and acts of reckless endangerment in what I regard as the most plausible reconstruction of Kant’s argument in *Supposed Right to Lie*.

Mere negligence is not a formal wrong, because a negligent actor may act on an unobjectionable maxim. For example, a philosopher may act on the maxim: “I will drive to the store to get some milk.” On the way, she may become so distracted by thoughts about Kantian political philosophy that she fails to notice a red light and hits another vehicle. The distracted philosopher has not committed a formal wrong, because the concept of a legal action in accordance with her maxim does not logically contradict the concept of a rightful condition.

Nonetheless, the distracted philosopher is civilly liable for the accident, because the law must secure our access to our means by legally enforcing an affirmative standard of reasonable care in situations in which we causally interact with each other. To accomplish this, the civil law traditionally holds negligent

actors responsible only for the foreseeable results of their negligence.¹⁷⁸ This limitation reflects the fact that wrongdoers such as the philosopher are liable only in virtue of what they failed to do: pay adequate attention. Because an “unforeseeable” harm just is a harm that no one can undertake to avoid, unforeseeable harms caused by negligent actions are harms, but not wrongs. Imposing civil liability on merely negligent individuals for unforeseeable harms would burden our freedom to go about the ordinary activities of life.

By contrast, an act of reckless endangerment is a formal wrong, because the danger that these acts create is intentional, and is therefore included in the content of their maxims.¹⁷⁹ For example, I might act on the maxim, “I will drive through town blindfolded in order to gain admission to a fraternity.” Endangering pedestrians is not a *purpose* for which I am acting, but I know perfectly well that danger to pedestrians is an intrinsic feature of my chosen action. For this reason, the concept of a legal action in accordance with my maxim logically contradicts the concept of a rightful condition, because security in our private rights is constitutive of our freedom. It is because acts of reckless endangerment are formally wrong that they traditionally entail civil liability for *all* resulting losses, not merely the foreseeable ones.¹⁸⁰ Imposing civil liability for the unforeseeable losses that result from a criminal act does not burden freedom, because a criminal act is not something that anyone has a preexisting right to do.

¹⁷⁸ See for example Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 344 (N.Y. 1928) (“The risk reasonably to be perceived defines the duty to be obeyed.”)

¹⁷⁹ Indeed, reckless endangerment is a crime in many jurisdictions. See Model Penal Code § 211.2 (1985).

¹⁸⁰ Restatement (Second) of Torts § 501 (1965).

In light of the foregoing, while I am not convinced that Kant makes his case, I believe that the best reconstruction of his argument in *Supposed Right to Lie* is this: lies are a kind of reckless endangerment. Lies are unlike mere negligence, because the wrong-making property of a lie is in the maxim of the liar's action: he intentionally redirects the actions of another person, knowing that he will be unable to control the nature or results of those redirected actions.¹⁸¹ The success of Kant's argument, on my reading, depends on the inference that this redirection amounts to a reckless usurpation of another person's agency, a bit like forcing someone to relinquish the driver's seat in his own car so that you can drive it blindfolded instead. It is for this reason, I believe, that Kant could have concluded that lies were formal wrongs. If one accepts the characterization of lying as a form of reckless endangerment, then the concept of a legal right to lie logically contradicts the concept of everyone's freedom in accordance with a universal law, because reckless actions intentionally undermine our security in our private rights, which is a constitutive element of a rightful condition.

Remedies and Punishments

I have shown that material and formal wrongs have different natures. The wrong-making property of a material wrong is a property of the wrongdoer's

¹⁸¹ Because a lie is an intentional wrong, Kant writes that a liar is liable for all of the harmful consequences of his act, no matter how unforeseeable they are: "whoever tells a lie, regardless of how good his intentions may be, must answer for the consequences resulting therefrom even before a civil tribunal and must pay the penalty for them, *regardless of how unforeseen those consequences might be.*" *Supposed Right to Lie*, p. 65. (Ak. 427) (emphasis added) This is the

action: her unauthorized use of (or interference with) someone else's means. The wrong-making property of a formal wrong is a property of the maxim on which the wrongdoer acts: a logical contradiction between the concept of a legal action in accordance with that maxim and the concept of a rightful condition. The state must therefore respond to these two different types of wrongs in different ways. Material wrongs are corrected in civil court by means of remedies, while formal wrongs are corrected in criminal court by means of punishments.¹⁸²

I believe that the way in which remedies and punishments are analogous but distinct can be understood with the help of Kant's analysis of the concept of opposition in the *Critique of Pure Reason*.¹⁸³ Kant distinguishes between two kinds of opposition: logical opposition, which is a relation between concepts, and "real" (i.e. "phenomenal") opposition, which is an analogous relation between (among other things) the physical forces that operate on objects. Because material wrongs are physical in nature, they can be corrected only by real opposition. Because formal wrongs are conceptual in nature, they can be

same civil damages rule that traditionally applies to acts of reckless endangerment. Restatement (Second) of Torts § 501 (1965).

¹⁸² Kant writes, "A transgression of public law that makes someone who commits it unfit to be a citizen is called a *crime (crimen)* simply but is also called a public crime (*crimen publicum*); so the first (private crime) is brought before a civil court, the latter before a criminal court." *Metaphysics of Morals*, p. 105. (Ak. 6:331)

¹⁸³ *Critique of Pure Reason*, p. 369. (A265/B321) Ripstein refers to this analysis to make a different claim about the difference between external freedom and morality. *Force and Freedom*, p. 376. In the course of this discussion, Ripstein appears to me to assume that all wrongs, both formal and material, are corrected by means of real opposition—a supposition at odds with my claim here that formal wrongs can only be corrected by means of logical opposition.

corrected only by a punishment that is determined by a maxim that logically contradicts (and therefore negates) the wrongdoer's maxim.

Civil remedies, at least ideally, stand in a relation of real opposition to material wrongs. Kant describes real opposition as the relation between two opposing forces which, acting on the same object, "partly or wholly destroy the consequence of the other, like two moving forces in the same straight line that either push or pull a point in opposed directions."¹⁸⁴ In a game of tug-of-war, for example, if I pull the rope East with the same force that you pull it West, no net physical movement will result, but our activity of pulling continues to exist (which will be clear to us as it tires us out). This is the way in which civil remedies oppose material wrongs: they restore to a victim the means to which she has a right, effectively imposing an equal and opposite force.

In an essay titled, "As If It Never Happened," Ripstein offers a detailed Kantian analysis of civil damages rules, which is consistent with their status as a kind of "real opposition."¹⁸⁵ The traditional principles governing civil damages, he argues, are best understood as applications of the Kantian concept of private right, according to which we each have a right to exclusively determine how our means will be used. The simplest kind of remedy for a material wrong is a court order that physically restores a person's external means to them. For example, a civil court may require a squatter to leave my property or a thief to return something that she has stolen.

¹⁸⁴ *Critique of Pure Reason*, p. 369. (A265/B321)

¹⁸⁵ See generally *As If It Never Happened*.

Even when these remedies are possible, they are not necessarily sufficient, because the wronged party was still deprived of her means for a period of time during which she might have used them to generate additional means. For example, if a thief steals my car, I may be unable to get to work as a result. In such cases, the court can only fully restore to me the means to which I am entitled by ordering the thief to replace the additional means that she indirectly deprived me of: my lost wages.¹⁸⁶ Under common law, those lost wages are considered consequential damages, and I am entitled to recover them.¹⁸⁷

Often, it is impossible for a wrongdoer to physically return the means that he has taken from another person. For example, a thief who stole your car might destroy it, abandon it, or sell it before he is caught. In cases in which the physical restoration of your means is impossible, the court calculates the value, to you, of those means, *considered as means*.¹⁸⁸ In most cases, this value will be the same as the market value of the thing you were deprived of, for example, the market price of a car of the same make, model, and condition as the one that was

¹⁸⁶ See *As If It Never Happened*, p. 1967.

¹⁸⁷ See Restatement (Second) of Torts § 906 (1965).

¹⁸⁸ A civil court does not consider factors like sentimental attachment when valuing property for the purpose of civil damages. Ripstein offers a very Kantian explanation for this: “Compensatory damages give you back the means you had. Your happiness, considered as such, is not among the means you use to set and pursue your purposes, even if, for example, your mental health could be described as something you use in that way. That is why someone who makes you unhappy without injuring your person or property is not liable, even if you are more successful at whatever you do when you are happy.” *As If It Never Happened*, p. 1984.

taken.¹⁸⁹ The idea is that you can use the money to replace the car, or you can use it for something else, as you would have if you had chosen to sell the car.

In unusual cases, the value of your means, as means, to you—that is, in terms of your ability to use them to acquire additional means—may be much higher than the market value of those means. For example, a jockey may own a horse with whom she wins lucrative races because of their close personal relationship. The market value of her horse may be much lower than its earning potential for her. If an envious competitor poisons her horse, the jockey will be entitled to damages equal to the amount of her lost earning potential, because the underlying principle of the civil law is to restore to the plaintiff all the means to which she would be entitled if the wrong action had never happened. This is why Kant’s “real opposition” model is an apt analogy: a remedy for a material wrong restores the victim’s means, considered as means, to her control.

Criminal punishments, by contrast, do not eliminate the effects of bad acts on the means of victims. Instead, they re-assert the authority of the state, which is why criminal prosecutors represent the state rather than any private party. Recall that a formal wrong is conceptual in nature: its wrong-making property is a feature of the maxim of a criminal action rather than a feature of the action’s physical “outer form.” This is why crimes of attempt are formal wrongs even when they are not material wrongs. Concepts can’t move in a direction in space, as physical objects can, so they cannot be opposed with an equal and opposite

¹⁸⁹ See *As If It Never Happened*, p. 1971.

force. Instead, they are opposed by negation.¹⁹⁰ For example, the logical opposite of the concept “West” is not “East.” Rather, it is simply “not West.”¹⁹¹

I have claimed that an action is a formal wrong just in case the concept of a legal action on its maxim logically contradicts the concept of a rightful condition. The fact that Kantian punishments invert criminal maxims to generate their logical opposites supports this claim. A criminal wills a maxim according to which she is free and others are not free. Her punishment negates both aspects of her compound proposition by making it the case that she is not free and others are free. The most fitting punishment for any crime deprives a criminal of freedom in a similar way, and to a similar extent, as her crime deprived others of freedom. Kant writes:

[W]hatever undeserved evil you inflict upon another within the people, you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.¹⁹²

This retributive standard must be applied by a court, which cannot rightfully “inflict *whatever* punishments [it] *chooses*” for crimes, because such discretion “would be literally contrary to the concept of *punitive justice*.”¹⁹³ Nor

¹⁹⁰ Two propositions are logically opposed “insofar as the sphere of one judgment excludes that of the other, yet [they have] at the same time the relation of community, insofar as the judgments together exhaust the sphere of cognition proper.” *Critique of Pure Reason*, p. 208. (A73/B99)

¹⁹¹ Kant offers as an example the proposition, “the soul is not mortal,” which simply means that the soul is undying, and therefore “immortal.” *Critique of Pure Reason*, p. 207. (A72/B97)

¹⁹² *Metaphysics of Morals*, p. 105. (Ak. 6:332)

¹⁹³ *Metaphysics of Morals*, p. 130. (Ak. 6:363)

can the court select punishments on the basis of their likely deterrent or rehabilitative effects, for such a utilitarian approach would treat the criminal “as a means to promote some other good for the criminal or for civil society.”¹⁹⁴

Kant’s colorful rhetoric on this subject is not effortlessly reconciled with the actual practices of modern Western legal systems, which use incarceration to punish almost everything, and a thorough analysis of the manner in which this can be best accomplished is beyond the scope of this project.¹⁹⁵ Briefly, however, one retributive justification for prison is that it deprives a prisoner of the full enjoyment of nearly all of his freedoms for a period of time, thereby broadly meeting Kant’s standard. For example, Kant writes, “whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property.”¹⁹⁶ As Arthur Ripstein observes, a prisoner lacks access to all real property and most personal property during her period of confinement, and any personal belongings that she is permitted to use in prison are not enjoyed *as property*—that is, not rightfully, but only at the discretion of the prison warden.¹⁹⁷

Even Kant concedes that literal retribution is beyond the rightful power of the state if the violent or degrading nature of a crime would render its visitation

¹⁹⁴ *Metaphysics of Morals*, p. 105. (Ak. 6:331)

¹⁹⁵ For a helpful analysis of three different ways in which Kant’s proportionality principle can be interpreted, see Jeffrie G Murphy, “Does Kant Have a Theory of Punishment?” *Columbia Law Review* 87 (1987): 509-32, 530-2.

¹⁹⁶ *Metaphysics of Morals*, p. 106. (Ak. 6:333)

¹⁹⁷ See Arthur Ripstein, “Hindering a Hindrance to Freedom,” *Jahrbuch für Recht und Ethic* 16 (2008): 227-250, 246.

back on the perpetrator “a punishable crime against *humanity* as such.”¹⁹⁸ In such cases, a punishment should fit the crime “if not in terms of its letter at least in terms of its spirit.”¹⁹⁹

Kant’s Typo

In this chapter, I have analyzed Kant’s language in the Universal Principle of Right, and I have argued that it articulates two separate standards for the rightness of actions. I have then shown that these two standards, as I understand them, effectively track the two types of wrongdoing—material and formal—that Kant identifies in his political writings. I have shown that not all material wrongs are formal wrongs, and that not all formal wrongs are material wrongs. I have also shown that the wrong-making property of a materially wrong action is a property of its “outer form”—the physical act. By contrast, the wrong-making property of a formal wrong is a property of its “principle of inner determination”—its maxim. Specifically an action is a formal wrong just in case the concept of a legal action on its maxim logically contradicts the concept of everyone’s freedom in accordance with a universal law (i.e. a rightful condition).

