**Juridical Law as a Categorical Imperative**
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In Kant's normative system, there are two types of moral law: 'laws of freedom are called *moral* laws. As directed merely to external actions and their conformity to law they are *juridical* laws; but if they also require that they (the laws) themselves be the determining grounds of actions, they are *ethical* laws' (6:214).[2] Kant also writes: 'For us, whose choice is sensibly affected and so does not of itself conform to the pure will but often opposes it, moral laws are *imperatives* (commands or prohibitions) and indeed categorical (unconditional) imperatives' (6:221). I understand Kant to mean that moral laws are, by definition, unconditional practical laws, which are therefore categorical imperatives for imperfectly rational beings like us.[3] This raises a question: how it can be the case that a juridical law is a categorical imperative? How can a statute passed by a legislative body generate an unconditional rational requirement for us to obey?

The aim of this chapter is to demonstrate that juridical laws[4] enacted by legislators *are* categorical imperatives, and that the external incentives that the state links to its legal commands play a critical role in making them so. I will argue that statutory commands must be categorical imperatives if they are to establish juridical laws, and that statutes that fail to establish juridical laws do not obligate us to obey their terms. My account depends on the deep structural similarity that Kant perceived between ethical law and juridical law. Careful attention to the Kantian concepts of a law and of an imperative will make this similarity apparent, so I will begin by reviewing them.

Next, I will describe Marcus Willaschek's 'paradox' — his claim that juridical laws cannot be categorical imperatives for us even though it appears that they must be — and some of the reasoning that supports it. I will then attempt to rebut Willaschek by offering my own account of how juridical laws can be categorical imperatives. Finally, I will demonstrate the plausibility of my proposed account by showing that it illuminates related, previously opaque passages in *The Doctrine of Right*.

## The Concept of a Law and the Concept of an Imperative

A law in general is a necessary relation between objects. Kant identifies at least three different kinds of law, which feature different kinds of necessity and relate different kinds of objects to each other: laws (or principles) of logic, laws of nature, and moral laws.[5] Principles of logic are 'the universal rules of thinking in general' (4:387). These rules relate concepts by means of conceptual containment.[6] Laws of nature relate events or states of affairs through causal necessity: 'the natural law of appearances in their relations to one another, namely the law of causality' (5:29).[7] Finally, moral laws relate agents (understood as rational beings) to acts or omissions by means of practical necessity.[8] Although Kant usually uses the word 'law' to refer to this kind of relation, he also sometimes uses it to refer to what he elsewhere calls the 'content' or 'matter' of the law: the legal command. I will specify how I understand him to be using the word in each relevant case.

An imperative is 'a practical rule by which an action in itself contingent is *made* necessary' (6:222). A rule of this type 'is indicated by an "ought," which expresses objective necessitation to the action' (5:20). Imperatives may be either hypothetical or categorical, depending on whether the necessitation they express is conditional or unconditional. A hypothetical imperative expresses a relation between an agent and an action that is necessary to bring about some chosen, contingent end. Such imperatives, Kant writes, are 'practical *precepts* but not *laws*' since (whilst they presuppose a relationship of natural causal necessity between means and ends) they do not assert a relationship of true practical necessity between an agent and an act — an agent can rationally respond to the precept by abandoning her contingent end as an alternative to doing the prescribed action (5:20). By contrast, a categorical imperative 'alone brings with it that necessity that we require of a law' because its 'unconditional command leaves the will no discretion' (4:420).

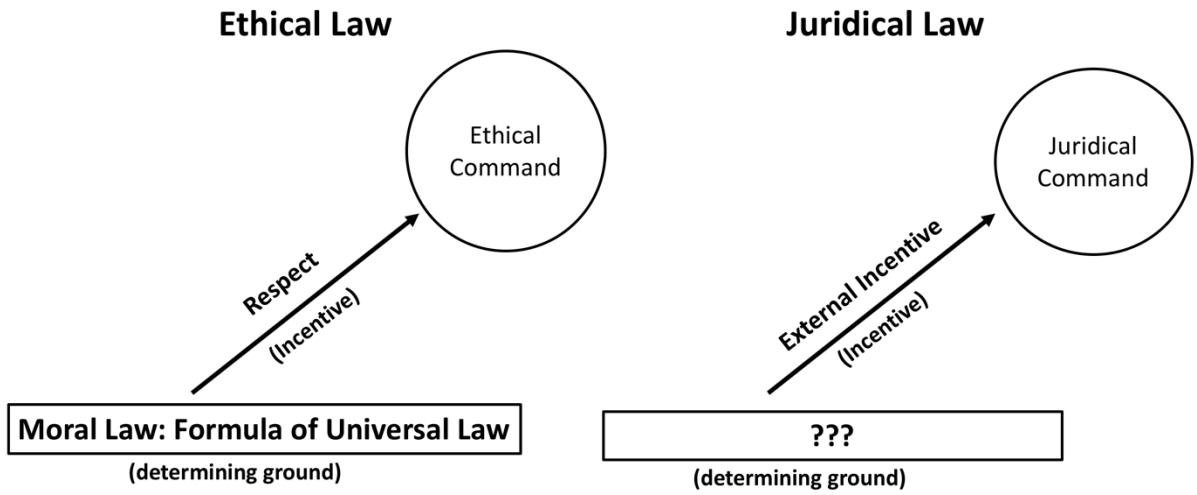
The concept of a categorical imperative is so similar to the concept of a moral law that Kant himself frequently seems to suggest that the two are identical. For example: 'moral laws are *imperatives* (commands or prohibitions) and indeed categorical (unconditional) imperatives' (6:221). However, at times Kant identifies two features that distinguish these two ideas. First, categorical imperatives express 'necessitation' rather than simply necessity (4:413). Kant uses this different terminology to reflect the empirical uncertainty that arises because imperatives are addressed to imperfectly rational beings: those capable of acting rationally but also capable of deviating from the requirements of reason. Second, Kant indicates that imperatives are, strictly speaking, representations of practical principles (be they precepts or laws) rather than precepts or laws themselves.[9] For example: 'The representation of an objective principle, insofar as it is necessitating for a will, is called a command (of reason), and the formula of the command is called an imperative' (4:413). We act in accordance with our representations of laws rather than in accordance with laws themselves because we act under the idea of freedom: our representation of a practical law is the activity of self-legislation.

