

Breaking the Law Under Competitive Pressure

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Abstract: When a business has competitors that break a burdensome law, is it morally required to obey this law, or may it break the law to avoid an unfair competitive disadvantage? Though this ethical question is pervasive in the business world, many non-skeptical theories of the obligation to obey the law cannot give it a clear answer. A broadly Kantian account, by contrast, can explain why businesspeople ought to obey laws of a certain type even under competitive pressure, namely laws that play a direct role in defining rights to use physical or financial resources free from substantial interference. Businesspeople must obey these laws even at the cost of allowing their businesses to fail and even when the acts proscribed are *mala prohibita*. This argument for obeying the law in competitive contexts has limited scope. Considerations of fairness or self-preservation may justify violating laws of other types under competitive pressure.

Many laws and regulations are incompletely enforced, in the sense that the incentives for compliance are often insufficient to motivate a purely self-interested person to comply. Consider a tax law that applies to cash transactions not subject to third-party withholding or reporting. Even if there are stiff penalties on the books for underreporting cash transactions, the chance of being caught underreporting these transactions is slight. Purely self-interested people may calculate that it is in their interest to underreport cash transactions and to evade the tax. When laws are incompletely enforced, people face an ethical question whether to comply with law for

reasons other than narrow self-interest. This ethical question is acute when individuals or businesses face pressure from law-breaking competitors. Suppose that a small business receives much of its income in cash, and the business owner knows that some competitors underreport their cash income. The business owner may want to pay taxes honestly, but doing so will involve accepting a competitive disadvantage. If competition is tight and profit margins are slim, the business may be unable to comply with tax law without operating at a loss. Does the business's interest in competing on equal terms or in staying in operation justify breaking the law? Or is this business owner ethically required to make the business "prey to others"?¹

Competitive pressure raises a distinctive ethical problem for theories of political obligation. All non-skeptical accounts of the moral obligation to obey the law explain why people are sometimes ethically required to comply with burdensome laws. Many accounts struggle to say whether people and businesses ethically must accept the burden of complying with laws and regulations that competitors break. More specifically, they struggle to say whether competitive pressure can justify lawbreaking when the laws in question attempt to create or to alter people's duties for the sake of organizing a valuable form of cooperation.² Indisputably, some forms of injustice in the distribution of the benefits and burdens of cooperation justify people in refusing to cooperate. Arguably, the burdens of complying with law are unfair to economic producers when the costs of compliance are high, competition is tight, and competitors either flout the law with impunity or accept light penalties as costs of doing business. It is a

¹ See Thomas Hobbes, *Leviathan*, I.xv.36.

² Legal philosophers typically say that people only *obey* the law, as opposed to merely complying with it, if they do what the law says at least partly *because* it is what the law says. See, e.g., Robert Paul Wolff, *In Defense of Anarchism*, (New York: Harper & Row, 1970), p. 12. When laws aim to codify or to help enforce a law-independent moral duty, the weight of that duty determines whether people can ever justifiably break these laws.

difficult question whether this form of injustice to law-abiding businesses justifies defensive lawbreaking.

I shall argue that many non-skeptical accounts of the moral obligation to obey the law cannot give this question a clear answer. Fair play accounts struggle to answer this question because it is unclear how people ought to balance the unfairness they would inflict on others by breaking the law against the unfairness they experience by complying with a law competitors flout.³ Many other theories of the obligation struggle to answer this question because they defend only a *pro tanto* obligation to obey the law, which moral considerations (including considerations of justice) potentially outweigh.⁴ By contrast, a broadly Kantian approach to the obligation to obey the law offers a clear and plausible answer to the question whether there is a moral obligation to obey the law under competitive pressure.

I shall not discuss Kant's own account of the obligation to obey the law, which is both opaque and controversial.⁵ Instead, I rely on only two elements of Kantian moral and political theory that I hope will be acceptable to many non-consequentialists. First is a limited form of the Formula of Universal Law: if it would be inconsistent with one's purposes to endorse others

³ Examples of fair play theories include H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review*, 64 (1955): pp. 175–91; George Klosko, *The Principle of Fairness and Political Obligation*, New Edition (Savage, Maryland: Rowman and Littlefield, 2004); John Rawls, "Legal Obligation and the Duty of Fair Play," in S. Hook (ed.), *Law and Philosophy* (New York: New York University Press, 1964).

⁴ This is identified as a standard feature of accounts of the duty to obey the law in William A. Edmundson, "State of the Art: The Duty to Obey the Law" *Legal Theory* 10 (2004): pp. 2015-259; and David Lefkowitz, "The Duty to Obey the Law," *Philosophy Compass* 1 (2006): pp. 571-598.

⁵ The opacity may be a result of a concern to avoid censorship. See Kenneth R. Westphal, "Kant on the State, Law, and Obedience to Authority in the Alleged 'Anti-Revolutionary' Writings." *Journal of Philosophical Research* 17 (1992): pp. 383-426. Kant is often more concerned with the ethics of forcible rebellion than with the ethics of ordinary lawbreaking.

acting according to a certain “maxim,” or way of reasoning, one should refrain from acting according to this maxim oneself.⁶ Second is the view that rights to financial resources and to most physical resources, including resources on which all businesses rely, are established by positive law.⁷ Though there may be a natural right to have a system of property, and there may be natural rights concerning the form that system should take, there are few or no natural rights to specific things. Building on these premises, I argue that there is a moral obligation to obey resource-allocation law even in the face of competitive pressure. The obligation has exceptions, however, and it does not extend to all of the just laws a state might choose to enact.

