

In Extremis

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*In one of the few widely discussed passages in the *Doctrine of Right*, Kant makes the surprising claim that a shipwrecked sailor who dislodges another from a plank that will support only one of them is “culpable, but not punishable.” Many commentators regard this passage as a sort of smoking gun that shows that, in *extremis*, Kant resorts to the very sort of empirical and consequentialist reasoning that he claims to do without. My aim in this paper is to defend his analysis, by showing both that it can be generalized, and that it provides a satisfying account of the normative boundary between justification and excuse in the criminal law. After explaining Kant’s remark in light of the context in which he makes it, my main strategy of defense will be to show how it applies not only to the specific example Kant considers, but also to cases in which a person responds to danger by damaging property, and those in which a person whose own life is not in danger breaks the law to save the life of another. I will also use his account to illustrate the difficulties with the leading alternatives.*

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¹ IMMANUEL KANT, *The Doctrine of Right, Part One of the Metaphysics of Morals*, in IMMANUEL KANT: PRACTICAL PHILOSOPHY 392 (Mary J. Gregor trans., 1996) (1797).

² See, e.g., Suzanne Uniacke, *The Limits of Criminality: Kant on the Plank*, in PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT 113 (Henry Tam ed., 1996); Claire Oakes Finkelstein, *Two Men and a Plank*, 7 LEGAL THEORY 279 (2001).

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I. LAW AND MORALITY

This paper is part of a more general project, focused on Kant's legal and political philosophy, the central theme of which is that law must be understood in terms of the legitimate use of force, rather than as an instrument for achieving ends that are regarded as morally desirable from some other perspective. On this Kantian view, the basic structural features of a legal system are expressions of the system's entitlement to force people to respect the equal freedom of others. The claim to coerce depends upon the legal system's claim to do justice, but the connection is mediated through its systematic features. As a result, on the Kantian view, law does not and must not aspire to be morality or to capture every morally important distinction.³ Instead, it is limited to what he calls "external" lawgiving, that is, it must depend on laws for which the incentive for compliance does not depend on whether the person to whom the law is addressed accepts the law as a principle of action.

The general idea of reciprocal limits on freedom provides Kant with the outline of an account of criminal law. The commission of crimes against persons and property is a particular way in which one person treats another as a mere means. Criminal law is part of a layer of public law governing relations between individuals and the state, built on underlying structures of the private law that govern interactions between private parties. The structure of the criminal law follows the structure of private wrongs, since the latter law defines the basic categories of wrongs against persons and property that are the main subject of the criminal law. Kant's account of private wrongdoing is not harm-based, but rights based: a private wrong is an interference with the freedom of another person.⁴ There are two basic types of interference: injury and trespass. An injury involves depriving a person of some power to which he had a right—by damaging or literally depriving him of it. Injuries to person, property and reputation deprive their victims of powers that they had—their ability to use their own bodies, their goods, or their good name. Injuries restrict freedom, depriving persons of means that they had with which to set and pursue their own purposes. A trespass involves using another person or his goods in pursuit of an end that the latter person does not choose to pursue. Trespasses against person, property and reputation use what properly belongs to one person for another's purposes: one uses another's powers, and in so doing subjects the powers of the first to the other's choice.

³ Recent moral philosophy has often been criticized for being excessively legalistic; my own view is that criminal law theory is too often excessively moralistic.

⁴ I develop this division of right (and so of wrongs) in detail in Arthur Ripstein, *Authority and Coercion*, 31 PHIL. & PUB. AFF. 2 (2004).

An important consequence of this division is that some harms are not even *prima facie* wrongful, while some wrongs are not harmful. If I deprive you of something to which you have no right—the view of the sunset over my land, or the use of someone else’s property—I do not wrong you. If I deprive you of something to which you have a right, I wrong you even if I do not harm you. Suppose that, without consulting you, I take an afternoon nap in your bed, while you are out of the house. (I bring my own sheets, sweep the floor on my way out, and so on). I do you no harm, but I wrong you in Kant’s sense. The same is true if I embezzle from you and return the money with interest. Crimes against persons and property are prohibited as injuries or trespasses that fail to treat their victims as ends. The criminal law takes wrongdoing rather than harm as its central focus.⁵

Kant frames his discussion of the criminal law through the idea of a social contract, arguing that all must jointly authorize a civil condition in which everyone’s rights and goods may be coercively protected, and that a “consequence” of the social contract setting up such a condition is that the executive branch of the government must have the power to punish crimes. The parties to the contract must be motivated by the precept, taken from Ulpian, to protect their “rightful honor” that is, to “never allow oneself to be a mere means for another.”⁶ The connection to the criminal law is not drawn explicitly, but Kant’s point is that the criminal law is required so as to prevent wrongdoers from making the existence of a public rightful order the means through which they wrong others, that is, to prevent them from turning right into a means for wrongdoing. In crimes against person and property, the criminal treats his victim as a mere thing. As such, the victim is entitled to private redress in the form of damages. But the criminal *also* turns the structure of a rightful condition against itself, using it as the means through which another can be wronged with impunity. Persons concerned with protecting their rightful honor could not authorize a condition in which that can happen; to allow it would be to authorize wrongdoing provided that damages were paid. 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. The state can only prevent this from happening by threatening to visit the wrongdoer’s wrong back upon him, so that the wrong does not become a possible means through which he pursues his ends. The threat of punishment makes the wronging of the victim *normatively* unavailable, that is, it is something that the wrongdoer cannot rightfully acquire through his act. That threat does not guarantee that no crime will go undetected or unpunished, because nothing could guarantee that.

⁵ The Kantian approach thus avoids the need to concoct remote harms to explain ordinary wrongs. See, e.g., John Gardner & Steven Shute, *The Wrongness of Rape*, in OXFORD ESSAYS IN JURISPRUDENCE 193 (Jeremy Horder ed., 4th Series 2000). Gardner and Shute seek to reduce the primary wrong of rape to a remote one by claiming that a rape of a drugged woman that is never discovered violates a general rule that is justified by the fact that it prevents harm.

