Kant's discussion of punishment has probably generated more scholarly attention than any other aspect of his legal and political thought. Much of that attention has focused on Kant's endorsement of a retributive principle; recent discussions, drawing on Sharon Byrd's groundbreaking article, have sought to integrate Kant's retributive remarks principle with his explicit references to deterrence. A successful integration of deterrence and retribution is of interest both to Kant scholarship and to legal philosophy more generally, in that it promises to bridge the divide between the two intuitive ideas that animate both popular and scholarly discussions of punishment. One of these says that we punish criminals because we don't want people to commit crimes; the other that we punish criminals because of the crimes they have committed. Many have sought to make these ideas consistent with one another.¹ My aim, which I will claim that Kant shares, is more ambitious: to argue that each requires the other. Both deterrence and retribution are sometimes conceived as extrinsic goals that a system of punishment should try to achieve: either the reduction in certain kinds of harmful acts, or the matching of suffering to wickedness. Each of these could, at least in principle, result without a legal institution of punishment. A Kantian account of punishment cannot accept either deterrence or retribution in these instrumental senses. Instead it must understand each as partially constitutive of a system of equal freedom under law.

In the "Introduction" to the *Doctrine of Right*,² Kant identifies Right with the "authorization to use coercion." The central focus of my argument will be Kant's...
claim that the authorization to coerce follows from the fact that coercion can be understood as a hindrance to freedom, and the enforcement of rights as the hindering of those hindrances. I will explain retribution as an expression of this idea, arguing that punishment is nothing more than the supremacy of law; I will bring deterrence under the same principle, arguing that the supremacy of law requires that the prospect of enforcement be capable of guiding conduct. I will argue that Kant generates both aspects as a priori features of public law, rather than as responses to potentially destabilizing features of human nature.

I will begin by providing an explanation of Kant's mechanical vocabulary of "hindering a hindrance." That vocabulary draws on Kant's distinctive way of understanding the relation between the Universal Principle of Right and the Categorical Imperative. I will explain that relation in order to elucidate the idea that a system of freedom under universal law is, as Kant puts it, equivalent to the "Possibility of a Fully Reciprocal Use of Coercion." (6:232) I will then explain how this idea generates both a protective and a remedial authorization to coerce. I will then turn to the issue of punishment. Kant views punishment as something that can only be done by a superior; he also emphasizes the way in which the distinctive feature of crime is the way in which the criminal seeks to exempt himself from the law. Bringing these strands together, I will argue that the criminal exempts himself from public law, and is liable to punishment simply because public law cannot permit unilateral exemptions. Punishment is the guarantee that public law is effective in space and time. The deterrent effect of the prospect of punishment is not something separate from this guarantee. Instead, for public law to be effective in space and time is for it to provide an incentive to its own supremacy by announcing in advance that attempts to violate it will fail. The threat of punishment is thus the announcement that public law will remain supreme. The prospective threat and retrospective applications of punishment are thus not an aim and a constraint on its pursuit; they are equivalent.

Before developing my own account, I should briefly situate it in relation to Byrd's important discussion. Those familiar with it will recognize significant similarities between our accounts. Like Byrd, I understand Kant's treatment of punishment in the context of his broader concerns about legality, and thus accept her claim that "punishment as coercive deterrence follows from the necessary nature of law within Kant's theory of justice." (153) I also agree with her that it is a non-accidental feature of punishment that it prospectively serves to guide conduct, and much of my argument will develop these ideas in ways that I take to be consistent with Byrd's treatment of them. Aside from differences of emphasis, my remaining disagreement with her may be largely verbal. It concerns her further claim that

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Byrd has inspired compatibility accounts, her view provides the resources for reading Kant as providing an account that makes the two aspects of punishment equivalent. see Byrd's "Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution," Law and Philosophy 8 (1989), 151–200.
the deterrent aspects of punishment require an instrumental analysis. Byrd characterizes civil society "as a means necessary to the end of individual freedom," (154) punishment as "instrumental in nature" (156) and criminal law as "an instrument to preserve civil society." (198) To characterize something as a means or instrument suggests that it serves to achieve something that might exist apart from it. Where Byrd writes of means or instruments, I will argue that Kant posits an identity: civil society is the systematic realization of individual freedom, required a priori "however well disposed and law-abiding human beings might be." (6:312) In turn, the criminal law is an integral part of civil society, for it is nothing more than the supremacy of public law against opposing individual wills, should there turn out to be any. The enforcement of its prohibitions is itself equivalent to the prohibitions themselves.

I. The Universal Principle of Right and the Categorical Imperative

The Doctrine of Right is the first part of the Metaphysics of Morals, and is presented as an a priori system. It does not rest on any claims about how likely it is that people will behave badly. Neither the "warped wood" of humanity nor Humean "circumstances of justice" appears in his account; the requirement to enter a rightful condition applies "however well disposed and law-abiding men might be" (6:312). The Kantian starting point confronts a challenge and an opportunity. The challenge is that of making do without arguments about the defects of human nature, and so foregoing the apparent advantage of drawing on premises about common and uncontroversial features of human experience. The opportunity is that of avoiding the limits of factual arguments, which, by beginning with experience in this way, doom themselves to ending with it, and justifying institutions only in terms of what they cause.

In the "Introduction" to the Metaphysics of Morals as a whole, Kant identifies the Categorical Imperative as the supreme practical principle. In its most familiar formulation, familiar from the Groundwork and Critique of Practical Reason, usually called the "Formula of Universal Law" it focuses on the maxim on which an agent acts and judges the moral worth of an action based on the agent's application of the Categorical Imperative.

The central principle of the Doctrine of Right seems different. Kant is adamant that whether an action is in conformity with the Universal Principle of Right does

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3 Byrd's article has generated its own literature. For example, Jean-Christophe Merle criticizes Byrd on the grounds that her conception of deterrence is insufficiently independent of her account of retribution. See "A Kantian Critique of Kant's Theory of Punishment," Law and Philosophy 19 (2000) 311–338. What Merle sees as a defect, I regard as a strength.

not depend upon whether the principle is itself the incentive to the action. To the contrary, mere outward conformity is sufficient for an action to be rightful.

Kant also argues that right’s focus on the external aspects of conduct entails that duties of right can be enforced coercively. The concept of coercion is introduced from two seemingly distinct directions: first, the Universal Principle of Right does not need to be its own incentive: “it does not at all expect, far less demand, that I myself should limit my freedom to these 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.” He goes on to add that the Universal Principle of Right allows that external freedom “may also be actively limited by others.” The status of these claims, and their relation to the Categorical Imperative is not at all obvious, and Kant offers little aid to his readers when he continues the same sentence by describing what he has just said as “a postulate that is incapable of further proof.” (6:231)

The Universal Principle of Right and the Categorical Imperative also differ in their incentives. For Kant, an incentive is a reason for taking an interest in an action. The incentive of ethics is nothing other than duty itself, but right permits an external incentive. Although all duties of right are also “indirectly” duties of ethics, right may permit an action that ethics forbids. Discussing self-defense, Kant notes that the “recommendation to show moderation” against a wrongful assailant “belongs not to right but only to ethics.” (6:235) In the Groundwork, Kant gives the illustration of two shopkeepers, both of whom are honest, but each of whom fails to act on the right principle: one behaves honestly out of a concern for his long-term reputation; the other does so out of sympathy with his customers. Both conform to right, but neither acts in accordance with duty, because neither acts in accordance with a conception of duty. The examples illustrate one way in which right and ethics can diverge in their demands: in the shopkeeper examples, that Categorical Imperative is more demanding than the Universal Principle of Right. Other examples show the Universal Principle of Right prohibits acts that are permissible under the Categorical Imperative. I can trespass against your land by mistakenly entering, thinking it is my own. I can make a contract with you, and wrong you by breaching, even if I did not foresee the circumstances that would leave me unable to perform.

