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NECESSITY, DETERRENCE, AND STANDING

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Few criminal defenses have generated as much controversy among philosophers and jurists as has necessity, and few philosophers disagree so thoroughly in political and legal philosophy as do Bentham and Kant. But, in a surprising moment of consensus, Bentham and Kant both argue that an imperiled wrongdoer facing death merits an acquittal because the threat of even capital punishment is insufficient to compel her to obey the law.[1] At a glance, we might take each therefore to hold that she merits an acquittal on the ground that those who could not conform their actions to the requirements of the law cannot fairly be held to answer for them.[2] But this misrepresents both Bentham's and Kant's views. For each, the nondeterrability of the imperiled wrongdoer does not defeat her responsibility for her actions but rather defeats a condition under which the state enjoys the right to punish wrongdoers. In short, for both Bentham and Kant, the imperiled wrongdoer merits an acquittal because the state lacks standing to punish her. I will call this the *ultra vires* thesis.

The *ultra vires* thesis has not received much attention. Jurists and philosophers have for the most part held that if imperiled wrongdoers are entitled to an acquittal, it is either because in dire circumstances an agent's capacity to conform her actions to the requirements of the law is compromised, or because desperate situations license desperate measures.[3] Here I

*This paper has a long history, during the course of which both its scope and some of the views I defend changed. Several people offered comments on various versions, many of whom may not find much of what they read in its final form. Thanks to Gillian Demeyere, John Gardner, Tracy Isaacs, Michael Milde, Marc Ramsay, Arthur Ripstein, and especially Stephen Morse.

1. Jeremy Bentham, THE PRINCIPLES OF MORALS AND LEGISLATION 170 (1948). I will hereafter insert references to this work in the text, following the abbreviation "PML." Immanuel Kant, METAPHYSICS OF MORALS 28 [6:235] (Gregor ed., 1996). I will hereafter insert references to this work in the text, following the abbreviation "MdS," to the Prussian Academy pagination. Kant makes the same claim in *On the common saying: That may be correct in theory, but it is of no use in practice*, PRACTICAL PHILOSOPHY 299n [8:300n] (Gregor ed., 1996). I will work only with the former, as it is later and more developed.

2. George Fletcher glosses Kant this way. Fletcher, RETHINKING CRIMINAL LAW 819 (1978). Michael D. Bayles represents this as the standard reading of both. Bayles, *Reconceptualizing Necessity and Duress*, 33 WAYNE L. REV. 1191, 1194–1195 (1987).

3. *See, e.g.*, Fletcher, *supra* note 2; Mirian Gur-Arye, *Should the Criminal Law Distinguish Between Necessity as a Justification and Necessity as an Excuse?* 103 L.Q. REV. 71 (1986); Bayles, *supra* note

would like to remedy this neglect. Before considering Bentham's and Kant's accounts I will consider a third justification of the *ultra vires* thesis, the view that the imperiled wrongdoer is outside the state's jurisdiction because she is in effect in the state of nature. No one, so far as I know, explicitly endorses this view.[4] But it has a certain intuitive appeal, and, furthermore, seeing its shortcomings will help show why the *ultra vires* thesis must rest on the claim that the imperiled wrongdoer cannot be deterred. While Bentham and Kant each ground their accounts of necessity on this point, they draw different links between the nondeterrability of the imperiled wrongdoer and the question of the state's standing to punish her. I will argue that Bentham's account bears a significant liability, one that can be escaped only by investing the *ultra vires* thesis in just the claim on which Kant's account is based. So, I will argue, the *ultra vires* thesis stands or falls on the plausibility of the Kantian account. The question of whether that account is sound, we will see, engages fundamental questions in political philosophy, questions that I cannot undertake to answer here. My goal, accordingly, is not to defend the *ultra vires* thesis but rather to show what, on its most plausible justification, it requires us to accept.

I.

I'd like to pause, before proceeding, to rule out one candidate condition of the acceptability of the *ultra vires* thesis and to briefly consider another, on which, as we shall see, the *ultra vires* thesis does rest. Doing so will help focus the discussion that follows.

1. The *ultra vires* thesis should be distinguished from the moral argument that we lack standing to condemn the imperiled wrongdoer because as far as we know, any of us might elect self-preservation over respecting the rights of others when peril forces the choice. Possibly this argument is sound. But its conclusion is one step short of the *ultra vires* thesis. The final (missing) step is the premise that the criminal law is just a vehicle for moral condemnation. Now, of course many crimes are moral wrongs, and punishment expresses condemnation. But our standing as reflective moral agents to condemn a given wrongdoer or class of wrongdoers is not dispositive of the state's standing to seek their conviction and, if successful, to punish them. The truth of the *ultra vires* thesis, in other words, does not rest on rejecting Lord Coleridge's (notorious) claim in *Dudley and Stephens* that sometimes the law has to enforce standards that we know we could not live up to.[5]

2. We shall see that a plausible case can be made that on any interpretation

2; and Perka v. The Queen (1985), 13 D.L.R. (4th) 1 (S.C.C). The view that this taxonomy is exhaustive is an inheritance from Aristotle. *See* NICHOMACHEAN ETHICS 3.1.

4. Though Jean-Christopher Merle seems to attribute something like this view to Kant. *See* Jean-Christopher Merle, *A Kantian Critique of Kant's Theory of Punishment*, 19 L. & PHIL. 311, 320.

5. R. v. Dudley and Stephens (1884), 15 Q.B.D. 273, at 288.

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the *ultra vires* thesis rests on denying that necessity is a justification. I confess that I harbor doubts that a decisive argument is to be had on this point. The defence of necessity is such a compelling and enduring topic in legal philosophy because necessity represents an exception that cuts to the core of the ordinary rules. So one's view on its classification reflects basic assumptions about how to think about criminal responsibility and civil liability, assumptions not likely to be dislodged by the consideration of one hard case. That said, I will offer an argument that seeks to diagnose just what the claim that necessity can justify homicide requires us to accept that seems to me to settle the issue against the view. The same considerations, however, show that necessity can plausibly be held to justify invading property rights to save life and limb. In such cases, the *ultra vires* thesis is, indeed, moot. While this argument will come at the end, I will, from the outset, suppose part of its conclusion: the *ultra vires* thesis, as I will discuss it, applies only to cases in which the imperiled wrongdoer takes a life to save hers and possibly others'.

It will be helpful to have an example of such a case to work with. I will use *Dudley and Stephens*. After twenty-two days in the dingy of the ill-fated *Mignonette*, having long since exhausted the meager provisions they had managed to salvage, Thomas Dudley and Edwin Stephens killed Richard Parker and, along with the fourth member of the crew, ate his body. As well as being well-known, *Dudley and Stephens* is a particularly clear case of necessity, because Parker was in no way contributing to his crewmates' imperilment. So we will not be distracted by difficult questions concerning the distinction between necessity and self-defence.[6]

II.