⁶ KANT, *supra* note 1, at 392.

Kant's contractarian account of punishment shows that the punishment of such conduct is something that everyone must authorize, as a condition of entering a civil condition, since everyone has an interest in not being wronged by another. For Kant, the parties to a social contract are concerned with preserving their independence, that is, concerned that they not become a mere means for another, or become entirely dependent on another's choice. The criminal law is an expression of this condition of the contract, since crime is a way in which one person treats another's freedom as a mere means or obstacle in pursuit of his own purposes, thus rendering the latter subject to his will. Kantian contractors have no parallel interest in avoiding the pains of punishment. To be punished for a wrong you have committed is not in any way incompatible with your claim to independence.⁷

II. IN EXTREMIS

The law's response to extreme circumstances is widely held to reveal its underlying presuppositions. For Hobbes, extreme circumstances force the law to revert to a state of nature, because they lay bare the system's fundamental premise of individual self-preservation. Hobbes thus insists that *in extremis* men have "a right to everything, even to one another's body."⁸ For Hegel, such circumstances reveal the conceptual priority of persons over property. For H.L.A. Hart, the criminal law's aim of giving effect to choice must run out when the agent is faced with an offer he cannot refuse. For the utilitarian, emergencies reveal ordinary rules to be mere heuristics to be abandoned when they will not produce their usual results. For George Fletcher, dire circumstances make the criminal law worthless as a measure of the character of wrongdoers.

Kant's more general theoretical views about law and coercion cannot make room for any of these standard ways of thinking about emergencies, whether couched in terms of justification or excuse. He must reject the Hobbesian account, because he regards all rights as relational, and so cannot accept the idea of "a right to all things" that is not a right in relation to others. He cannot allow a general utilitarian defense of lesser evils; to allow it would be to license one person to treat another as a mere means to his own purposes, or those of a third party. He cannot accept the Hegelian view that the law presupposes a hierarchy of values, and so must not punish those who act in keeping with that hierarchy,⁹ because he insists that the law must abstract from what he calls the "matter" of an agent's choices, and so from "mere need or wish."¹⁰ The fact that I need something in order to

⁷ Kant makes this point in his preferred vocabulary of noumena and phenomena, saying that as a noumenal self, I must will that crimes be punished, though as a phenomenal self I will the commission of a crime. I do not will the punishment upon myself. KANT, *supra* note 1, at 476.

⁸ THOMAS HOBBS, *LEVIATHAN* 80 (Edwin Curley ed., 1994) (1651).

⁹ GEORGE W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 155 (H.B. Nisbet trans., 1991). For an elaboration and defense of Hegel's argument, see Alan Brudner, *A Theory of Necessity*, 7 *OXFORD J. LEGAL STUD.* 339 (1987).

¹⁰ KANT, *supra* note 1, at 387.

survive cannot give me a right to that thing, and so cannot justify my taking it. It is incumbent on the state to provide for those in need, but that duty neither grows out of, nor generates, an enforceable duty on the part of one private citizen to aid another, and so cannot justify a corresponding right on the part of the person in peril to take what he needs.

Nor can Kant accept the standard contemporary analyses of excusing conditions. He must reject H.L.A. Hart's idea that it is unfair to punish a person who lacked the capacity or opportunity to bring his conduct into conformity with the law. For Hart, the criminal law is a system that is supposed to give effect to people's choices, by providing them with fair warning that they will be punished if they choose to do certain things. Kant cannot accept the idea that the criminal law is a series of offers, because these are not offers that anyone could rightfully make. Criminals are not punished because the law includes the bundle (crime, punishment) among the available options; they are punished because they do something that is legally *not* an option. As a result, he must reject Hart's view that we decline to punish where the offer was on unattractive terms because the other available choices were limited. Kant cannot endorse George Fletcher's claim that excusing conditions block the inference from an agent's conduct to his character, because he must deny that character is relevant to criminal wrongdoing. And he cannot accept the idea that people who act in emergencies are the subjects of judicial compassion, because that would make their excuses contingent in the wrong way. If we did not feel sorry for the person who responds to extreme circumstances, that would not make it appropriate to punish him; if we happened to feel sorry for the person who was overwhelmed by greed or lust, that would not make it appropriate to reduce his punishment.¹¹ Each of the standard accounts presupposes some idea of legality that is divorced from the idea of reciprocal limits on freedom.

Kant's analysis, if it can be defended, has profound implications not only for criminal law theory, but also for legal and political philosophy more generally. Kant's basic premise is that there is a special morality governing what people may be forced to do. The failure to distinguish between what someone *should* do and what he can rightly be *forced* to do has been the reef on which much legal and political philosophy has foundered.¹² The fact that someone *should* do something does not license others to force him to do that thing. Nor does the fact that someone should do something mean that others must aid him or even acquiesce in his so doing. As a result, enforceable legality will not necessarily track moral blameworthiness.

¹¹ See JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* (1992).

¹² I discuss this issue in more detail, and defend Kant's account, in Ripstein, *supra* note 4.

III. THE PLANK

In the Appendix to the Introduction to the *Doctrine of Right*, Kant considers two cases of what he refers to as “ambiguous” or “equivocal” right: cases of equity, and of necessity. The issue of necessity concerns the question of whether there is a right to use force against someone who has done no wrong to me, that is, the case of what philosophers have recently taken to calling “innocent threats.” Kant puts the problem in its starkest form, asking whether I am authorized to take the life of another person in such circumstances. But his answer is clearly meant to be more general: there is no right of necessity because my circumstances could never give me a right that I would not otherwise have. Indeed, because rights always govern relations between persons, and set reciprocal limits on their freedom, *nothing* specific about me could give me a right that I otherwise did not have. Merely being in a condition of want or need could not give me a right because my wants and needs do not implicate others in the right way.