These differences in both incentive and the classification of particular actions reflect a deeper difference between the Categorical Imperative and the Universal Principle of Right, but not an incompatibility between them. Instead, the Universal Principle of Right enters as a “postulate incapable of further proof” because it introduces a new type of content, which is not contained in the Categorical Imperative. Kant also notes that the Universal Principle of Right entitles a person to stand on his or her rights, but ethics may demand otherwise. A general statement of this claim is made at Theory and Practice, in: Practical Philosophy (op. cit. fn. 2), 8:300–1; a specific application to the case of self-defense can be found in the Doctrine of Right at 6:235.

The vocabulary of postulates brings to mind the practical postulates of the Critique of Practical Reason: God, Freedom, and Immortality. These must be postulated in order for
A new type of content can only be introduced at a suitably general level by introducing its distinctive form, that is, the basic organizing principle that determines whether particulars of that content are compatible. The new content is the occupation of space, and the new form is spatiality.

The categorical imperative is a principle of pure practical reason, and, as such, applies to all rational beings, considered as such. It does not presuppose that rational beings occupy space. 7 The Universal Principle of Right thus introduces the postulate that rational beings occupy space. It is "incapable of further proof," because it could be neither given a proof from rational concepts, nor one from experience. Instead, a postulate is required because, as Kant explains in the Critique of Pure Reason, spatial relations differ from conceptual relations. Space is a whole, which can be divided into parts. It thus differs from a concept, which applies to (possible) instances. Concepts stand in inferential and logical relations to each other. Parts of space, by contrast, stand in part/whole relations. The difference is important, because parts of space have different identity conditions than do different concepts, and are also incompatible in different ways than concepts are. So too, the occupation of space by different persons can be incompatible in ways that are not purely conceptual: you and I cannot be in the same place at the same time. Nor can any part of either of us occupy a space occupied by a part of the other.

The differences between spatial incompatibility relations and conceptual ones explain the differences between the Categorical Imperative and the Universal Principle of Right: the Categorical Imperative governs the ways in which an agent's maxim can be inconsistent with itself; 8 the Universal Principle of Right governs practical reason to complete itself, in particular, to resolve the Antinomy of Practical Reason. The Postulate in the Doctrine of Right is doing a different job, however. It does not serve to complete practical reason, but, instead, to extend it to actions in space and time. It thus corresponds to the Postulates of Empirical Thought in the Critique of Pure Reason, which govern the application of concepts to objects.

7 It cannot presuppose anything of the sort because space is the form of outer sense for a particular case of finite rational beings, and we do not have any grounds for supposing that it is even the only possible form of outer sense. See Kant's Critique of Pure Reason, Cambridge, Cambridge University Press, 1998, A 26–7/B 42–3.

8 The Categorical Imperative operates on maxims, understood as practical rules of action, and functions as a test of consistency in action: a maxim, that is, a principle of action of the general form "use these means in order to achieve this end" is acceptable if, and only if, it could be consistently willed to be a universal law. The test imposed by the categorical imperative operates on maxims, without reference to anything empirical, since the addition of anything empirical would interfere with practical reason's purity. As a test of consistency, the Categorical Imperative operates exclusively on the content of a maxim. On standard readings, it looks at whether the universalization of the maxim can be conceived or willed, that is, consistent with each rational being's concern for its own ability to set and pursue purposes. If a maxim cannot be conceived as universal, or if a rational being could not will a situation in which certain means was systematically denied to it, then it cannot be consistent with its own reason, except that maxim as a rule of action. The Categorical Imperative is also presented as Reason's own law, and as the condition of free moral action. Such freedom is only possible, however, if the Categorical Imperative is itself the incentive to action.
the ways in which one person’s purposive activities in space can be inconsistent with the purposiveness of others. Wrongs against persons are wrongs against their bodies, because your person, and your right to your own person, is your right to your body, that is, your entitlement to occupy the space that you occupy, and your concomitant entitlement to repel others. Although the Universal Principle of Right is formulated in terms of maxims or 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” (6:230) – it considers maxims only in terms of the means used, rather than the ends for which they are used. Provided that each person sets and pursues their own ends using only their own means, their respective exercises of freedom are consistent regardless of which ends they pursue.9

Kant conceives of persons under the Universal Principle of Right as occupying space, and the Universal Principle of Right governs interaction of rational beings in space. Kant notes that those interactions can only be rendered consistent by focusing on the form of interaction, rather than what he calls its “matter.” (6:230) The formal nature of spatial interaction provides the context for Kant’s remarks about the role of coercion in hindering a hindrance to freedom.

Kant illustrates his discussion of hindrances to freedom with an analogy to mechanics, pointing, in particular, to the presentation of the principle of universal freedom “in pure intuition a priori, by analogy with presenting the possibility of bodies moving freely under the law of the equality of action and reaction” (6:232). He notes that “reason has taken care to furnish the understanding as far as possible with a priori intuitions for constructing the concept of right.” (6:233) Kant’s use of the analogy with mechanics reflects the role of spatial intuition in generating the possibility of opposing forces. In the Appendix to the “Noumena and Phenomena” chapter of the Critique of Pure Reason, titled the “The Amphiboly of Concepts of Reflection” Kant focuses on various differences between comparisons of concepts and comparisons of objects. He notes that no opposition between concepts can be thought, but that forces in space and time can be “in opposition with each other, and, united in the same subject, and partly or wholly destroyed the consequence of the other, like two moving forces in the same straight line that either push or pull a point in opposite directions, or also like an enjoyment that balances the scale against pain.” (A265 / B321)

Reciprocal forces can be represented a priori, because doing so only the idea of equivalent forces moving in opposite directions. Thus the intuitions that “reason has

9 The same structure animates Kant’s use of the term “maxim” at 6:256 “whoever acts on a maxim by which it becomes impossible to have an object of my choice as mine wrongs me”. Only the use of prohibited means could make an object unavailable for choice, and an act using such means will have that effect no matter what end is being pursued through it. In the same way the claim that “It is not experience from which we learn of human beings’ maxim of violence” (6:312) refers to the readiness to use violence, rather than the readiness to use it for any particular end.
taken care to furnish... for constructing the concept of right,” are simply those of bodies occupying different spaces, and interacting in ways that can cancel each other out. At the same time, any particular representation of a particular opposition will be in accordance with these a priori intuitions, but depend on the particularities of experience for its content. We can know a priori that an equal and opposite use of force can hinder a hindrance to freedom, but can only know from experience what the magnitude of the initial hindrance was, and the quantum required to hinder it.¹⁰

On this understanding, then, the authorization to use coercion to hinder a hindrance to freedom is the use of force to “destroy the consequence” of the initial hindrance, that is, to make it as though it had never happened. Reciprocal limits on coercion, then, can be represented in two equivalent ways: equal freedom in conformity with universal laws and reciprocal limits on coercion. On the first representation, exercises of freedom that are all consistent with each other, according to their form, that is, the rights that each person has against interference by all the others, form a set of reciprocal limits on the exercise of freedom. On the second representation, any cancellation of the effects in space and time of any violation of this first set of reciprocal limits on freedom is itself nothing more than the upholding of those very limits. If a person does not limit the exercise of his or her freedom, and others exercise their freedom to destroy the consequences of that exercise of freedom, then the latter, remedial exercises of freedom, are themselves part of a system of reciprocal limits on freedom. The hindering a hindrance is nothing more than the limits themselves.