The days following the arrest of the *Mignonette*'s survivors saw a lively debate in the pages of the London *Daily Telegraph*. Sympathy for the defendants ran high. W.C. Russell, a popular novelist who specialized in tales of the sea, argued that *Mignonette* and its crew were "quite beyond Blackstone."[7] There is a literal truth underneath Russell's metaphor: when they killed Parker, Dudley and Stephens *were*, after all, in the middle of nowhere. It is noteworthy that the incidents that have given rise to many of the leading necessity cases occurred during storms at sea.[8] Similarly, the incidents that have given rise to many of the leading duress cases happened during war or civil unrest.[9]

6. Questions possibly raised by Kant's own example of a sailor who wrests another off a plank that can only support one. I take this substitution to be a friendly amendment to Kant's argument; Kant describes the view against which he is arguing to be that the law confers "an authorization to take the life of another who is doing nothing to harm me, when I am in danger of losing my own life" (MdS 235).

7. London Daily Telegraph, Sept. 11 1884, 1. Russell identified himself only as "A Seafarer." A. Brian Simpson identified A Seafarer as Russell in Cannibalism and The Common Law 87 (1984).

8. Along with Dudley v. Stephens, *see, e.g.*, U.S. v. Holmes, 26 Fed. Cas. 390 (Penn. Cir. Ct., 1941) and *Perka*, *supra* note 3.

9. *See, e.g.*, R. v. Steane [1947] 1 K.B. 997 (K.B.) and Director of Public Prosecutions v. Lynch [1985] A.C. 653 (H.L.).

Each set of circumstances represents a kind of real-world approximation of the social contract theorists' state of nature. The situation is nasty and brutish, life threatens to be short, and the state cannot help. If beyond the state's help, then, perhaps it follows that the imperiled agent is also beyond its punitive reach. We can thus think of what we might call the social contract theory of necessity as an interpretation of the *ultra vires* thesis.

There are, however, two problems with the social contract theory. The first is that the resemblance between perilous circumstances and the stark, Hobbesian portrayals of the state of nature does not, in itself, tell us anything about the state's standing to punish imperiled wrongdoers. The social contract, after all, is supposed to empower a third party to protect us from each other, not from nature. So nothing in itself follows from the state's inability to protect us from natural peril. Second, the social contract theory either proves too much or fails to explain the standing the state (presumably) does have. Suppose Dudley and Stephens had tortured Parker to death. I take it we would not hesitate to prosecute them for the torture, if not for the killing (odd as that might seem). So it is false that in the state of nature, anything goes. Of course, Locke, for example, would agree.[10] But this is no help here, because our judgment (I take it) is not that on the modified facts Dudley and Stephens would merit private punishment—to which we have a right in the Lockean state of nature[11]—but rather that the state would have standing to punish them. This the social contract theory cannot explain.

There is an important lesson to take from this second point, namely that the imperiled wrongdoer is not entirely beyond the state's jurisdiction. The claim must rather be that the state does not have standing to punish the self-preserving actions of the imperiled wrongdoer. So the *ultra vires* thesis rests on there being some feature of those actions that ties the state's hands. That feature, according to both Bentham and Kant, again, is that when faced with death, the imperiled agent cannot be deterred. In Kant's words, "a threat of an ill that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an ill that is *certain*" (MdS 235–236). Indeed, as Hobbes argued, the point holds even if death by judicial verdict *is* certain. Then "a man would reason thus, *If I doe it not, I die presently; if I doe it, I die afterwards; therefore by doing it, there is time of life gained*."[12] This is, of course, only the first

10. Possibly Hobbes would as well. He defines the Right of Nature as "the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto." Hobbes, LEVIATHAN 189 (Macpherson ed., 1968). Thus the Right of Nature is a right to take whatever means necessary to preserve oneself. That isn't the same as allowing that anything goes. On the other hand, for Hobbes "wrongdoing" and indeed "injury" have no meaning outside an enforced convention.

11. John Locke, SECOND TREATISE OF GOVERNMENT 9–13 (Macpherson ed., 1980).

12. Hobbes, *supra* note 10 at 346. Hobbes's point is that even if the rules of the Commonwealth applied to the imperilled wrongdoer, they would be inefficacious. But that is not, on his account, what grounds the defence. Instead his claim is that the right to preserve oneself in the face of grave peril is an element of the Right of Nature that no one forfeits upon entry into the Commonwealth.

step of an argument. We need to connect the undeterrability of the imperiled wrongdoer to the conditions of legitimate state punishment. Bentham's and Kant's arguments exhibit the same structure. Each argue that the feature of state punishment that exempts it from the ordinary prohibition against intentionally harming others is defeated in the case of the undeterrable wrongdoer. I shall consider Bentham's account in the next section and Kant's in the one that follows it.

III.

"The general object which all laws have, or ought to have, in common," Bentham argues, "is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief" (PML 170). But "all punishment is mischief," and "in itself is evil"; thus "upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil" (PML 170). The same principle that justifies punishment, then, sets its limits. It follows from the principle of utility, for example, that among the "cases unmeet for punishment" are those in which punishment "must be inefficacious."[13] In this class we find what are often called status excuses—it is pointless to punish those incapable of comprehending the law, such as infants—and the prohibition against retroactive legislation. The same consideration accounts for the cases in which we are interested here; those, in Bentham's words:

> [w]here, though the penal clause might exercise a full and prevailing influence, were it to act alone, yet by the *predominant* influence of some opposite cause upon the will, it must necessarily be ineffectual; because the evil which [the agent] sets himself about to undergo, in the case of his *not* engaging in the act, is so great, that the evil denounced by the penal clause, in case of his engaging in it, cannot appear greater. . . .

As, for example, "in the case of *physical danger*; where the evil is such as appears likely to be brought about by the unassisted powers of *nature*"(PML 174-5).[14]

In sum: Because the threat of punishment in necessitous circumstances will be inefficacious, delivery on the threat will do more harm than good and is therefore impermissible. Below I will raise some questions about what

13. The rest are cases in which it is groundless (e.g., where the putative victim has consented), or unprofitable (e.g., when public sympathy with the offender is great), or needless (e.g., when alternative means, such as education, will more effectively put an end to the practice in question). PML 171–172, 175–177.

14. The other case is "*threatened mischief*; where it is such as appears likely to be brought about through the intentional and conscious agency of *man*" (PML 175).