Finally, Kant has at times specified a relationship of conceptual containment other than identity between a moral law and a categorical imperative. For example, 'a (morally practical) *law* is a proposition that contains a categorical imperative (a command)' (6:227). A categorical imperative might therefore be thought of as the aspect of a moral law that is visible to us from our perspective as imperfectly rational beings.

**Two Types of Moral Law**

Kant identifies two types of moral law: ethical and juridical (6:214). Any 'lawgiving' (which I take to be the activity of generating a law) for either type of moral law shares a basic two-part structure: '**first**, a law, which represents an action to be done as *objectively* necessary, that is, which makes the action a duty; and **second**, an incentive, which connects a ground for determining choice to this action *subjectively* with the representation of the law' (6:218). I understand Kant to be using the word 'law' here to refer to the 'matter' of the law: the content of the legal command.[10]

**FIGURE 1 Two Types of Moral Law**




Although structurally similar, juridical laws differ from ethical laws in four important ways. First, 'the author of [a juridical] law' is not necessarily[11] the same agent as 'the author of the obligation in accordance with the law' (6:227). I have argued elsewhere that Kant is referring to the omnilateral will as the author of the obligation in accordance with a juridical law, while the 'author of the law' — the supplier of the content of the legal command — is the legislative body of the state (for example, the UK Parliament).[12] With respect to ethical laws, by contrast, an individual agent is the author of both the content of the legal command and the obligation to act in accordance with it.

Secondly, ethical and juridical lawgivings provide different kinds of incentives. In the *Doctrine of Right*, Kant states succinctly that ethical lawgiving makes the idea of duty itself the incentive (6:219). In the *Second Critique*, Kant explains in somewhat more detail how the idea of duty can connect the law subjectively with a determining ground of the will: reflecting on the concept of duty — the idea of an unconditional rational requirement to which we must submit ourselves — gives rise to a feeling called 'respect', which is the product of pure reason and yet also subjective (5:74). By contrast, juridical lawgiving 'does not include the incentive of duty in the law and so admits an incentive other than the idea of duty itself' (6:219).[13] A juridical law 'still needs an incentive suited to the law' but 'can connect only external incentives with it' (6:219). The external incentive provided by the juridical law 'must be drawn from the pathological determining grounds of choice, inclinations and aversions' (6:219). By 'pathological', Kant generally means 'dependent upon sensibility' (5:20). Insofar as inclinations and aversions determine our choices, they are pathological determining grounds because they appeal to our sensible nature rather than to our rational nature (6:219).

Thirdly, '[t]he freedom to which [juridical] laws refer can be only freedom in the *external* use of choice' (6:214). I take Kant to mean that juridical laws can establish only our external freedom, understood as 'independence from being constrained by another's choice' (6:237). By contrast, our internal freedom is established by ethical laws, which 'cannot be subject to external lawgiving simply because they have to do with an end which (or the having of which) is also a duty' (6:239). Kant identifies our external freedom as 'the principle and the basis for any exercise of coercion' (6:340). The subject matter of the

juridical law is thus limited to 'the external and indeed practical relation of one person to another' (6:230).

The fourth difference between juridical and ethical laws 'follows from' the above observations about the nature of external freedom: 'it cannot be required that this principle of all maxims [i.e. the Universal Principle of Right] be itself in turn my maxim, that is, it cannot be required that *I make it the maxim* of my action; for anyone can be free so long as I do not impair his freedom by my *external action*, even though I am quite indifferent to his freedom and would like in my heart to infringe upon it' (6:231). Therefore, juridical laws are 'directed merely to external actions and their conformity to law', unlike ethical laws, which 'also require that they (the laws) themselves be the determining grounds of actions' (6:214). Juridical laws cannot demand anything more than external compliance because they are justified solely by the idea of external freedom, which requires nothing more.

To summarize, a juridical law is distinct from an ethical law in the following ways: 1) its content (that is, 'matter') can be supplied by an entity that exercises the state's legislative authority; 2) the incentive provided by a juridical lawgiving is external and 'pathological'; 3) it is justified exclusively on the basis that it establishes our external freedom (as opposed to our internal freedom); and 4) a juridical law therefore commands only external conformity — a juridical law is never violated simply because it is complied with on the basis of morally indifferent or even immoral maxim.