These differences between the Categorical Imperative and the Universal Principle of Right explain the two respects in which Right is coercively enforceable. First, Right does not need to be the incentive to an action.¹¹ Second, force may be used to uphold a right. These two dimensions come together, because the possibility that force will be used to uphold a right is also available as an incentive to conformity with right. For Kant, an incentive is a reason for taking an interest in an action. Duty is supposed to be the incentive to virtue, but it does not need to be the incentive to Right. Any number of incentives are possible and all are acceptable. Duty may provide an incentive to Right for some particular agent on some particular occasion, as when someone refrains from theft because it would be wrong to steal. The Groundwork examples show that sympathy, or concern for long-term reputation can also motivate conformity with right. For that matter, in certain circumstances anger or spite might serve as an incentive. Nonetheless, right also has a special incentive of its own, namely the prospect of coercion. The prospect that a hindrance to freedom will be hindered does not need to be the incentive to right.

¹⁰ The a priori nature of the law of equality of action and reaction is controversial, and it is not my purpose here to defend it as a theoretical proposition. It is relevant, however, because Kant thinks that the idea of hindering a hindrance is not empirical (and so not hypothetical).

¹¹ “When one’s aim is not to teach virtue but only to set forth what is right, one may not and should not represent that law of right as itself the incentive to action.” (6:231)
but it is the incentive that right itself generates, simply because the prospect of having the effects of an action cancelled will count against the ordinary incentives to wrongdoing. In the case of inadvertent wrongdoing – negligence, breach of contract occasioned by circumstance, or innocent trespasses against property – the prospect of coercion will not always provide an incentive, because in such cases the wrongdoer may be unaware of wrong. As we shall see, in the case of wilful wrongdoing, the connection between cancelling the wrong and providing a contrary incentive is tighter. In both cases, the prospect that, should I injure your freedom, my freedom will itself be hindered operates both as an expression of the system of freedom under universal law and, at the same time, as an incentive to conformity with it. Although right does not require a person to limit his or her freedom for the sake of obligations of right, or out of fear of coercion, right does provide its own incentive: every obligation of right is enforceable, and the prospect of that enforcement potentially deprives the violation of a right of its point.

Enforceability thus has two distinct but related places in Kant’s account of coercion. On the one hand, the enforcement of a right simply upholds the surviving right. On the other, enforcement provides a prospective incentive to refrain from wrongdoing, because the prospect of enforcement will ordinarily deprive wilful wrongdoing of any point it might have. At the same time, public law provides the only means through which enforcement can be made consistent with freedom. A plurality of separate persons can only enjoy their rights together in a rightful condition, which provides each person with what Kant calls “assurance” that others will respect their rights. (6:256) Public law is essential to this assurance, because it sets up a systematic incentive to conformity with right, by holding out the prospect that any wrongful act will have no effects with respect to the rights of others.

II. Wrongs and Remedies

The idea that enforcement upholds a right that has been violated reflects the specific sense in which rights both are and are not vulnerable to wrongdoing. A wrong is, on the one hand, a violation of a right, and rights are, as reciprocal limits on freedom, themselves vulnerable to violation. This vulnerability is not merely factual and empirical, although its particulars will often have a factual and empirical component. H.L.A. Hart once suggested that law and morality overlap in their content, prohibiting, for example, crimes against persons and property, because of the specific facts of human vulnerability and need. Hart suggests that if humans had hard shells, like some sort of giant land crab, and were able to extract nourishment from the air, they would not require prohibitions on crimes against person and property.12 For Kant, however, the basic law of persons and property does not depend on factual vulnerability to harm or injury, but rather on juridical vulnerability

to wrongdoing, that is, to the violation of reciprocal limits on freedom. Hart’s crab-like beings could commit batteries against each other, if one were to lay its claw on another’s shell without the other’s permission. They could also commit wrongs against the property of others. Hart’s empirical speculations are potentially relevant to the *inclination* of such beings to commit crimes, but the ground for prohibition is not that crime is tempting, but that it is wrongful. Had Hart imagined his invulnerable beings to be sessile as well, they might be factually incapable of certain wrongs, and only able to commit nuisances against each other. The normative basis of the wrongs would not change, however. It is the nature of rational beings who occupy space that they are vulnerable to wrong if they interact. Another person can interfere with your ability to set and pursue your own purposes, either by depriving you of means you have, or by using those means without your authorization.

At the same time, although right is by its nature vulnerable to wrong, it is also, in another sense, immune to it. That is, if one person wrongs another, the wrong-doer deprives the victim of something to which he or she has a right. The right, however, survives. In simple cases of conversion or theft, the fact that a thief takes your book deprives you of physical possession of the book, but the thief does not deprive you of your right to it. That is why you have a claim to recover it from the thief. If the thief destroys the book, you have a claim to damages, precisely because your right survives the wrong against it. The thief takes what is yours wilfully, but if another person destroys your book wrongfully but not wilfully, that person also fails to destroy your right to the book. By contrast, if your book is destroyed without any wrong, there is no longer an object to which you have a right. Any natural object to which you have a right, including your own body, is, by its nature, subject to natural growth and decay. A right to the thing is a right only against other persons, not against nature, and so if nature, even in the form of a side effect of an act by another person, which is not itself wrongful, destroys what is yours, your right does not survive. Your right constrains the conduct of others, but does not constrain nature; your right was to exclude others from a natural object, which by its nature subject to generation and decay. When that decay takes place – however suddenly or slowly – your right is to exclude others from the decayed object. If it decays completely, there is no remaining object over which you have a right.