If my account of the differences between material and formal wrongdoing is correct, I believe that it is highly unlikely that Kant intended to articulate a single standard for the rightness of actions in the Universal Principle of Right. What single standard could identify both physical and conceptual

¹⁹⁸ *Metaphysics of Morals*, p. 130. (Ak. 6:363) Most contemporary readers would interpret this standard more stringently than Kant did. Kant argued that raping a rapist would violate this standard, but that castration would be an appropriate punishment. Ibid.

¹⁹⁹ Ibid.

incompatibilities, or could otherwise correctly determine the contents to two only partially overlapping sets of wrong actions? If Ripstein's unitary interpretation appears to accomplish either goal, it does so only by using ambiguous language that must be interpreted in two different ways in order to plausibly identify these different types of wrongs. Ripstein's formulation is as follows:

The universal principle of right demands that each person exercise his or her choice in ways that are consistent with the freedom of all others to exercise their choice.²⁰⁰

In the context of material wrongs, Ripstein's formulation can be interpreted in a way that makes sense: I can't "choose" to use my body or property in "ways" that are physically inconsistent with everyone else's freedom to choose what they will do with theirs. Physical coercion, trespass, theft, and property destruction are all ways of using my body that would be wrong under this test. By specifying that the consistency in question is physical, this reading of Ripstein's test takes the word "ways" to refer to my physical manner of engaging with my means, which may in turn interfere with your means. This interpretation is plausible in part because it correctly establishes the wrongful nature of torts such as innocent trespass, which are committed mistakenly on the basis of an unobjectionable maxim. The sense in which I "choose" to use my means in these wrongful "ways" is that I choose to engage in the physical action that constitutes the material wrong. The word "choose" does not reflect any knowledge that my act constitutes a transgression. My wrong action is, as

²⁰⁰ *Force and Freedom*, p. 35-6.

Ripstein points out, individuated by my maxim, but my maxim is otherwise irrelevant.

So understood, however, Ripstein's interpretation of the Universal Principle of Right cannot correctly classify attempted crimes as formal wrongs. Recall my attempted theft of your spark plugs: I undertake to steal the spark plugs from your car in order to prevent you from interviewing for a job I want. However, I misread my license plate in the dark and remove the spark plugs from my own car instead. If the "way" in which I use my means is understood to be my physical engagement with my own spark plugs, it is difficult to see how that physical engagement itself could be wrong. Suppose I removed my own spark plugs because I am prone to sleepwalking, and I wanted to guard against the possibility of a dangerous, involuntary midnight drive. Although my physical engagement with my means would be identical, my action would not be wrong.

But the wrongful nature of my attempted crime can't be located in the referent of the word "choose" either, because we have already determined that this test as applied to material wrongs only interprets the word "choose" to require that a particular activity was an action at all. The requirement that I "choose" to use my means in a particular way is satisfied in the case of innocent trespass just so long as, for example, my physical activity of building a treehouse qualifies as an action. "Choose" can't denote knowledge of the wrong-making property of my action when the test applies to formal wrongs while denoting no such thing when the same test applies to material wrongs. Not if this test is truly a single standard.

Some scholars who believe that the Universal Principle of Right articulates a single standard may be misled by a fragment of text that Kant refers to as the “universal law of right” three paragraphs later. It is tempting to try to read this “universal law of right” as a restatement of the Universal Principle of Right. Kant states:

Thus the universal law of right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law that lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; instead, reason says only that freedom is limited to those conditions in conformity with the idea of it and that it may also be actively limited by others.²⁰¹

However, as Mulholland observes, the grammatical form of the Universal Principle of Right is descriptive; it simply identifies the conditions under which an action is right.²⁰² By contrast, the “universal law of right” has an imperative form: “so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law.”²⁰³ This grammatical difference is reinforced by the fact that the German words *Prinzip* (translated as “principle” in the Universal Principle of Right) and *Rechtsgesetz* (translated to “law” in the “universal law of right”) do not have identical meanings. A

²⁰¹ *Metaphysics of Morals*, p. 24-5. (Ak. 6:231)

²⁰² *Kant's System of Rights*, p. 168-9. Accord Allen W. Wood, *Kant* (Malden, MA: Blackwell, 2005), p. 144.

²⁰³ *Metaphysics of Morals*, p. 24-5. (Ak. 6:231) As Kant writes, “The representation of an objective principle, insofar as it is necessitating for the will, is called a command (of reason), and the formula of the command is called an **imperative**.” *Groundwork*, p. 24. (Ak. 4:413)

“principle,” for Kant, need not be a practical (i.e. prescriptive) principle. Kant’s “principles of pure understanding” in *Critique of Pure Reason*, for example, are rules for cognition, not rules for action.²⁰⁴ By contrast, the word *Rechtsgesetz* combines the German word for “law” (*Gesetz*) with the German word for “right” (*Recht*). I believe that it is consistent with the imperative form of the “universal law of right” to conclude that Kant is using this word specifically to denote a practical law—a law of action.²⁰⁵

This distinction matters, because while a juridical law can’t require us to adopt any particular maxim, the only way in which it can prospectively constrain our actions is by constraining the set of maxims on which we may act. Mary Gregor explains:

Since juridical laws require that certain actions take place, they must require that we have certain maxims, because human action is action on a maxim. They do not require that we adopt the formal maxim of lawfulness but only that the material maxims which we have be such that we can act upon them without violating the freedom of others.²⁰⁶

A practical law of right must therefore command us not to act on criminal maxims (i.e. it must command us not to commit formal wrongs). With this in

²⁰⁴ *Critique of Pure Reason*, p. 388. (A301/B357)

²⁰⁵ Kant considers practical laws to be a subset of principles: “A principle that makes certain actions duties is a practical law.” *Metaphysics of Morals*, p. 17. (Ak. 6:225)

²⁰⁶ Mary J. Gregor, *The Laws of Freedom: A Study of Kant’s Method of Applying the Categorical Imperative*, (Oxford: Basil Blackwell, 1963), p. 41. (footnote) (hereafter *Laws of Freedom*) I believe that Gregor’s meaning would have been clearer if she had put the word “only” in between “have” and “certain” in the first sentence. Her subsequent sentence makes it clear that she means that the set of possible lawful maxims is restricted by the juridical law, and not that the juridical law can require us to adopt a specific maxim.

mind, I understand Kant's "universal law of right"—"so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law"—to command us to adopt only maxims of action (i.e. principles of choice) that can be freely chosen consistently with everyone's freedom in accordance with a universal law.²⁰⁷ The rest of the sentence explains that the juridical law enforces this command externally.

The "universal law of right" is unitary because it cannot and does not address itself to unintentional material wrongs. To command a person not to do something is just to command her not to act on certain maxims, and unintentional wrongs have irreproachable maxims. The Universal Principle of Right, by contrast, articulates two standards because actions can be wrong in two ways, one of which does not depend on whether an agent undertakes to do wrong.

If I am right about the foregoing, then Kant restates only the second prong of the Universal Principle of Right (A) in imperative form as the "universal law of right" (B). I believe that a side-by-side textual comparison supports my philosophical argument:

- A) Any action is right...if under its maxim the freedom of choice of each can coexist with the freedom of all in accordance with a universal law.
- B) [S]o act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law

²⁰⁷ For an alternative account of the distinction between the Universal Principle of Right and the "universal law of right," see Katrin Flickschuh, "Reason, Right, and Revolution: Kant and Locke," *Philosophy & Public Affairs* 36 (2008): 375-404, p. 390. (hereafter *Reason, Right, and Revolution*)

Each of the above clauses refers to the “freedom of choice” or the “free use of your choice” rather than to a choice or action, *simpliciter*. I believe that Kant chose these words because, as I have argued, the test for formal wrongs focuses on whether the *legality* of a contemplated action—the freedom to choose to act in its maxim—would be consistent with everyone’s freedom in accordance with a universal law.

One serious textual objection to my two-standard interpretation of the Universal Principle of Right remains: the principle as written appears to establish a disjunctive standard for the rightness of actions, when a conjunctive standard is required. Gregor correctly converts the German *oder* into “or” in her popular translation:

Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, **or** if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.²⁰⁸

Given how I have interpreted its component parts, this principle appears to state that any action is right 1) if it is not a material wrong, “or” 2) if it is not a formal wrong. This cannot be Kant’s literal meaning, because no action can be both wrong and right. A right action must meet *both* standards.

Logicians have identified two distinct meanings of “or,” known as the “inclusive or” and the “exclusive or,” but neither one can rescue this sentence as a standard for the rightness of actions. If this sentence employs the “inclusive or,”

²⁰⁸ *Metaphysics of Morals*, p. 24. (Ak. 6:230) (emphasis added)

it states that any action is right if it meets either one of the two standards.²⁰⁹ A “right action,” on this interpretation, also may—but does not need to—meet both standards. The “exclusive or” interpretation also fails to yield the required meaning. Indeed, it is a less plausible choice than the “inclusive or,” because the “exclusive or” presupposes that any action which meets one of the two disjunctive standards must fail the other.²¹⁰ In other words, on the “exclusive or” interpretation, the principle wrongly assumes that any action which is not a material wrong must be a formal wrong and vice-versa, and states that any action which is wrong in only one way is right—a pair of claims that incoherently imply that *all* actions are both wrong and right.

One of two things must, therefore, be true: either my central claim about the meaning of the Universal Principle of Right—that it articulates two distinct standards for the rightness of actions, corresponding to the two different ways, formal and material, in which actions can be wrong—is incorrect, or the German word *oder* in this sentence is a typo. This chapter’s philosophical argument in favor of a two-standard reading weighs in favor of the latter possibility. The original edition of the *Doctrine of Right*, in which the Universal Principle of Right appears, was not carefully vetted for errors. Indeed, many scholars believe that it presents several of Kant’s arguments in the wrong order.²¹¹ Moreover, Kant reportedly refused to help publishers who edited this work for a subsequent

²⁰⁹ See Alan Hausman, et al., *Logic and Philosophy: A Modern Introduction*, 12th Edition (Wadsworth: Boston, 2013), pp. 30-2.

²¹⁰ Ibid.

²¹¹ See *Metaphysics of Morals*, pp. xxxii-iv. (translator’s note on the text)

edition because he was too consumed by other projects.²¹² The typo that I claim to have identified is certainly not obvious, given the opacity of the Universal Principle of Right and the controversy surrounding its meaning. It could easily have escaped notice. But if I am right, then its correction—from *oder* to *und*—is very illuminating.

²¹² Ibid.

Chapter 3: The Limits of the Law

In *The Metaphysics of Morals*, Kant writes that the legislative authority “cannot do anyone wrong by its law.”²¹³ Some theorists overlook this ambiguous passage in favor of a Kantian theory that accommodates the existence of “unjust laws”—enactments that wrong the people but obligate them to obey nonetheless. In this chapter, I will argue for an alternative view. I believe Kant meant to say, in the passage quoted above, that any statute that logically contradicts the concept of a rightful condition—and therefore wrongs the people—is no law at all. If my interpretation of Kant’s argument in this passage is correct, it has a surprising implication: an action can only be criminalized if it is independently formally wrong.

Advocates for a positivist interpretation of Kant’s legal philosophy cite his passionate injunctions against resistance, insurrection, and revolution as proof that Kant cannot have been a natural law theorist. However, such objections fail to distinguish between a negative duty to refrain from resisting the state’s executive authority and an affirmative duty to obey the nominal commands of unjust enactments. Moreover, I will show that Kant’s unconditional commitment to every rational being’s duty of logical consistency precludes a positivist theory of law.

²¹³ *Metaphysics of Morals*, p. 91. (Ak. 6:313)

Possible Lawgiving

Kant maintained that all juridical law is a product of the omnilateral will, and therefore cannot be unjust.²¹⁴ He writes:

The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it cannot do anyone wrong by its law.²¹⁵

At least two very different interpretations of this passage are textually plausible. On what I will call the “procedural interpretation,” Kant would be claiming that all laws are just (i.e. in accordance with principles of right) if they are enacted in a procedurally adequate way by the sovereign (i.e. the legislative body). The procedural interpretation takes the words “legislative authority” to refer concretely to the sovereign of an existing government, and the word “law” to refer to any of the sovereign’s procedurally adequate enactments. On this reading, all properly enacted statutes are laws, and they are also just, because the sovereign is empowered to make laws on behalf of the people, who cannot wrong themselves.

The procedural interpretation must be wrong, because Kant’s conception of “right” is not merely procedural. At the very beginning of the *Doctrine of Right*, Kant states, “The sum of those laws for which an external lawgiving is possible is called the *doctrine of right*.”²¹⁶ Therefore, not every conceivable statute is a possible law. Shortly thereafter, he describes the doctrine of right in terms of three ways in which it limits the subject matter of the law:

²¹⁴ When I use the word “unjust” in reference to a legislative enactment or other state action herein, I intend it to have the same meaning as the words “wrong” or “non-rightful.”