The situation of necessity, as posed by the innocent threat, is different from the case of defense against an aggressor, where, as Kant remarks, the “recommendation to show moderation belongs not to right but only to ethics.”¹³ I have no obligation to restrain myself in the face of an aggressor, although virtue may well require me to do so. Force may be used to forestall a wrongdoer. Where the other person has done no wrong, I could not have an authorization to use force against him. The contrast between harm and wrong is crucial here: the other sailor already on the plank does not wrong me by being on the plank. He harms me, at least in the counterfactual sense that I am much worse off than I would have been had he not grabbed the plank first. But the mere fact that someone worsens my comparative situation in virtue of being “where nature or chance has placed him,”¹⁴ does not entitle me to better that situation by removing him. Indeed, even if he harms me not merely counterfactually, but through some affirmative deed, I would only be entitled to use force against him if that deed was wrongful. If he had pushed me off the plank first, I could rightfully dislodge him, because he would be a wrongdoer. Kant writes:

[T]here can be no *penal law* that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning). Hence the deed of saving one’s life by violence is not to be judged *inculpable* . . . but only *unpunishable* . . . , and by a

¹³ KANT, *supra* note 1, at 391.

¹⁴ *Id.* at 414.

strange confusion jurists take this *subjective* impunity to be *objective* impunity (conformity with law).¹⁵

Care is required in explaining just why law cannot guide in such circumstances. Of course, it may guide some in conscience: the drowning sailor may say to himself, “Thou shalt not kill,” as he swims away from the plank. This possibility is not ruled out; indeed, Kant concedes that this may happen even in the face of aggression, where there is no obligation to refrain from using force. External lawgiving does not depend upon its ability to guide in conscience, but rather on its ability to secure the conditions of equal freedom. If that is what it is supposed to do then, in circumstances in which the wrongdoer *could not* be guided by the law’s threats, the law has failed to threaten at all, and so cannot punish.¹⁶

The claim that the wrongdoer could not be so guided is not empirical. As Dennis Klimchuk has shown, Kant offers it as an analysis of the very idea of a threat.¹⁷ A threat provides an incentive to action if the agent represents it as an evil. Kant’s claim is that insofar as fear of death is an incentive for the sailor, the prospect of certain death must move him more than any prospect of uncertain death. A threat can only be carried out if it can be made; here the threat can be uttered but not made. Again, we might imagine that the prospect of a slow and painful death, or of punishment meted out against the wrongdoer’s family, might be sufficient to deter in even the most extreme circumstances. Kant takes it for granted that this is not an option, because the rationale for punishment is systematic: crimes of a particular type merit a particular type of punishment. To increase the punishment in response to the difficulty of the circumstances in which the wrongdoer finds himself would be incompatible with the systematic concern with reciprocal limits on freedom that provides punishment with its rationale in the first place. That rationale precludes extreme punishments for ordinary murderers, and so precludes them for murderers who kill in emergencies.

It might be thought that the two fears are not equivalent, because even without an enhanced penalty, the prospect of being found guilty of murder and executed might strike some people as worse than death itself. Yet if the fear in question is the fear of being thought, or found, to be a wrongdoer, Kant’s point still goes through.¹⁸ Some particular drowning sailor might well fear a trial and conviction, but the law does not have trials and verdicts as a way of shaping the behavior of those who happen to fear them. The punishment that is threatened is supposed to

¹⁵ *Id.* at 392.

¹⁶ For a discussion of the history of the example, see Joachim Hruschka, *On the History of Justification and Excuse in Cases of Necessity*, in *PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS* (Werner Krawietz et al. eds., 1994).

¹⁷ Dennis Klimchuk, *Necessity, Deterrence, and Standing*, 8 *LEGAL THEORY* 339 (2002).

¹⁸ It has recently become fashionable to focus on the trial as the central locus of the criminal law. For an extreme version of this, see John Gardner, *The Mark of Responsibility*, 23 *OXFORD J. LEGAL STUD.* 157 (2003).

visit the wrong back upon the wrongdoer, insofar as it is possible to do so, and conviction for a crime is not part of the wrong that the punishment seeks to address. So the collateral incentive of the fear of a trial is not part of the purpose of punishment. It is also perhaps worth noting that if the thing that the imagined sailor most fears is it becoming known that he did wrong, that might well move him even if he is not punished. The criminal law cannot presuppose such motivations of honor, so it cannot make them part of the measure of punishment.

Kant's account of deterrence contrasts with the more familiar utilitarian understanding of it, according to which its point is exclusively forward-looking: we punish the wrongdoer when he violates the law so as to warn others of what will happen to them, and so discourage them from wrongdoing. This form of deterrence operates empirically: the appropriate measure of punishment depends upon the way in which those to whom it is addressed are likely to reason about whether to commit a crime. Their reasoning will presumably be a function of the magnitude of sanction if they are caught committing a crime, and their beliefs about the likelihood of apprehension and conviction. Such empirical deterrence can operate in emergencies: if the sailor who dislodges the other is convicted, and that conviction is publicized, others in less extreme situations may hesitate to break the law. As Lord Coleridge says in *Regina v. Dudley and Stevens*, the law can "speak most loudly" in such situations.¹⁹ For the Kantian account, deterrence cannot be exclusively forward-looking, or proportional to the likelihood of detection.

As Joachim Hruschka has shown, Kant's treatment of necessity reflects his more general reliance on a sequenced account of imputation of a sort that has recently become prominent in criminal law theory.²⁰ The first stage is concerned with the direction of conduct: the criminal law tells people what they are and are not allowed to do, and in some instances, what they are required to do. The second is concerned with the legal system's response to conduct: it tells judges what can and cannot be punished. The former aims to guide prospectively; the latter is applied retrospectively. Because the account is sequenced, the first stage enjoys a certain kind of priority, for it is the stage that determines the appropriate description of a person's action. The second stage is concerned with the legal system's response to the action so described, but does not lead to a new description of it.