In private right, Kant treats the first aspect of enforcement as so obvious as to barely merit mention. In distinguishing the payment of damages from the acquisition of something new from another person by contract, Kant remarks that if another “has wronged me and I have a right to demand compensation from him, by this I will still only preserve what is mine undiminished but will not acquire more than what I previously had.” (6:271) The compensation simply gives me back what I had all along, because my right to what I had survives any wrongs committed against it. If I damage your vase, you do not cease to have a right to it. So too, if I break your arm: you still have, as against me, a right to your arm, intact. That is just to say that you have a right to cancel the consequences of my wrong, that is, that you have a right to compel me to compensate you by giving you back what
you had before. The prospect of liability may well lead me to watch what I do around your vase or arm in future. The basis of liability, however, is just your right to what you had all along. Damages make that right effective in space and time, precisely because the object of the right was your power to determine the use of that thing in space and time. You had a right that your vase be subject to your choice; I violated that right in space and time, and so, can be compelled, consistent with our respective freedom, to restore to you your effective right in space and time. If my wrongdoing has destroyed the object of your right, the payment of money does so because money is, as Kant elsewhere explains, the “universal means by which men exchange their industriousness with one another” (6:287). That is, it can be used to acquire from others objects and make them subject to your choice.13

The combination of vulnerability to wrongdoing and immunity from it is a reflection of Kant’s central idea that laws of right are laws of freedom governing beings in space and time. The normative basis for supposing that we have the familiar juridical obligations to respect the rights of others that we do – to avoid interfering with other people’s bodies, keep off of their property, and honor our contracts – is to be found in the directly normative arguments of the “Introduction” and “Private Right.” Those normative arguments, in turn, provide the basis of our entitlement to suppose that human bodies, the bits of matter that make up property, and agreements, fall under laws of freedom. Kant variously describes this latter entitlement as a “fact of reason” or “categorical imperative,” in each case echoing the argument of the Critique of Practical Reason, according to which we have no theoretical basis for supposing that our empirical deliberations are expressions of underlying, noumenal freedom, but that we have the practical grounds for believing exactly that. In the same way, we have no basis in theoretical reason for supposing that there can be noumenal contracts, vases or dollars, but rather, are entitled to suppose that there are on the grounds that we know ourselves to have obligations that take agreements, vases, and dollars as their subject matter.14 Precisely because obligations and entitlements take these objects as their subject matter, we must also regard the objects of those obligations and entitlements as outside of space and time, and so, inevitably, not subject to empirical change. Thus if I owe you $100, and fail to pay, I still owe you that hundred dollars.15 If I deprive you of some piece of property, the property remains yours. My mere empirical act can do nothing to change your title. You can compel me to pay you, because in so doing you simply get back what was yours all along: my failure to pay hinders your freedom by depriving you of something to which you have a right; coercing me to pay gives you the very thing to which you had a right, thereby hindering my hindrance of your freedom.


14 I develop this analysis in detail in “A Postulate Incapable of Further Proof”, forthcoming in a special issue of International Review of Philosophical Studies.

15 If I pay, I discharge my obligation, but my act doesn’t change the fact that you were entitled to have me pay you one hundred dollars.
III. Punishment

I now want to suggest that the formal structure just outlined applies to Kant’s account of punishment. A crime violates a public law; as such it is legally void, and so without legal consequence. The commission of a crime neither changes the law nor exempts the criminal from its application. Instead, the law remains noumenally unchanged. Yet the criminal has factually violated the law; punishment makes the law remain effective in space and time.

Kant contends that punishment is something that only a superior can do to a subordinate (6:347). I will now argue that the rationale for punishment is simply the upholding of the relation between superior and subordinate, that is, between the state, as representative of public law, and a private citizen.

The “superior” in question is not another private person, but rather the people, which Kant defines as “a multitude of human beings” (6:311), that is, a plurality of persons considered as a unity (A80/B106). They count as a unity only if they are unified through public law, which alone can provide an omnilateral standpoint from which reciprocal limits on conduct are authorized on behalf of all. The authorization of those limits includes an authorization of their enforcement, both prospectively—what Kant calls “protectively”—and retrospectively, that is, punitively. These two authorizations are not separate components, analytically detachable from each other. Neither is justified by hypothesis about how dreadful conditions would be in its absence. Instead, positive law, including institutions of legislation, adjudication, and enforcement makes public law effective in space and time, by creating a standpoint through which omnilateral public law replaces unilateral private choice.16 Kant’s claim is that public law constitutes a system of equal freedom in which no person is subject to the choice of another by generating omnilateral institutions to create, apply and enforce law.

The possibility of enforcement is crucial to this conception, because enforcement hinders hindrances to freedom, both prospectively and retrospectively. Institutions make public law effective protectively and prospectively by providing an incentive to conformity with law; that is, they prevent people from violating the law. They do so retrospectively in those cases in which wrong is committed, and the same law guarantees that the wrongful acts are without legal consequences. The prospective and retrospective fit together because the external incentive to conformity with the law is just the law’s guarantee that any violation will be legally nothing, its guarantee that rather than earning the criminal the exemption from the law that he seeks, it will exclude him from the aspect of the law that he has violated. By announcing in advance that the law will make a wrong fail, the law pro-

16 In the Appendix to the Doctrine of Right Kant argues that a categorical imperative requires thinking of positive law as an expression of the idea of the General Will. Here, once more, the invocation of the Categorical Imperative is used to identify the practical ground for thinking of fallible human institutions in space and time as expressions of concepts of right. (6:371).
spectively hinders whatever might make crimes seem to be an appealing prospect by holding out the prospect that the criminal will be burdened in the very way he hopes to succeed. As Kant notes in his discussion of the supposed “Right of Necessity,” the prospect of enforcement must serve as a threat. As I shall explain below, the provision of an incentive against wrongdoing is required to reconcile each person’s entitlement to stand on their own rights with their obligation to respect the rights of others. To respect the rights of others without the assurance that they will respect yours rights allows them to treat you, and what is yours, as mere means towards their purposes. Public law reconciles entitlement and obligation by providing a systematic incentive against wilful wrongdoing. This assurance is not an empirical prediction. It provides normative grounds for conformity to law by providing each person with an assurance that the state will provide others with an inventive to conformity.

People may be so “well disposed and law-abiding” that they have no inclination to violate the law. If so, the incentives provided by law will be empirically unnecessary, but still legally required.

The prospective and retrospective applications of Public Law are thus not an aim and a constraint on its pursuit; in the way that, Hart, for example, supposes that the aim of punishment is to discourage crime, and the principle of its distribution is to make the law a system of individual choices. Instead, the threat is one of retributive punishment – that the supremacy of the law will be upheld. The threat is required because the state must uphold the supremacy of the law – that is, its effective guidance of conduct. The two aspects of punishment are not merely mutually supporting, but mutually constituting. From one perspective, the retrospective application is conceptually prior to the prospective, because it determines the content of the threat that can be made; from another, the prospective application is concep-

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17 I am not sure if I am disagreeing with Byrd here. There is a potential ambiguity in her text. She distinguishes her way of combining deterrence and retribution from Hart’s distinction between the justifying aim of punishment and a principle governing its distribution. However, her discussion of the retributive principle as a limitation on the ways in which crime-prevention can be pursued at least sometimes appears to present it as a limitation on the pursuit of an independent public purpose. See e.g. p. 195. Drawing on Meir Dan-Cohen’s distinction between “decision rules” and “conduct rules,” Byrd suggests that the deterrent aspect of punishment serves to guide conduct of citizens by threatening unwelcome consequences should they violate the law, but the retrospective and retributive aspect of the criminal law guides officials in dealing with those who have committed crimes. 84, citing Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” Harv. L. Rev. 97 (1984), 625; G. Fletcher, Rethinking Criminal Law, Boston, Little, Brown & Company, 1978, 491–2. She continues “Similarly punishment is threatened to induce compliance with criminal law norms or to deter violations, but is executed according to the demands of justice stated in the principle of retribution, because the actor violated the norm.” Although the deterrent threat and the retributive principle are addressed to different persons, it does not follow that they are normatively distinct principles in the way that rules of conduct and excusing conditions arguably are. Byrd’s formulation appears to suggest such normatively distinct principles, one grounded in its anticipated effects the other in the dignity of the person being punished.
tually prior because retrospective application does nothing more than uphold the law's entitlement to guide conduct externally.