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we might call the *nondeterrability thesis*, the claim that imperiled agents cannot be deterred. For now let us grant it. That is, let us grant that the threat to punish imperiled agents must be inefficacious, leaving aside, for now, the question of the nature of this "must." Even so, Bentham's argument is open to a well-known objection. As H.L.A. Hart argued, it does not follow from the fact that an individual defendant could not have been deterred that punishing her might not have salutary effects on overall compliance with the law.[15] Now, Hart's argument rests on a empirical claim that may not range equally over all cases, and necessity is a plausible exception. The question whether the punishment of a nondeterrable wrongdoer will secure general deterrent effects turns in part on what class of would-be wrongdoers we aim to reach. If the punishment is aimed at deterring persons contemplating raising the same defence—for example, aspiring malingerers considering advancing the defence of insanity—then Hart's argument might not hold in the case of necessity, just because it would be difficult to stage or somehow feign peril of the sort in which the crew of the *Mignonette* found themselves.[16] But the scope of the relevant putative general-deterrent effects may well be very broad: a state that punishes persons who could not have been deterred by the threat of punishment will likely be regarded as one that clearly means business.

Now, the crucial weakness of Bentham's argument, in my view, is not that this empirical hypothesis might be true. It is rather that, on his account, it *matters* whether it is true. It is at least a liability of his account, it seems to me, that it makes any given class of defendant's right to an acquittal await vindication by considerations of general deterrence in this way. Presumably, to take another example, the prohibition against the retroactive enforcement of prohibitions is not conditional on the inefficacy of its suspension but is instead secured by our commitment to the rule of law. This does not necessarily impugn the idea that the deterrability of a given category of wrongdoer bears upon the state's standing to punish her. But if there is a connection between the two, it cannot be as Bentham draws it.

IV.

Kant's account of necessity surprises many readers. It does not sound like Kant—not, in any case, the Kant who later, in the *Doctrine of Right*, argues that "[*p*]*unishment 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*" (MdS 331).[17] It's difficult *not* to interpret this remark as expressing two core

15. H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY 18–20, 40–43 (1968).

16. Stephen Morse raised this objection to me.

17. I qualify the point because as Jeffrie Murphy points out, the *Doctrine of Right* account of punishment is not the account we would have predicted from Kant's earlier writings. Jeffrie Murphy, *Does Kant Have a Theory of Punishment?* 87 COL. L. REV. 509 (1987).

retributivist ideas: that punishment cannot be an occasion for the promotion of some independent good, and that the fact that an agent has committed a crime is a sufficient reason for punishing her. How can we square this with Kant's claim that because the law assigning the death penalty to the imperiled wrongdoer could not have deterred him, it "could not have the effect intended"?

B. Sharon Byrd argues that the apparent tension here is easily defused if we attend carefully to what Kant says.[18] The effect at issue in Kant's discussion of necessity, note, is that of *threatening* punishment. The prohibition on extraretributivist considerations in the later passages of the *Doctrine of Right*, by contrast, applies only to the *execution* of punishment. For Kant, on Byrd's telling, the state threatens punishment to secure compliance with the law, but when the state delivers on the threat, it must be indifferent to any consideration outside the *lex talionis*. This, I think, is right. It respects the text and furthermore saves Kant from plain inconsistency. And it also means that Kant's account does not share the liability suffered by Bentham's, just because on Kant's account we may—indeed, *must*—be indifferent to the possibility that punishing the imperiled wrongdoer will promote overall compliance with the law.

But if anything, Byrd's solution makes Kant's account of necessity *more* puzzling. If the point of punishing wrongdoers is (let us say) to set aright the wrong, then why, for Kant, should the failure of the threat of punishment to deter the wrongdoer bear on whether she should (or may) be punished? The answer is that, in Kant's language, it follows from the nondeterrability of the imperiled wrongdoer that there has been a failure of external lawgiving in her case.[19] Let me explain what this means and why it is so. It will take a bit of time: Kant's language and view are less familiar to us than are Bentham's. Later I will argue, however, that we can find the main idea on which Kant relies in early modern English political philosophy.

Kant's argument issues from the foundations of his political and legal philosophy, that is, of the doctrine of right. The doctrine of right, Kant tells us, consists in "the sum of those laws for which an external lawgiving is possible" (MdS 229). Both the idea of an external lawgiving and the relevant senses of possibility need explication. I'll treat each in turn.

1. A "lawgiving," for Kant, is the placing of an agent under an obligation to do or forbear from doing something. (One example, as we shall see, is the enactment of a positive law.) All lawgiving consists of two elements: a law and an incentive. Internal (or *ethical*) lawgiving and external (or *juridical*) lawgiving are distinguished in terms of the incentives through which they connect a law with the agent to whom they apply. "That lawgiving

18. B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 L. & PHIL. 151 (1989).

19. As Leslie Mulholland suggests in KANT'S SYSTEM OF RIGHTS 194 (1990).

which makes an action a duty and also make this duty the incentive," Kant tells us, "is *ethical*" (MdS 218). Duty is my incentive if I do what duty requires just because duty requires it; if, in the language of the *Groundwork of the Metaphysics of Morals*, I act "from duty."[20] Juridical lawgiving, by contrast, is "that lawgiving which . . . admits an incentive other than the idea of duty itself" (MdS 218).

So delimited, the class of incentives appropriate to juridical lawgiving seems very broad. But two things narrow it. First, because "it is a lawgiving, which constrains, not an allurement, which invites" (MdS 219), the incentive imparted by an external lawgiving must by definition take the form of the threat of a cost rather than the promise of a reward. Second, in the long run, conceptually speaking, only the state may permissibly impose external incentives to action—hence the tag, *juridical* lawgiving. So the incentive appropriate to external lawgiving is the threat of state sanction. The doctrine of right, then, is comprised of those laws for which state sanction is a possible incentive. The doctrine of virtue, by contrast, is comprised of those laws for which only self-constraint is possible.

I'll turn to consider what "possible" means here in a moment. But first a word about "incentive." It is important to bear in mind that an incentive, as Kant uses the idea here, is part of the structure of obligation. An agent can be said to be under a given obligation—that is, to be the addressee of a given lawgiving—only if the incentive imposed by that obligation can in principle provide for her a reason for doing as the relevant law requires. The idea here will be familiar to readers of the *Groundwork*. There Kant argues that the categorical imperative really is an imperative for us only if it is possible for us to act from duty. In the language of the *Metaphysics of Morals*, Kant's point is not only that a lawgiving is ethical only when the incentive it imparts is that of duty; it is also that it is *a* lawgiving properly speaking—that is, the agent is bound by the duty imposed by the law in question—only if duty alone *can* be an incentive for compliance with that law. Similarly, an agent is, properly speaking, an addressee of an external lawgiving only if the incentive supplied by that lawgiving could in principle reach her—if, that is, she belongs to a class for which such lawgiving is possible. Let us see what that means.