At both levels of analysis, Kant's analysis of imputation is a consequence of the idea of equal freedom, rather than an independent piece of analysis. Questions about whether a deed can be imputed to an agent are not empirical or even theoretical questions. Instead, imputation takes place in relation to a norm of conduct, and gets its point from the system of norms. At the first level, the pertinent question is: Has the accused interfered with the freedom of another? The answer must be "yes," for he has chosen to take another person's life. Has the

¹⁹ 14 Q.B.D. 273 (1884).

²⁰ See generally Joachim Hruschka, *Imputation*, 1986 BYUL REV. 669.

accused made the interference with another's freedom the means through which he pursues his purposes? Again, the answer must be "yes," for he took that life to spare his own. At this first stage of imputation, we know all we need to in order to assess civil damages. One person interfered with the rights of another, and he can be compelled to make good the loss he thereby created. At this first level of analysis—the only level that is possible for private right—the sailor remains subject to compulsion by a court, even though his acts could not be compelled prospectively, because he can be compelled to make up the loss by having his assets attached (if he has any). At this level of analysis, coercion can still operate after the fact to restore to each what is rightfully his, at least by giving the sailor's survivors damages equivalent to the income they would have received from him had he lived.

At the second stage of analysis, we ask again if the act can be imputed to the sailor. This time we ask whether it can be so imputed for purposes of punishment. The only way we can answer this question is by asking the underlying question which it presupposes: Did the state threaten to punish this sort of action? This time the answer must be "no," because the state cannot threaten where the threat cannot shape conduct. It can at most announce its intention to punish in these circumstances, but so announcing would not make a difference to conduct, and so would be irrelevant to the accused's ability to wrong the other as a matter of right. At this level of analysis, coercion only guides conduct prospectively. Where it must fail to do so, the only possible coercive response is the mandatory payment of damages. That is just to say that the sailor who pushes the other off the plank commits murder successfully.

The Kantian account gives a novel expression to the truth underlying contemporary theories of excuses. George Fletcher's account, which understands excuses as modeled on the idea of involuntariness, is right about something: to make and carry out a threat that must fail is as pointless as punishing an involuntary act. You can visit pain on a person for a deed that he will commit regardless of what you threaten to do to him, but you cannot threaten to do so in order to stop him from doing that deed. Thus the acts in question are punitively involuntary, because the criminal law cannot speak to them. Fletcher's related claim that we excuse crimes when anyone would have done the same thing also contains a grain of truth: the criminal law coerces performance by demanding it, and so must assume that its demands make a difference to how people will behave. When life is in peril, the law must assume that people will ignore its threats, and so must assume that anyone else would have done the same. Such an assumption is systematic, not empirical. Hart is also right about something: if someone lacks the capacity or opportunity to conform to the law, his conduct cannot be punished, because to do so would be incompatible with the law's claim to guide conduct. We do not need to talk about maximum space for deciding whether to obey the law or the fairness of the opportunities thus created to see this point: where there is no capacity or opportunity, there is no system of choices, and so no system of choices that is either fair or unfair. The law as such cannot shape one's conduct. In each

case, Kant offers a more direct account of the phenomena that Fletcher and Hart seek to explain.

These advantages of Kant's view should come as no surprise, for they are a reflection of his more general insight that not every judgment made by an institution is an all-things-considered judgment about the overall merit or responsibility of the person being judged. This point is familiar in other contexts. If a student fails to hand in a paper on time because of the death of a family member, she gets an extension, that is, the ordinary penalty for lateness is waived. The standard accounts of necessity as either a justification or an excuse all have their analogues here. Some may think this is a case of a justification: it is right to change your priorities when a family member dies. Others may think that she is excused because it is unfair to hold her to a deadline she lacks the capacity or opportunity to meet. Still others may think of it as an expression of compassion: we feel sorry for the student, and so go easy on her. The analogous Kantian analysis gives a more perspicuous explanation: The very purpose of, and justification for, deadlines in coursework cannot be made to apply to this case. People are ordinarily sufficiently distraught and preoccupied in such circumstances that their academic work, if done on time, would not be a measure of their ability or mastery of the material. Other factors may well interfere with the ability to do work on time—laziness, focus on other coursework, and so on. None of these things normally excuses lateness because all of them are factors that the system of assigning grades takes to be normal circumstances that students can be expected to plan around. The idea of assigning grades presupposes a distinction between the ordinary stresses and pressures of life and those that overwhelm the capacity to perform up to one's ability. Thus, no purpose inherent in the imposition of deadlines could be served by holding an overwhelmed student to one.²¹

The academic examples are different from the legal examples, because the academy differs from the criminal law. In the academic cases, excuses are those claims that make the ordinary norms and practices of the university ineffective or pointless. In the legal context, excuses are the things that make the ordinary norms and practices of the criminal law—the making of threats, that is—ineffective or pointless.

To suppose extensions reflect some idea of justification is to make the mistake of supposing that every institution must answer to everything of moral significance. To suppose that extensions reflect compassion on the part of instructors or administrators is to make the mistake of supposing that excuses are at the whim of those with power. Standard treatments of necessity in the law make one or both of these mistakes.

²¹ The communicative theories of punishment made prominent by Joel Feinberg, Jean Hampton, and Antony Duff have their analogues here too. The communicative function is (as Feinberg himself rightly emphasized) a result of punishment, but not its purpose. We professors do not impose deadlines and grant extensions to tell people what good character is: we do so to grade their work fairly.

IV. EXTENDING THE ACCOUNT: LIFE AND PROPERTY

A hiker, caught in a sudden storm, breaks into a cabin to save his life. The hiker commits a wrong against the owner of the cabin: he uses another person's property without his consent, and as a result is liable in damages for the lock he breaks, the food he eats, and the furniture he burns. On Kant's analysis, the interference with the property of another is imputable to him at the first of the two levels. He is a trespasser. The harder question is whether he thereby commits a crime. The Kantian analysis of this case must be parallel to the analysis of the sailors struggling over the plank. No deterrent suitable to the crime of breaking and entering could ever prevent the hiker from saving his life.