In this section I will begin with the retrospective aspect of punishment. The basic idea is simple, but each part of it requires explanation: the criminal, through his crime, chooses to exempt himself from one or more of the prohibitions contained in public law. He thus asserts a form of what Kant calls "wild, lawless freedom." The crime does not change the law noumenally, but it blocks its effect in space and time, because, in every case of a crime, the law has failed to create a system of equal freedom by constraining conduct. The punishment restores the supremacy of the law because it deprives the criminal's deed of its effect in space and time. It does so by turning the criminal's maxim — the principle through which he makes "such a crime his rule" (6:321) against him: where he sought exemption, he receives exclusion, so that the law remains supreme.

1. Crime and Public Wrong

Kant's discussion of punishment is contained in a "General Remark" the subject of which is "the effects with regard to rights that follow from the nature of the civil union." (6:318) Punishment is discussed in the fifth of either five or six subsections to the "General Remark." The other subsections contain what appears to be a miscellany of 18th century legal doctrines: the prohibition on Revolution, this state's role as the "supreme proprietor" of all land, the duty to support the poor, the power to grant offices, and the power to regulate immigration and emigration. Underneath this surface, however, the subsections contain a unifying structure. All are examples of the supremacy of the legal order through which a people gives itself public laws. In each case, the legal system contains an answer to those that challenge its supremacy. At least some of the challenges have something of an 18th century flavor to them, but Kant's general point concerns the law's supremacy as against whatever part of society seeks to challenge it. The revolutionary claims to speak for the people, but not through its institutions, and the prohibition on Revolution turns on the requirement that the people can be a people only by giving itself laws through institutions. The state's claim to be supreme proprietor of the land overrides the competing claims of corporations, churches and estates to hold land in perpetuity independently of public law, and entitles it to burden private claims to uphold the systematic requirements of a rightful condition. The ability to override competing claims to land follows from the fact that the supreme proprietorship is the spatial manifestation of the supremacy of sovereignty (6:323). The public law duty to support the poor displaces the power of churches to claim that as their vo-

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18 Bernd Ludwig, "The Right of a State' in Immanuel Kant's Doctrine of Right," Journal of the History of Philosophy 28 (1990) 403–415 argues persuasively that the numbering and ordering of the sections of Public Right reflect printer's errors which Kant was too preoccupied to correct.
cation, and relegates them to the status of purely private associations with no political authority, because the basis of the duty is the need to guarantee the omni-lateral perspective of public law in perpetuity. Offices are distributed by the state because inherited offices violate the "natural division" between sovereign and people; as such an existing aristocracy must exist purely by the grace of the sovereign, revocable at will. The state's power to regulate immigration and emigration reflects the priority of public law over any questions of a particular people or culture raising a claim that is prior to the state that constitutes them as a political body.

Each of these potential challenges to the supremacy of public law receives its own institutional answer. Kant's engagement with questions of crime and punishment must be understood as an answer to a different, individual challenge to the supremacy of public law. The criminal is punished because he has committed a crime. A crime, in turn, is a "transgression of public law that makes someone who commits it unfit to be a citizen." (6:331) In a footnote to his discussion of revolution, Kant explains that "Any transgression of the law can and must be explained only as arising from the maxim of the criminal (to make such a crime his rule); for if we were to derive from a sensible impulse, he would not be committing it as a free being and it could not be imputed to him" (6:321). The criminal's maxim is the rule on which he acts, and, like any maxim, must have the form "use these means in order to achieve this end." For Kant, external wrongdoing always consists in using prohibited means: private wrongs against person and property either involve using means that either belong to another, or acting in ways that deprive another persons of means to which he or she is entitled. Kant's use of the vocabulary of maxims is potentially misleading, since it might suggest that the difficulty with the criminal's acts is the use of the means for the end. However, Kant's elucidation of the concept of right in the introduction to the Doctrine of Right makes it clear that "no account at all is taken of the matter of choice, that is, the end each has in mind with the object he wants" (6:230). Thus a maxim is objectionable from the standpoint of right purely on the basis of the means that are used, regardless of the end pursued. Kant's examples of crime all turn on the use of wrongful means: theft, murder, burglary, rape, and counterfeiting; in each case, the wrongfulness of the crime is identified though its maxim, that is the means used rather than the end pursued. In each case, the criminal uses means that he knows to be prohibited. In each of these examples, the criminal's ends are ordinary, and might be pursued through in other contexts through acceptable means; the difficulty lies in the means that the criminal uses. The use of those means (with the exception of some instances of counterfeiting) 20

19 Counterfeiting contrasts with "fraud in buying and selling, when committed in such a way that the other could detect it." (6:331) The latter is merely a single wrongful transaction; counterfeiting of money or bills of exchange is inconsistent with the very possibility of universal exchange, because money is never particular. As a result, it frees exchanges from the particularities of the matter of their choice.

20 Rousseau gives the example of a person who gives counterfeit money as a gift. The recipient is not deprived of anything, and so is not wronged, but the counterfeiter still does wrong. See Rousseau, Reveries of a Solitary Walker, New York, Penguin Books, 1984, p. 65.
typically wrongs someone in particular, and the victims would also have a private right of action against the criminal.

The criminal uses means that are inconsistent with a system of equal freedom, and that inconsistency provides the grounds for prohibiting those crimes: theft, murder and counterfeiting are inconsistent with a system of equal freedom under universal law, and so they must be prohibited under public law.\(^{21}\) Kant writes that “counterfeiting money or bills of exchange, theft and robbery, and the like are public crimes, because they endanger the Commonwealth and not just an individual person”\(^{(6:331)}\). Kant’s emphasis on the danger to the Commonwealth recurs in his later discussion of theft, when he writes “Whoever steals makes the property of everyone else insecure”\(^{(6:333)}\). These claims all go to the grounds for prohibiting theft, counterfeiting and the like: they are inconsistent with the possibility of property; since part of the state’s role is to make property claims conclusive, it must prohibit crimes against property. None of these enters Kant’s account as an empirical claim about the inevitable or even probable effects of crime. Instead, they enter as claims about the normative structure of property. A property right is a right to an object that can be physically separate from its owner but subject to the owner’s choice. Taking another person’s property violates the basic norm of property: the thief seeks to remove an object from the owner’s choice merely by physically separating it from the owner. If you could do that, there would be no property.

The ground for punishing theft, however, is not the fact that the thief chooses to violate the basic norm of property. If that were the rationale, punishment would be possible outside of a rightful condition. Instead, the grounds for punishment reflect the fact that his choosing to do so must be understood as choosing to exempt himself from the authority of the law. Kant writes that “Any transgression of the law can and must be explained only as arising from a maxim of the criminal (to make such a crime his rule)”\(^{(6:321)}\). His rule may be one of exemption, “without formally renouncing obedience to the law.” Such self-exemption need not expressly repudiate the law in the way that Kant supposes that a revolutionary or regicide does – it is not, as Kant says “diametrically opposed to the law”\(^{(6:321)}\).