This Kantian account supports two significant conclusions. First, people are sometimes ethically required to let businesses fail rather than break laws against *mala prohibita*, acts that would not be wrong if there were no legal prohibition against them. Second, people are sometimes justified in breaking just laws. I consider the first of these conclusions both more important and more surprising.

⁶ This is the “practical contradiction” interpretation of the Formula of Universal Law. See Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), pp. 92-101. The version of the formula I present here is limited in that it is a one-directional conditional. I take no stand here on the question whether the practical contradiction test is a sufficient condition for practical reasoning to be ethical; I only claim that it is a necessary condition.

⁷ For Kantian defenses of this claim, see Arthur Ripstein, *Force and Freedom* (Cambridge, Mass.: Harvard University Press, 2009); Helga Varden, “Kant’s Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature.” *Kantian Review* 13 (2008): pp. 1-45. Though John Locke defended natural property rights, some contemporary Lockeans argue that there are few concrete natural property rights because the “enough and as good” proviso on appropriation from the commons is difficult to satisfy. See, e.g., Michael Otsuka, *Libertarianism without Inequality* (Oxford: Oxford University Press, 2003).

1 Lawbreaking and unfair competitive pressure

I shall begin by briefly describing how competitive pressures can make compliance with the law distinctively burdensome and why these burdens are unfair. There are many competitive activities in which lawbreaking can give someone an unfair competitive advantage. This article focuses on unfair competitive advantages that affects people's opportunity to make a living as they choose. Losing a job, being denied a university place, or experiencing the failure of one's business is a serious loss. People have a legitimate interest in protecting themselves from experiencing such losses unfairly. For simplicity of exposition, I will present my arguments as they apply to competition among businesses, though they also apply to competition among individuals.⁸ I leave open whether unfairness in forms of competition that do not affect people's livelihood, e.g. competition for social status, raises the same issues for the ethics of breaking the law.

Suppose that the market for widgets is perfectly competitive. People make purchasing decisions about widgets based solely on price, and buyers can efficiently comparison shop. Widget producers do not compete on product quality, nor do they differentiate themselves from competition through branding. Widget producers are thus price-takers: if their price exceeds the market price, they will have no customers. Suppose further that the cost of complying with a certain law (say, a tax) exceeds the profit margin of any firm in this industry, even after taking account the benefit of avoiding legal penalties. Suppose finally that all firms in the industry have

⁸ I focus on examples in which pressure to break from the law comes from competitors who seek an unfair advantage by breaking the law in a way that enables them to cut prices. A comparable ethical issue can arise when a firm faces pressure from competitors or suppliers to join an illegal horizontal or vertical cartel. See Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, Volume VI (New York: Wolters Kluwer, 2017), pp. 50-63.

previously been law-abiding. One widget-maker with significant market share now starts breaking the law, and it lowers its price by an amount greater than its competitors' margin per unit. Other widget-makers will be forced to match this lower price. If they do not join their competitor in breaking the law, they will be unable to continue selling widgets at the same volume without operating at a loss.

Several outcomes are possible for law-abiding widget firms. First, if the law abiding firms can operate at a loss temporarily, they may be able to bring pressure to bear on the lawbreaking firm. If the law in question gives competitors of lawbreakers a private cause of action, they could sue. If a lawsuit is not an option, perhaps law-abiding firms could lobby for stricter enforcement. That may or may not be feasible; it is infeasible if the law in question is inherently difficult to enforce (e.g. a tax law as applied to an industry in which many transactions are in cash). Perhaps they could instead conduct a publicity campaign shaming the law-breaker and persuading customers to boycott. That, too, may or may not be feasible. If no strategy for pressuring the law-breaking competitor is available, perhaps law-abiding firms could keep operating profitably if there are cost-cutting measures they have previously chosen not to take (e.g. cutting wages) or if they could lower per unit production costs by producing at a smaller scale. If operating profitably in this environment is impossible, following the law will likely result in the death of the firm, since few businesses can afford to operate at a loss long term.

The case I have just described is extreme. Pressure from a law-breaking competitor will be less serious if the cost of compliance is lower or if the law-breaking competitor is small and has little ability to increase production. Pressure from a law-breaking competitor may be less serious if a firm is not a price-taker. For example, if a law-abiding firm can differentiate its brand through marketing, it may be able to charge an above-market price. Even if a firm has market

power (i.e. is not a price-taker), lawbreaking can enable a competitor to gain an unfairly large market share. If the costs of compliance are high enough, law-breaking by a competitor could put a firm with market power out of business.