The competing analysis is not that he commits a wrong for which he cannot be punished, but rather that the hiker does the right thing, and so his act is justified.²² The lesser-evils analysis may appear to comport more closely with ordinary intuitions. Nonetheless, I want to suggest that the Kantian account gives us a better understanding even in this case of the distinctively legal response.

It might be thought that if Kant's account is defensible at all, it is limited to the factual context in which the threatened punishment is the same as the threatened peril. Abolish capital punishment and we might be thought to lose the formal character of the inference. Make the peril facing the actor not death, but bodily injury, then, unless the punishment for the crime in question involves maiming, the conceptual connection appears not to hold. Direct the threat towards the actor's child rather than the actor, and the same problem arises.

I want to suggest, nonetheless, that the conceptual connection to which Kant draws our attention holds in each of these cases, not as a matter of how ordinary people will reason, but rather as a matter of how the criminal law must conceive of their reasoning. The connection is not to be found at the level of the individual decision maker, but as a reflection of the systematic nature of punishment. The criminal law presupposes some grading of offenses in terms of their seriousness: more serious offenses receive more serious punishments. This idea of proportionality is framed conceptually, in terms of wrong done, rather than empirically, in terms of cost. If, as Kant contends, punishment visits the wrong, or some proxy for it, back upon the wrongdoer, more serious crimes must receive more serious punishments. As a result, the criminal law cannot abandon this idea of proportionality in the application of its own threats. We have already seen this point once: it cannot punish murder committed in extreme circumstances more severely than murder committed in more ordinary ones. More generally, the criminal law must deem its system of threats to be ordered in a certain way, so that it must take the conceptual thesis to be true, so that no property offense can be punished so severely as to make the distant prospect of the punishment outweigh

²² See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 761 (1978). Fletcher cites the tort case of *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910), as an example of this reasoning.

the immediate prospect of saving one's own life. This will almost certainly turn out to be true as a factual matter. But the law must take it to be true based on its own conception of wrongdoing and punishment. Once this systematic idea is filled out, we will see that the criminal law must exempt from punishment in each of these cases, not because the agent is not blameworthy, but because the law's claim to be systematic must determine the manner in which punishment is meted out.

Kant's example is an extreme one: taking the life of another person to save my own. Equally familiar is the case of the hiker. The hiker fears for his life, but the only punishment he might fear is a short prison term for breaking and entering. Since no deterrent purpose could be served by threatening him with death, no such purpose could be served by threatening any less severe punishment. If the threat of the most severe punishment must fail, then the threat of any lesser punishment must fail. The point, once again, is not empirical. It may well be that there are some people who would rather die than face the prospect of a criminal trial and conviction. "Death before dishonor," they might say. Although this may be true as a matter of fact, the system of penal laws must conceive of persons in terms of its own structure of incentives, not in terms of their idiosyncratic attitudes towards particular punishments.

The systematic nature of punishment and the consequent systematic grading of penalties enables Kant to reveal the element of truth in Hegel's analysis of necessity in terms of the relative priority of life over property. Hegel moves from the unexceptionable claim that crimes against persons are more serious than crimes against property, and the equally unexceptionable claim that no property crime merits a punishment as severe as the punishment for murder, to the much stronger claim that when life is at stake, one person is justified in using or destroying the property of another.²³ Hegel contends that in the conceptual order at the heart of any legal system, life takes priority over property, so that anybody who commits a crime against property in order to save a life is justified in doing so.

The Kantian analysis has no space for any such idea, since, for Kant, right must abstract from "the matter" of choice, and so from both wish and need. For Kant, there is a clear sense in which life takes priority over property even at the level of external lawgiving, because life is the presupposition of the ownership of property. But from the standpoint of external lawgiving, that priority must be personal to the one whose life and property it is. Anything else would allow one person to be a mere means for another's purposes, because it would make my title to use what is mine in pursuit of my own purposes subject to the needs of another person. Kant insists that right must abstract from the "matter" of choice, including wish and need, precisely to preserve this independence. As a result, the priority of personality over property is not the same priority that the Hegelian account requires, which is priority across persons: for Hegel, *my* need takes priority over *your* right to property.

²³ HEGEL, *supra* note 9.

The difficulty involved in making the priority of life over property into the basis for a justification is more obvious in another case of relative priority, that of life over bodily integrity. Staying alive is more important than loss of limb. Nobody—not even those who would criminalize self-mutilation—would deny that the hiker who cuts off his arm to save his life is fully justified in so doing. Nobody—not even those who deny that consent is properly a defense to a charge of maiming—would deny that the surgeon who amputates a limb in order to save a life is justified in so doing. But if the surgeon's patient is a competent adult and does not wish to lose the limb, the surgeon is not justified in using force despite the genuine priority of life over limb. And few would claim that the priority of life over limb justifies forcible seizure of one person's kidney to save another person's life, just as few would claim that the priority of life over mobility justifies restraining one person so that another can borrow her kidneys.²⁴ Returning to the example of the priority of life over property, nobody has a duty to destroy his own property to save his own life. For the Kantian, enforceable rights are always rights to independence, not to existence. The problem with the idea that the use or destruction of property is justified when life is at stake is that it cannot explain how the priority carries over across persons, except by turning into either the utilitarian account that says that any person is justified in putting a thing to its most efficient use, or the Hobbesian one that says that when life is at stake, all enforceable rights evaporate.²⁵

Despite these difficulties, the lesser evils account has other sources of appeal. It probably also gets some of its appeal from the thought that, if you were breaking into my cabin to save your life, it would be wrong of me to throw you back out in the cold. If a police officer were standing by, it would be wrong for him to try to stop you from saving your life. It is tempting to combine this thought with the commonplace of criminal law theory according to which one is not justified in interfering with justified actions. The reasoning behind the commonplace is beyond question: a justification changes legal relationships between persons, but an excuse is personal to the person excused, and cannot change the rights of others.²⁶ Combining the commonplace with the obvious wrongfulness of

²⁴ Nor would it justify forcibly detaining a person to service another with her kidneys. Judith Jarvis Thomson once remarked, considering the hypothetical example of a person who has been kidnapped by the society of music lovers so that his kidneys can be used to cleanse the blood of a famous violinist, "If anything in the world is true, it is that you do not commit murder, you do not do what is impermissible, if you reach around your back and unplug yourself from that violinist." Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 52 (1971).