**Willaschek's Paradox**

Scholars have wondered how juridical laws, given that they have the four distinctive properties listed above, could possibly be categorical imperatives. Marcus Willaschek calls this a 'paradox'. It seems as though juridical laws must be categorical imperatives since they are supposed to unconditionally obligate us, and yet the features that Kant attributes to juridical laws seem to make that impossible.[14] Willaschek argues that all categorical imperatives demand that they be followed for their own sake (i.e. out of respect for law), and we know that juridical laws don't have this property since Kant explicitly states that juridical laws 'do not expect, much less demand' compliance from the motive of duty (6:231). Willaschek also suggests that threatened punishments cannot move us unconditionally because they move 'only those who in fact want to avoid (the risk of) coercion and punishment' to obey.[15] This suggestion implies that there is nothing about coercion or punishment that we are unconditionally rationally required to avoid

Willaschek concludes that although his paradox cannot be resolved, it can be 'tamed': 'I suggest we understand Kant as saying that juridical laws indeed are prescriptive, but only when considered from the ethical perspective.'[16] From this perspective, Willaschek suggests, 'people ask for normatively binding reasons to obey a given law, and, if the law indeed is unconditionally valid (is binding irrespective of prudential reasons), then there is such a reason to obey the law—which, because of the unconditional validity, is a reason to obey it for its own sake.'[17] I will address Willaschek's arguments in reverse order.

**Willaschek's Paradox Must Be Dissolved, Not Tamed**

Willaschek proposes that we can tame his paradox by seeking 'normatively binding reasons to obey a given law'. He reasons that 'if the law indeed is unconditionally valid…then there is such a reason to obey the law — which, because of the unconditional

validity, is a reason to obey it for its own sake.'[18] Willaschek does not specify the kinds of reasons that he thinks would reveal a statutory command that cannot be represented as a categorical imperative to nonetheless be unconditionally valid. It seems to me, though, that this approach cannot tame Willaschek's paradox because, as I will show, a juridical lawgiving must be capable of moving us to obey unconditionally. A statute that cannot move us to obey unconditionally (that is, regardless of our inclinations) lacks universality, and thus it cannot be respected as law.

The way in which a juridical law must be universal is revealed by Kant's discussion of the role that 'equal assurance' plays in establishing our legal obligations (6:307). Such assurance is 'contained in the concept of an obligation corresponding to an external right' (6:256). For example, 'No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint towards him' (6:307).[19] Kant elsewhere writes, 'I am…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' (6:255-56). This assurance can only be provided 'under a general external (i.e. public) lawgiving accompanied with power' (6:256). Kant uses the word 'power' in the context of state action to refer to the executive authority to 'exercise coercion'.[20] I therefore understand Kant to be claiming that the state's coercive power must accompany any external lawgiving to provide us all with equal assurance of each other's compliance, without which we do not have legal obligations.

Moreover, Kant's language indicates that that this coercive assurance 'constrains' our conduct prospectively (6:219). For example, 'no one is bound to refrain from encroaching' on what others possess if others give no 'equal assurance' that they will 'observe the same restraint' (6:307). In other words, assurance is not merely *insurance* (for example, a civil recompense after a wrong has been done). Rather, it functions as a deterrent, and it must, in some sense, serve this function for us all equally.[21]

Why does Kant seem to think that a coercive deterrent is a prerequisite for legal obligation? My answer is that a juridical law must be universal in the sense that it *is capable of moving us all to obey* regardless of our subjective preferences. By contrast, a statutory command that can determine the wills of some but not all subjects (that is, one that can be represented only as a hypothetical imperative) cannot provide *equal* assurance, and thus it cannot obligate us. Nothing can empirically guarantee that imperfectly rational beings like us will obey the terms of a statute, of course, just as nothing can guarantee that we will always obey ethical laws. But a juridical lawgiving, just like an ethical one, must give us all a good reason to obey, because anything less would not provide 'equal' assurance in *any* sense of that word.[22] I will later argue that a coercive deterrent can provide such a reason.

If a statute that cannot move us all to obey fails to provide equal assurance and therefore lacks the universality of a law, then it cannot inspire 'respect' within us, which is, by definition, a rational being's subjective response to the universal form of law. Willaschek's paradox—that juridical laws cannot be categorical imperatives even though it seems they must be—cannot be tamed. It must instead be *dissolved* by an alternative account of the nature of juridical laws according to which they can be categorical imperatives for us — an account that does not depend on the ethical incentive of respect for law as such.

**Juridical Laws as Categorical Imperatives**

On my proposed account, statutory commands succeed in establishing juridical laws if they are capable of being represented *both* as hypothetical and as categorical imperatives. I will show that a statute that threatens a punishment for disobedience can be represented in both of these ways.[23] Kant's own comments suggest that to qualify as a 'punishment', a legal consequence imposed in response to a crime must have three closely-related features. It must be 1) physical, 2) a pathological aversion and 3) incompatible with the external freedom of the person punished. I will argue that this third feature of punishment enables us to represent juridical laws as categorical imperatives.

First, a punishment 'must be drawn from *pathological* determining grounds of choice, inclinations and aversions, and among these, from aversions; for it is a lawgiving, which constrains, not an allurement, which invites' (6:219). In the *Second Critique*, Kant describes punishment as a 'physical harm' and also as a 'physical consequence' imposed on a convict (5:37).[24] A punishment therefore cannot be an admonishment or condemnation. In the same discussion, Kant states that every crime 'is of itself punishable — that is, forfeits happiness (at least in part)', which is consistent with Kant's claim that an external incentive provided by a juridical lawgiving must be contrary to our natural inclinations (since 'happiness' is the abstract unity of all such inclinations) (6:537).[25] So far, it appears that punishments enable us to represent statutory commands as hypothetical imperatives by connecting the juridical law subjectively to the '*pathological* determining grounds of choice'.