In competitive markets of any type, it is a richly empirical question whether law-abiding firms can survive in competition with lawbreakers. No doubt businesspeople may sometimes be tempted to deceive themselves about the facts, and mistakenly to judge that a law-abiding firm cannot compete successfully against a lawbreaker. Sometimes, though, businesspeople will rightly judge that their business cannot survive pressure from a lawbreaking competitor without following suit. These businesspeople undeniably would face an unfair competitive environment. The difficult ethical question is whether the unfairness of this competitive pressure justifies businesspeople in breaking the law.

2 Limits of other accounts

Many theories of the duty to obey the law struggle to say anything about whether and why there is an obligation to obey the law even in the face of competitive pressure. The core of the problem many theories face is that they allow unfairness in the distribution of the benefits and burdens of law-governed activity to justify disobedience. Fair play theories derive a moral obligation to obey the law from an argument that disobedience would (in some contexts) involve unfairness to law-abiding citizens. If compliance with law under competitive pressure would involve becoming a victim of a more serious form of unfairness than the unfairness one would inflict on others by lawbreaking, the fair play argument for obeying law is incomplete. Many other theories of the obligation to obey the law defend only a *pro tanto* obligation to obey the law, which considerations of justice can outweigh. These theories cannot explain why the

unfairness of becoming a victim of lawbreaking competitors does not justify following suit to protect one's own business.

Some theories of the duty to obey the law do not condition the duty on substantive justice in the law. Among these are some consent-based accounts and some democracy-based accounts. These accounts do not face the limitation I identify in this section. But many of these theories do condition the duty to obey on a demanding standard of *procedural* justice or legitimacy. Consent-based theories support a duty to obey the law in actual societies only if people have, in fact, given morally significant consent to the authority law claims. This is controversial at best.⁹ Likewise, one must take an optimistic view of the political process in contemporary democracies to think that these democracies satisfy the standards of legitimacy laid out in typical democracy-based accounts of the duty to obey.¹⁰ This section will focus on theories that apply to many actual societies, including flawed democracies, even if we do not choose to interpret these societies' political processes in an optimistic light.

Fair play

Fair play accounts of the obligation to obey the law build on an ethical prohibition on free-riding. They propose that breaking the law is wrong in much the same way that it is wrong to jump the turnstiles on the subway. Rider support of subways is a cooperative scheme. The subway system will function well, benefiting riders, only if most riders pay their fares. That said,

⁹ This challenge to consent-based or actual contract theories dates back to the essay by David Hume, "Of the Original Contract," in *David Hume's Political Essays*, C. W. Hendel (ed.) (Indianapolis: Bobbs-Merrill Co., 1953 [1752]).

¹⁰ Viehoff, a defender of a democracy-based account, concedes the point: "Many (perhaps all) existing democratic states fall short" of even a "quite minimal" standard of democratic procedure. Daniel Viehoff, "Democratic Equality and Political Authority," *Philosophy & Public Affairs* 42(2014): 337-375, p. 342.

it is possible for a few people to jump the turnstiles and use the system to get where they want to go for free. The fair play principle holds that turnstile jumping raises an issue of fairness.

Accepting the benefits of the subway system without taking on the burdens raises issues of fair play.

Legal systems organize various forms of cooperation in which compliance with rules produces public benefits. Cooperation with the tax system funds government functions that provide collective security. Cooperation with traffic law helps to keep the roads and streets safe and to enable people to travel quickly. Many forms of cooperation organized by law differ from the rules of the subway in that one cannot opt out of the benefits of cooperation. Why must people accept the burdens of law-organized cooperation nonetheless? Klosko's fair play theory gives a two-part answer to this question.¹¹ First, there is a duty to accept the burdens of cooperating in the provision of a nonexcludable good if (i) it is worth participants' effort, (ii) it is presumptively beneficial, and (iii) its benefits and burdens are fairly distributed.¹² Protection against foreign invasion is an example. Second, in modern societies, presumptively beneficial goods cannot be provided unless government also provides some package of other goods that are not presumptively beneficial. For instance, effective defense requires a well-functioning transportation system, which could take various forms (no one of which is presumptively beneficial). There is a fair play obligation to cooperate with government's provision of this package of other public goods if there is a fair procedure for deciding *which* package of public goods shall be provided, and if there is a good-faith argument for the fairness of the outcome.

¹¹ Rawls's fair play account faced an objection on this score. See Robert Nozick, *Anarchy, State, and Utopia* (Englewood Cliffs, N.J.: Basic Books, 1974), pp. 93-94.

¹² Klosko, *Principle of Fairness*, p. 39. Klosko's precise characterization of the circumstances that give rise to issues of fair play is at p. 34.

Fair play theory nicely explains why there is a moral obligation to do one's part in law-organized cooperative activities (e.g., paying taxes) when all or nearly all of one's fellow citizens are doing theirs. The theory's implications are less clear when many of one's fellow citizens obey the law and many others break it. Under these circumstances, the choice whether to obey a burdensome but socially valuable law is a choice between contributing to unfairness and being a victim of it. Breaking the law is unfair to fellow citizens who accept the burdens of compliance. Obeying the law makes one a victim of the many free-riders. When some form of unfairness is inevitable, why does one have an obligation to become a victim of unfairness rather than a contributor to it? Klosko's fair play theory does not answer this question. The theory explains why there is an obligation to do one's part only when the distribution of benefits and burdens is at least arguably fair. When some firms in a competitive market accept the burdens of complying with law and others do not, the burdens of cooperation are unfairly distributed. This unfairness is both clear and large when complying with a law competitors break would involve a serious risk of business failure. Moreover, the unfairness one would experience by complying with law is arguably more serious than the contribution one would make to the unfairness of the system by breaking the law (given that there are already many lawbreakers putting pressure on law-abiding businesses).¹³ So fair play theory does not offer a straightforward defense of an obligation to obey the law under competitive pressure.