2. Kant compresses several ideas in the condition of an external lawgiving being possible. First, for a law to be a possible subject of external lawgiving it must be *conceptually* possible for an agent to have discharged the duty imposed by that law for the reason supplied by an external incentive. This condition, Kant argues, limits the objects of external legislation to actions and omissions, just because no external incentive can compel an agent to act *for* a given reason. In Kant's words, while I can be compelled to further an end, nothing can compel me to set that end; that is something only I can

20. Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS 12 [4: 399] (Gregor trans., 1996).

do (MdS 381). Here is an example. One's obligations under a scheme of redistributive taxation can be compelled by the threat of legal sanction. So I can be compelled to *further* the end of others' well-being (supposing that to be the goal of the taxation scheme). But I cannot be compelled to *adopt* the well-being of others as an end. The attempt is certain to fail, because it guarantees that my end will *not* be others' well-being but, rather, avoiding the threatened sanction. Thus beneficence can only be a duty of virtue.

It follows from this that right is concerned only with what Kant calls "external freedom," or our freedom inasmuch as it can be affected by the actions and omissions of others. And it follows, as well, that the principle governing external freedom cannot direct agents to adopt one rather than another end. Thus that principle must be purely formal. Right, then, is "the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom" (MdS 230). Note that there is here no mention of the addressee agents' ends. One is free under right to pursue any ends one likes as long as neither they nor the means necessary to bring them about compromise another's freedom, where the boundaries of that freedom are set by the formal condition stipulated in the definition of right above.

The second sense of possibility at issue here is what Kant calls moral possibility (MdS 383). For a law to be the subject of an external lawgiving, not only must it be conceptually possible for an external incentive to induce compliance with that law, but it must also be morally permissible for such an incentive to be imposed on an agent. There are two points here, the second deeper than the first. The first is that it follows that all duties to oneself are (only) duties of virtue, even those that forbid particular actions and so for which an external lawgiving is possible in the first sense.[21] This is because for Kant the state may step in only when one threatens another's freedom.[22]

The second and more important point is that state coercion bears a heavy burden of justification. How can coercion, by definition a compromise of external freedom—that freedom, that is, ordinarily protected and vindicated by the doctrine of right—be compatible with right? Kant's answer is that right and coercion are linked analytically. The link is analytic because

21. For example, the duties to refrain from suicide from self-love, and to avoid stupefying oneself by the excessive use of food or drink.

22. This point might seem to extend to at least some duties owed to others, but the question is complex. An obvious example is the duty to tell the truth: While some broken promises will be actionable under the law of contract, many others are presumably beyond the state's legitimate interest. But this is a duty to act in a certain way and so one for which external compulsion seems possible, in the first sense. However, in the *Doctrine of Virtue*, the duty to tell the truth in extralegal circumstances turns out to be a duty to oneself (MdS 429–431). Similarly, while at times Kant speaks as though duties of respect owed to others require only that one act in a certain way (MdS 463), there are reasons to think that one's motives matter here, and so that it is not possible in the first sense for respect to be externally compelled. On this question, *see* Marcia Baron, *Love and Respect in the* Doctrine of Virtue, 36 (Supp.) So. J. PHIL. 29 (1997).

all we need to draw it is a principle of contradiction: "[r]esistance that counteracts the hindering of an effect promotes this effect and is consistent with it" (MdS 231). Insofar as it counteracts the hindering of a citizen's legitimate exercise of her freedom, then, coercion promotes that exercise and is thereby consistent with it. Coercion under such a condition is, thus, permissible.

We should be careful to distinguish Kant's claim here from Locke's argument that unless others could be coerced to respect our rights, those rights would be hollow.[23] For Locke there is, first, the question of which of our interests enjoy protection under natural right and, second, the question of whether we enjoy executive power to defend ourselves against the invasion of these rights. Kant, by contrast, tells us that it is a mistake to think that right is composed of two elements, an obligation under the law and a right of others to coerce compliance with that obligation (MdS 232). Instead, on Kant's view, a right just is a title to coerce.[24]

Kant considers the (alleged) right of necessity as a putative counterexample to this account of the relationship between right and coercion.[25] We need to fill in one more detail to see why it seems so. An authorization to use coercion, on Kant's account, is connected only with what he calls "narrow" or "strict" right. "Strict right," Kant tells us, "rests . . . on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal laws" (MdS 232). This is terse, even for Kant. But the idea, I think, is straightforward enough. If, as we have seen, a right is a title to coerce, then it follows that a given interest of mine is protected by a right if and only if coercion of those under that right's correlative duty is consistent with a universal law. My interest (if we may call it such) in having others do my bidding at my will, for example, is not so consistent, because in the resulting schedule of titles to coerce each such title would conflict with every other. Thus that interest is not protected by a right. By contrast, to use Kant's example, "when it is said that a creditor has a right to require his debtor to pay his debt," what is meant is "that coercion which constrains everyone to pay his debts can coexist with the freedom of everyone, including that of debtors, in accordance with a universal external law" (MdS 232). Thus the creditor's right is a narrow or

23. Locke, *supra* note 11 at 9–10.

24. This contrast is echoed in contemporary legal theory in the contrasting interpretations of property rules and liability rules offered, respectively, by Guido Calabresi and A. Douglas Melamed in *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) and Jules Coleman and Jody Kraus in *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986).

25. It follows that the latter must restrict the legitimate actions of the state. The point doesn't go without saying, because Kant does not explicitly link the discussion of the relationship between right and coercion in the Introduction to the *Doctrine of Right* to the body of the work. Certainly coercion does not refer just to punishment. Instead the title to coerce is held even in the state of nature and, as we will see below, governs civil suits as well as criminal prosecution. But the fact that Kant treats necessity where and as he does shows that the constraints implied by the relationship between right and coercion must restrict the punitive actions of the state.

strict right and compliance with its correlative duty may permissibly be coerced.

However, Kant continues, "people also think of right in a *wider* sense (*ius latium*), in which there is no law by which an authorization to use coercion can be determined" (MdS 234). One such (putative, wider) right is the right of necessity, which Kant says "admits" coercion without right (MdS 234).[26] By this he means, I think, that perilous circumstances can be said to coerce agents to act contrary to right—or perhaps, better, to outbid the incentives of right: As Arthur Ripstein puts it, in perilous circumstances crime pays, even if you're punished.[27] Thus "there can be no *penal law* that would assign the death penalty" to someone who kills to save himself. The emphasis is Kant's and draws attention to his point, which is that in such a case there is a failure of external lawgiving.