However, this is not the *only* way in which a punishment affects a convict. Punishment has a more abstract significance also: a convict is 'someone who has lost [his dignity as a citizen] by his own *crime*, because of which, though he is kept alive, he is made a mere tool of another's choice (either of the state or of another citizen). Whoever is another's tool (which he can become only by a verdict and right) is a *bondsman*…and is the property of another, who is accordingly not merely his *master* but also his *owner*' (6:329-30). These words offend modern sensibilities and could create the impression that Kant's conception of punishment is inconsistent with respect for the humanity of convicts.

In context, however, Kant's words reveal that he conceives of punishment as treatment incompatible with the external freedom of convicts, rather than with their unconditional moral worth.[26] Recall that external freedom is 'independence from being constrained by another's choice' (6:237). To say that a convict becomes 'another's tool' is just exactly to say that she becomes externally unfree due to her crime. A convict's external un-freedom amounts to the loss of her 'dignity as a citizen', although nothing can strip a person of her inner dignity as a being with unconditional moral worth.[27]

Kant's examples of punishments that have the above-described features. First, a person guilty of slander may be 'constrained by judgment and right not only to apologize publicly to the one he has insulted but also to kiss his hand' (6:332). This punishment involves literally being made a 'tool of another's choice', performing an act averse to his natural pride, presumably backed by the threat of another deprivation of freedom (imprisonment, perhaps) if he disobeys. Other examples of punishment, 'convict or prison labor' and 'solitary confinement involving hardship', deprive convicts of external freedom of action, movement and/or association (6:332-33).

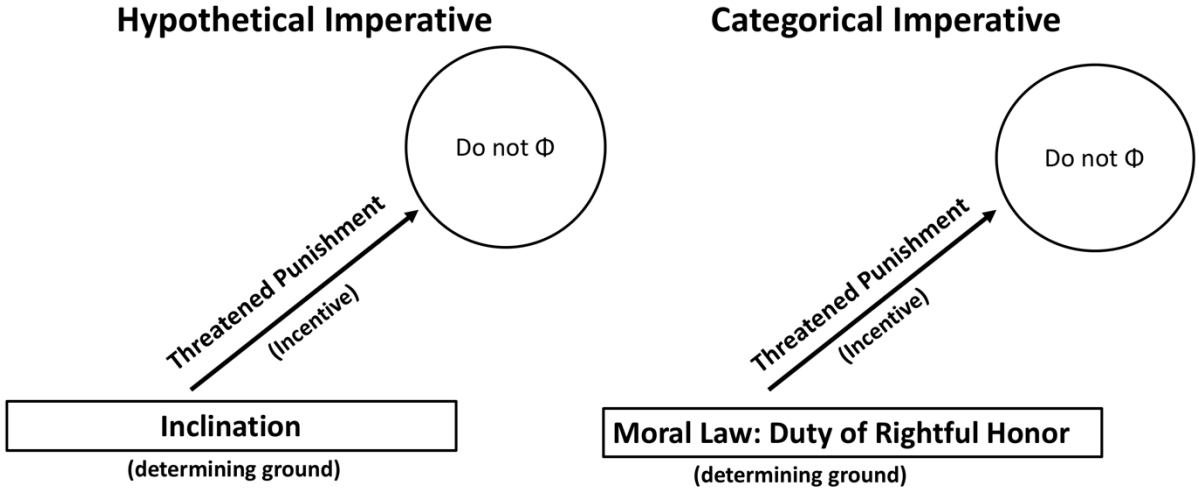
Willaschek argues that punishments can move 'only those who in fact want to avoid (the risk of) coercion and punishment'.[28] He is certainly right that we are able to represent statutes that authorize such punishments as hypothetical imperatives. As aversions, threatened punishments can connect legal commands subjectively to the determining grounds of our sensible impulses. Most of us would find most criminal penalties very unpleasant, so the resulting hypothetical imperatives can inspire a great deal of compliance, but they cannot do so universally.

Because punishment is also a state of external un-freedom, though, it is something we are required by reason alone to avoid, regardless of our individual inclinations (assuming that remaining externally free is our alternative) *because our external freedom is an end that we are unconditionally rationally required to have*. We can only be externally free in a rightful condition, which is why 'reason, by a categorical imperative, makes [a rightful condition] obligatory to strive for' (6:318). This premise is Kant's sole justification for state authority: we must regard the state as holding the legislative, executive and juridical authorities, because only in the context of a civil condition can we regard ourselves as externally free under laws we give to ourselves.

Our duty of 'rightful honor' is directly implied by the status of our external freedom as a necessary end for us: 'Do not make yourself a mere means for others' (6:236). I think Kant means that we are rationally required not to throw our external freedom away, thus becoming 'a mere tool of another's choice' (6:237). Kant elucidates our duty of rightful honour as a premise in his argument that we are obligated to leave the state of nature, but readers should not be misled into thinking that we have this duty only in the absence of a functioning state. Kant's 'idea of the original contract' is the conceptual, not historical, basis of state authority (6:319). A person who lives within the territory of an existing state 'leaves the state of nature' simply by meeting her obligations under public laws. In this context, I will argue that her duty of rightful honour does the same work that it would do in a state of nature: she is obligated to obey statutory commands in the first instance because her duty of rightful honour forbids her from throwing away her freedom by becoming legally liable to punishment, and thus no longer secure in her rights. This analysis makes sense of Kant's claim that 'it is impossible to will to be punished' (6:335). Such a will would be in contradiction with itself, since punishment is the negation of external freedom, which we are rationally required not to throw away.[29]