¹³ Klosko could try to argue that a firm's decision to break the law defensively introduces a more serious form of unfairness than the unfairness it resists because it could undermine respect for law generally (not only for the specific law the firm breaks). This argument rests on the empirical claim that public disobedience for laws of one kind tends to promote disobedience of other laws. Absent evidence for this claim, we should be skeptical of it. It is not unusual for people to hold certain laws in contempt (e.g. the laws against jay walking or underage drinking) while respecting laws of other sorts (e.g. property law and tax law).

Defeasible obligations to obey the law

Cases involving competitive pressure also present a problem for accounts of the obligation to obey the law that only defend a defeasible or *pro tanto* obligation to obey. Wellman's samaritan theory of the duty to obey the law is an example.¹⁴ Wellman argues that we have moral duties to help others who are "imperiled" and we can help "at no unreasonable cost to ourselves."¹⁵ When we can rescue others in peril by doing our part in a collective project, and participating is not unreasonably costly, we have a moral duty to participate. Widespread compliance with just law is required to protect people from the perils of the state of nature. The burdens of complying with the just laws of a legitimate state are not unreasonable. So there is a duty to obey the just laws of a just state. But this duty is only a "*prima facie*" duty.¹⁶ It can be outweighed by competing considerations.

Since the duty to obey the law can be outweighed, on Wellman's account, it is unclear whether businesspeople facing pressure from lawbreaking competitors have an all-things-considered duty to obey the laws competitors break. People have reason to avoid becoming victims of unfairness. Does this consideration outweigh the general moral duty to obey the law? Wellman's stated conclusion leaves this unclear. Moreover, samaritan duties are limited to rescues that are not unreasonably costly. If the costs of complying with certain laws are unreasonable, we do not have a samaritan duty to comply with these laws. The cost of complying with a burdensome law in the face of pressure from lawbreaking competitors is arguably unreasonable.

¹⁴ Christopher Wellman, *Samaritanism and the Duty to Obey the Law*, in Christopher Wellman and John Simmons, *Is There a Duty to Obey the Law?* (Cambridge, UK: Cambridge University Press, 2005), pp. 1-89.

¹⁵ *Ibid.* p. 31.

¹⁶ *Ibid.* p. 53.

A similar limitation affects Gilbert's plural subject theory of political obligation.¹⁷ Her theory builds on a broader theory of obligation to groups. When all the members of a group either explicitly or tacitly express commitment to doing something as a group, each person in the group acquires a *pro tanto* obligation to do what they committed to doing. This obligation is not always a decisive reason for action, but it is a *sufficient* reason for action. For example, if two people have a joint commitment to walk somewhere together, each person has reason during the walk to resist inclinations to dart off in another direction without explanation. The plural subject theory of political obligation proposes that the people of a political community have a *pro tanto* obligation to obey the law when they are jointly committed, as a group, to upholding their system of government. One indication that individuals see themselves as committed to upholding a system of government, together with fellow citizens, is that they refer to the government as "ours." If one has expressed readiness to join fellow citizens in upholding a legal order, breaking the law is like darting off in a different direction while walking with a group. One should not do this without justification.

That businesspeople have a *pro tanto* obligation to obey the law does not settle the practical question they face. The more important question is whether they have all-things considered reason to obey the law under competitive pressure. Gilbert claims that the obligation associated with joint commitment takes precedence over inclinations and self-interest.¹⁸ But it does not take precedence over moral considerations, possibly including considerations of fairness. If obeying the law in the face of competitive pressure would impose an unfair burden on

¹⁷ Margaret Gilbert, *The Plural Subject Theory of Political Obligation* (Oxford: Oxford University Press, 2006).

¹⁸ Gilbert declines to characterize the obligation as "moral."

law-abiding companies, it is unclear on Gilbert's account whether companies or their agents have all-things-considered reason to obey the law.

Cases involving competitive pressure present a problem for any theory of the obligation to obey the law that allows the obligation to be conditional on the fairness of the distribution of the burdens of law-organized cooperation. To show that there is an all-things-considered obligation to obey the law under competitive pressure, it would be necessary to show that an unfair distribution of the benefits of cooperation does not necessarily excuse or justify lawbreaking. Any plausible theory of obeying the law has to acknowledge that some forms of injustice justify law-breaking (or at least breaking social norms that are widely regarded as laws).¹⁹ So to show that there is a duty to obey the law under pressure from lawbreaking competitors, we would need a way to distinguish forms of injustice that justify lawbreaking from forms of injustice that do not.²⁰

3 Kantianism and the obligation to obey resource allocation laws

I propose that we should distinguish injustice in the content of the law from injustice in the benefits and burdens of social cooperation that results from individuals' choices. Kantian ethical principles can explain why this distinction matters in the context of a particular type of law: laws that play a role in defining rights to use physical or financial resources free from substantial interference. Given two broadly Kantian assumptions, it is possible to explain why

¹⁹ Some legal anti-positivists hold that an unjust purported law is not a law. These anti-positivists recognize that there can be unjust rules that are socially regarded as laws. Mark Murphy describes, but does not endorse, this view in "Natural Law Jurisprudence," *Legal Theory* 9 (2003): pp. 241–267.