²¹⁵ *Metaphysics of Morals*, p. 91. (Ak. 6:313)

The concept of right, insofar as it is related to a moral obligation corresponding to it (i.e., the moral concept of right), has to do, *first*, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But, *second*, it does not signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other's *choice*. *Third*, in this reciprocal relation of choice 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; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*, and whether the action of one can be united with the freedom of the other in accordance with a universal law.²¹⁷

At least some conceivable statutes—such as those prohibiting purely personal beliefs and activities or consensual relationships—would appear to fall outside of this purview.

I believe, therefore, that Kant's claim that the legislative authority "cannot do anyone wrong by its law" requires a different interpretation if it is not to be discarded as meaningless. On my alternative reading, the words "legislative authority" in Kant's statement refer to the sovereign's lawmaking authority rather than to the sovereign itself. So understood, Kant's claim is that all laws must be rightful because they are the product of that authority—a claim that implies that statutes only have the status of laws insofar as they are rightful. For example,

²¹⁶ *Metaphysics of Morals*, p. 23. (Ak. 6:229)

²¹⁷ *Metaphysics of Morals*, pp. 23-4. (Ak. 6:230-1)

Kant argued that a sovereign lacks the ability to delegate his legislative authority to another body:

Whoever has [the legislative authority] can control the people only through the collective will of the people; he cannot control the collective will itself, which is the ultimate basis of any public contract.²¹⁸

I believe that Kant's point in the above sentence can be generalized in this way: all laws are rightful because the subject-matter limitation that right imposes on lawmakers functions as a legal disability. When lawmakers enact unjust statutes, they simply fail to exercise their authority.

This legislative disability is analogous to our duty of "rightful honor" on an individual level.²¹⁹ Recall that private contracts to sell our selves into slavery or indentured servitude have no legal effect because they contain terms to which no free agent could rationally consent, thus violating our duty of rightful honor.²²⁰ I can try to make such a contract—I can utter the words or sign the document that expresses my intention—but the result is a legal nullity. I believe that unjust statutes are legal nullities in exactly the same way, and for exactly the same reason. Kant's standard for the justice of statutes is one of possible consent:

"The touchstone of anything that can serve as a law over a people lies in the question: whether a people could impose such a law on itself."²²¹

²¹⁸ *Metaphysics of Morals*, p. 113. (Ak. 6:342)

²¹⁹ *Metaphysics of Morals*, p. 29. (Ak. 6:236)

²²⁰ *Metaphysics of Morals*, p. 104. (Ak. 6:330)

²²¹ *What is Enlightenment*, p. 21. (Ak. 8:39)

A statute to which we cannot possibly consent is just like a private contract to which we cannot possibly consent: both violate our duty of rightful honor. Neither public nor private violations of this kind can legally bind us, because they logically contradict the concept of a rightful condition.

Recall that the state's three authorities—legislative, executive, and judicial—must be exercised separately because they authorize metaphysically distinct activities. Legislation is purely conceptual, judgment is the application of concepts to physical objects, and the exercise of executive authority is physical coercion in accordance with law.²²² I believe that the reason lawmakers cannot “wrong the people” by passing statutes that contradict the concept of a rightful condition is because lawmaking is a conceptual activity.²²³ A logical contradiction simply negates itself. Therefore, a logical contradiction between a statute and the concept of a rightful condition makes it the case that the statute in question simply does not exist as a law.

This is a controversial Kantian view. Many Kantian views do not take seriously Kant's claim that “[t]he legislative authority...cannot do anyone wrong by its law.” Disregarding this sentence enables some Kantians to conclude that statutes that are not rightful are “unjust laws,” which may wrong us, but which nonetheless have the capacity to obligate us.²²⁴ Unfortunately, Kant uses the word “law” in more than one way. Sometimes, he uses the word merely to refer to “what is laid down as right, that is, what the laws at a certain place and at a

²²² See, *supra*, p. 34-5.

²²³ *Ibid.*

certain time say or have said.”²²⁵ Used in this way, “law” can describe unjust statutes. For example, Kant writes, “If a public law is so composed that an entire people could not possibly give its assent to it (as, for example, in the case of a certain class of subjects having the hereditary privilege of a ruling rank), then it is unjust.”²²⁶

Much more often, however, Kant uses the word “law” to refer to statutes that have the capacity to obligate us by “represent[ing] an action that is to be done as *objectively* necessary.”²²⁷ When Kant uses the word “law” in this narrower sense, his remarks suggest that unjust statutes are not laws at all. For example, Kant declares, “The touchstone of anything that can serve as a law over a people lies in the question: whether a people could impose such a law on itself.”²²⁸ Specifically, an unjust enactment restricting religious belief “is quite simply null and void, even if it were to be confirmed by the most supreme authority, by means of parliaments or by the most ceremonious of peace treaties.”²²⁹ Such linguistic inconsistencies cannot be explained by the different subject matter of the enactments in question, for they fail the same formal test that Kant establishes for rightfulness: that the people could possibly consent to

²²⁴ See, for example, *Reason, Right, and Revolution*, p. 395. See also *Kant’s Theory of Justice*, pp. 112-3.

²²⁵ *Metaphysics of Morals*, p. 23. (Ak. 6:229)

²²⁶ *Theory and Practice*, p. 51. (Ak. 8:297)

²²⁷ *Metaphysics of Morals*, p. 20. (Ak. 6:218)

²²⁸ “What is Enlightenment?” in Pauline Kleingeld, Ed., *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Trans. David L. Colclasure (New Haven: Yale University Press, 2006) p. 21. (hereafter *What is Enlightenment*) (Ak. 8:39)

²²⁹ *What is Enlightenment*, p. 20. (Ak. 8:39)

them.²³⁰ Rather, Kant must be writing colloquially in some instances and more technically in others.

I believe that it is important to use the word “law” to refer only to just legislation in the context of Kant’s political philosophy, because only just legislation has the capacity to obligate us. The symmetry that Kant’s philosophy establishes between the moral law, which is internal, and the juridical law, which is external, depends on the normativity of both.²³¹ Kant writes that the difference between moral and juridical laws (when the latter are obligatory laws rather than permissive laws²³²) is merely the nature of the incentive to obey the law’s command. Because the moral law obligates us to adopt the categorical imperative as a principle of action, and because no one can coerce another to adopt any principle of action, the moral law’s incentive to obey must be internal: respect for the law.²³³ By contrast, a juridical law can only obligate us by

²³⁰ “[W]hat the whole people cannot decide for itself the legislator also cannot decide for the people.” *Metaphysics of Morals*, p. 102. (Ak. 6:327) “What a people (the entire mass of subjects) cannot decide with regard to itself and its fellows, the sovereign cannot decide with regard to it.” *Metaphysics of Morals*, p. 103. (Ak. 6:329) “Whatever a people cannot decide over itself cannot be decided over it by the legislator.” *Theory and Practice*, p. 58. (Ak. 8:305) “But what a people is not able to legislate over itself, a monarch is even less entitled to decree; for his legislative standing is based precisely in the fact that he unifies in his will the collective will of the people.” *What is Enlightenment*, p. 21. (Ak. 8:40)

²³¹ A law “makes the actions [commanded] a duty.” *Metaphysics of Morals*, p. 20. (Ak. 6:218)

²³² See, *infra*, pp. 106-7. (discussing the distinction between obligatory laws and permissive laws)

²³³ *Metaphysics of Morals*, p. 21. (Ak. 6:220)

establishing an external incentive to obey in the form of coercive law enforcement.²³⁴

In the sections that follow, I argue that Kant's claim that no law can wrong the people should be taken seriously, and that my interpretation of his words is correct. In order to avoid compounding the confusion generated by Kant's occasional ambiguous use of the word "law," I shall use that word to refer only to just legislation. I shall call unjust provisions "statutes," or "enactments." Statutes that logically contradict the concept of a rightful condition cannot have legal authority—that is, they cannot obligate us—because the concept of a rightful condition is the justification for the state's legislative authority. We are obligated to obey the law because it is just, and only insofar as a statutory enactment is just is it a law.

Authorization and Formal Defects

With respect to questions of judgment—the application of the principles of right to particular circumstances in the world—subjects are rationally required to regard the state's answer to disputed questions as their own answer, reached by the unilateral will. The government resolves many such questions at the level of policy as well as at the level of individual rights, from whether some particular war must be fought in order to defend the nation's borders to whether state support for sick might be more efficiently disbursed as cash than by maintaining a public hospital.²³⁵ Even lawmakers' illicit private purposes cannot deprive such

²³⁴ *Metaphysics of Morals*, p. 24-5. (Ak. 6:231)

²³⁵ *Theory and Practice*, p. 51. (Ak. 8:297) (The question of whether some particular war is necessary is a matter of judgment.) See also *Metaphysics of*

statutes of lawful authority.²³⁶ Statutes that lawmakers have enacted in order to advance an improper purpose—like catering to the happiness of the population in order to secure reelection—may nonetheless be laws in light of any public purpose they might advance.²³⁷ For example, a content population could be instrumentally necessary to the preservation of the state, because content people are less likely to revolt.²³⁸

However, Kant did not believe that subjects were rationally required to regard their government's *logical errors* as authoritative. If a legislature passes a statute that logically contradicts the concept of a rightful condition—the idea by which subjects are obligated to recognize the authority of the state in the first place—then the subject cannot be rationally required to regard that statute as an exercise of state authority, since no one can be rationally required to simultaneously regard two contradictory ideas as correct. For this reason, “every human being indeed has his inalienable rights, ones that he cannot surrender

Morals, p. 133. (Ak. 6:367) (The state may conclude that it will be more efficient to close a public hospital in order to provide money to individual patients for care at a location they choose.)

²³⁶ Indeed, Kant acknowledges that public lawmakers “have a lively interest positions for themselves and their families, in the army, the navy, and the civil service, that depend on the minister, and who are always ready to play into the government’s hands.” *Metaphysics of Morals*, p. 96. (Ak. 6:319-20)

²³⁷ *Theory and Practice*, p. 52. (Ak. 8:298)

²³⁸ *Ibid.* Mary Gregor explains, “While Kant holds that it is legitimate for the state to secure the well-being of its citizens to the extent necessary to make them content to remain with it, such legislation is only in the nature of a means to an end.” *Laws of Freedom*, p. 36.

even if he wanted to and with regard to which he has the authority to pass his own judgment.”²³⁹

There are at least three ways in which legislation can be formally defective. First, a statute is formally defective if it contradicts the *lex permissiva*, abrogating our natural permissive right to acquire rights of property, contract, and status. These principles of private right “do not need to be promulgated,” and indeed they were common law principles in Prussia for at least part of Kant’s lifetime. Kant explains in the context of property law that these rights cannot be negated by statute:

When people are under a civil condition, the statutory laws obtaining in this condition cannot infringe upon *natural right*, (i.e., that right which can be derived from *a priori* principles for a civil constitution); and so the rightful principle ‘whoever acts on a maxim by which it becomes impossible to have an object of choice as mine wrongs me,’ remain in force. For a civil constitution is just the rightful condition, by which what belongs to each is only secured, but not actually settled and determined.²⁴⁰

Accordingly, a statute that nominally prohibits some (or all) members of the population from acquiring property cannot be a law, because no person could consent to a law that made it impossible for her to own an object of choice. Indeed, Kant implies that such statutes lack the status of law when he says that public enforcement of such a statute “wrong” a subject, who is thereby denied the right own property. Unlike lawmakers, whose exercise of public authority is purely conceptual, executive branch officials have the ability to wrong the people

²³⁹ *Theory and Practice*, p. 57. (Ak. 8:304)

²⁴⁰ *Metaphysics of Morals*, p. 45. (Ak. 6:256)

by physically coercing them without legal authority.²⁴¹ If as Kant claims, the legislative authority “cannot do anyone wrong by its law,” and if enforcement of statutes that deny individuals access to rights of property, contract, and status thereby wrongs them, it follows that such statutes cannot be laws.²⁴²

Second, statutes are formally defective if they violate the principle of equality under the law. This is the case, Kant explains, because we cannot consent to be bound more than we can, in turn, bind others.²⁴³ For example, a war tax levied only against a disfavored group makes an impermissible distinction between citizens.²⁴⁴ A ruler who imposes a tax or draft on an unequal basis “proceeds contrary to law” because she “goes against the law of equality.”²⁴⁵ The principle of equality also applies to political participation. Kant did not see universal suffrage as a requirement of justice, but if some persons are allowed to vote, Kant believed that the principle of equality required that laws establishing the qualifications for voting be neutral to the limited extent that any adult man could in theory “work his way up” from non-voting to voting status.²⁴⁶

Finally, Kant identifies certain private activities that cannot be justly criminalized, notably free speech and the free exercise of religion, because such

²⁴¹ Kant writes that it is possible for “the *ruler*,” meaning the executive branch, to “proceed contrary to law,” and that doing so amounts to an “injustice.” *Metaphysics of Morals*, p. 95. (Ak. 6:319)

²⁴² *Metaphysics of Morals*, p. 91. (Ak. 6:313)

²⁴³ *Metaphysics of Morals*, p. 91. (Ak. 6:314)

²⁴⁴ *Theory and Practice*, p. 51. (Ak. 8:297) (footnote)

²⁴⁵ *Metaphysics of Morals*, p. 95. (Ak. 6:319)

²⁴⁶ *Metaphysics of Morals*, p. 92. (Ak. 6:315) A more consistent Kantian analysis might conclude that the principle of equality requires the franchise to be extended on a gender-neutral basis.

laws “would be opposed to the humanity in their own persons, and so to the highest right of the people.”²⁴⁷ A constitutional provision that established a requirement of religious orthodoxy, for example, “is quite simply null and void, even if it were to be confirmed by the most supreme authority, by means of parliaments or by the most ceremonious of peace treaties.”²⁴⁸ I understand Kant to mean that such enactments are not laws, because they contradict the concept of a rightful condition and therefore our duty of rightful honor, which limits the exercise of state authority to the range of conditions to which we have the capacity to legally obligate ourselves.