²⁵ It also has difficulty explaining why civil damages would be awarded. If a deed is justified by the priority of life over property, that priority must hold in the civil as well as the criminal context. It is sometimes said that the person who acts in circumstances of necessity must pay civil damages because he is unjustly enriched. Any such account of unjust enrichment must deny that the priority of life over property carries over across persons, on pain of being unable to articulate the nature of the relevant injustice.

²⁶ FLETCHER, *supra* note 22, at 762.

interfering, it is perhaps tempting to draw the conclusion that your breaking into my cabin is justified. Matters are more complicated, however.²⁷ The commonplace about how one may respond to justified action actually points in both directions in this sort of case. First of all, there are different ways in which I might interfere with your breaking in. Even if it were true that you are justified in using my cabin to save your life, it does not follow that I must leave my cabin unlocked so that it is easy for you to do so. I might be justified in doing various things that make it difficult or even impossible for you to do so, simply because securing my cabin will keep out wild animals or thieves, even if it might frustrate your ability to break in.

Second, and more importantly, any right to use force against a wrongdoer must be subject to the condition that the person defending his or her property not commit a serious wrong (or danger of serious wrong) against the trespasser. The fact that you wrong me by breaking into my cabin does not entitle me to put you into mortal danger once you are safe, even if you have no right that I spare you from a danger you are already in. Although I can lock my cabin, knowing full well that it might keep you out in an emergency, in so doing I do not put you in any danger you were not already in. I simply fail to provide you with the means to save your life. Anything I do to exclude you must not, however, *put* you into serious danger. I cannot use a spring gun to keep trespassers out of my cabin, even if I am certain that any trespasser will be a wrongdoer. (Perhaps it is located someplace where the weather never gets bad enough to constitute an emergency). Just as I am not allowed to shoot trespassers, so too you are not allowed to throw stowaways overboard from your boat. Neither is a police officer allowed to do either of these things. It does not follow from any of these prohibitions that either the trespassers or stowaways are *justified* in doing what they do.

The idea of proportionality that is at work here can be thought of as one way of thinking about the priority of life over property. Nobody is entitled to take the life of another to protect his own property. It is, however, a very different understanding of that priority than the Hegelian understanding according to which any person is justified in using another's property to preserve his or her life. On the understanding under consideration here, the priority manifests itself in limits on the ways in which wrongs can be addressed, rather than in the definition of those wrongs.

²⁷ The inference also fails as a matter of form: the truth of the consequent "*q*" of a conditional statement of the form "if *p* then *q*" is consistent with the falsity of the antecedent "*p*." To infer that an act is justified from the fact that the use of lethal force against it is not justified is to commit the logical fallacy of affirming the consequent. The formal difficulties do not show that the antecedent is false. That is why I attend to its intuitive ambiguities and weaknesses in the text.

V. EXTENDING THE ACCOUNT: RESCUING A THIRD PARTY

The examples so far have been easy in that the person who is excused is the one whose life is in peril. Cases in which the person who violates the law does so because of a danger to *another* person require an additional level of analysis. Before turning to that analysis, I pause to consider the idea of lesser evils as a defense in these cases.

Cases of self-help are no different from cases in which one person rightfully helps a third party. If you (or your dog) are about to attack me, I can defend myself. Anyone else can do the same to protect me against aggression. The authorization to help a third party in this situation comes from the way in which the defender is acting on another person's behalf. If one person is entitled to do something, then, as a general matter, another is entitled to do that very thing on his or her behalf.

It is a commonplace of criminal law theory that no parallel transfer principle applies to excuses. If you break the law in a way that is not justified but only excused—because, for example, you are mistaken—my acts in aiding you are neither justified nor excused unless I have an independent justification or excuse. If I share your mistake, I am excused on grounds of mistake, not because you are mistaken, but because I am. If you *would* have been excused if you did something, but I do it, and you do not, then the status of my act as excused depends on whether excusing conditions apply to me, not on whether they *would* have applied to you.

This commonplace appears to make it difficult to extend the view I have been advancing to cases in which a person who is not in danger breaks the law to save the life of another who is. Even if the person in peril would not be punishable, the rescuer, it seems, would be. Nonetheless, I now argue that the Kantian account provides a more satisfactory explanation of these cases.

Let me introduce another extreme example: a parent commits a crime against property to save the life of his or her child. In *Perka v. The Queen*,²⁸ Madame Justice Bertha Wilson says that where there is a special duty to aid owed, as there is between parents and children, such an act is justified, even though in the case of rescuing a stranger (or rescuing oneself) the lawbreaking would merely be excused. The parent's duty to the child generates a justification. Wilson's claim is surely too strong. If neither parent nor child would be justified in breaking in on his own behalf, it is difficult to see how the parent would be entitled to break in on the child's behalf.²⁹ A duty owed to one person does not provide a justification for wronging another. I cannot steal a car because I have been subpoenaed to appear in court, or rob a bank to pay my taxes or debts.³⁰

²⁸ [1984] 2 S.C.R. 232.

²⁹ See, e.g., Brudner, *supra* note 9.

³⁰ This is clear even in the case Justice Wilson considers. Suppose a kidnapper threatens to kill a child, unless his or her parents commit some illegal act short of murder. Virtually all parents

Still, the relationship between parent and child *does* shape the way the law must view this situation. The child would be excused if she broke into the cabin. The parent, who has an obligation to the child (legal and moral) and who is, moreover, as Kant puts it, “in possession” of the child, must act on the child’s behalf.