²⁰ It would not suffice to argue that lawbreaking is unjustified when there is reasonable disagreement about whether there is an injustice. It is quite clear that when some businesses in a competitive industry break the law and others do not, the law-abiding firms suffer an injustice.

there is a moral obligation to obey laws of this type even under competitive pressure. For brevity, I shall call laws of this type “resource allocation laws.” This phrase is a term of art. The category I label “resource allocation laws” does not include laws prohibiting *minor* interferences with someone’s rights to a resource. Laws against simple trespass and minor parking regulations are examples. Though there may be good ethical reasons to comply with laws of the latter type, my argument for obeying the law under competitive pressure will not extend to them.

Many laws help to define the conditions in which an individual or organization has an entitlement to use a resource in some set of ways, free from substantial interference. For example, the law of landlord and tenant identifies the ways in which leases can be formed, the rights to rental property that landlords have, the rights tenants have, and the forms of interference that substantially violate these rights. Any law that directly requires the transfer of a physical or financial resource from one individual or organization to another plays a role in defining rights to use these resources. Tax law, for example, plays a role in defining rights to use financial resources, as it entitles an organization (the government) to use a resource (certain sums of money).²¹ A refusal to perform a legally required transfer of a resource substantially interferes with the rights of the person or organization that was to receive the transfer. Many public law regulations are resource allocation laws in this sense. Laws against air pollution give the public an entitlement to use air that is free from certain kinds of artificial contamination.²² A city regulation establishing a taxi medallion system gives medallion holders a right to use a resource (the city streets) in a certain way (offering taxi rides for hire) free from competition from

²¹ Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002).

²² It is a delicate question which interferences with this entitlement are substantial and which are minor.

unlicensed taxis. Establishing an illegal ride-sharing service would substantially interfere with medallion owners' legal rights.

Though many laws help to define rights to use physical and financial resources free from substantial interference, many do not. As mentioned before, these include laws against minor violations of (private or public) private property rights that do not substantially interfere with their rightful use. There are also many laws that affect the distribution of resources in society but that do so only indirectly. Consider a law prohibiting the possession of certain dangerous objects. Noncompliance with this law could affect the allocation of resources by affecting the frequency of accidental property damage, but the prohibition on possessing dangerous objects does not directly grant anyone any entitlement to use a resource. Another type of law that does not have a direct role in the allocation of physical and financial resources is the law of intellectual property. Though intellectual property law affects the finances of many people and organizations, it does not directly entitle anyone to any financial (or physical) resources. Though I do not deny that there is a moral obligation to respect intellectual property law or laws against possessing dangerous objects, I shall focus on the question whether competitive pressure can ever justify breaking laws that *directly* concern rights to use *physical and financial* resources.

Every business requires physical and financial resources. Every business requires a space where it can operate without interference, and thus requires rights of some kind to land. Every business also requires rightful control over movable property that is not in the immediate physical possession of anyone associated with that business. At a minimum, a business needs to be able to keep records. Business owners and operators also need to be able to control financial resources. They need to be able to pay for labor and other costs, and in a profit-oriented economic system, business owners need to have publicly recognized entitlements to (after-tax)

business earnings. So all businesspeople are rationally committed to their business having property rights to physical resources and to financial resources, rights that others recognize and generally respect. Indeed, they are not committed merely to the abstract possibility of their business having property rights that others respect. They are committed to demanding that others respect the very property rights that their businesses currently claim, or at least those rights that are critical to the operation of their business. (They may not be committed to demanding that others refrain from harmless trespass or other minor property rights violations.)

From this commitment and two broadly Kantian premises, there follows a duty to obey resource allocation law. The first premise is that the rights to physical and financial resources on which businesses rely are largely, perhaps entirely, creations of law. There is a debate in political philosophy about the extent of law's role in determining the allocation of resources. Some thinkers, including Locke, argue that there can be determinate natural property rights, property rights whose existence is independent of human-created law and custom.²³ I do not wish to enter the debate about whether a regime of natural property rights is possible in principle, and I certainly do not deny that there are universal principles of justice in resource allocation. It is obvious, however, that law plays a role in the allocation of resources in most actual societies. Modern forms of money, stock, and other financial instruments are creations of law. Ownership of a resource created by the law is not a natural property right. Many legally recognized property claims to physical resources could not derive from natural morality alone. Many parcels of land, for instance, have at some point in history changed hands by force or fraud. Their current legal owners (or lessors) thus could not have a Lockean natural property right in them. If there is a moral obligation to respect the existing allocation of resources (not to steal, not to counterfeit

²³ John Locke, *Second Treatise of Government*, Chapter V.

money, not to cheat on one's taxes, and so forth), this obligation must derive at least in part from an obligation to respect legal determinations about who may use what things.