The range of criminal laws that Kant explicitly identifies as formally defective is narrow, and roughly tracks the protections afforded by the First Amendment to the U.S. Constitution. Kant sometimes argued for freedom of speech, press, and religion on the specific basis that these freedoms contribute to the improvement of the state and of the human condition, and it is possible that Kant himself perceived no more general basis or range of application for this substantive limitation on the state’s criminal lawmaking authority. Nonetheless, I shall argue in the next section that Kant’s specific examples in fact represent an application of a more general limitation on the state’s power to criminalize

²⁴⁷ For example, “The supreme authority especially has no right to prohibit internal reform of churches, for what the whole people cannot decide upon for itself the legislator also cannot decide for the people. But no people can decide never to make further progress in its insight (enlightenment) regarding beliefs...since this would be opposed to the humanity in their own persons and so to the highest right of the people. So no supreme authority can decide this for the people.” *Metaphysics of Morals*, p. 102. (Ak. 6:327)

²⁴⁸ *What is Enlightenment*, p. 20. (Ak. 8:89)

private conduct—one that Kant ought to have recognized whether or not he did so.

The Limits of the Criminal Law

I believe that a statute is formally defective—and therefore not law—if it purports to criminalize conduct that is not formally wrong. In chapter 2, I argued in favor of a two-pronged interpretation of the Universal Principle of Right, according to which an action is a formal wrong just in case the legality of an action on its maxim logically contradicts the concept of everyone’s freedom in accordance with a universal law (i.e. the concept of a rightful condition).²⁴⁹ This test has no empirical component: it simply compares the concept of a legal action on some particular maxim to the concept of a rightful condition. For this reason, formal wrongs need not contravene any statute in order to be wrong. Indeed, formal wrongs are possible in the state of nature, as Kant explains:

Given the intention to be and to remain in this state of externally lawless freedom, human beings do one another no wrong at all when they feud among themselves; for what holds for one holds for the other, as if by mutual consent. But in general they do wrong in the highest degree by willing to be and remaining in a condition that is not rightful, that is, in which no one is assured of what is his against violence.²⁵⁰

Whether I am in the state of nature or in a rightful condition, if the legality of an action on my maxim is logically inconsistent with the concept of a rightful condition, then my action on that maxim is a formal wrong by the standard that I

²⁴⁹ See, *supra*, pp. 43-4.

²⁵⁰ *Metaphysics of Morals*, p. 86. (Ak. 6:307-8) (Latin parenthetical omitted)

have argued is the correct one.²⁵¹ Merely existing in the state of nature is not formally wrong, but “willing” (i.e. choosing) to remain in that condition is formally wrong.

I believe that the status of any given action as a formal wrong is independent of legislation in this way even when the action involves a violation of acquired rights established by legislation. Such crimes—thief or attempted theft, for example—are formally wrong in all circumstances. Theft just happens to be impossible to commit in the state of nature, and attempted theft is impossible to commit in the state of nature by anyone who *knows* that they are in a state of nature. Recall that the property of wrongness in a formal wrong is a property of the maxim on which the offender acts: an action is a formal wrong just in case the concept of a legal action in accordance with her maxim logically contradicts the concept of a rightful condition. Facts about legal ownership do not affect the results of this inquiry. Rather, our subjective beliefs about legal ownership restrict the set of maxims on which we can act.

For example, if I know that I am in the state of nature, I can’t act on the maxim, “I will steal from others in order to feed myself,” because the concept of stealing presupposes property, which presupposes a state. If I know that I am in a state of nature, but I would prefer to be in a civil condition, my maxim might be, “I will eat whatever does not belong to another in order to feed myself.” There is no logical incompatibility between the legality of an action in accordance with

²⁵¹ I thus disagree with Jacob Weinrib’s assertion that there are “two basic types of formal wrongs.” *Juridical Significance*, p. 150. I believe that there is a single standard for formal wrongdoing, which is equally applicable in the state of nature and in a rightful condition.

my maxim and the concept of a rightful condition. This maxim is therefore unobjectionable in either environment. It just so happens that, in the state of nature, I can eat almost anything in accordance with this maxim, since there are no established property rights to violate.

On the other hand, if I mistakenly believe that I am in a civil condition, I can commit a formal wrong by making it my maxim to steal even though property rights don't actually exist. This case—essentially a case of attempted theft—is like those of the nearsighted anarchist and the would-be spark plug thief from Chapter 2.²⁵² In each case, the agent commits a formal wrong because she makes it her maxim to do something that is wrong. The fact that none of these agents succeed in actually committing material wrongs does not change the formally wrong nature of their actions.

Kant's analysis in *Supposed Right to Lie* supports my claim that subjective beliefs—not external facts—are relevant to the question of whether my action is a formal wrong (and thus also supports my more fundamental claim that the wrong-making property of a formal wrong is a property of the action's maxim). Kant advises a man who must decide whether to lie to a murderer who comes to his door to demand the location of his intended victim:

[I]f you told a lie and said that the intended victim was not in the house, and he has actually (though unbeknownst to you) gone out, with the result that by so doing he has been met by the murderer and thus the deed has been perpetrated, then in this case you may be justly accused as having caused his death.²⁵³

²⁵² See, *supra*, pp. 56-7.

²⁵³ *Supposed Right to Lie*, p. 65. (Ak. 427)

I do not offer this example in order to defend Kant's implausible conclusion that lying is always a formal wrong.²⁵⁴ Rather, I offer it to show *how* he reaches his conclusion. Kant reveals that he considers the wrong-making property of the statement in question to be a property of the speaker's maxim—"I will lie to a murderer in order to save a friend's life"—rather than a property of the utterance itself. In the above version of Kant's hypothetical, the utterance itself was true, because the speaker's friend had, in fact, secretly left the house. Nonetheless, Kant concludes that the would-be deceiver is responsible for the consequences of his statement, because a feature of the speaker's maxim—his subjective principle of action—made it the case that his action was a formal wrong.

I have argued that formal wrongs have their status as wrongs regardless of whether or not they are prohibited by any legislative enactment, because the wrong-making property of a formally wrong action is a feature of the agent's maxim and therefore does not depend on external facts about the world. If I am correct, it follows that the converse proposition is also true: legislation cannot make it the case that some previously rightful action becomes a formal wrong. A statute that criminalizes the playing of contract bridge, for example, doesn't cause contract bridge-playing to become formally wrong, because whether or not contract bridge-playing happens to violate the terms of a statute is not directly relevant to the question of whether the concept of a legal action on some particular contract bridge-player's maxim logically contradicts the concept of a rightful condition.

²⁵⁴ I suspect that I disagree with Kant about the status of lies, but the analysis necessary to convert this suspicion (or its opposite) into a belief is beyond the

Recall that Kantian rights are reflexive: I have a right to do anything that is not wrong.²⁵⁵ It follows that coercion is only authorized (i.e. just) insofar as it hinders a wrong action.²⁵⁶ In Chapter 2, I described the two distinct ways in which an action may be wrong—material and formal—which together exhaust the possibility space for wrong actions.²⁵⁷ The state is authorized to hinder material wrongs by means of civil remedies, which bear a relation of “real opposition” to the material harm done. The state is also authorized to hinder formal wrongs by means of punishments determined by maxims that bear a relation of logical opposition to the maxim of a criminal act. Conversely, state coercion is unauthorized, and therefore unlawful, unless it is hindering a wrong action in one of these two ways. If my action is right, Kant argues, then “whoever hinders me in it does me wrong; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law.”²⁵⁸

scope of this particular project.

²⁵⁵ See, *supra*, p. 7.

²⁵⁶ Kant never claims that all wrong actions are coercive. A wrong is not necessarily a “first use” of coercion. A wrong action, defined as a “hindrance to freedom” may “hinder freedom” without coercing anyone, in which case it is a “formal wrong.” But coercion is always a “hindrance to freedom” unless it is in response to a wrong action, in which case it is hindering a hindrance to freedom.

²⁵⁷ Formal wrongs and material wrongs together exhaust the possibility space for wrong actions because “formal” and “material” are logical opposites. Kant explains that two concepts are logical opposites “insofar as the sphere of one judgment excludes that of the other, yet at the same time [they have] the relation of community, insofar as the judgments together exhaust the sphere of cognition proper.” *Critique of Pure Reason*, p. 208. (A73/B99) Ripstein appears to argue that Kantian principles can be used to establish a third wrong-making property of actions: free riding. See *Force and Freedom*, pp. 256-261. I argue for an alternative interpretation of statutes regulating access to public resources in chapter 4.

²⁵⁸ *Metaphysics of Morals*, p. 24. (Ak. 6:230-1)

Kant's philosophical commitments about the nature of right and the nature of formal wrongdoing thus establish a natural law theory of crimes: criminal penalties are authorized by the principles of right only insofar as they punish actions that are independently formally wrong. My philosophical argument for this point is consistent with a textual analysis of Kant's discussions of criminal wrongdoing and punishment. In his discussion of public right, Kant identifies a "right to punish" those who commit crimes rather than a right to make conduct criminal.²⁵⁹ For example, he writes, "The *right to punish* is the right a ruler has against a subject to inflict pain on him because of his having committed a crime."²⁶⁰

Moreover, Kant appears to understand a "penal law" to be legislation that authorizes the punishment of a crime rather than legislation that creates a crime. For example, Kant writes: "I subject myself together with everyone else to the laws, which will naturally also be penal laws if there are any criminals among the people."²⁶¹ Kant also hints that the state's inability to legislate against certain types of criminal conduct doesn't make it the case that the conduct in question is not a crime when he writes, "There are...two crimes deserving of death, with regard to which it still remains doubtful whether *legislation* is also authorized to impose the death penalty."²⁶² In chapter 4, I will suggest that crimes can be punished only in cases in which the penal law provided a criminal with a certain

²⁵⁹ *Metaphysics of Morals*, p. 102. (Ak. 6:327) (italics omitted)

²⁶⁰ *Metaphysics of Morals*, p. 104. (Ak. 6:331)

²⁶¹ *Metaphysics of Morals*, p. 108. (Ak. 6:335)

²⁶² *Metaphysics of Morals*, p. 108. (Ak. 6:335)

kind of incentive to obey, which the criminal disregarded. For the remainder of this chapter, I will focus on the question of which actions are “public crimes”—formal wrongs—in the first place.²⁶³

The application of my proposed standard for formal wrongdoing to actual statutes will be a complex challenge, a comprehensive exposition of which is beyond the scope of my current project. Questions of judgment—the application of legal standards to specific actions in the world—are questions that the state’s judicial authority allows it to resolve conclusively. For example, if a jury finds that a defendant intentionally engaged in a particular course of conduct, and court rules that that course of conduct meets the legal standard of reckless endangerment, it follows that the conduct in question may be justly punished. Therefore, I believe that a criminal statute is formally defective only if it establishes or relies upon a formally defective standard for rightful conduct, such that even appropriate deference to a court’s exercise of judgment with respect to its application of that standard cannot make it the case that the conduct prohibited is formally wrong.

It seems likely to me that at least some strict liability criminal statutes are formally defective for this reason. Compare the rationales of two hypothetical strict liability criminal statutes: 1) a statute that makes it a criminal misdemeanor to drive more than 20 miles per hour over the posted speed limit on public roads, and 2) a statute that makes it a criminal misdemeanor to possess “burglar’s tools.” The former statute might, in the judgment of a court, apply exclusively to a category of conduct that intentionally unreasonably endangers others, thus

²⁶³ *Metaphysics of Morals*, p. 105. (Ak. 6:331)

constituting reckless endangerment. The conduct of driving so much faster than the speed limit may be, as a matter of law, adequate evidence of an intention to drive very fast. A speeder's maxim might be, "I will drive very fast in order to get to work on time." Whether the speed at which the driver understood himself to be driving posed an unreasonable danger to others as a matter of law is a question of judgment, which the state is authorized to resolve. Insofar as all of the conduct prohibited by a statute such as this one can be judged to be reckless endangerment, it is formally wrong conduct, and the statute is a just criminal law.