In the case of the parent saving the life of the child, the existence of the relevant relationship is straightforward, since parents are, on both Kantian and ordinary juridical analysis, in possession of their children, having, as Kant puts it “brought [them] into the world without [their] consent and on [the parents’] own initiative.”³¹ Some such transfer principle is fundamental to their legal relationship: the parent has a duty to act on the child’s behalf. The parent must not use the child to pursue his own purposes, and must, as Kant puts it, “manage and develop” the child, so that the child can grow into a self-directing being. That is just to say that their interactions must be understood as structured by the parent’s obligation to act on the child’s behalf, so that the parent’s act must be treated as the child’s. If I enroll my daughter in school, she is enrolled in school. If I hold funds in trust for my son, he gets any income they earn, because I am his agent. And if I break into a cabin in a storm to save either of them, I act on their behalf, not on my own.³²

Acting on the child’s behalf does not license the parent to commit a crime. The tabloid stories of the parents who falsify their children’s test scores or kill their playground rivals are paradigms of unjustified behavior. They are unjustified, and also inexcusable. Were the child to do any of these things, she would be neither

would yield to the kidnapper’s demand; any parent who did would not be punished. Were a parent to refuse, however, it is difficult to imagine that any legal system would punish the parent for failing to provide the necessities of life to the child.

³¹ KANT, *supra* note 1, at 429–30, explains this in some detail. His argument is a “deduction” in his sense of the term: an uncovering of the presuppositions of the moral significance of relations between parents and children.

³² I have not given Kant’s conception of agency and his sequenced account of imputation the full defense they deserve. It is worth noting in passing that they provide a simple and satisfying account of the notorious *Morgan* case, DPP v. Morgan [1976] A.C. 182, in which the defendants raped a woman and claimed to have believed that she had consented because her husband had assured them that she did, and had told them that she would struggle to increase her satisfaction. The House of Lords rejected their story as incredible, but held that as a matter of law, a genuine but mistaken belief about consent is a complete defense to a charge of rape. On a Kantian analysis, the case can be analyzed as one in which the husband claimed to be consenting on behalf of his wife, and the defendants claimed to take his claim as authorized by the wife. Their claim to have believed that she consented must therefore fail as a matter of law. They could never be entitled to believe the husband in the face of any apparent contrary evidence. A principal cannot authorize an agent to bind him or her to specific performance of a personal action. Therefore, no third party could ever be entitled to accept the agent’s representations if the principal indicates a contrary intention. A prize-fighter can authorize his manager to book fights for him, but if he has second thoughts and tries to leave the ring, nobody is entitled to block his exit, regardless of what his manager says. The *Morgan* defendants are claiming an equivalent entitlement, but no belief, even if true, could ever provide the basis for such an entitlement.

justified nor excused. The parent is, in a sense, acting as the child's agent, and an agent can acquire no justification that the principal does not have. I want to suggest, however, that if the child would have been excused on grounds of necessity, so is the parent. The example of parents and children is distinctive, because both the relationship and the sense in which parents must be taken to act on behalf of their children is so clear.

Can a similar relationship be found in other cases? As a matter of private law, when one person acts to preserve the life of another, he or she is also taken to be acting on the person's behalf. As a matter of tort law, rescuers of life are always treated as foreseeable, however unlikely they may be, although rescuers of property are treated as intervening actors, however common they may be. In the law of restitution, improvers of property are standardly treated as volunteers, with no claim to restitution for their efforts, but those who act to save the lives of others are treated as acting on their behalf, and so entitled to restitution for their unrequested efforts. As a result, we can perhaps find the requisite agency relationship, and do so without presupposing any special emotional ties that bind the parties. If so, the rescuer who breaks the law can be thought of as acting on behalf of the person in peril.

The Kantian approach analyzes the first level of imputation in terms of the private relations between the parties: the rescuer acts on behalf of the person in peril. That does not, on its own, settle the question of the second level of imputation, because it does not determine whether a criminal response to the rescuer is either possible or appropriate.

We have seen that it is a commonplace that one may not act on behalf of, or in support of, an act that is merely excused. Just as the commonplace according to which others may not intervene to prevent a justified act does not license us to conclude that an act is justified from the wrongfulness of certain interventions, so too the commonplace about the significance of the acting in support of an excused action needs to be understood in a more nuanced way.

The rescuer cannot simply claim the benefit of the excuse that the person in peril would have had. Instead, the difficulty with punishing rescuers for crimes they commit arises because the criminal law cannot legitimately deprive the person in peril of the rescuer, and punishing the rescuer would do exactly that. Like the sailor who deprives another of a plank, the rescuer is culpable but not punishable, although the reason punishment must fail is different.

Once again, the key idea depends upon the sequenced account of imputation that Kant provides. Consider again the example of the cabin in the storm. The cabin owner would wrong the person in peril by forcing him back *out* into the storm, once he had rescued himself. But, as a matter of the rights as between the parties, the cabin owner would not wrong the person in peril by failing to help him get *into* the cabin out of the storm. In the same way, the police officer would do wrong towards the stranded traveler by blocking his way, but does not, at the level of private right, do wrong by failing to aid him. The thing that would be wrong—the thing that would be analogous to using a spring gun to prevent trespassers from

entering—is not failing to provide the traveler with shelter, but depriving the traveler of something that is his, or putting him into (or back into) the path of danger. Failing to open the door in the storm merely leaves the traveler in the path of the storm, a danger that he was already in. Putting him out from the cabin, by contrast, puts him into a danger that he was not in until somebody wrongfully put him there.