The criminal’s choice of means is inconsistent with the rule of law and so with a civil condition, because he unilaterally determines which means are available to him, rather than accepting the omnilateral judgment of public law. He thereby asserts a claim to what Kant elsewhere calls “wild lawless freedom.” The inconsistency parallels the inconsistency between theft and property, but does not merely replicate it. The fundamental structure of a civil condition is that omnilateral public law replaces unilateral private judgment. Through their representatives, the citizens as a collective body give themselves laws, together. No private person is entitled to make, apply or enforce laws. Only officials acting in their official capaci-

ties are entitled to do so. Much of the matter of these laws is dictated by innate right or private right: public law “contains no further or other duties of human beings among themselves than can be conceived” in a state of nature; “the laws of the condition of public right accordingly have to do only with the rightful form of their association” (6:307). In making crime his rule, the criminal violates not only the “duties of human beings among themselves” that make up the matter of most familiar crimes, but also the rightful form of public law, because the criminal’s “rule” is one of unilateral exemption from omnilateral law. If unilateral choice could cancel omnilateral law, there could be no omnilateral law.22

The fundamental feature of crime is thus not its inconsistency with the rights of other private persons, but its inconsistency with the claim of public law to protect those rights. In the concluding note to “Private Right” Kant introduces a distinction between what is formally wrong and what is materially wrong.23 In introducing it, his immediate concern is with acts that are formally but not materially wrong, such as remaining outside a rightful condition. The example of crime suggests that some acts can be both formally and materially wrong.24 Formal wrongs “take away any validity from the concept of right itself and hand everything over to savage violence, as if by law, and so subvert the right of human beings as such.” (6:308) They do so because the right of human beings as such is the right to freedom under universal law; the repudiation of the possibility of reciprocal limits on freedom in favor of “wild lawless freedom” is contrary to it. Kant is not making an empirical claim when he says that a criminal “hands everything over to savage violence” any more than when he says that the thief “makes the property of everyone else inse-

22 It is perhaps worth contrasting Kant’s view with the prominent version of retributivism developed by Herbert Morris. Morris portrays the criminal as taking unfair advantage of the self restraint of others by exempting himself form a rule that others follow. Kant’s view focuses not on the unfair benefit claimed, but rather on the incompatibility of the crime with the rule of law. The advantages of Kant’s approach are clear: the rule of law is not a set of discreet burdens that people accept in return for their expected benefits; it is just the condition of the consistent enjoyment of freedom.

23 I am grateful to Jacob Weinrib for convincing me of the importance of the concept of formal wrongdoing throughout the Doctrine of Right, both in general and in the discussion of punishment. See Weinrib’s “The Juridical Significance of Kant’s ‘Supposed Right to Lie’,” Kantian Review 13 (2008) 141–171. I largely avoid the vocabulary of formal wrong, because Kant appears to reserve it for the case of the person whose maxim is diametrically opposed to right.

24 Kant uses the distinction between formal and material at several different levels. Every material wrong can also be characterized in terms of its formal aspect. In the case of theft, the formal aspect consists in acting on a maxim that is inconsistent with property as such. More generally the form of private right does not attend to the matter of the things to which private persons have rights, but only the form of their interaction so that, as far as the principles of private right go, everyone is entitled to keep what is his, regardless what it might (materially) be, and anyone who deprives another of what is his commits a (formal) wrong.

A similar hierarchy of formal/material distinctions can be found in the Critique of Pure Reason (op. cit. fn 7), A 266/B 322, and in Kant’s Lectures on Logic, trans. and ed. by J. Michael Young, Cambridge, Cambridge University Press, 1992, 75, 589, 598, and 616.
cure.” Instead, both the wrongfulness of his act and the ground for punishment rest on formal aspects of his rule of action: the incompatibility of theft with property grounds its criminalizing theft as a matter of public law; its incompatibility with publicly given law grounds its punishment. A crime is a violation of the very possibility of a system of equal freedom, because the criminal becomes a law unto himself. His principle of action permits him to exempt himself from the public legal regulation of conduct and resolution of disputes. As such, he is like the person who chooses to remain in a state of nature: he asserts his own “wild, lawless freedom,” against the claims of the state, even if he does so “by way of default only” (6:321).

On this analysis, a crime is wrongful as against its victim because it is inconsistent with the rights that private persons have against each other; it is wrongful as against the public because it is inconsistent with the right of the citizens, considered as a collective body, to uphold their respective freedom by giving themselves laws together. Every crime will, by its nature, “endanger the commonwealth,” because the Commonwealth itself is nothing more than the possibility of the citizens giving themselves laws together. In exempting himself from the law’s authority, the criminal arrogates to himself a “wild, lawless freedom.”

That is why the criminal is discussed together with the revolutionary, the entailed estate, the church, the hereditary nobility and even the people, considered culturally rather than juridically. All of these claim for themselves wild lawless freedom within a specific domain, because each of them supposes that the principles of social order should be something independent of principles of the rule of law.

2. Hindering a Formal Wrong

If every crime is wrongful because of its incompatibility with the form of public lawgiving, it can only be hindered through a response that upholds the form of public lawgiving. In the case of the particular wrong against some victim, it is up to the victim who has been wronged to decide whether to claim a private remedy, whether that is, to stand on his or her rights. The wrong against the form of lawgiving requires a different and mandatory response, rather than a discretionary one.

A civil union enables people to give themselves coercive laws together. The only way they can do so, however, is by giving laws to themselves externally. In characterizing the executive power of the state as “irresistible” (6:316), Kant is making a conceptual claim about the nature of executive power. Anything you do contrary to sovereignty is without legal effect. If you wrongfully take something from another person, it does not become yours, and damages restore it to its original possessor. If you seek to exempt yourself from the law, the state prevents you by giving you a contrary incentive; if you ignore the incentive, the state restores its own authority by hindering your hindrance of the system of equal freedom by removing the legal effect of your exemption.
Noumenally, the law remains supreme even in the fact of violation, because a noumenal hindrance to freedom is just a contradiction. Empirically, however, a hindrance to freedom can be hindered by an equal and opposite force. Punishment hinders the juridical effect of wrongdoing by upholding the aspect of right that the criminal has sought to exempt himself from.

The analysis works most straightforwardly in Kant's examples of theft. The thief exempts himself from public law by exempting himself from the law's claim to regulate property. The way to make it the case that the crime did not change the law is to turn the criminal's own maxim against him. Having sought to exempt himself from the rule of law as realized in the law of property, the criminal finds himself excluded from the system of property, prohibited from having any external objects subject to his choice.

Just as the nature of crime needs to be understood formally rather than materially, so too, does Kant's phrase, "whatever undeserved evil you inflict on another within the people, that you inflict upon yourself." (6:332) As a result, the thief must be understood not merely to have deprived some particular person of some particular piece of property, nor even to have acted contrary to the system of property. Instead, he has acted contrary to the people's power to give themselves laws. He made self-exemption his rule by making the violation of a particular public law his rule; his act must be made into an act of self-exclusion from that aspect of the system of public law from which he exempted himself.

Noumenally, the law survives any wrong against it. In the world of space and time, however, the wrong must be made without legal effect. The wrongdoer violated the law by violating some particular prohibition; to restore the supremacy of the law that very prohibition must be upheld. Just as the crime is an exemption from an aspect of the law's supremacy, the punishment excludes the criminal from that very aspect of its protection.