By contrast, a strict liability statute that makes it a criminal misdemeanor to possess burglar's tools would be an example of a "proxy crime"—a category of "offenses that are not blameworthy in themselves, but that stand in for more culpable activities."²⁶⁴ Unlike the speeding statute, this strict liability statute doesn't reflect a state's exercise of judgment by marking off some degree of intentional danger to others on a continuum between rightful and wrongfully reckless conduct. Instead, statutes that create "proxy crimes" prohibit wholly non-dangerous conduct by some in order to simplify the process of preventing criminal misbehavior by others.²⁶⁵

²⁶⁴ Zachary Price, "The Rule of Lenity as a Rule of Structure," *Fordham Law Review* 72 (2004): 885-941, p. 912.

²⁶⁵ Jeannie Suk offers an excellent argument for the proposition that the issuance of a criminal protection order in the context of a domestic violence allegation amounts to the creation of a proxy crime with this kind of rationale. See Jeannie Suk, "Criminal Law Comes Home," *The Yale Law Journal* 116 (2006): 2-70, pp. 17-20.

If I am a handywoman, I may find the prohibited collection of tools professionally useful. My maxim might be: “I will possess burglar’s tools in order to repair my client’s refrigerators.” Nothing in this maxim reflects knowledge of facts about my conduct that make it the case that my conduct endangers others or the state. The rationale for the creation of a proxy crime is that imposing criminal penalties on blameless conduct will make wrongful conduct, such as the commission of burglaries, more difficult and risky for those who might be inclined to commit criminal acts. One might argue, therefore, that the concept of a legal action on my maxim contradicts the concept of a rightful condition because the state will, as an empirical matter, find it impossible to prevent all burglaries if the possession of burglar’s tools is legal. Effectively, the argument must be that my legal possession of burglar’s tools endangers others by causing a subset of the population to commit burglaries that they would otherwise forego.

I believe that such a rationale cannot be accorded deference as the state’s legitimate exercise of judgment, because it depends on a conception of persons that is logically incompatible with the conception of persons as free rational beings that undergirds Kant’s entire normative philosophy. It is our capacity to set our own purposes in accordance with the moral law that makes our external freedom a categorical imperative for us.²⁶⁶ Because the state is justified on the basis our status as free agents, its laws must be formally consistent with that status. The free choice of another person (or even the free choice of my future self) to commit a crime such as burglary thus breaks the inferential chain

between my intrinsically harmless conduct—possessing burglar’s tools for the innocent purpose of fixing refrigerators—and any subsequent crimes committed.²⁶⁷

We can now see that Kant’s famous examples of formally defective criminal statutes—those which prohibit speech or religious observance—are “proxy crimes” also, because they are formally defective according to the same analysis that I have just applied to a hypothetical statute criminalizing the possession of burglar’s tools. The only argument for the proposition that speech or religious observance endangers the state or others involves a claim that these intrinsically harmless acts “cause” others (or our future selves) to subsequently commit crimes. Because a criminal act is, by definition, the choice of a free agent, I believe that the law cannot presuppose such a causal relationship in order to justify restricting our lawful freedom. I intend to take up the complex question of how my formulation of Kant’s standard for formal wrongs should be applied at greater length in a subsequent project.

While a formally defective statute cannot create an obligation to obey its terms, it does not follow that those who disregard such statutes can lawfully resist their coercive enforcement. As the case of the nearsighted anarchist in Chapter 2 illustrated, it is formally wrong to resist the state’s executive authority even if state officials are exercising that authority unlawfully, and therefore despotically.²⁶⁸ In the next section, I will explain how this apparent

²⁶⁶ *Metaphysics of Morals*, p. 95. (Ak. 6:318)

²⁶⁷ I am grateful to Charles Fried for a helpful conversation about this subject.

²⁶⁸ See, *supra*, pp. 54-7.

inconsistency can be resolved by distinguishing between physical resistance to state executive branch officials and mere passive disobedience of the nominal commands of unjust statutes. I believe that this account can also assuage the concerns of proponents of a “legal positivist” reading of Kant by showing that a natural law theory can provide adequate philosophical resources to explain Kant’s unconditional opposition to active resistance against a legitimate state.

The “Highest Legislation”

So far, I have described what I take to be the limits of the sovereign’s legislative authority. I have argued that we must always obey the law, but also that no formally defective (i.e. unjust) statute is a law. This may seem like too deflationary an account of the law to qualify as Kantian. After all, Kant is famous for his passionate injunctions against “resisting” the officials of any minimally adequate government, even if they are perpetrating deep injustices. Jeremy Waldron, for example, argues that Kant must have been a legal positivist, because Kant’s justification for the state’s authority to resolve questions of judgment concerning the application of legal norms in the physical world also proves that even formally defective statutes must obligate us as laws.²⁶⁹

I believe that arguments like these fail to attend adequately to the nuances of Kant’s idea of the original contract, which carefully distinguishes between the state’s legislative, executive, and judicial authorities. Waldron, for example, assumes that unless an unjust enactment obligates us as a law, subjects would

²⁶⁹ See Jeremy Waldron, *The Dignity of Legislation*, (Cambridge: Cambridge University Press, 1999), p. 49.

have a right to physically resist executive officials who attempt to enforce it.²⁷⁰ Kant's confusing remarks on the subjects of "obedience" and "resistance" can be better understood—and reconciled—by attending to the fact that each authority is supreme in its own distinct sphere: the law must always be obeyed, a court's judgment in a particular case is final, and state executive branch officials must never be resisted.²⁷¹

I have argued that the nominal commands of formally defective statutes need not be obeyed because they simply are not laws. However, just because the body that holds the legislative authority—the sovereign—fails to exercise that authority on some particular occasion does not mean that it no longer holds the exclusive authority to legislate on behalf of the people. Revolution—understood as the overthrow of the sovereign—therefore remains wrong. Moreover, state executive branch officials cannot legally be physically resisted even when they act despotically, because the executive authority just is the state's supreme coercive power. Kant writes:

[A]ll revolt that leads into rebellion, is the highest and most punishable offense in the commonwealth because it destroys the latter's very foundations. And this prohibition is unconditional, such that even if the legislative authority or its agent, the head of state [the executive authority], violates the original contract and thereby surrenders, in the perception of the subjects, the right to be legislator by authorizing the government to act thoroughly violently

²⁷⁰ *The Dignity of Legislation*, p. 56.

²⁷¹ *Metaphysics of Morals*, p. 93. (Ak. 6:316)

(tyrannically), the subject is still not allowed to resist in any way.²⁷²

Because the state's three authorities are constitutive of our external freedom, we are rationally required to conceive of the existing government as holding those authorities so long as it maintains "a condition in which what belongs to each can be secured against everyone else."²⁷³ A government need not do this task perfectly in order to be legitimate. A comprehensive determination of necessary and sufficient conditions for state legitimacy is beyond the scope of this project, which explores questions of legal obligation in the context of a presumptively legitimate state. It is clear, though, that Kant himself thought the bar that a state must clear in order to be legitimate was very low, and certainly consistent with a great deal of abuse and injustice perpetrated by government. This fact is clearly demonstrated by Kant's anti-revolution writing.

Most governments, then, are legitimate states in the sense that they must be regarded as holding the three authorities identified by Kant as the idea of the original contract. Moreover, a state is the only means by which "the people" of any given state can be regarded as a totality at all. It follows that individuals who attempt to overthrow the sovereign cannot possibly represent "the people," because they are attempting to destroy the only institution through which "the people" can act. Kant explains:

[S]ince a people must be regarded as already united under a general legislative will in order to judge with rightful force

²⁷² *Theory and Practice*, p. 53. (Ak. 8:299)

²⁷³ *Metaphysics of Morals*, p. 29. (Ak. 6:237)

about the supreme authority (*summum imperium*), it cannot and may not judge otherwise than as the present head of state (*summus imperans*) wills it to.²⁷⁴

Because groups of revolutionaries cannot act on behalf of “the people,” Kant argues, they are merely “mobs”—groups of individuals who lack the coercive authority that belongs only to the people, considered as a totality.²⁷⁵

Some of Kant’s remarks on this subject appear ambiguous when taken out of context: does he mean to argue for a blanket duty of obedience to statutes, or is he merely condemning revolutionary activities? In such cases, the surrounding discussion usually makes it clear that he is, again, condemning attempts to overthrow the government. For example, Kant writes that, “a people cannot offer any resistance to the legislative head of state which would be consistent with right, since a rightful condition is possible only by submission to its general legislative will.”²⁷⁶ Because he is speaking specifically of the state’s legislative authority, it is tempting to read this passage as a claim that all statutes must be obeyed as law. However, Kant’s next sentence indicates that he is writing

²⁷⁴ *Metaphysics of Morals*, p. 95. (Ak. 6:318) The phrase “head of state” is ambiguous. In some places, Kant refers to the sovereign legislature as the “head of state.” *Metaphysics of Morals*, p. 94. (Ak. 6:317) In others, he uses the phrase “head of state” to refer to the three authorities of the state—legislative, executive, and judicial—considered as a unified whole. *Metaphysics of Morals*, p. 111. (Ak. 6:338) By “supreme authority,” Kant seems to refer to the entire, unified state, so it is perhaps more likely in context that he assigned the same meaning to the words “head of state” here in order to avoid repetition.

²⁷⁵ *Theory and Practice*, p. 55. (Ak. 8:302)

²⁷⁶ *Metaphysics of Morals*, p. 96. (Ak. 6:320)

specifically in opposition to any attempted overthrow of the sovereign: “There is, therefore, no right to *sedition* (*seditio*), still less to *rebellion* (*rebellio*).”²⁷⁷

A few sentences later (during which he declares the assassination of a monarch, who holds the legislative authority, to be always unacceptable), Kant describes the duty not to resist the “highest legislation.” I understand him to be referring to the idea of the original contract:

The reason a people has a duty to put up with even what is held to be an unbearable abuse of supreme authority is that its resistance to the highest legislation can never be regarded as other than contrary to law, and indeed as abolishing the entire legal constitution.²⁷⁸

Under the idea of the original contract, only the sovereign (i.e. the legislator) can make law, and only the ruler (i.e. the executive) can engage in rightful coercion. It follows that the people do wrong if they overthrow the sovereign or coerce executive branch officials.²⁷⁹

So understood, nothing in Kant’s remarks indicates that the nominal commands contained in formally defective statutes must be obeyed as though they are law, and I do not know how an obligation specified in just that way could be consistent with the concept of a rightful condition. For example, suppose that a formally defective statute required subjects to report their neighbors for engaging in prohibited religious practices. To obey the statute would involve

²⁷⁷ *Metaphysics of Morals*, p. 96. (Ak. 6:320)

²⁷⁸ *Metaphysics of Morals*, p. 97. (Ak. 6:320)

²⁷⁹ Kant summarizes, “this way of seeking one’s right [revolution] (taken as one’s maxim) makes all lawful constitutions uncertain and leads into a state of complete lawlessness (*status naturalis*), where all right ceases, or at least ceases to be effective. *Theory and Practice*, p. 55. (Ak. 8:301)

reporting your neighbors for committing no wrong. By contrast, to forego resistance to the state's executive authority would involve allowing yourself to be taken into custody if the police come to arrest you for failure to report your neighbors. Not only does active obedience to the nominal command of the defective statute not seem obligatory, it seems as though we might be obligated to *disobey* such a statute. Kant wrote that subjects must "[o]bey the authority that has power over you (in whatever does not conflict with inner morality)."²⁸⁰ Because moral duties are unconditional, it follows that we are morally obligated *not* to obey statutes that nominally command us to do wrong.

The lawmaking authority of a Kantian state is vested exclusively with the sovereign, but depending on what statutes they pass, I believe that lawmakers may or may not succeed in actually exercising this authority. Kant's political philosophy does not provide the resources necessary to establish a general obligation to obey the propositions contained in statutes. Rather, we are obligated to obey the law. We are also morally obligated not to commit other formal wrongs, including resistance and revolution, whether or not the legislature has specifically prohibited them.

²⁸⁰ *Metaphysics of Morals*, p. 136. (Ak. 6:371)

Chapter 4: Acting Lawfully

Imagine that you are running errands downtown, and you realize that the two-hour meter at which you have parked your car is about to expire. Do you retrieve your car immediately, or do you complete your tasks? More importantly for the argument that follows, on what basis do you make your choice? Do you feel obligated to obey the terms of the ordinance that limits public parking to two hours, or do you simply estimate the likelihood and cost to you of receiving a parking ticket? I believe that many, perhaps most, of us make decisions about parking violations on the basis of the likely costs and benefits, to us, of nominal compliance with the law. I also believe, and hope to show, that in doing so we do no wrong, even from a Kantian perspective.

Kant recognized two different kinds of juridical law: “obligatory laws,”²⁸¹ which were the primary focus of Chapter 3, and “permissive laws.”²⁸² Obligatory laws constrain our prospective choices as we set and pursue our private purposes.²⁸³ Collectively, they are the state’s answer to the question: “What may I lawfully choose to do?” This kind of law has two constitutive elements: universality and obligation.²⁸⁴ Because the juridical law “does not expect, much

²⁸¹ “Obligatory laws for which there can be an external lawgiving are called *external laws (leges externae)* in general.” *Metaphysics of Morals*, p. 17. (Ak. 6:224)

²⁸² *Metaphysics of Morals*, p. 16. (Ak. 6:223)

²⁸³ “A principle that makes certain actions duties is a practical law.” *Metaphysics of Morals*, p. 17. (Ak. 6:224)

²⁸⁴ *Metaphysics of Morals*, p. 14. (Ak. 6:220) An obligatory law “represents an action that is to be done as *objectively necessary*.” *Metaphysics of Morals*, p. 20. (Ak. 6:218) By “objectively necessary,” I take Kant to mean that an obligatory law must be universally necessary, meaning necessary for everyone.

less demand” that we obey the law merely out of respect for the law, any obligatory law must provide us with an “external incentive” to obey its commands.²⁸⁵ I believe, and will try to show, that this required external incentive must be one that every person is rationally required to respond to by obeying the law in the set of circumstances to which the law applies, and that this requirement is an application of the law’s more general requirement of universality.