In other words, we see here that there is a third sense in which it must be possible for an external incentive to induce compliance with a law for the law to be the subject of an external lawgiving, namely that such an incentive must in principle be efficacious. Failure of this condition does not make the imperiled wrongdoer's action rightful, because an action bears the property of rightfulness only if it is consistent with right. It follows from the definition of right, Kant holds, that "[i]f . . . my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me *wrong*" (MdS 230–231). Dudley's and Stephens's actions plainly turn out wrong on this measure. But while their actions run afoul of right, because the incentive imposed by the relevant lawgiving—that is, the threat of punishment—could not "have the effect intended," they are beyond the state's punitive reach. Put another way, while Dudley and Stephens remained addressees of the *law* forbidding killing the innocent, on the twenty-second day adrift in the *Mignonette*'s dinghy they were not addressees of the *lawgiving* which connects that law to its addressees by external incentive—that is, of the positive law prohibiting killing the innocent. So the state lacks standing to punish them.

V.

Now, Kant does not explain why, exactly, efficacy-in-principle is a condition of the possibility of external lawgiving. On the surface, it looks as though he is making a decidedly *un*Kantian claim, namely that the contours of right are subject to empirical conditions. But he is not. To see why, we need to have a closer look at what I called the nondeterrability thesis, the claim that the threat even of capital punishment cannot deter an imperiled wrongdoer faced with death.

26. He characterizes the other putative counterexample to his account, the right of equity, no less obscurely as admitting of "right without coercion" (MdS 234).

27. Arthur Ripstein, EQUALITY, RESPONSIBILITY, AND THE LAW 166 (1999).

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Several objections can be raised to the nondeterrability thesis. First, quite possibly it is empirically false: It is conceivable that some persons might prefer death to the dishonor of a conviction for homicide. Worse, we could make it true, or more often true: We could threaten fates worse than death. Stephen's claim that the law should speak most loudly when it is the most difficult to hear is apropos here, if chilling.[28] Still worse, the nondeterrability thesis seems to entail (or rely on) the principle that anyone who cannot be deterred by the threat of the law's sanctions is beyond its reach, a principle that seems, in some cases, to issue a license to kill. Possibly there are persons utterly indifferent to the threat of punishment or, at least, for whom the deed would be well worth the price. And certainly there are persons to whom no further threat can be made. Consider, for example, someone serving a life sentence with no chance of parole in a jurisdiction that does not permit the death penalty.

All of these objections can be answered, though with the result that the nondeterrability thesis does not quite mean what it says or might at first be taken to say. First of all, the law cannot permissibly threaten fates worse than death. So doing, Kant holds, is inconsistent with the respect owed all persons, a respect we owe to the wrongdoer "even though by his deeds he makes himself unworthy of it" (MdS 463). So the claim is that the threat of no *permissible* punishment could deter the imperiled agent faced with death. Second, the nondeterrability thesis is not empirically false because, I suggest, it is not empirically falsifiable. It is not empirically falsifiable because it is not an empirical claim but rather a decision-theoretic one. The nondeterrability thesis does not rest on the claim that no particular person might be moved to obey the law by respect for persons or for the positive law. Instead the claim is that the incentives to which the law can permissibly avail itself cannot compete with imminent certain death on a cost-benefit analysis conducted in isolation from any other considerations that might move actual persons. The point is not that it would be irrational for someone to be dissuaded, for example, by respect for persons or for the criminal law. It is rather that these incentives would move only a virtuous agent, and virtue cannot be the subject of an external lawgiving. So the state cannot rely on these incentives. In this sense an external lawgiving would be impossible.

The idealized decision-theoretic nature of the nondeterrability thesis answers, as well, the problem of the agent indifferent to the law's threats. We can without inconsistency be indifferent to his indifference, because the sort of exception he represents, unlike that of the life-threatened imperiled agent, does not fall within the scope of the analysis. More difficult is the last objection. The criminal serving a life sentence without a chance of parole in a jurisdiction that does not permit the death penalty does, I think, end up beyond the law's reach on Kant's account. But this is less problematic than it seems. Recall that Kant's claim is not that the imperiled self-preserv-

28. James Fitzjames Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND VOL. II 107 (1883).

ing killer merits compassion or forgiveness. His claim is rather that he is unpunishable. So too is the convict: We cannot, after all, do anything else to him. This shows just how *objective* necessity is on Kant's account. I will return to this point in Section VII.

VI.

My goal here, again, is to show what, on its most plausible justification, the *ultra vires* thesis requires us to accept. I claim that Kant's account provides that justification. Now, the three accounts I have surveyed exhaust, I think, the list of plausible alternatives. But I mean to claim more on behalf of Kant's account than that it is best because we have run out of alternatives. Instead, I suggest that the failures of the first two accounts show that the *ultra vires* thesis is plausible only if we accept a principle at the heart of Kant's account. Seeing how this is so will at the same time isolate what the *ultra vires* thesis requires us to accept.

Let us take a step back and review the main steps of the argument. The *ultra vires* thesis holds that imperiled wrongdoers faced with death are entitled to an acquittal because the state lacks standing to punish them. It ought to be kept distinct from the moral argument that we lack standing to condemn the imperiled wrongdoer because, as far as we know, any of us might elect self-preservation over respecting the rights of others when peril forces the choice. Our standing as reflective moral agents to condemn a given wrongdoer or class of wrongdoers is not dispositive of the state's standing to seek their conviction and, if successful, to punish them. So the *ultra vires* thesis must show that some feature of the imperiled wrongdoer's circumstances defeats some condition on which the legitimacy of the state's punitive power rests. One candidate feature is the direness of the circumstances, which exhibit the properties of the most grim portrayals of the state of nature. In the social contract tradition, the state's title to intentionally harm others rests on its capacity to thereby secure a better life than the state of nature provides. But the analogy is superficial, because the state's legitimacy rests on its capacity to protect us from each other rather than from nature. Furthermore, the social contract theory of necessity cannot explain why we would retain standing to punish Dudley and Stephens for torturing Parker, as we presumably would.