We can therefore represent a statute that links a legal command to a threatened punishment as a categorical imperative if it presents us with a choice between 1) doing what the law commands and being able to continue to regard ourselves as externally free under juridical laws that we give to ourselves via the omnilateral will, or 2) violating the legal command and becoming legally punishable. Being legally punishable is inconsistent with regarding ourselves as externally free even if we escape detection, because we lose the assurance we formally had that our rights will be respected, and such assurance is constitutive of any right for Kant. A threatened punishment can thus connect an otherwise just[30] legal command subjectively with an *unconditional* ground of obligation, specifically our duty of rightful honour.[31] Figure 2

**Figure 2: Juridical Lawgivings Can be Represented in Two Ways**




Once a juridical law exists, our ability to represent it as a categorical imperative due to our apprehension of its universality, and therefore its law-like form, will give rise to the ethical incentive of 'respect' within us — reason's subjective response to the form of law. This is how we can be moved to obey a juridical law from duty alone, and this explains how all of our juridical duties are 'indirectly ethical' as well (6:221). Kant describes this kind of mental leap in his discussion of the 'Formula of Humanity' in the *Groundwork*:

> [R]ational nature exists as an end in itself. The human being necessarily represents his own existence in this way; so far it is thus a *subjective* principle of human actions. But every other rational being also represents his existence in this way consequent on just the same rational ground that also holds for me; thus it is at the same time an *objective* principle from which, as a supreme practical ground, it must be possible to derive all laws of the will (4:428-29).

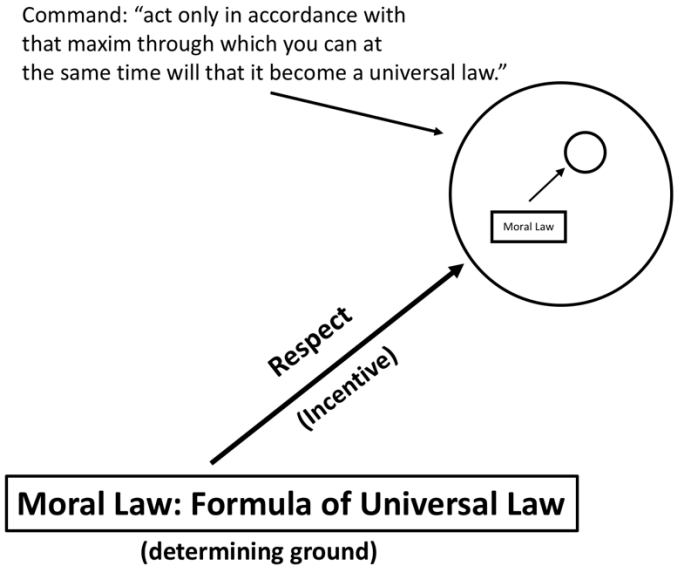
Analogously, the reason a threatened punishment makes it the case that an agent is rationally required to do what an otherwise just statute commands is that she is rationally required to have her own external freedom (that is, freedom from being a mere means for others) as an end. This is essentially what Kant describes above as 'a *subjective* principle of human actions' and is therefore 'a ground for determining choice' that a threatened punishment can connect '*subjectively* with the representation of the law' — exactly what a juridical lawgiving requires (6:218). Only if and when an agent makes the subsequent inference that 'every other rational being also represents his existence in this way' does she apprehend the universality of the juridical law and become able to obey the juridical law out of duty alone.

**Juridical Laws Do Not Command Us to Act from Duty**

One question remains: does my analysis imply that juridical laws themselves demand obedience from duty (that is, out of respect for law)? Willaschek argues that 'the only way to obey a categorical imperative, as such, is to obey it for its own sake…But then, it seems, juridical laws cannot find expression in categorical imperatives, after all, because juridical laws do *not* require obedience for their own sake.'[32] Willaschek clarifies that when he refers to obeying a categorical imperative 'for its own sake', he means 'out of respect for law'.[33] Fortunately for my account, I think that Willaschek is mistaken to conclude that all

categorical imperatives necessarily command that they be obeyed out of respect for law. Willaschek's mistake is to generalise from the example of the ethical principle, which does indeed command this, to all categorical imperatives. The command to 'act only in accordance with that maxim through which you can at the same time will that it become a universal law' *just means* act lawfully (that is, from duty) (4:421). The command to act from duty is therefore the matter (that is, the content) of the ethical law. Because the Formula of Universal Law embodies the concept of a categorical imperative—an unconditional rational requirement—the ethical principle has a uniquely recursive structure.

**Figure 3: Kant's Recursive Ethical Principle**




It does not follow that all categorical imperatives must have this recursive feature. On the contrary, Kant seems to specifically state that this is not a required feature of categorical imperatives as such: 'ethical lawgiving includes within its law the internal incentive to the action (the idea of duty), and this feature must not be present in external lawgiving' (6:219). I understand Kant's words 'within its law' in this sentence to refer to the contents (i.e. matter) of the law: the legal command.

A juridical lawgiving can and must generate a duty to do what the law commands, but the contents of that legal command need not include a requirement that we act from the idea of duty. The existence of a duty not to ϕ does not logically entail that not ϕ-ing itself involves acting on the basis of a particular incentive.[34] For example, we can be obligated not to steal by a juridical law that commands, 'do not steal' without it being the case that that juridical command further stipulates that we must refrain from stealing out of duty. I do exactly what a juridical law prohibiting theft commands me to do if I do not steal because I think jail would be unpleasant (thus acting on my representation of the relevant statute as a hypothetical imperative), or even without being aware of the legal command at all, so long as I do not steal. In other words, juridical laws do not command obedience from duty; they command only external 'conformity', which we are under a duty to provide (6:214). If this reasoning is sound, then I have successfully dissolved Willaschek's paradox by showing that a juridical law's distinctively juridical features do not preclude its status as a categorical imperative.