Permissive laws are not formally defective, or they could not be considered “laws” at all. However, they can be distinguished from obligatory laws by the fact that they do not obligate us to do or refrain from doing anything.²⁸⁶ Instead, permissive laws empower us to change our legal rights and obligations voluntarily. In other words, a permissive law “makes it possible for a merely permissible act, one that is neither forbidden nor required, to have consequences for rights.”²⁸⁷

Some permissive laws give effect to the original *lex permissiva*—our natural permissive right to acquire rights of property, contract, and status—by establishing procedures that enable us to acquire such rights if we so choose. For example, a statute that specifies how and where property deeds are recorded does not obligate me, because it does not tell me that I must acquire property, nor does it tell me (unless it is formally defective) that I cannot do so. It simply specifies

²⁸⁵ *Metaphysics of Morals*, p. 21, 24-5. (Ak. 6:219, 6:231)

²⁸⁶ Kant writes, “An action that is neither commanded nor prohibited is merely *permitted*...The question can be raised whether there are such actions and, if there are, whether there must be permissive laws (*lex permissiva*) in addition to laws that command and prohibit.” *Metaphysics of Morals*, p. 16. (Ak. 6:223)

the means by which I can acquire a legal title to real property (along with a corresponding legal liability for property taxes). Similarly, a statute that establishes a set of rights and obligations for marital partners does not require me to get married, nor (unless it is formally defective) does it prohibit me from marrying. Rather, it specifies one way in which I can alter my legal rights and obligations if I so choose.

All of our legal obligations are moral obligations as well,²⁸⁸ but determining exactly *what* the law requires or prohibits is no straightforward exercise. In the coming pages, I will argue that only punishments involving physical coercion, such as incarceration or the death penalty, can provide a universal external incentive to comply with the terms of any statute. Therefore, statutes that impose only fines for noncompliance are not obligatory laws, and non-compliance with the terms of such statutes is not “unlawful” in the Kantian sense of the word. Instead, if such statutes are free of formal defects, I believe that they must be regarded as rightful permissive laws that impose taxes or fees on lawful conduct.

Legal Obligation Requires a Universal External Incentive

Like the Categorical Imperative, an “obligatory law” (by which I will always mean a juridical law that imposes an obligation on us) is a kind of “morally practical law” because it “asserts an obligation with respect to certain

²⁸⁷ *Force and Freedom*, p. 103. (footnote)

²⁸⁸ *Metaphysics of Morals*, p. 22. (Ak. 6:220-221)

actions.”²⁸⁹ However, while the incentive to comply with moral commands can come only from within the deliberating agent,²⁹⁰ any obligatory law must provide an external incentive to obey its command.²⁹¹ This is the case because, as Kant explains, an external law by definition “does not at all expect, far less demand, that *I myself* should limit my freedom.”²⁹² An obligatory law’s external incentive must be “drawn from *pathological* determining grounds of choice, inclinations and aversions, and among these, from aversions, for it is a lawgiving, which constrains, not an allurements, which invites.”²⁹³

I believe that there are two different reasons why an obligatory law’s external incentive must be an “aversion” rather than a reward or privilege. First, as Kant observes above, it is inconsistent with the idea of obligation to reward people simply for obeying the law. Second, no material benefit could serve as a *universal* incentive, and universality is a constitutive property of law.²⁹⁴ Whether or not I value money or accolades, for example, is a contingent empirical fact. I am not rationally required to value them, and if I do not, then rewards in the form of money or accolades could not motivate me. By contrast, every free agent is rationally required to value her freedom. For this reason, I believe that the

²⁸⁹ A categorical imperative, because it asserts an obligation with respect to certain actions, is a morally practical *law*.” *Metaphysics of Morals*, p. 15. (Ak. 6:223)

²⁹⁰ See *Groundwork*, pp. 13-4. (Ak. 4:400-1)

²⁹¹ *Metaphysics of Morals*, p. 20-1. (Ak. 6:219)

²⁹² *Metaphysics of Morals*, p. 24-5. (Ak. 6:231)

²⁹³ *Metaphysics of Morals*, p. 20. (Ak. 6:219)

²⁹⁴ Universal law is the only kind of “law” there is, because universality is a constitutive property of law understood as an objective (i.e. universal) principle of action.

incentive that any juridical law must provide in order to obligate us universally must be the threatened loss of external freedom. In other words, it must be coercive.²⁹⁵

Kant writes that the concept of obligation, in the context of both moral and juridical law, “is the necessity of a free action under a categorical imperative of reason.”²⁹⁶ If, as Kant maintains, juridical law cannot expect us to obey merely out of a sense of respect for law,²⁹⁷ then I believe it follows that an obligatory law’s external incentive must make it the case that we are rationally required to obey the law’s command. An incentive can only establish a rational requirement if it can motivate us regardless of any contingent preferences that we may have.

Kant’s famous analysis of the so-called “right of necessity” illustrates this point, while at the same time demonstrating that a *universal* incentive (i.e. an incentive that will motivate everyone insofar as they are rational) is not necessarily also an *unconditional* incentive (i.e. an incentive that will motivate in all circumstances). In highly unusual circumstances, the punishment authorized by a criminal law cannot provide a potential wrongdoer with an external incentive that she is rationally required to respond to by obeying the law. In such

²⁹⁵ My inference is consistent with Kant’s claim that “one can locate the concept of right directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone.” *Metaphysics of Morals*, p. 25. (Ak. 6:232)

²⁹⁶ *Metaphysics of Morals*, p. 15. (Ak. 6:222)

²⁹⁷ Kant writes that “consciousness [of an obligation to obey] may not and cannot be appealed to as an incentive to determine [a subject’s] choice in accordance with this law.” *Metaphysics of Morals*, p. 25. (Ak. 6:232)

cases, even egregious wrongs cannot be punished by law,²⁹⁸ because “*there is no law* by which an authorization to use coercion can be determined.”²⁹⁹

In Kant’s classic hypothetical, a shipwrecked sailor pushes an innocent man off a floating plank in order to save his own life, thereby drowning his victim.³⁰⁰ The homicidal sailor thus commits a formal wrong, because the concept of legal murder—even *in extremis*—logically contradicts the concept of everyone’s freedom in accordance with a universal law. To see this, recall that law makes a rightful condition possible by making all of my possible choices consistent with all of your possible choices.³⁰¹ The sailor therefore cannot have a legal right to act on the maxim, “I will kill you in order to save my own life,” because his action on that maxim would be hindered by his intended victim’s action on the same maxim.³⁰² As I explained in Chapter 1, it is logically impossible for rights, as Kant conceives of them, to conflict in this way.³⁰³

The logical impossibility of a legal right to commit murder demonstrates that murder is always wrong, but it does not entail that a sailor in these circumstances has a *legal obligation* not to commit murder. Not all wrongful acts are unlawful—failing to leave the state of nature is wrong but not unlawful—so we know that the impossibility of a legal right does not entail the presence of a

²⁹⁸ *Metaphysics of Morals*, p. 28. (Ak. 6:236)

²⁹⁹ *Metaphysics of Morals*, p. 27. (Ak. 6:234) (italics added)

³⁰⁰ *Metaphysics of Morals*, p. 28. (Ak. 6:235)

³⁰¹ See, *supra*, pp. 17-8.

³⁰² As Kant explains, “It is evident that were there such a right [to kill an innocent threat] the doctrine of right would have to be in contradiction with itself.” *Metaphysics of Morals*, p. 28. (Ak. 6:235)

³⁰³ See, *supra*, pp. 17-8.

legal obligation. The following analysis will show that the shipwrecked sailor in Kant's hypothetical has no legal right to kill his victim, but he also has no *legal* obligation not to do so (though he always has a *moral* obligation not to do wrong). Effectively, the shipwrecked sailor and his victim are in a state of nature, understood as a situation in which the juridical law cannot govern our conduct.³⁰⁴

Kant concludes that the state cannot punish the sailor, because the punishment that the law threatened for murder—the death penalty—failed to provide the sailor with an external incentive to obey the law under his unusual circumstances.³⁰⁵ Kant explains:

A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning).³⁰⁶

I think Kant's analysis here shows that he considers a universal incentive—one that will motivate every person to obey insofar as they are rational—essential to establish a legal obligation.

As a matter of empirical fact, the anticipated public shame of a murder conviction might deter some people from committing murder even in the face of certain death.³⁰⁷ However, Kant does not consider an empirical psychological

³⁰⁴ Kant indicates that the sailor's murder was wrongful but not unlawful in the sense of being opposed to the juridical law when he writes that "there is no law" by which the sailor's punishment could be authorized. *Metaphysics of Morals*, p. 27. (Ak. 6:234)

³⁰⁵ *Metaphysics of Morals*, p. 28. (Ak. 6:235)

³⁰⁶ *Metaphysics of Morals*, p. 28. (Ak. 6:235-6)

³⁰⁷ I therefore disagree with Allen Rosen's interpretation of Kant's analysis of the shipwreck case. Rosen writes, "The general principle...is that juridical laws should never attempt to regulate forms of external conduct that, in view of the

incentive of this kind adequate to give the penal law the “effect intended.” Nor did Kant discount the incentive of shame simply because, as a matter of empirical fact, the incentive of shame did not overcome this particular sailor’s fear of death. By that logic, no criminal would ever be punished, because all criminals by definition overcame the incentives provided by the punishments associated with the laws they broke.

Rather, Kant’s analysis shows that an external incentive is adequate to give a penal law the “effect intended” just in case it is one that every human being is rationally required to respond to by obeying the law, regardless of his or her contingent preferences. The threatened death penalty provides an incentive that every potential murderer is rationally required to avoid by obeying the law, except under circumstances in which death will result from obedience. The law against murder therefore legally obligates us under all and only those circumstances in which it provides us with a rational requirement to do obey.

More generally, I believe that the “effect intended” by the penal law as Kant conceives of it is to constrain our prospective conduct universally. It follows that the law must punish if—and only if—the punishment that it threatened is one that the wrongdoer was rationally required to avoid by complying with the law. A court would make the same mistake by punishing someone under circumstances in which he was not rationally required to obey the law as it would by failing to punish someone under circumstances in which he was rationally required to obey. Both kinds of inconsistency would undermine the universal character of

contingent facts of human psychology, cannot effectively be controlled through the coercive apparatus available to legal systems.” *Kant’s Theory of Justice*, p.

the law, which must constrain everyone's choices to the same extent under the same circumstances.

Understood in this way, the universality of obligatory law is exactly the same thing as our equality under it. Recall that an external incentive to obey is essential to provide "assurance" that our rights will be secure. "Assurance" makes our rights secure in a way that is independent of the mere "good will" of our neighbors, and is therefore essential to make the rights of the weak or mild subject equal to the rights of the strong or unscrupulous one. A merely contingent incentive would give us unequal assurance by motivating those for whom the incentive is adequate while leaving those for whom the incentive is inadequate unrestrained. A law must be universally capable of guiding our conduct in order to universally obligate us. Because the law must obligate us equally in order to obligate us at all, I therefore believe that a merely contingent incentive cannot generate a legal obligation for anybody.

Monetary Penalties Are Not Universal Incentives

If I am correct that a law can only obligate us by means of an external incentive that is adequate to establish a rational requirement to obey, then the range of external incentives by which the state can legally obligate us is narrower than many people believe. I previously argued that monetary rewards or accolades cannot be universal incentives, because no one is rationally required to value money or accolades over any competing desire. Similarly, I believe that monetary penalties cannot be universal incentives, because no one is rationally

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required to value the continued possession of a sum of money over any competing desire.

As Kant observes, money has “no value in itself.”³⁰⁸ Rather, it “can be used only by being alienated.”³⁰⁹ There are no external circumstances under which we are rationally required to prioritize our continued possession of a sum of money over competing interests, save perhaps in the unusual circumstance that the sum of money in question is essential to our continued survival.³¹⁰ This is the case because money is merely a means by which we can measure the tradeoffs that we make between our desires: “a thing which, in the circulation of possessions, determines the *price* of all other things.”³¹¹

Ripstein has observed that civil damages cannot universally motivate us to respect the rights of others, although he does not appear to share my view about the implications that his analysis has for our legal obligations. He writes:

The person who sets out to wrong another cannot merely be made to disgorge his gains or pay damages. Such payment could in principle entitle the criminal to wrong his victim, as a matter of right, simply by paying the requisite fee.³¹²

³⁰⁸ *Metaphysics of Morals*, p. 69. (Ak. 6:286)

³⁰⁹ *Metaphysics of Morals*, p. 69. (Ak. 6:286)

³¹⁰ We may be rationally required to prioritize retaining some particular sum of money over a smaller and less certain sum of money. However, there is no set of external circumstances under which that would be the only possible interest at stake. For example, a person who enjoys the feeling that she is doing something illegal may break the law for the sheer fun of it. Her preference may be open to moral criticism, but we cannot say that she is acting against her own rational self-interest valuing the enjoyment she receives from breaking a law more than the money her actions will cost her.