The second broadly Kantian premise is a limited form of the Formula of Universal Law: if it would be inconsistent with one's purposes to endorse others acting according to a certain "maxim," or way of reasoning, one should refrain from acting according to this maxim oneself. This limited form of the Formula of Universal Law is a one-directional conditional. I do not claim that it exhausts the content of morality; I claim only that people reason immorally about what to do if their reasoning fails this test.²⁴ For the Formula of Universal Law to provide a valid test of moral reasoning, it must be applied only to maxims that present agents' reasoning accurately. Moreover, maxims subjected to the test must present the agent's reasoning *as* reasoning. If a maxim calls for a certain action in some circumstance and not others, it must indicate a rationale for the distinction.

Maxims must also be formulated to include relevant conditions that people may not specify when explaining their actions in casual conversation. This requirement is important to the correct Kantian evaluation of maxims in competitive contexts. "I will take the first place in line" is an incompletely specified maxim. Were the Formula of Universal Law applied to this incomplete maxim, it implausibly suggests that taking the first place in line would be wrong. I cannot endorse others getting first in line if I am trying to do so. But the formula yields plausible results when applied to maxims that specify the conditions under which one will act. The maxim "I will take the first place in line *no matter what*" fails the test, and it should. Willingness to get

²⁴ Because this version of the Formula of Universal Law is a one-directional conditional, it is not vulnerable to "false negative" counterexamples. That some immoral maxims pass this test is no objection to it. For discussion of the problem of alleged "false negatives" and "false positives" in the application of the Formula of Universal Law, see Richard McCarty, "False Negatives of the Categorical Imperative," *Mind* 124 (2015): pp. 177-200.

to the front of a line by shoving others away is an immoral attitude. The maxim “I will take first place in line if no one has gotten there first” passes the test. Kantian ethics does not condemn all forms of competition, but it does call for ethical constraints on competitive behavior.

I shall argue that the limited Formula of Universal Law, when applied to the actions of businesspeople committed to the social recognition of their business’s property rights, yields an obligation to respect the legally-defined property rights of other individuals and organizations. The argument is not straightforward, because we must first identify the maxim or reasoning the businessperson must oppose others using. Clearly the businessperson must condemn others acting on a maxim of ignoring all legally defined property rights. If the businessperson endorsed this maxim, the businessperson might thereby endorse others interfering with her business’s use of its resources. Since it would be inconsistent with the businessperson’s commitments to endorse others ignoring all legally defined property rights, the Formula of Universal Law implies that the businessperson cannot rationally or ethically adopt a maxim of disrespect for all property rights.

Might the businessperson adopt a maxim of respect only for just property rights, though? Suppose that a businessperson correctly believes that her business’s property rights are just and that some other resource allocation rules (e.g. the tax code) are unjust. This businessperson could consistently demand that others respect her business’s just property rights while maintaining that she and her firm are morally permitted to violate the resource allocation rules that are unjust. There is a problem with this stance, however, if reasonable people can disagree about what rules of resource allocation are just. If everyone adopts a practice of following resource allocation rules only when they *think* these rules just, then resource allocations that are in fact just will be generally respected only when all reasonable people regard them as just. Those aspects of the

resource allocation that are in fact just but that reasonable people reasonably disagree about will not be generally respected. Since a businessperson should fear that the justice of some aspect of her business's property rights or her individual property rights could at some point be publicly questioned, she should not endorse a practice of following only those resource allocation rules that are in fact just. She should instead adopt an attitude of deference toward those publicly enacted resource allocation rules that could reasonably be regarded as just rules. Businesspeople thus have an obligation to obey resource allocation laws that are not transparently unjust.

Businesspeople might try to argue that it is transparently unfair for there to be certain types of resource allocation laws (e.g. tax laws) that are incompletely enforced in a competitive industry. But incompletely enforced laws are not *transparently* unfair when there are good reasons for these laws to exist and good reasons for them to be incompletely enforced. Full enforcement of a law might require excessive public expenditure on policing or the imposition of disproportionate punishments. Full enforcement might also involve objectionable violations of privacy.²⁵ Or full enforcement may be simply impossible. For example, it is impossible fully to enforce business income taxes as applied to cash transactions. No doubt there is an injustice when a burdensome law is incompletely enforced and some of a law-abiding firm's competitors violate that law. But neither the content of tax law nor the inaction of the executive branch is clearly to blame. The blame for the injustice falls exclusively on the law-breaking competitors.