The thief's specific maxim - the specific way in which he uses prohibited means - must be turned against him because an exemption from the law is, in an important sense, juridically impossible: a person cannot act so as to exempt himself from the law. Instead, he must be taken to have chosen something else. His maxim is one that is contrary to freedom under public law. The only way the state can recognize and respond to his maxim is by treating it as its own mirror image, that is the exclusion of himself from the very same public law. The thief's specific maxim is of the form "all property is entirely subject to my choice," which amounts to "there is not property to me." The punishment inverts the maxim from a challenge to the authority of public law to an exclusion from it: the thief is held to the implications of his own maxim, and so is excluded from the system of property: there is property, but not for him. In willing that the property of another be subject to his choice, the criminal is taken to have willed that there be no property for him, since his maxim is inconsistent with the possibility of property. The use of force that responds to this must be the objectification of the maxim, the turning of the crimi-
nal’s game against himself. The criminal wants to be exempt from the rule of property by making the law of property nothing to others; the punishment exempts him in a different sense by making the law of property nothing to him. He makes a rule only for himself; the law responds by limiting its application to him alone. His hindrance to freedom is thus hindered by sealing it off.

What exactly does it mean to exclude the criminal from the system of property? In the case of a material wrong, the hindrance must itself be material. The criminal would lose an equivalent amount of property, or even all of his property. In the case of a wrong against an aspect of public law, the exclusion must also be formal, that is, exclusion from the rightful system of property for a specified time. It would not be enough for him to lose whatever property he had, because that would merely restrict his participation in the system of property by its particulars, and so would not address the formal incompatibility of his self-exemption with the law. Instead, the exclusion would require that no object be subject to his choice; he would not be allowed to acquire anything and would only be able to use things with the permission of others. Kant overstates the implications of this when he says that it would “reduce him to the status of a slave,” (6:333) because his ability to use his powers would be entirely subject to the choice of others.

The example of theft makes Kant’s account of punishment analytically clear, but it is also potentially unrepresentative. It is one thing to say that the thief exempted himself from public law in general by violating the law of property in particular, and so is excluded from the system of property, unable to own anything. Other wrongs violate aspects of public law that are more difficult to represent as self-contained components of it. A person who commits a crime against another person’s body violates the victim’s innate right; the state protects innate right, but it is not required to make innate right conclusive. That person cannot be excluded from the “system” of personal protection, and turned into an outlaw, who others may attack at will. Crimes against persons can only be punished in a way that avoids making “the humanity in the person suffering it into something abominable.” (6:333)

25 Kant, Critique of Pure Reason (op. cit. fn. 7), B 276: “One will realize that in the preceding proof the game that idealism plays has with greater justice been turned against it.”

26 Kant’s use of the vocabulary of slavery here risks spoiling his more general point. There are at least two difficulties. First, from the standpoint of right, slavery is worse than death, as it is the annihilation of personality, whereas death is simply the loss of it. This has the surprising consequence of making the punishment for theft more severe than that for murder. Second, Kant says that the length of imprisonment for theft can be for “a certain period.” Yet the concept of temporary slavery is incoherent. I am grateful to Alexander Aichele for discussion of this issue.

27 Except insofar as conclusive acquired rights are required to make innate right fully secure. You cannot recover damages for bodily injury unless your injurer can own property and transfer it to you; you cannot have an enforceable right to have another person come to your defense unless there are enforceable contracts. That is why states, which remain in a state of nature, can renounce their membership in an alliance in order to avoid getting drawn into war.
Conversely, the criminal cannot be subjected to a punishment that is inconsistent with the humanity of the official carrying it out. "Thus the principle of *lex talionis* must be honoured in its spirit." (6:363)

Kant gives little guidance as to how this might be done, but his emphasis on the formal nature of criminal wrongdoing provides the resources to address this issue. Because every crime is formally a self-exemption from public law, exclusion from the system of freedom must be the appropriate punishment. The seemingly self-contained nature of property is not only unrepresentative but misleading in this respect. The underlying retributive principle requires excluding the wrongdoer from participation in the civil society constituted by public law insofar as he has sought to exempt himself from some aspect of public law. Every form of punishment will thus be a form of exclusion from full participation in civil society. The "spirit" of *lex talionis* is thus the requirement that self-exemption be hindered by exclusion. Indeed, as Kant's own discussion of theft makes clear, the only way to exclude someone from the system of property is to physically confine him. The most obvious way to exclude someone from a system of *freedom* is also through physical confinement. The appropriate quantum of confinement – the length of the prison term – must be proportional to the gravity of the wrong. In assessing the gravity of the wrong, the particular public law the criminal violated provides an appropriate measure, for the material wrong is the precise manner in which the criminal has committed the formal wrong. Thus the principle of *lex talionis* must always be honoured in its spirit. The particularity of the criminal's choice of means is only significant inasmuch as it is the material way in which the criminal sought to exempt himself from public law. Excluding him from participation in the system of freedom created by a rightful condition addresses the public aspect of wrongfulness; the particularity of the matter can only be specified in light of it. Kant's preferred example of property illustrates this point: the thief is excluded from property by excluding him from freedom under law.

### 3. Deterrence

Punishment upholds the supremacy of the law in space and time. The law is noumenally supreme, and so immune from wrongdoing. However, it is empirically vulnerable to wrongdoing, in the sense that a crime violates the law's supremacy in space and time because every time a crime is committed, public law has failed to guide conduct. As Kant observes, the criminal is punished "because he has committed a crime." (6:331) I now want to argue that the law's supremacy is nothing

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28 In principle, a monetary fine could also serve as a punishment, insofar as money is the general "means by which men exchange their industriousness." (6:287). As such it can be treated as an approximation to a measure of freedom. Kant is wary of fines, however, precisely because of the role of money in exchange, which might lead someone to regard it as merely a price, and so as potentially worth paying. (6:332)
Hindering a Hindrance to Freedom

more than its ability to guide conduct prospectively. Your private rights are effective in space and time just in case the things to which you have a right are subject to your exclusive choice. Public law is effective in space and time just in case it hinders those acts inconsistent with it, by shaping conduct prospectively.

Public law can guide conduct externally only by providing incentives to conformity. The incentives are external and, indeed, the only possible incentive is that of having actions that hinder the system of freedom themselves hindered. The criminal takes an interest in committing a crime in the hope of achieving something; the law hinders the crime prospectively by announcing in advance that if a crime is committed, it will be hindered retrospectively. The law is effective if and only if conduct inconsistent with it will be hindered, whether prospectively through an incentive, or retrospectively, by upholding it.

If punishment is nothing more than the law being effective in space and time, Kant's seemingly extreme remarks about the need to punish are cast in a new light. Outside of a rightful condition, only "protective right" is available as a hindrance—the prospect of defensive force provides an incentive to refrain from aggression. In a rightful condition, the prospect of remedial force also provides a possible incentive. Both protective and remedial force are only possible incentives, because they are fully discretionary on the part of the person exercising them. A person defending himself may follow the recommendation of ethics and "show moderation" against a wrongful assailant (6:235). The person who is entitled to a remedy in accordance with strict right may listen to conscience and decline to claim it. More generally, a person may fail to stand on his or her rights for any number of reasons, and so the prospect of protective or remedial force must be merely possible.