³¹¹ *Metaphysics of Morals*, p. 70. (Ak. 6:288)

³¹² *In Extremis*, p. 417.

To see what he means, suppose that a disgruntled employee considers adopting the maxim, “I will punch my boss for the sheer joy of it.” Because the concept of a legal action on her maxim logically contradicts the concept of a rightful condition, the disgruntled employee is considering committing a formal wrong. However, the threat of liability for civil damages may or may not provide this employee with an incentive to refrain from punching her boss, depending on just how disgruntled she is and how happy she thinks that punching her boss would make her. Although it is certainly true that many people in her situation would in fact be deterred from committing assault by the prospect of an expensive judgment, no one would be *rationally required* to be so deterred. If civil penalties alone do not deter this employee from her violent act, we may complain that she is acting immorally, but not that she is disregarding her own rational self-interest.³¹³

For this reason, Ripstein argues, individual rights can be reliably protected only by means of a threatened criminal punishment that “makes the wronging of the victim *normatively* unavailable, that is, it is something that the wrongdoer cannot rightfully acquire through his act.”³¹⁴ The sense in which criminal punishments make wrongdoing “normatively unavailable” is that, unlike paying a sum of money, death or imprisonment are not conditions to which I can rationally consent in return for the satisfaction of any material desire. In a different context, Kant observes:

³¹³ As Christine Korsgaard explains, “Kant is not claiming that it is irrational to perform immoral actions because it actually embroils us in contradictions.” *Groundwork*, p. xxi. (introduction)

³¹⁴ *In Extremis*, p. 417.

[E]verything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.³¹⁵

Although Kant was there speaking of moral law, the principle he articulates is applicable in the context of external freedom as well: Our external freedom has a dignity, and it cannot rationally be traded for anything. This principle is contained in the Kantian concept of rightful honor, which limits the kinds of legally binding bargains that I can make with others to those that preserve my physical freedom of action. For example, if I try to sell myself into slavery, the result is a legal nullity, because this is not a bargain to which I, regarded as a rational being, have the ability to consent.³¹⁶

Rightful honor mediates the difference between civil damages, which I can rationally agree to pay, and a jail term, to which I cannot rationally commit myself. Kant describes prison labor as such a condition:

[N]o human being in a state can be without any dignity, since he at least has the dignity of a citizen. The exception is someone who has lost it by his own *crime*, because of which, though he is kept alive, he is made a mere tool of another's choice (either of the state or of another citizen)...No one can bond himself to this kind of dependence, by which he ceases to be a person, by contract, since it is only as a person that he can make a contract.

We can now see that criminal punishments provide us with a universal external incentive to obey just in case they are conditions to which our duty of rightful

³¹⁵ *Groundwork*, p. 42. (Ak. 4:434)

honor would make it impossible for us to bind ourselves.³¹⁷ As Ripstein writes, “Kant cannot accept the idea that the criminal law is a series of offers, because these are not offers that anyone could rightfully make.”³¹⁸

Fines Establish Only Permissive Laws

A monetary penalty cannot, in principle, be a universal incentive to obey any law, because no one is rationally required to value a sum of money over any competing material interest. While Ripstein appears to see this merely as a reason why civil damages cannot reliably protect our rights, I believe that it has an additional implication: criminal penalties are the only way in which the state can legally obligate us. A universal external obligation requires a universal external incentive.

Criminal punishments are “pathological” in the sense that they constrain us physically, but it is their effect on our freedom that gives them their universal character. A disgruntled employee may not *actually* value her freedom from jail more than the happiness she expects to receive by punching her boss, but the fact that she is rationally required to do so makes this incentive universal in the only way it possibly can be universal. Obligatory laws must threaten criminal penalties because only physical restraint or harm will necessarily motivate everyone to obey under the same set of circumstances insofar as they are rational.

³¹⁶ *Metaphysics of Morals*, p. 104. (Ak. 6:330) Kant would make an exception for domestic relationships, which he thought required special natural law authority because they limited freedom of movement. See, *supra*, pp. 20-5.

³¹⁷ I am grateful to Daniel Viehoff for helpful comments on this subject.

³¹⁸ *In Extremis*, p. 419.

Insofar as the law obligates us to obey, this requirement of universality is really a requirement of equality under the law.

One surprising implication of this analysis is that many familiar laws that we are accustomed to thinking of as obligatory, including many ordinary parking and traffic ordinances, do not actually constrain our lawful choices. Indeed, in the context of a law against slander, Kant himself explains that a fine is not a universal incentive, and also that it does not bear an appropriate relation of logical inversion to the charged crime:

A fine, for example, imposed for a verbal injury has no relation to the offense, for someone wealthy might indeed allow himself to indulge in a verbal insult on some occasion; yet the outrage he has done to someone's love or honor can still be quite similar to the hurt done to his pride if he is constrained by judgment and right not only to apologize publicly to the one he has insulted but also to kiss his hand, for instance, even though he is of a lower class.³¹⁹

A wealthy would-be slanderer can thus be punished by a court order coercing him to perform humiliating actions, while a fine—because money has value only insofar as it determines the price of gratifying our desires—cannot serve this function.³²⁰

Ripstein concedes that “Kant is wary of fines” as punishments for this reason.³²¹ Nonetheless, Ripstein believes that fines can be punishments because that fact that money “is the general ‘means *by which men exchange their*

³¹⁹ *Metaphysics of Morals*, p. 106. (Ak. 6:332)

³²⁰ Presumably, if the slanderer refused to comply with the court order, he could be imprisoned for contempt of court.

³²¹ *Hindering a Hindrance to Freedom*, n. 28.

industriousness” makes it the case that money “can be treated as an approximation to a measure of freedom.”³²² But of course Ripstein would deny that there is actually some rate of exchange between money and freedom. Indeed, the distinction between them is mediated by the duty of rightful honor, which permits us to alienate our future interest in material goods, but not to alienate our future physical freedom of action.³²³ This important distinction is reflected in the law of contract, which does not require specific performance of labor contracts, but instead authorizes only monetary damages for their breach.³²⁴

I think Ripstein means to say that insofar as money is a perfectly general means of satisfying our material desires, we are rationally required to prefer more money to less money, all else equal. This seems like an arguable but possibly correct claim.³²⁵ If it is correct, then it follows that a monetary penalty can serve as a “universal external incentive” only in a much less demanding sense

³²² Ibid.

³²³ This is true except, for a more traditional Kantian than I am, in the special case of Kantian domestic relationships, which for that very reason require natural law authority.

³²⁴ See, for example, *Clyatt v. United States*, 197 U.S. 207, 215-16 (1905). To my mind, this raises an interesting further question of whether Kant might be constrained by his own principles to endorse the doctrine of efficient breach in contract law. According to this theory, I cannot truly alienate my performance, but only the value of my performance as means, meaning that I would not wrong a person to whom I have a contractual obligation if I tender the full monetary value of my performance to her in lieu of the performance itself. This is an interesting avenue for future investigation.

³²⁵ This conclusion is arguably implied by Kant’s argument in favor of the possibility of transferring property by inheritance: that a named beneficiary of a will would necessarily accept a right to a legacy, “since he can always gain but never lose by it.” *Metaphysics of Morals*, p. 75. (Ak. 6:294)

than I have claimed is required to establish a legal obligation. On Ripstein's view as I understand it, any threatened sanction that counts as a universal *prima facie* consideration against violating the terms of a statute is adequate to establish a legal obligation not to violate those terms, even if that *prima facie* consideration is easily outweighed by a rational assessment of the benefits obtainable by breaking the rule. If Ripstein's weaker notion of a universal external incentive were adequate to establish a legal obligation, then some subjects could profit, rather than being punished, for choosing to break the law. The law would not have supremacy with respect to such subjects, but would instead be a mere means for them. It is for this reason that I believe equality under the law requires more: an obligatory law must provide us with an external incentive that is universal in the stronger sense that every subject is thereby rationally required to obey the law. In Kant's words, a punishment must be sufficient to "*determine* [a subject's] choice to act in accordance with [the] law," rather than merely exercising an inconclusive influence on a subject's choice.³²⁶

In a brief passage in *Groundwork for the Metaphysics of Morals*, Kant suggests that not all "sanctions" are punishments. He writes, "sanctions are called 'pragmatic' that do not flow strictly from the right of states as necessary laws but from provision for the general welfare."³²⁷ I believe that Kant characterizes welfare-enhancing "sanctions" as "pragmatic" in order to distinguish them from punishments associated with what he calls "necessary laws." I argued in Chapter 2 that formally wrong actions are wrong

³²⁶ *Metaphysics of Morals*, p. 25. (Ak. 6:232)

³²⁷ *Groundwork*, p. 27. (Ak. 4:416) (footnote)

independently of their prohibition by statute, and that the state must criminalize formally wrong actions in order to establish a rightful condition.³²⁸ I therefore understand Kant's reference to "necessary laws" to refer to those laws that prohibit formal wrongs.

By contrast, "pragmatic" means "belonging to welfare" rather than pertaining to rights.³²⁹ Pragmatic sanctions, therefore, are one means by which the state can protect itself by safeguarding the welfare of its subjects through activities such as pollution control, public health measures, and the regulation of conduct in public spaces. Insofar as the many laws that further these ends impose only fines on those who violate their terms, I believe that such laws are permissive laws. In Ripstein's words, permissive laws enable "a merely permissible act, one that is neither forbidden nor required, to have consequences for rights."³³⁰ Permissive laws that impose only fines cannot legally obligate us. Therefore, they do not constrain our lawful choices. They nonetheless "have consequences for rights" by making it the case that we incur a monetary liability as a result of exercising a particular lawful choice. In this way, fines function as taxes or fees on lawful conduct.

Are Regulatory Violations Necessarily Material Wrongs?

So far, I have shown that fines cannot establish a prospective legal obligation because they do not provide a universal incentive to obey a statute's nominal commands under any set of external conditions. For this reason, I have

³²⁸ See, *supra*, pp. 90-3.

³²⁹ *Groundwork*, p. 27. (Ak. 4:417)

argued that laws that impose only fines on nominal violators are not obligatory laws. Instead, they are permissive laws that associate taxes or prices with some of our lawful choices. I personally find this combination of conclusions intuitively satisfying, but I understand that others may feel that something has gone wrong here. How can it not be wrong to disobey the terms of a rightful public statute? In this section and the next, I will explore this objection by considering an example involving a common traffic ordinance and a very eager barber.

John Edwards offers Barber Barbara \$400 to give him a haircut, but only if she arrives at the airport in time to cut his hair before his private jet's scheduled departure. Barbara tells Edwards that she can arrive on time only if she travels alone in the highway's carpool lane, violating the terms of the following statute:

UNACCOMPANIED MOTORISTS ARE PROHIBITED
FROM DRIVING IN DESIGNATED CARPOOL LANES.
VIOLATORS WILL BE FINED \$100.

Edwards convinces Barbara to drive in the carpool lane by pointing out that the \$100 fine that the law imposes is far less than the price of his haircut. Moreover, because the law is enforced by cameras instead of police patrols, receiving a ticket would not delay her, and let us say for the sake of argument that the incident also would not affect Barbara's auto insurance premiums. Convinced, Barbara heads to the airport in the carpool lane and cuts Edwards' hair as his jet idles on the tarmac.

³³⁰ *Force and Freedom*, p. 103. (footnote)

Was Barbara's journey to the airport in the carpool lane wrong? An action is a material wrong if it interferes with another person's use of her means, or if it constitutes an unauthorized use of another's means.³³¹ It is certainly possible to imagine circumstances under which Barbara's use of the carpool lane involves wronging another individual. For example, Barbara might enter the lane carelessly, thereby causing an accident, and we can (and will) debate the question of whether or not she wrongs another driver if her presence in the lane slows down traffic. Nonetheless, her nominal violation of the carpool lane statute does not, in itself, amount to "wronging anyone else in particular."³³² It is possible to act as Barbara did without committing a material wrong against another person.

If public roads were private property, Barbara's use of the carpool lane would be trespass: an unauthorized use of another person's real property. Ripstein appears to make an argument along these lines when he refers to the use of a public space in a manner inconsistent with the terms of laws of public provision as "a private appropriation of public space."³³³ For example, Ripstein writes that a beggar, insofar as his activity violates the terms of any legislative enactments, "does wrong by appropriating public space for private purposes."³³⁴ A parking law violator likewise "claimed the public space for private purposes," whether or not her violation hindered anyone's ability to travel or park.³³⁵

³³¹ See, *supra*, pp. 46-7.

³³² *Force and Freedom*, p. 250.

³³³ *Force and Freedom*, p. 262.

³³⁴ *Force and Freedom*, p. 263.

³³⁵ *Force and Freedom*, p. 262.