**Textual Puzzles Resolved**

My proposed account is especially plausible because it can shed light on at least two additional discussions in the *Doctrine of Right*. First, Kant claims that 'the law of punishment is a categorical imperative' (6:331).[35] He means that the person who holds the state's executive authority (the 'ruler') is unconditionally rationally required to respond to a crime[36] by punishing the lawbreaker: '*Punishment by a court*…can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*' (6:331). Kant further underscores the unconditionality of the duty to punish by condemning a grant of clemency as 'injustice in the highest degree'—a formally wrong action (6:337).[37] Kant's statement therefore implies that his concept of a rightful condition requires the state to punish all criminal wrongdoing.[38]

These discussions can be uncharitably read as expressions of vengefulness or anger toward criminals, but it seems more likely to me that punishment is a categorical imperative for the state's executive officials because a threatened punishment is a constitutive part of any juridical lawgiving. Because a threatened punishment necessarily accompanies any obligatory legal command embodied in statute, the same juridical lawgiving that legally requires a subject to do what the law commands legally requires the ruler to punish those who do not. My account makes this reading appealing by explaining why threatened punishments are so critically important: they enable us to represent juridical laws enacted by legislators as categorical imperatives. Alternative accounts such as Willaschek's are not directly inconsistent with Kant's claims that punishments are essential to juridical lawmaking, but they do not explain *why* punishments are essential.

My thesis can also illuminate a second opaque analysis of Kant's regarding the ill-named 'right of necessity'. Kant considers the case of a shipwrecked sailor 'who, in order to save his own life, shoves another off a plank on which he had saved himself' (6:235). The sailor's act is wrong because it violates his victim's innate right of humanity, which we all have even in the state of nature. However, Kant concludes that the homicidal sailor is 'unpunishable' because 'there can be no *penal law* that would assign the death penalty' to someone in this situation (6:235). Kant reasons as follows: 'A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning). Hence the deed of saving one's life by violence is not to be judged *inculpable* but only *unpunishable*, and by a strange confusion jurists take this *subjective* impunity to be *objective* impunity (conformity to law)' (6:235-36).

If the thesis of this chapter is correct, a statute prohibiting murder cannot be represented as a categorical imperative by Kant's sailor, because it does not present him with a choice between 1) doing what the law commands and being able to continue to regard himself as externally free under juridical laws that he gives himself via the omnilateral will, or 2) violating the legal command and becoming legally punishable, which is inconsistent with regarding himself as externally free. If the sailor does what the statute prohibiting murder commands under these circumstances, he will be dead, which will extinguish the possibility of his external freedom. By contrast, some possibility of external freedom remains for the sailor if he commits the homicide because he may be acquitted or offered clemency. Accordingly, in this situation the threatened punishment of death cannot connect the statutory

command ‘do not murder’ subjectively with the ground of this sailor’s duty of rightful honour.

Kant describes the sailor’s legal situation as one of ‘*subjective* impunity’ because a juridical lawgiving must provide an external incentive that ‘connects a ground for determining choice to this action *subjectively* with the representation of the law’, and under the sailor’s circumstances it could not do so unconditionally (6:218).[39] The sailor’s action is a juridical wrong because he violates his victim’s innate right, but since no juridical lawgiving obligated the sailor to refrain from doing what he did, no law authorises the state to punish him. In other words, he has violated the natural juridical law of innate right without violating any legislative enactment.[40] Of course, the sailor could still preserve his internal freedom by respecting his companion’s innate right, and the ethical incentive of respect (that is, duty subjectively considered) could move him to act rightly.[41] This same analysis would not apply to cases involving acquired rights of property, contract, or status because acquired rights do not exist in the absence of legislation that establishes and protects them, nor would it apply to public legal obligations such as the duty to pay taxes.

**Conclusion**

I have argued that statutory commands must be capable of being represented as categorical imperatives by us if they are to legally obligate us, and that statutory commands must be linked to external incentives that are incompatible with our external freedom to be capable of being represented in this way. The statutes that I have demonstrated provide the required command/incentive combination are what Kant calls ‘penal laws’, or ‘criminal laws’ in current parlance. All juridical laws promulgated by legislators are indeed ‘criminal laws’, if by that term we simply mean the set of legal commands that we are obligated to obey by means of a threatened coercive response to wrongdoing that is inconsistent with our external freedom (that is, a ‘punishment’).[42] Such laws do not need to be labelled ‘criminal’ or ‘penal’ by lawmakers in order to have the effect of obligating us to obey, but they do need to contain the constitutive elements of any juridical lawgiving. By contract, laws that establish civil remedies are essential in a rightful condition because they restore a rightful allocation of property, contract and status after a wrong has occurred, but constraining wrongdoing prospectively is neither their purpose nor their universal effect. It follows that legislative bodies ought to link otherwise just statutory commands to threatened punishments that are inconsistent with our external freedom, because only in this way can they establish our external freedom through obligatory laws that we give to ourselves.[43]

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[1] I am grateful to Pablo Muchnik, Oliver Thorndike, Marcus Willaschek, and Allen W. Wood for valuable feedback on earlier drafts of this project. All errors remain my own.