Can lawbreaking in business be justified by the unfairness resulting from competitors' lawbreaking, as opposed to unfairness in the content of the law or in a government decision not to enforce it fully? Suppose that a business adopts a policy of breaking incompletely enforced

²⁵ Robert C. Hughes, "Law and the Entitlement to Coerce," in Wil Waluchow and Stefan Sciaraffa, eds., *Philosophical Foundations of the Nature of Law* (Oxford: Oxford University Press, 2013), pp. 183–206.

resource-allocation laws only to prevent being a victim of unfairness resulting from others' violation of incompletely enforced resource-allocation laws. If some of its competitors do not pay taxes on their cash income, it will be a victim of unfairness if it complies with the tax. It therefore chooses not to pay tax on its cash income to avoid being a victim of unfairness. But if a business does this, its own property rights will become morally insecure. Tax evasion is theft from the public. If businesses evade taxes, all members of the public will be victims of injustice. Suppose that members of the public act on the same principle the defensively tax-evading business has adopted: they will violate resource allocation law to avoid becoming victims of injustice. They might carry out this principle by shoplifting or pilfering from businesses they believe to be avoiding taxes, with the motive of imposing a comparable burden.²⁶ This sort of vigilantism is bad, but a tax-evading business would have no moral standing to complain about it. A business cannot rationally be indifferent to the moral security of its claims to private property. So it cannot endorse everyone acting on a maxim of violating resource-allocating law to prevent unfairness in the distribution of the burdens of complying. A business ethically must comply with property law, tax laws and other resource-allocating laws, even in the face of pressure from law-breaking competitors.

This argument for a moral obligation to obey resource-allocation law does not condition the obligation on the government's constitutional form. It applies equally in democratic and non-democratic societies. This conclusion may appear troubling. It is seemingly in tension with the

²⁶ They might also pilfer from businesses in response to tax evasion by other consumers. Suppose, for instance, that waiters can easily cheat on their taxes because they receive cash tips. Tax evasion is more difficult for fast food workers because they are not tipped, and their employers report wages to tax authorities. If fast-food workers believe that waiters often cheat on their taxes and thereby gain an unfair advantage in the market for scarce goods, fast-food workers could try to defend their relative economic position by pilfering from stores.

widely-defended view that the obligation to obey democratically-created law derives in part from the democratic character of the constitution.²⁷ My conclusion that there is a moral obligation to obey some laws in undemocratic states should not be troubling in light of the conclusion's limitations. First, it only applies to laws that people could reasonably regard as just. If the content of a law is *indisputably* unjust, nothing in the above argument precludes disobeying it.²⁸ Second, the argument only concerns disobedience motivated either by simple self-interest or by a desire to avoid an unfair competitive disadvantage. The argument is silent about the ethics of civil disobedience. Individuals and companies in a non-democratic society may be justified in breaking the law to promote democracy, to express dissent, or to protect themselves or others from violations of natural rights. But a company cannot justify refusing to pay minimum wage by pointing out that the minimum wage law was not democratically enacted.

4 Limits of the obligation to obey the law

Though there is an obligation to obey resource-allocation law even under pressure from competitors, this obligation has significant gaps. First, the obligation does not apply when obeying the law despite competitive pressure would jeopardize someone's life by depriving them of their only possible livelihood. Second, the obligation does not apply to laws that have been supplanted by customs. Finally, though the argument for obeying resource allocation law may

²⁷ See, e.g., David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008); Anna Stilz, *Liberal Loyalty: Freedom, Obligation, & the State* (Princeton: Princeton University Press, 2009); Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999).

²⁸ In a society with very large inequalities of income and wealth, it might be indisputable that the property system contains injustice. There might nevertheless be reasonable disagreement about which specific property rights are unjust. Only clear injustice of specific property claims or property rules would justify businesspeople in lawbreaking. My argument is silent about the ethics of theft by people with no property.

apply to some laws of other types, it does not apply to all laws. In particular, it does not apply to laws that are beneficial but not essential either to the operation of business or to commitments all human beings rationally must have. My Kantian argument for obeying resource-allocation law does not exclude the possibility that there could be other grounds for obeying the law in these cases. In light of the unfairness that lawbreaking by competitors puts on law-abiding businesses, however, it is likely that businesspeople are sometimes justified in violating the law in response to pressure from lawbreaking competitors.

Desperate circumstances

I have assumed that the death of a business does not normally result in the death of its owners or of its employees. If a business with lawbreaking competitors fails because it obeys the law, its respect for law typically will not cost anyone their life, even though it may cost people their jobs or their investment returns. In dire economic circumstances, this assumption may not be true. Suppose there are domestic laborers who have no other possible job opportunities and no source of support other than work. Suppose most laborers in this market work “under the table.” They do not pay income tax, and their employers do not pay payroll tax. The wage these workers earn barely provides a subsistence. Domestic laborers who are unable to find an employer willing to pay an above-market wage, one that covers taxes in addition to a subsistence post-tax wage, will be unable to survive without breaking the law.

Kantian ethics does not require these workers to obey tax law at the cost of their own survival. Natural duties constrain the possible content of artificial duties. One cannot make a

morally valid promise to do something wrong.²⁹ If one cannot take on an obligation to do something wrong through one's own decisions, one also cannot acquire an obligation to do something wrong through other people's decisions to impose that obligation. To maintain one's own life and the lives of one's children is a natural duty. So there cannot be a moral obligation to obey laws that require one to sacrifice one's own life or one's children's lives, except when there is a natural moral duty—a duty not created by law—that conflicts with the duty to preserve oneself and one's children.