So the claim must be narrower. Some feature specifically of the imperiled wrongdoer's self-preserving actions must put them beyond the state's reach. That feature must be their immunity from the threat of legal sanction. But this is one step short of the conclusion: We need to connect the inefficacy of the threat of sanction to a condition of the state's legitimate exercise of its mandate. Bentham's answer is that what justifies the state's exemption from the prohibition against intentionally harming others is that in some cases harming some persons results in less overall harm to others. If the

imperiled wrongdoer could not have been prevented from harming another, then harming her yields a net gain in harm, and so is prohibited. So while her action runs afoul of a standing legal prohibition, in her case the state's punitive hands are tied. But there are two problems with the claim that harming the imperiled wrongdoer will cause more harm than good. The first is that it may be false: Possibly overall compliance with the law *will* be promoted by the state's ruthless punishment of those who could not have been deterred by the threat of legal sanction. The second is that it matters whether it is true or false: The view that any given class of defendant's right to an acquittal awaits vindication by considerations of general deterrence in this way utterly divorces questions of crime and punishment from considerations of responsibility and desert.

So the *ultra vires* thesis must show that the state's hands are tied before questions concerning the effects of convicting and punishing the imperiled wrongdoer can be raised. It must show, in other words, that the imperiled wrongdoer was in the moment not an addressee of the positive law prohibiting the killing of the innocent. This, on my reading, is just what the Kantian account aims to show. That account rests on the principle that an agent is, properly speaking, an addressee of a positive law only if the threat of legal sanction can in principle secure her compliance. Let us call this the *core principle*. The *ultra vires* thesis stands or falls on the plausibility of the core principle. Why ought we to accept the core principle?

Let us return to Kant. His claim is that strict right "requires only external grounds for determining choice; for only then is it pure and not mixed with any precepts of virtue" (MdS 232). This points the way, but it can mislead. It points the way because it directs us to the issue that frames the answer to our question, namely the distinction between right and virtue, between justice and morality. Behind our question, that is, is Kant's justification of the core liberal doctrine that the state may not promote virtue. But the point is not that had Dudley and Stephens refrained from killing Parker they would have done something *merely* virtuous or supererogatory. For Kant, Dudley and Stephens acted in plain breach of right. No less is the point that the rule prohibiting the killing of the innocent somehow becomes a controversial moral doctrine in perilous circumstances, one that a liberal state has, for that reason, no business enforcing. Instead the idea is that the same consideration that *does* prevent the state from enforcing virtue generally limits its authority to enforcing those rules for which external incentives can induce compliance.

The main idea here goes back to Locke's *Letter Concerning Toleration*. One of the reasons the care of souls cannot fall within the magistrate's purview, Locke argued, is that it is in the nature of the understanding that "it cannot be compelled to the belief of any thing by outward force."[29] That is, on Locke's account, one of the reasons why the state cannot promote one

29. John Locke, A LETTER CONCERNING TOLERATION 20 (1990).

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rather than another religion is that it will succeed in appearance only. Kant's claim is that not only beliefs but more generally reasons for action may not be legislated just because they *cannot* be legislated.[30] For Kant this amounts to a prohibition on state promotion of virtue because the mark of a virtuous action is that it is done for moral motives. That is, on the Kantian account, the prohibition on state promotion of virtue issues from two considerations. First, undertaking to compel *A* to *x* for reason *R* by threatening sanction *S* will fail to the extent that it appears to succeed, because it will make avoiding *S* *A*'s reason for *x*-ing. Second, avoiding *S* is an amoral motive for *x*-ing. So when Kant claims that right "requires only external grounds for determining choice; for only then is it pure and not mixed with any precepts of virtue," he is not claiming that it is *desirable* that the positive law refrain from undertaking to promote virtue. Instead he is arguing that the domain of right is, by definition, comprised only of those rules for which external grounds can determine choice. It follows that an agent is properly speaking an addressee of a positive law only if the threat of legal sanction can in principle secure her compliance. And this—the core principle—yields the *ultra vires* thesis. In short, the *ultra vires* thesis is a consequence of—and a test case for—a particular justification of what is arguably the core doctrine of liberal political philosophy, namely that it is not in the state's purview to promote the good.

Perhaps, however, that is not all. A possible objection to the *ultra vires* thesis (however understood) is that it is false because necessity is a justification. In other words, the *ultra vires* thesis may rest on a second claim, this one a question of criminal law theory rather than political philosophy, namely that necessity is *not* a justification.[31] I will consider this in the next and final section.

30. Marc Ramsay suggested to me that Kant's point might be deeper than Locke's, because perhaps for Locke the impossibility is empirical rather than conceptual. This may well be right. But my general point remains, namely that we ought to understand Kant's claim as part of a broader and familiar justification for the prohibition of state enforcement of the good.

31. Supposing, that is, that necessity on the *ultra vires* thesis is *not* a justification. This does not quite go without saying. There is a current of thought that holds that, inasmuch as each are beyond the state's legitimate interests, there is no salient difference between justified actions and those actions against which there is no presumptive prohibition. We might call this the "permissible *simpliciter*" theory of justification. (Probably only Paul Robinson explicitly endorses this view. *See* Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. REV. 266, 272. It is implicit in the idea, endorsed by the drafters of the Model Penal Code, that the absence of justification (and excuse) is an element of every offense.) On this view, necessity on the *ultra vires* thesis looks like a justification. But the appearance is deceptive: The state cannot at once abjure standing to judge a defendant *and* grant that her actions were permissible—the two claims are logically incompatible. And in any case, we ought to reject the permissible *simpliciter* theory of justification, just because there *is* a salient normative distinction between actions against which there is no presumptive prohibition and justified actions. As George Fletcher puts it, "[i]t is the difference between punching a ball and punching someone in the jaw" (George Fletcher, *The Right Deed for the Wrong Reasons: A Reply to Mr. Robinson*, 23 U.C.L.A. L. REV. 293, 310 (1975)). Justified actions are, we might say, all-things-considered permissible. But they are still prima facie wrongdoings; that's why they need to be justified. A successful justifications, in other words, shows that it was permissible to

VII.

Above I noted how objective necessity is on Kant's account. One might argue that it follows that it does not matter whether there is a sense in which the defendant was justified in doing as she did, because her right to an acquittal issues from considerations that preempt asking the questions to which a claim of justification is an answer. The state's hands are tied, we might say, before these questions can be raised. Put another way, the state cannot at once abjure standing to pass judgment on the defendant *and* grant her permission—or whatever deontic property justifications confer upon prima facie wrongful actions[32]—to do as she did.

I think this is a powerful argument. But there is a plausible response to it. It rests on two claims. The first is taxonomic: There is a broad but serviceable sense in which necessity in the *ultra vires* thesis is an excuse. The qualifications may seem unnecessary, because it might seem that necessity on the *ultra vires* thesis is plainly an excuse. But it is not. Excuses in one way or another divorce the doer from the deed by showing (according to one common account) that the ordinarily permissible inference from an agent's action to her character is barred for one reason or another, or (according to another common account) by showing that the agent could not conform her actions to the law's requirements.[33] Possibly either or both of these conditions obtained in *Dudley and Stephens*. But on the view under consideration here, this is beside the point. On the *ultra vires* thesis, the exculpatory significance of perilous circumstances is that in principle they outbid the sternest sanctions the state may permissibly threaten.