Ripstein’s language about public spaces and private purposes may seem confusing at first, because we use the public roads for private purposes all the time. Ripstein believes that the public purpose of the road is to preserve our independence by providing a means by which we can travel in order to associate with others.³³⁶ My activity of traveling on the road is a fulfillment of that purpose, but the state’s purpose does not need to be *my* purpose.³³⁷ Indeed, I may be traveling to a demonstration in favor of privatizing the public roads.

The Veronese example from Chapter 2 may clarify Ripstein’s meaning. Recall that Romeo does not wrong Juliet (in the sense bearing on rights) if he cuddles her for the private purpose of making Rosaline jealous, so long as he tells no lies and Juliet agrees to be cuddled.³³⁸ However, Romeo does wrong Juliet if he cuddles her without her consent, even though she would have agreed to be cuddled had she been asked.³³⁹ This example demonstrated that two private parties to a rightful interaction must “share a purpose” in a very strong but very narrow sense. They must have a “meeting of the minds”—and therefore something like a numerically identical purpose—regarding the terms of any rightful interaction itself. However, the parties’ private purposes—what each may “hope to gain” from the interaction—need not be identical in any way. Applying

³³⁶ See *Force and Freedom*, pp. 243-9.

³³⁷ Analogously, procreation is the purpose for which Kant believed that sex was justified in the context of marriage, but he did not believe that procreation had to be individuals’ subjective purpose. Rather, he believed that it was unobjectionable for married couples to have sex for pleasure. See *Metaphysics of Morals*, p. 62. (Ak. 6:277)

³³⁸ See, *supra*, p. 50.

³³⁹ See, *supra*, p. 48.

this analytical approach to Barbara's use of the public roads yields Ripstein's result: Barbara wrongs the state if she uses the public road in a manner which the people, through their laws, have not authorized. So long as Barbara follows the rules, her private purposes need not be in any way identical with public ones.

However, this analysis is inappropriate in the context of public spaces, because the state itself has no property rights. Ripstein himself writes in a different context, "as Kant understands states, they do not have external objects of choice."³⁴⁰ Recall the reason for this: independent adjudication by an authority is a constitutive element of a property right, and the state cannot coherently be subject to itself on equal terms with an individual subject in any dispute over property rights.³⁴¹ When Kant describes the transition between a state of nature and a civil condition, he explains that the state can never be united with its own subjects under law:

The *civil union* cannot itself be called a *society*, for between the *commander* and the *subject* there is no partnership. They are not fellow members: one is *subordinated to*, not *coordinated with* the other; and those who are coordinate with one another must for this very reason consider themselves equals since they are subject to common laws. The civil union is not so much a society but rather *makes* one.³⁴²

The state cannot own property in the Kantian sense, because it cannot coherently be subject to its own laws of private right.³⁴³

³⁴⁰ *Force and Freedom*, p. 228.

³⁴¹ See, *supra*, pp. 37-8.

³⁴² *Metaphysics of Morals*, p. 85. (Ak. 6:306-7)

³⁴³ *Metaphysics of Morals*, p. 99. (Ak. 6:324)

The state's means therefore do not consist of external objects of choice, but rather of the state's three authorities—"the right of command" over the people.³⁴⁴ For this reason, I think that Ripstein's analysis does not show that the state was materially wronged by Barbara's conduct. Indeed, I believe that the state, because it has no acquired rights, *cannot* be materially wronged by its own subjects.³⁴⁵ All wrongs committed by subjects against the state within which they reside are formal wrongs.

Are Regulatory Violations Necessarily Formal Wrongs?

Barbara's use of the carpool lane was not a formal wrong either. On my proposed interpretation of the Universal Principle of Right, an action is formally wrong just in case the concept of a legal action on its maxim logically contradicts the concept of everyone's freedom in accordance with a universal law (i.e. the concept of a rightful condition). At first, it seems obvious that Barbara's action is not a formal wrong by this standard. Carpool lanes, useful though they might be, are not a constitutive element of a rightful condition.

However, I must formulate Barbara's maxim in order to apply my proposed standard, and doing so raises the question of how to handle the fact that Barbara *knows* that her action nominally violates the carpool lane statute. Barbara believes that by acting on her maxim, she will break the law. Potentially relevant circumstances should be incorporated into any maxim evaluated under

³⁴⁴ *Metaphysics of Morals*, p. 99. (Ak. 6:324)

³⁴⁵ Insofar as a state is embodied by its territory, there may be a metaphorical sense in which a state is materially wronged by a foreign invasion. See *Metaphysics of Morals*, p. 116. (Ak. 6:346)

my standard. Barbara's maxim should therefore be formulated: "I will drive in the carpool lane, even though it is illegal, in order to earn money."

The concept of a legal action on Barbara's maxim may appear at first to be *self-contradictory*, because an action cannot be legal and illegal simultaneously. However, I believe that this is a mistake. In Chapter 3, I showed that the circumstances identified in an agent's maxim for the purpose of determining formal wrongdoing are subjective beliefs, not facts about the external world.³⁴⁶ It is logically possible to perform a legal action while incorrectly believing it to be illegal. The question in this case is whether the legality of an action on what I will call a "lawbreaking maxim"—one that incorporates a subjective belief that the action undertaken is illegal—would for that reason contradict the concept of a rightful condition.³⁴⁷

I do not believe that the concept of a legal action on a maxim that reflects an agent's subjective belief that her action violates the law contradicts the concept of a rightful condition for that reason. To conclude otherwise would create a category of actions that are simultaneously wrong and obligatory, which is logically impossible. For example, suppose that an unjust statute requires me to report the identities and locations of my Jewish neighbors to the police, so that any such neighbors can be arrested and deported. Because I suffer from a flawed theory of law, I incorrectly believe that I have a legal obligation to report my neighbors. Nonetheless, I am tempted to flout my perceived legal obligation because I love my neighbors and cannot bear the idea of causing them to suffer.

³⁴⁶ See, *supra*, pp. 90-3.

³⁴⁷ I am grateful to Michael Joel Kessler for helpful comments on this subject.

Which course of action open to me would be right? I would materially wrong my neighbors if I voluntarily reported them to a government that intended to illegally deport them. However, if my incorrect subjective belief that I am legally required to report my neighbors were enough to make my decision *not* to report them a formal wrong, then reporting them would also be obligatory. For Kant, such a double bind is logically impossible:

A conflict of duties would be a relations between them in which one of them would cancel the other (wholly or in part). –But since duty and obligation are concepts that express the objective practical *necessity* of certain actions and two rules opposed to each other cannot be necessary at the same time, if it is a duty to act in accordance with one rule, to act in accordance with the opposite rule is not a duty but even contrary to duty; so a *collision of duties* and obligations is inconceivable.³⁴⁸

A subjective belief that an action is illegal therefore cannot suffice to make it the case that the action in question is formally wrong.

However, there is an additional argument to be made for the proposition that Barbara’s action is formally wrong, which is of the same form as the argument I offered in Chapter 2 for the proposition that reckless endangerment is formally wrong. Recall that an act of reckless endangerment is formally wrong because it intentionally puts others in grave danger of being materially wronged.³⁴⁹ Because grave danger of material wrongdoing is a part of the maxim on which a reckless party acts, the legality of an action on her maxim logically contradicts the concept of a rightful condition.

³⁴⁸ *Metaphysics of Morals*, p. 16. (Ak. 6:224)

³⁴⁹ See, *supra*, p. 61.

Barbara's use of the carpool lane does not necessarily slow down traffic in that lane, which may be almost empty, but one might reasonably argue that the act of entering the carpool lane is extremely likely to cause traffic in that lane to slow down slightly in order to accommodate an additional vehicle, just as the act of driving blindfolded through town is extremely likely to injure pedestrians. If this is correct, then entering the carpool lane is a formal wrong if other drivers in the lane would be materially wronged by being required to slow down. It is a material wrong to interfere with another person's use of her means, so long as that use is not itself wrongful. Because the carpoolers are not doing anything wrong, the question is whether Barbara, by slowing down traffic, wrongfully interferes with their use of their own vehicles to get to their destinations.

Ripstein draws a useful distinction, relevant here, between actions that interfere with others' use of their means, and actions that merely change the environment in which others act.³⁵⁰ You have a right to go to the store to try to buy milk, but I do not wrongfully interfere with your activity if I arrive before you and purchase the last carton. The reason I do not wrong you is because you don't have a right to succeed in your effort; all you have a right to is the free use of your own means, which do not include—until and unless you are able to purchase one—a carton of milk.³⁵¹ By beating you to the last carton, I have merely changed your environment in a way that you find inconvenient.

³⁵⁰ *Force and Freedom*, p. 99-101.

³⁵¹ As Ripstein writes, "Your person and your acquired rights exhaust the means that are subject to your choice." *Force and Freedom*, p. 241.

Applying this analysis to the carpool lane case would provide an easy answer if Barbara were driving in the lane with a companion. A carpooler who generates slightly more traffic for those behind her is no different than a shopper who generates slightly more market demand for milk. The critical question now appears to be whether Barbara's solo carpool lane occupancy is different from this scenario in some way bearing on rights. The argument that Barbara's action wrongs other drivers must go something like this: we each have a right to use our own vehicles to travel on the public roads *in the manner prescribed by law*. Among lawful drivers, first-come-first-serve is unobjectionable, but Barbara is helping herself to a freedom prohibited to others. In doing so, she wrongly interferes with other drivers' use of their vehicles to get to their destinations on the public roads.

Indeed, Ripstein appears to make an argument along these lines. Comparing a traffic violation to a private contract violation, Ripstein writes, "the 'free rider' wrongs his fellow citizens by taking advantage of their efforts."³⁵² He also writes:

In the context of mandatory social cooperation, if you do your part but others do not do theirs, they have treated you as a mere means, because you have contributed to the achievement of their purposes. You set out to do your part; rather than doing theirs, they took advantage of your efforts.³⁵³

I believe that arguments of this type beg the very question at issue in this chapter: how we ought to interpret laws of public provision. If we interpret laws of public

³⁵² *Force and Freedom*, p. 258.

provision as obligatory laws, then Barbara is a wrongdoer, because she makes herself an exception to a law that she is rationally required to endorse for others. If we interpret laws of public provision as permissive laws, then Barbara is traveling on the public roads “in the manner prescribed by law,” and Ripstein’s objection does not apply to her.

I believe that a concern for the universality of the law is at the heart of this kind of objection. I also believe that universality is precisely the property of law that makes it the case that laws imposing only fines on nominal violators must be interpreted as permissive laws. In order to obligate us, a statute must establish a universal external incentive for compliance—a punishment that every person is rationally required to avoid by complying with the law. Because the statute that Barbara nominally violated did not provide such an incentive, Barbara’s action was both lawful and rightful, though not particularly virtuous.

Of course, not every law that imposes a fine is necessarily free of formal defects. A law that imposes a fine on something we have a preexisting right to do may infringe on our freedom if it prevents the exercise of our rights or if it is unrelated to any public cost associated with the fined conduct. For example, it would probably be impermissible to charge a special tax on those who exercise the right to pray. Similarly, as Ripstein argues, our external freedom may include a right to travel on public roads in order to freely associate. If he is correct, a fee charged for the mere right to travel on the public roadways could be inconsistent with our freedom, especially if it contained no exception for those who could not

³⁵³ *Force and Freedom*, p. 257.

afford to pay it. Fines can also violate the principle of equality under the law by charging some individuals more than others without any reasonable basis. In light of my finding that such laws should be considered permissive rather than obligatory in nature, these questions should prove fruitful avenues for additional inquiry.

Conclusion

This project has endeavored to provide a Kantian philosophical framework for understanding our individual obligations under public law. We are all rationally required to value our external freedom, and the state is therefore authorized to establish and enforce coercive laws for the purpose of securing the greatest equal freedom that is possible for us. Because we have a right to do anything that is not wrong, I have offered an interpretation of Kant's Universal Principle of Right that tracks the two ways—material and formal—in which actions can be wrong. My interpretation yields some surprising insights, most notably a novel formulation of Kant's standard for formal wrongdoing, which establishes that the wrong-making property of a formally wrong action does not depend on whether or not the action in question has been prohibited by statute. I infer from this a natural law theory of public crime: only if an action is already formally wrong can it be justly prohibited by the state.

I also developed a Kantian theory of the prerequisites for legal obligation. In order to obligate us, a legal prohibition must include a universal external incentive to comply with the law in the form of a criminal punishment. Fines cannot serve as the required universal external incentive, because they can never generate a rational requirement to obey a law. It follows that otherwise just enactments that impose only fines on nominal violators should be understood as rightful permissive laws, according to which we may incur liabilities through our voluntary choices.

While this project covers a great deal of ground, it also raises many additional questions, which I hope will be fruitful avenues for future research. I have not yet explored in detail the manner in which my formulation of Kant's standard for formal wrongdoing might be applied to actual criminal statutes in order to determine whether they have lawful authority. I also have not yet explored in detail how permissive laws must be structured and administered in order to be consistent with the principle of equality. For example, does imperfect or intermittent enforcement of fines associated with permissive laws amount to an objectionably arbitrary application of the law? What fine-avoidance activities on the part of subjects are permissible, and which are morally or legally objectionable? When do fines impermissibly burden liberty rights that we may have to access public spaces such as roads? A research program that answers these and other questions will develop a richer theory of Kantian permissive law.