Now consider the case in which the cabin owner or police officer restrains the rescuer. Doing so may be a wrong against the rescuer, but put that possibility to one side, assuming that the rescuer can be restrained in a way that does not endanger him at all. Would doing so be a wrong against the person in peril? It would deprive the person in peril of the means to his safety, that is, his rescuer. Although the peril he faced would not be one of battery, but of storm, once the rescuer has arrived on the scene, the peril from the storm can be regarded as completed. In the same way, if someone is dying of thirst in the desert, once he has a bucket of water within his reach, to deprive him of the bucket is to kill him, even though he would die of the same cause without the bucket. That risk had run its course, and he was secure from it. Then he was put back into the danger from which he had escaped. Here, to deprive the person in peril of his rescuer is to return him to a peril that he had escaped.

Now consider a more realistic version of the same example. Instead of the police officer physically apprehending me, or threatening to shoot me if I help the stranded traveler into a stranger's cabin, suppose instead that the long arm of the law acts at a distance. I am not threatened immediately by the police officer standing beside me, but mediately, by the legal system telling me that I will face time in prison if I help the stranger into the cabin. Just as the police officer cannot make the threat in circumstances in which making it endangers the life of an innocent bystander, so too the legal system cannot make a threat in such circumstances. Because it cannot threaten me—doing so lies outside its rightful powers—it cannot carry out the threat that it would have made.

There are several things that are worth noticing about this account. The first is that it depends upon the Kantian analysis of punishment in terms of threats designed to shape conduct that we saw in the opening section of this paper. It also depends on the specific analysis of what it is to make a threat to a particular person that we saw in those opening sections. If a threat to punish cannot be made, then it cannot be carried out.

The case of rescuing the third party is thus parallel to, but distinct from the plank case. It is parallel in that the problem with punishment is a result of a defect in the threat of punishment. In the plank case, it is impossible to make any threat consistent with the systematic nature of right, since the law must suppose that any such threat must fail. In the rescue case, it is also impossible to make a threat consistent with the systematic nature of right, but for a different reason. Any such threat must pose a great danger to someone other than the person violating the law, and so be inconsistent with the systematic requirements of right. In each case, the argument turns on the way in which a just criminal law must be systematic. Actual

criminal law may depart from these requirements to varying degrees, but its rationale cannot ever abandon the idea of systematicity entirely.

VI. AFTERWORD: CAN POSITIVE LAW PROVIDE A JUSTIFICATION OF NECESSITY?

My argument in this paper has proceeded at the level at which Kant's proceeds, that is, at the level of the presuppositions of a legitimate legal system. I want to close by conceding that that analysis does not preclude a statutory defense of justification of damaging property while life is in peril. Unlike justifications such as self-defense, which are required by the systematic structure of the criminal law, any such defense would have to be statutory. Moreover, it would have to accompany a criminal law duty to make easy rescues.

There are two consistent possibilities: either the criminal law does not enforce a duty to make easy rescues, and necessity is never a justification; or, alternatively, there is a criminal law duty to rescue in some circumstances, and necessity serves as a justification. The Canadian criminal law coherently, if coldly, takes the first option; the German criminal law embraces the second—a duty to aid and a right to use another person's property to save one's own life, provided that damages are paid.³³

There is much to be said in favor of a criminal law duty to make easy rescues, provided that we steer clear of the idea that such a duty can be grounded in the utilitarian or Hegelian ways considered above. A better analysis sees the duty to make easy rescues as of a piece with the duty to pay one's taxes, that is, as part of a more general system of social cooperation and coordination.³⁴ On the Kantian view of freedom, those with property have a duty to pay taxes, so as to enable the state to satisfy its duty to provide the necessities of life to the poor. On this account, support for the poor is not a private duty running from one citizen to the other, but a sort of system of coordination so that private citizens meet their charitable duties effectively. On the Kantian analysis, the entire point of the public duty is to see to it that no poor person is subject simply to the charitable inclinations of those who are more fortunate, for to be so subject is to be a kind of slave, who manages to continue to exist solely through the grace of those who have more.³⁵ A criminal law duty to rescue can be thought of as providing a different way of thinking about the importance of independence: by threatening those who refuse to make easy rescues, the criminal law removes the element of discretion over the life of another that makes poverty so objectionable from the standpoint of

³³ Even common law legal systems have small-scale versions of such affirmative duties: the duty to call the fire department in an emergency; the duty to move out of the way of emergency vehicles, and so on.

³⁴ I have argued elsewhere that any criminal law duty to rescue must be analyzed in terms of the general public-law obligation to support schemes of social cooperation. See generally Arthur Ripstein, *Three Duties to Rescue: Moral, Civil, and Criminal*, 19 *LAW & PHIL.* 751 (2000).

³⁵ See Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 *NOTRE DAME L. REV.* 795 (2003).

freedom. Particular other people benefit from its fulfillment, but it is not a private duty to benefit them in particular. This way of framing a duty to rescue does not depend on any ideas about the priority of person over property: a duty to aid others who are in immediate peril is a duty both to make my property available to them and, just as much, to make my own efforts available to them.

If such a duty is created, it can take on a variety of different contents, including the duty to make one's property available, on a temporary basis, to those who need it. If there is such a legal duty, then, in an emergency in which the person subject to the duty is not present to discharge it, a third party may take it upon himself to act as that person's agent in discharging it. If you have a legal obligation to make your cabin available in emergencies, then, in an emergency, I can act on your behalf, with complete justification, in letting somebody (including myself) into your cabin. If the criminal law can attach sanctions to this sort of failure to aid, then the justification of using the property of another to save my own life or the life of a third party is straightforward: I am simply acting on behalf of the person who has the obligation to make that property available. But because it is a public law duty, the person who damages property in saving a life must pay to repair the property, because the logic of the argument does not require that the rescuer make a gift to the person in peril.³⁶

³⁶ In order for me to be entitled to do so, however, you, as property owner, must be subject to the duty. The fact that *I* am subject to a duty to aid others does not in and of itself entitle me to use *your* property to do so, any more than I am entitled to use your property to carry out any of my other duties.