On the other hand, there is a broader sense of "excuse"—more common, perhaps, in ordinary language than in criminal law theory—accord-

violate a prohibitive norm. It does not show that the norm did not apply in the first place. (On this point, *see* John Gardner, *Justifications and Reasons*, HARM AND CULPABILITY 103 (Simester and Smith eds., 1996)).

32. In my view, justifications hold that the defendant's actions were (merely) permissible because the criminal law is a system of prohibitions and, as such, cannot expresses anything more robust than permissibility. It follows that, as Kent Greenawalt points out, on certain moral standards, some legally justified actions might merit only an excuse. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984) 1904–1907. This is not a weakness of the criminal law. Instead it reflects the fact that it rightly does not enforce ideals.

Some theorists argue, however, that justified actions are not merely permissible but positively good and rightful. *See, e.g.*, Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. REV. 266, 274 (1975), and George Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 U.C.L.A. L. REV. 1355, 1358–1360 (1979). *See*, in response to Fletcher on this point, Joshua Dressler, *New Thoughts About the Concept of Justifications in Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 U.C.L.A. L. REV. 61, 81–87 (1984), and in support of the classification of justified actions as permissible generally, Douglas N. Husak, *Conflicts of Justifications*, 18 L. & PHIL. 41, 52–56 (1999).

33. The character and choice theories of excuse, respectively. *See* Michael S. Moore, *Choice, Character, and Excuse* 7 SOC. PHIL. & POL. 59 (1990), *and* R.A. Duff, *Choice, Character, and Criminal Liability*, 12 L. & PHIL. 345 (1993).

ing to which "to excuse" means, roughly, "to let off the hook." In this sense, an excuse is any defence that is not a justification. Let us call the defenses so grouped the broad excuses. Necessity in the *ultra vires* thesis is a broad excuse. This matters because—this is the second claim—broad excuses are captured by what I will call the *priority thesis*, which holds that justifications have, in Kent Greenawalt's words, a "natural priority" over excuses.[34] Just what this priority consists in is open to debate. The main thought is that excuses in some sense presuppose wrongdoing: If the defendant did not do anything wrong, why does she need an excuse? The problem is that an equally plausible intuition leads us in the opposite direction: Unless the defendant was, in principle, answerable for her actions, why ask whether they were in some exceptional sense permissible? That said, there is, as Douglas Husak points out, a certain *moral* priority to justifications. Permissible actions are generally speaking morally better than merely excused ones.[35] Rather than concede that she was laboring under a condition that diminished her responsibility, for example, a defendant might reasonably prefer to show that she was justified in taking violent action in self-defence. So, for the defendant's sake, we ought to ask whether she was justified in doing as she did. This extends to the imperiled wrongdoer. Furthermore, the state would *want* to reach the defendant only if what she did was at least *prima facie* wrong and as such a candidate for justification. So a case can be made that the question of whether necessity is plausibly reckoned a justification must be faced squarely by proponents of the *ultra vires* thesis. As I mentioned in Section I, my claim is only that necessity cannot justify homicide.

34. Greenawalt, *supra* note 31 at 1899. The priority thesis is close to the received view among criminal law theorists. *See also, e.g.*, Paul H. Robinson, *Criminal Law Defences: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203, 221 (1982), George Fletcher, *The Right and the Reasonable*, 95 HARV. L. REV. 949, 958–962 (1985), *and* Gardner, *supra* note 32 at 119. The lone (as far as I know) dissenting voice is Douglas Husak, *The Serial View of Criminal Law Defenses*, 3 CRIM. L.F. 369 (1992). Husak argues, convincingly in my view, that most of arguments in favor of the priority thesis fail. Here I rely on one he makes in its favor, and another he does not consider.

35. I say generally speaking because, as Husak points out, at least in some cases this might not be so. Some excusable actions carry no stigma, for example, losing control of one's car while being attacked by a swarm of bees. (Possibly this is so only on the broad sense of excuse. On a more fine-grained taxonomy we might say that the attacked driver did not need an excuse because *mens rea*—and perhaps *actus reus*—would not have been proven. Perhaps only such defences carry no stigma.) Similarly, Husak argues, some justified actions may not be morally commendable. "Suppose," he suggests, "in a jurisdiction with no duty to retreat that a defendant kills a psychotic aggressor in an act of self-defence when escape was possible. This killing might be minimally permissible, although hardly praiseworthy." Husak, *supra* note 35 at 398. Thus, Husak concludes, the moral priority of justification "depends largely upon the adoption of a substantive theory of justifications according to which justified acts are commendable rather than barely tolerable." *Id.*, 399. This is a compelling argument, but I think the conclusion is hastily drawn. I would suggest, rather, that the contemplated law is wrong: Self-defending actions when retreat is possible are not justified. This is not to say that justified actions need to be praiseworthy, but rather that there is a threshold of permissibility that is not satisfied by killings that can be avoided with less than self-sacrifice, and that legally justified actions ought to pass this threshold.

The drafters of the Model Penal Code (MPC) would likely have acquitted Dudley and Stephens, just because one death is better than four and necessity licenses opting for the lesser harm when harm in unavoidable.[36] I will assume that if necessity justifies homicide, it is on these grounds.[37] The idea is, of course, open to objections to tallying lives in this way. But I do not want to press that line here. Instead I want to suggest that a close look at the normative structure of the interaction between the imperiled party and his victim shows that a legal system—or, at least, *our* legal system—could not permit necessity to be a defence to homicide. At a glance, necessitous circumstances might look as though they give rise to a conflict of rights. Instead, I will argue, they give rise to a conflict over *a* right, one to which the law could not give Dudley and Stephens title. The same argument, however, shows that it is plausible that the law allow necessity to justify taking or borrowing property to save life and limb.

Let me begin by making a bit more explicit what the MPC-licensed argument claims. It moves from something like:

(1) All things remaining equal, it is better that fewer die when it is inevitable that some will die.[38]

to something like:

(2) Someone has a right to bring the better state of affairs about, even by killing innocent persons.