The prospect of punishment is different, because it must provide an incentive if the law is to be effective in space and time. Moreover, it must provide the incentive systematically, and thereby everyone with an assurance that each of the others will act in conformity with their rights. In Private Right, Kant argues that "I am therefore not under 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." Instead, rights to external objects of choice are only consistent in a civil condition, because it is "only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance." (6:255–6) On this formulation, assurance under public law mediates between each person's entitlement to stand on his or her own rights and the rights of others.29 to refrain from the possession of

29 Kant introduces the three **Utlan** precepts at 6:236. The first demands that a person not allow others to use him merely as a means; the second that each refrain from wronging others. The third requires entering a rightful condition in which "what belongs to each can be secured to him against everyone else." The assurance argument follows this structure. The details of this transition can be spelled out in a number of different ways that do not matter for present purposes. The general form of Kant's argument is preserved in all of them; the simplest and most forceful presentation of it is still Julius Ebbinghaus's. For a succinct formulation, see
others when they do not do the same allows them to treat you (and what belongs to you) as mere means in pursuit of their purposes. The only way to reconcile these is to provide everyone with the assurance that everyone else has an external incentive for conformity with the rights of everyone else. People may have a variety of incentives for such conformity, including morality, sympathy, or concern for reputation. Each of these may lead to acts in conformity with law, but they fail to provide assurance because their overlap with the requirements of law is merely coincidental so contingent in any particular case. Only public law, with the threat of punishment, provides the requisite assurance, by providing an incentive that is available even when others fail in a particular case.  

As the upholding of public right, punishment is not discretionary; although the sovereign has the right to grant clemency, Kant characterizes it as the “slipperiest” right of all, because it does “injustice (unrecht) in the highest degree” (6:337). In exceptional circumstances, clemency can be granted (though not in cases of crimes of subject against each other) “to show the splendor of his majesty” (6:337). Even when permissible, however, it is done outside of the law, and is strictly speaking inconsistent with the existence of a rightful condition. That Kant should take such a harsh stand against clemency is unsurprising; to fail to punish the convicted criminal is to permit him to exempt himself from the rule of law, and so to set up his own “wild, lawless freedom” (6:316). As a private person, the criminal can be thought to have merely exempted himself from the law to achieve a private purpose. The sovereign is not a private actor, entitled to pursue his or her own purposes; the sovereign is the onunilateral will, and has no discretion over the ends that it will pursue. As a result, it does not have means in the way that a private person has means subject to his or her choice in setting and pursuing ends.  


31 Kant’s notorious remarks about the society disbanding needing to execute any murderers in their midst follows the same reasoning: “for otherwise the people can be regarded as collaborators in this public violation of justice (6:333). Kant’s claim about complicity follows from his analysis of the relation between prohibition and punishing those who violate them: to fail to punish a convicted murderer is to acquiesce in his choice of means, that is, to subject the rule of law to the criminal’s choice. The need to follow through, then, is not merely, as Byrd contends, to fail to follow through on an intention that has been announced. Such a failing could only be a personal failing on the part of the sovereign, (although personal to the office, not the person or persons who occupy it) of a piece with familiar weaknesses of sovereigns like the breaking of election promises, or defaulting on the national debt. Neither of these is a wrong in the highest degree. If the threat of punishment is understood as justified by its expected results, the failure to follow through on a threat makes the sovereign ineffectual, and perhaps even renounces a commitment, but does not renounce concepts of right.  

32 It is striking that Kant never uses the concept of choice in characterizing the activities of the state, precisely because the state does not set and pursue its own private purposes. It is the supreme proprietor of the land, but it cannot decide what to do with it; it holds it as a
constituted figure the sovereign does wrong in the highest degree by renouncing its own principle, even in the form of a single exception.

Kant's much discussed remarks about the supposed right of necessity also reflect the role of punishment in making the law effective. Kant writes that "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 juridical verdict) cannot outweigh the fear of an ill that is certain (drowning)" (6:235-6). Kant's point here is that in circumstances in which the law cannot guide conduct, it cannot carry through on the punishment. Kant's formulation is not based upon the assignment of two separate purposes to the criminal law, one of which is forward-looking, and the other of which is backward-looking. Instead, if the punishment just is the upholding of the law's supremacy, then Kant's claim must be that, in circumstances in which the law is systematically incapable of guiding conduct, its supremacy cannot be upheld. To turn the criminal's maxim back against him would fail to uphold the law's supremacy. The sailor who shoves the other off the plank remains a law unto himself because public law cannot give effect to the system of equal freedom in such cases, as the only means available to it are means internal to the system of equal freedom, that is, the enforcement of the law. Since enforcing the law by punishing the sailor who murders another is systematically incapable of providing an incentive in such circumstances, the state has no means at its disposal with which to uphold the law.\textsuperscript{33}

IV. Conclusion

Kant's legal and political philosophy is presented as an \textit{a priori} system, which is meant to apply to finite embodied rational beings, without any reference to the malevolence or defects of human nature, or the difficult circumstances in which humans find themselves. His theory of punishment poses an apparent obstacle to the \textit{a priori} status of his account. Crimes are typically the product of bad people or difficult circumstances. In spite of the roots of crime, I have argued that Kant's account of punishment is required because of the nature of freedom, rather than the imperfections of free beings or the world in which they find themselves.

I have argued that deterrence and retribution are not merely compatible, but that they mutually require each other. In so doing, I have sought to provide an account that is both true to Kant's texts and, at the same time, resolutely non-instrumentalist. Retributive punishment does not serve to see to it that the wicked suffer as they

\textsuperscript{33} As Dennis Klimchuk has argued, Kant's claim about the plank is not that the threat will fail empirically, but rather that it must fail conceptually. Other incentives might lead the sailor to refrain from dislodging the other, but the threat of execution cannot, simply because the prospect of losing one's life now cannot be outweighed by the prospect of losing it later.
deserve to; nor does punishing one person serve as a deterrent in order to prevent others from engaging in unwelcome behavior. Instead, punishment is nothing more than the supremacy of the rule of law. Prospectively, it guides conduct by threatening to make actions contrary to law pointless; retrospectively it makes any such actions pointless, depriving them of their legal as well as their factual effects. The principle of punishment is thus the guarantee of freedom in space and time, the hindering of hindrances to freedom.

Zusammenfassung


Ich bin der Auffassung, dass Abschreckung und Vergeltung nicht lediglich kompatibel sind, sondern sich gegenseitig bedingen. Dabei habe ich versucht, eine Konzeption zu entwerfen, die einerseits Kants Texten treu bleibt und zugleich entschieden nicht-instrumentalistisch ist. Vergeltende Strafe dient weder dazu, darauf zu achten, dass die Bösen leiden, wie sie es verdienen haben, noch dient die Bestrafung einer Person der Abschreckung, um andere daran zu hindern, sich unliebsam zu verhalten. Strafe ist demgegenüber nichts anderes als die Vormacht einer Herrschaft des Rechts. Prospektiv leitet Strafe das Verhalten, in dem sie damit droht, gesetzeswidrige Handlungen sinnlos zu machen, retrospektiv macht Strafe jede solche Handlung sinnlos, weil sie sie ihrer rechtlichen und tatsächlichen Vorteile beraubt. Das Prinzip der Strafe ist daher die Garantie der Freiheit in Raum und Zeit, ein Hindernis des Hindernisses der Freiheit.
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Kant’s Doctrine of Right in the Context of Eighteenth Century Natural Law

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