[2] All quotations from Kant’s works are taken from Mary J. Gregor (trans. and ed.), *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* (Cambridge: Cambridge University Press, 1996).

[3] Kant elsewhere indicates that unconditional necessity is a constitutive feature of any moral law. For example, he writes that ‘a law, if it is to hold morally, that is, as a ground of obligation, must carry with it absolute necessity’ (4:389). He also writes, ‘unless we want to deny the concept of morality any truth and any relation to some possible object…it must hold not only for human beings but for all *rational beings as such*, not merely under contingent conditions and with exceptions but with *absolute necessity*’ (4:408).

[4] Kant acknowledges the existence of so-called 'permissive laws', which enable people to alter their rights and obligations without requiring them to do or refrain from doing anything. Because such enactments do not obligate us, they cannot be moral laws as Kant conceives of the latter. For brevity and consistency, I will use the term 'juridical laws' to refer only to what Kant elsewhere calls '[o]bligatory laws for which there can be external lawgiving' (6:224). When I refer to permissive laws, I will say so explicitly.

[5] These types of law correspond to the ancient Greek division of sciences endorsed by Kant: logic, physics, and ethics (4:387).

[6] These are analytic propositions, a good example of which is: 'Whoever wills the end also wills (insofar as reason has a decisive influence on his actions) the indispensably necessary means to it that are within his power' (4:417). In this example, 'the imperative extracts the concept of actions necessary to this end merely from the concept of a volition of this end' (4:417).

[7] Elsewhere Kant writes, 'Physical causality, or the condition under which it takes place, belongs among the concepts of nature' (5:68). He also writes, '[T]he universality of law in accordance with which effects take place constitutes what is properly called nature in its most general sense' (4:421).

[8] 'A principle that makes certain actions duties is a practical law' (6:225), and 'duty and obligation are concepts that express the objective practical necessity of certain actions' (6:224).

[9] Rational beings like ourselves do not act directly in accordance with laws as things in the natural world do, but instead act 'in accordance with the representations of laws' (4:412).

[10] This distinction is explained at (5:29).

[11] Some juridical laws, such as those establishing acquired rights, 'may be recognized as obligatory *a priori* by reason even without external lawgiving' and therefore do not require an external author to supply the matter of the law, although they do require external application and enforcement (i.e. the exercise of the judicial and executive authorities of the state). (6:224) These are 'external but *natural* laws.' (6:224) By contrast, 'positive laws' have contingent content and therefore require an external author to supply the matter of the law (6:224). Kant says elsewhere: 'rights are divided into *natural* right, which rests only on a priori principles, and *positive* (statutory) right, which proceeds from the will of a legislator' (6:237).

[12] See M. E. Newhouse, 'The Legislative Authority' 24(4) *Kantian Review* (2019). (*forthcoming*)

[13] I understand Kant to be saying that the matter (i.e. content) of a juridical law does not insist that we obey from duty. This does not entail that we have no duty to obey the juridical law or that our duty to obey cannot move us to obey.

[14] *See generally* Marcus Willaschek, 'Which Imperatives for Right? On the Non-Prescriptive Character of Juridical Laws in Kant's *Metaphysics of Morals*' in Mark Timmons (ed.), *Kant's*

*Metaphysics of Morals: Interpretive Essays* (Oxford: Oxford University Press, 2002), pp. 65-87.

[15] Willaschek, 'Which Imperatives for Right?', p. 71. Willaschek is surely correct that the prospect of pain or discomfort alone can establish only hypothetical imperatives for us. For example, the imperative that a young person 'must work and save in his youth in order to not to want in his old age' is merely hypothetical, since a person may think that 'in case if future need he can make do with little.' (5:20)

[16] Willaschek, 'Which Imperatives for Right?', p. 86.

[17] Willaschek, 'Which Imperatives for Right?', p. 86.

[18] Willaschek, 'Which Imperatives for Right?', p. 86.

[19] Kant's example is taken from private right, but Kant nowhere suggests that assurance is not similarly required to establish a legal obligation corresponding to an external public right.

[20] Kant writes, 'the executive power of the *supreme ruler*…is *irresistible*' (6:316). He also writes that 'the executive authority…has the supreme capacity to *exercise coercion* in conformity with the law' (6:317).

[21] Kant's requirement that assurance be equal seems to be implied by 'innate *equality*' – an 'authorization' that Kant takes to be contained in the concept of external freedom: 'independence from being bound to others to more than one can in turn bind them' (6:237-38).

[22] Kant's conception of obligation is 'the necessity of a free action under a categorical imperative of reason', and he emphasizes that this conception is 'common to both parts of *The Metaphysics of Morals*' (6:222).

[23] A rational being acts in accordance with the representations of laws rather than directly in accordance with laws because she acts under the idea of freedom, i.e. she has a will (4:412). If laws determined our conduct directly, as the laws of nature determine the behavior of things, we would be unable to experience our actions as free choices. Perfectly rational beings act in accordance with their representations of laws just as we do, but because perfectly rational beings always obey the law, their representations do not take the form of imperatives as ours do. As imperfectly rational beings, our representations have an imperative form because we are aware of our capacity to deviate from the requirements of reason (4:413).

[24] Kant also refers to punishment in this discussion as 'mere harm' in order to emphasize that the concept itself does not include any idea of an extrinsic benefit to the wrongdoer or to society (5:37).