36. I say likely because in fact they suggest that *Dudley and Stephens* is open to reasonable disagreement. American Legal Institute, MODEL PENAL CODE, TENTATIVE DRAFT NO. 8, 9–10 (1958). This is surprising, as Dudley's and Stephens's actions seem plainly licensed by §3.02 of the MPC which provides:

(1) Conduct which the actor believes to be necessary to avoid an evil to himself or to another is justifiable, provided that:
(a) the evil to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.

and because the drafters explicitly hold that the defence should be permitted in cases of homicide as long as the number of lives saved exceeds that of lives taken. They hold, however, that *Dudley and Stephens* is a case in which it is unclear what the provision entails, because "it might be held, in support of that decision, that there is an absolute moral prohibition of directly taking life for selfish ends." But that is precisely what §3.02 extends legal protection to.

Michael D. Bayles is less ambiguous: "The absence of a reasonable alternative justifies killing one person to save two or more persons." *Supra* note 2 at 1205.

37. At a glance, one might think Blackstone defends another ground when he argues that: "[t]here is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish." William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, VOLUME 4: OF PUBLIC WRONGS 186 (1769). But "principle" here bears its older sense of origin or cause, rather than justifying rule (note that it "prompts"). It goes without saying, I take it, that the law does not recognize a right to self-preservation *simpliciter*.

38. In fact §3.02 of the MPC would not require the qualification "when it is inevitable that all must die." But I add it here to make the argument more plausible.

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Some readers will, I think, find this inference obviously sound, while others will find it plainly unsound. There are of course, as I noted, several large issues in the background here. I will not engage them directly. What I want to do is to draw attention to what this inference requires us to accept.

Consider, first, a case in which the trade-off was between property and bodily security: Ploof v. Putnam.[39] Sylvester Ploof and his family were sailing when a severe storm suddenly arose. Ploof attempted to moor at Putnam's dock but was prevented from doing so by one of Putnam's employees. Ploof and his family were subsequently thrown into the water and onto the shore. Putnam was held liable for their injuries. The best explanation of his liability is that it attached to a breach of duty correlative to a right on Ploof's part.[40] *Ploof* thus stands for the proposition that peril confers upon the imperiled a right to use another's property when doing so is the only means of saving life or limb. It is important to see what this claim amounts to. Bear in mind that the common law does not impose a duty to rescue even when rescue is costless. Ploof's right, that is, was not to Putnam's help. Ploof's right to self-help, then, must have issued from a transfer of property rights, or, more precisely, of those incidents of property—the right to exclude, some rights to use—whose temporary assumption by Ploof comprised the only means to escape peril.[41] While the storm raged, it was Putnam's employee who was, in effect, the trespasser (or would-be trespasser).[42]

I think most of us would be inclined to say that *Ploof* was correctly decided.[43] That means that we are prepared to say that the ordinary exercise of property rights is in some cases conditional upon the needs of others,

39. 71 Atl. 188 (Vt. S.C., 1908).

40. *Ploof* needs to be interpreted for two reasons. First, the plaintiff brought suit under the old causes of action of trespass and case. Second, the court did not explain its decision.

41. One might respond that we ought rather to say that Putnam was barred from enforcing his rights. The response raises a deep question: Is a property right comprised of two components, an entitlement and the rules providing the terms of its protection, or is it rather exhausted by such rules? (On this question, *see* Calabresi and Melamed, *supra* note 24, and Coleman and Kraus, *id*.) My interpretation of *Ploof* follows the latter. But adopting the former would only make it more complex and not change the crucial point, which is that the law (at least) suspends the conditions ordinarily attached to Putnam's title.

42. Thanks to Ian Kerr for suggesting this way of putting the point.

43. Two factors potentially complicate our ability to draw a lesson from *Ploof* for the present inquiry. The first is that it follows from Vincent v. Lake Erie Transportation Co., decided two years later, that had Putnam's employee permitted Ploof to moor and the dock been damaged, Ploof would have been liable for the cost of repair. Vincent v. Lake Erie Transportation Co., 124 N.W. 221 (Minn. S.C., 1910). But this does not bear on the present point. *Vincent*-liability, as we may call it, is notoriously difficult to explain, because everyone agrees that liability would not attach to Putnam's (putative) trespass *simpliciter*. *That* is the point we are interested in here: Ploof would have done no wrong in doing what would ordinarily amount to trespass. My claim is that this is entailed by the fact that Putnam was held liable, and that the only way to make sense of this is to hold that a transfer of property rights was forced by law upon Putnam. The second complication is that *Ploof* is, of course, a civil case, and our interest is in criminal liability. But I think the reasoning carries through. If anything, the scope of liability in tort in this context is broader. If Ploof would not have been liable in tort for trespass, then presumably he would not have been guilty of criminal trespass either.

and that this condition expresses itself in the temporary transfer of such rights as are necessary to permit others to escape perilous circumstances. I will accept this without further argument.[44] It follows that in cases in which property is traded for bodily security, necessity operates as a justification, because it makes permissible what would ordinarily be trespass. Granting the priority thesis and the broad conception of excuses, it follows that the *ultra vires* thesis does not apply in cases like *Ploof*. It is not so much false as it is moot.

Matters are different, however, when a life is taken to save others. On the forgoing analysis, in killing Parker, Dudley and Stephens were laying claim to his body. Even if it turns out that property rights are conditional on the needs of others, presumably we are not prepared to say the same is true of protected interests in bodily security. Dudley and Stephens could be said to act under the protection only of something like Hobbes's Right of Nature, which grants us, *inter alia*, the liberty to use others' bodies to preserve ourselves.[45] But the dominion of the Right of Nature represents the absence of a legal order. The claim implicit in Dudley's and Stephen's action could thus not be recognized by law or, in any case, by a legal system such as ours.

Or so I argue. If this is right, we may then ask whether the state had standing to punish them. The answer depends on whether we accept the principle that an agent is an addressee of a positive law only if the threat of legal sanction can principle secure her compliance. This principle, in turn, is embedded in a justification of the prohibition of the state promotion of the good and as such raises fundamental questions in political philosophy, questions with which I cannot deal here.

44. The point would, I take it, come out uncontroversially on a consequentialist analysis. It also has support among deontologists. Hegel argues, for example, that:

> Life as the sum of ends has a right against abstract right. If for example it is only by stealing bread that the wolf can be kept from the door, the action is of course an encroachment on someone's property, but it would be wrong to treat this action as an ordinary theft. To refuse to allow a man in jeopardy of his life to take such steps for self-preservation would be to stigmatize him as without rights.

G.W.F. Hegel, THE PHILOSOPHY OF RIGHT 252 (§127 [A.]) (Knox ed., 1952). *See also* Alan Brudner, *A Theory of Necessity* 7 OXFORD J. LEGAL. STUD. 339 (1987).

45. *Supra* note 10 at 189.

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