[25] We are not rationally required to have any particular set of natural inclinations. I take Kant to be plausibly suggesting that humans overwhelmingly share certain natural inclinations due to our physical similarity, and that punishments must be averse to these. A person with a highly unusual set of inclinations (including masochism, perhaps), might be attracted rather than repelled by the hypothetical imperative generated by a threatened punishment, which is

one reason (though not the only one) why punishments must also generate categorical imperatives for us.

[26] Indeed, Kant elsewhere argues that legislators must 'take into account respect for the humanity in the person of the wrongdoer (i.e. respect for the species)' when they prescribe punishments (6:362-63). Kant concludes that certain crimes, such as rape, cannot be punished by treating the criminal as he has treated his victim, since the imposition of, for example, rape as a punishment would be a 'crime against *humanity* as such' (6:363).

[27] The concept of dignity is essentially the concept of pricelessness. Kant writes, 'In this kingdom of ends, everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.' (4:434) When Kant refers to the 'dignity of a citizen', I understand him to be referring to the external freedom of a citizen, which makes him '*beyond reproach*' under the law so long as he has done nothing wrong (6:238). This civil dignity that we enjoy is priceless in the sense that we cannot rationally choose to sacrifice it, which, I will argue, is what Kant means when he says that 'it is impossible *to will* to be punished' (6:335).

[28] Willaschek, 'Which Imperatives for Right?', p. 71.

[29] It is only because we can continue to see ourselves as free under just laws that we are required to obey the demands of rightful statutes. By contrast, my duty of rightful honor would not compel me to obey a robber who threatens to beat me if I do not turn over your wallet, because the robber would not be offering me a choice between freedom and un-freedom. Instead, he is offering me a choice between two kinds of un-freedom, and I can rationally choose either to comply or to resist.

[30] The question of how an agent can represent a statute that makes an unjust demand — one that is inconsistent with our rightful freedom — is an important one for future research. The analysis of this chapter presupposes that the statutes in question are otherwise consistent with the requirements of justice.

[31] As Kant writes, 'rational nature exists as an end in itself. The human being necessarily represents his own existence in this way; so far it is thus a subjective principle of human actions' (4:428-29).

[32] Willaschek, 'Which Imperatives for Right?', p. 70.

[33] Willaschek, 'Which Imperatives for Right?', p. 71.

[34] As Kant writes, 'Duty is that action to which someone is bound. It is therefore the matter of obligation, and there can be one and the same duty (as to the action) although we can be bound to it in different ways' (6:222). I understand Kant to mean that the word 'duty' in this context refers to the action that it is a practical necessity for a person to undertake, that this action is specified in the 'matter' (i.e. content) of the legal command, and that we can be bound (i.e. obligated) to undertake this same action in different ways: both juridically and ethically. If Kant were to insist, as Willaschek does, that the action specified by the content of the legal command must include a particular incentive (e.g. respect for law as such), then

Kant's conclusion that we can be bound to this action in multiple different ways (i.e. by means of different incentives) would not make sense.

[35] A few pages later, Kant refers to 'the categorical imperative of penal justice' (6:336). In the *Second Critique*, Kant mentions in passing that 'punishment…would still have to be connected with [moral wickedness] as a consequence in accordance with principles of moral lawgiving' (5:37).

[36] A crime is 'a transgression of public law that makes someone who commits it unfit to be a citizen' (6:331). Kant distinguishes between intentional wrongdoing within the privity of contract ('private crime'), such as embezzlement, and public crimes such as counterfeiting, theft, and robbery, and he suggests that only the latter category require punishment (The former are brought before a 'civil court', presumably so that civil remedies may be imposed.) (6:331). This is no longer a recognized distinction in the common law, and I mention it only to note that I do not think it presents a problem for my argument.

[37] *See* M. E. Newhouse, 'Two Types of Legal Wrongdoing' *Legal Theory* 22 (2016), pp 59—75, 63.

[38] Kant writes, 'The rightful effect of what is culpable is punishment' (6:227).

[39] A particular sailor might, of course, dread death by hanging far more than death by drowning, and might therefore be moved by the juridical law against murder on the basis of his representation of it as a hypothetical imperative. However, no statute could be represented as a categorical imperative for individuals in the sailor's situation, which is what a juridical lawgiving, and therefore external legal obligation, requires.

[40] The command to leave the state of nature seems to be another natural juridical law in the sense that it is unconditionally binding without being externally legislated (6:237). The question of how such natural juridical laws can be categorical imperatives for us is tantamount to the extremely deep question of how right and ethics are related, and this chapter does not address this deeper question. I am grateful to Allen W. Wood for helpful comments.

[41] For a thought-provoking discussion of this issue, see Alice Pinheiro Walla, 'When the Strictest Right is the Greatest Wrong: Kant on Fairness', Estudos Kantianos, 3/1 (2015), 39–56.

[42] 'Punishment' is just the label for the concept of a threatened legal response to wrongdoing that is incompatible with our external freedom. Any response to wrongdoing that is inconsistent with our external freedom can generate a legal obligation as part of a juridical lawgiving, regardless of how it is described by lawmakers.

[43] Only formal wrongs — those that are committed on the basis of bad maxims — require punishment, because punishment is supposed to constrain us to obey. Wrongs that are committed inadvertently (and therefore on the basis of innocent maxims) warrant civil damages but not punishment because they cannot be prospectively constrained. *See* Newhouse, 'Two Types of Legal Wrongdoing', p 73. Kant's reference to a juridical incentive as an 'external constraint' is consistent with my interpretation: a 'constraint' prevents future actions; it does not remedy or unwind the effects of past actions (6:220).