Dead letter law

Sometimes, a resource allocation rule is encoded in law but widely ignored because it has effectively been replaced by a custom. For example, Robert Ellickson's study of property norms in the ranching communities of Shasta County, California found that there were large differences between the law and the culturally effective norms about who bears responsibility for building and maintaining fences.³⁰ Ranchers in Shasta County were justified in following local custom rather than California law—both when local custom demanded more than the law and when it demanded less. This justification for lawbreaking is not available when the law is broken by a few competitors but widely accepted and followed in society as a whole. Suppose that a rancher seeks to reduce his cost of raising cattle by grazing on neighbors' property, in violation of laws that are widely accepted as rules in the community but that are not effectively enforced. Because this rancher can raise cattle more cheaply than law-abiding neighbors, he can lower his prices,

²⁹ Seana Valentine Shiffrin, "Immoral, Conflicting and Redundant Promises," in R. Jay Wallace, Rahul Kumar, and Samuel Freeman (eds.), *Reasons and Recognition: Essays on the Philosophy of T.M. Scanlon* (Oxford: Oxford University Press, 2011), pp. 155-178.

³⁰ Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1994), pp. 66-75.

which affects other ranchers' sales. May other ranchers in this market defend their competitive position by engaging in similar acts of trespass? Perhaps the victims of cattle trespass, if they are themselves ranchers, are justified in grazing their cattle on the offending rancher's land as a form of self-help. But other ranchers competing with the law-breaking rancher are not justified in defending their market position by trespassing on innocent third parties' land. They necessarily assert exclusive property rights of their own—to their cattle at least, if not to the exclusive use of their land. It is both irrational and immoral to assert property rights against others while refusing to respect others' property rights.³¹

A parallel account applies to taxation. Again, tax is part of a society's system of rules for the allocation of resources. To withhold tax payments one owes is morally equivalent to stealing from the public. What are people's obligations when tax laws are not widely followed, however? Much as customs about fence-mending supplanted law in Shasta County, a society can have customs surrounding taxation that supplant the law on the books. Customs of tax payment supplant law when these customs are widely acknowledged in a society *as norms*. Consider the Italian norms Arthur Kelly reported in his 1977 case study.³² Italian tax authorities expected firms to underreport their profits by 30 to 70 percent. They responded to a firm's tax return with a tax bill that was several times the amount shown on the return. Both the firm's tax return and

³¹ Ranchers might argue that there is a principled distinction between rights to land and rights to movable objects.

Such a distinction will not help the ranchers to defend their conduct. Since all human activities require the use of space, and not all human activities require the use of movable objects, rights to use space are more central to human freedom than rights to use things. One could plausibly argue that the right to own moveable objects (including cattle) matters more than landowners' right against harmless trespass. But cattle trespass is not harmless.

³² Arthur Kelly, "Italian Tax Mores," in Thomas Donaldson and Patricia H. Werhane, ed., *Ethical Issues in Business: A Philosophical Approach*, Fourth Edition, (Englewood Cliffs: Prentice Hall, 1993), pp. 81-83.

the authorities' initial tax bill were merely initial offers in a negotiation. Customs regarding tax payment had effectively replaced the law on the books.

Matters are different when some competitors violate a tax law that has not been effectively replaced by a custom. Suppose that a manager has reason to believe that some firms, including competing firms, are cheating on their taxes (with impunity), but that the general public continues to think that firms in this industry ought to pay their taxes as legally required. Under these circumstances, there may be a pattern of law-breaking in the industry, but a pattern of behavior does not constitute a custom. A custom involves a widespread belief about how people *ought* to behave. For there to be a custom of underpaying taxes, this conduct must be widely judged acceptable, not only by the people engaged in this conduct, but in the community at large. If the public generally believes that firms ought to pay taxes as required by law, there are no customs specifying tax responsibilities that differ from the legally defined tax system. There is one socially relevant set of rules for the support of public goods, namely the rules set out in law. Violating these rules is wrong, even to maintain the position of one's firm against a competitor. Every firm in a private property economy claims a right to exclude others from its property. It is wrong to insist that others respect one's firm's claims to resources while refusing to respect the government's legally valid and socially recognized claim to resources.

Beneficial but non-mandatory cooperation

I presented my argument for obeying only a specific type of law under competitive pressure, namely law that plays a direct role in defining rights to use physical or financial resources free from substantial interference. The argument can be extended to some other areas of law. It applies to law that is strictly necessary to achieving something to which person or every businessperson rationally must be committed. All business requires the ability to make binding

agreements and for there to be reasonably clear rules about when agreements are valid. If universal ethical principles regarding the validity agreements are not sufficiently clear, then business requires positive law of contract.³³ Businesspeople thus have a moral obligation to respect the law of contract.³⁴ All people (including all businesspeople) need clarity about what safety precautions they can reasonably expect others to take. To the extent that universal moral norms fail to specify what people should do to respect others' safety, we need tort law or public safety regulations to specify what we owe to each other. Businesspeople are morally required to respect tort law and to obey safety regulations, even under competitive pressure.

All that said, there are some types of law that do not serve purposes to which everyone, or all businesspeople, rationally must be committed. Law can be both beneficial and desirable without serving a critical function. Consider laws that regulate parking in a way intended to maximize the efficient use of limited curb space. For example, it may be efficient for a city to designate certain areas of curbside as one-hour parking, so that it will be easier for shoppers to find parking in a commercial district. Though laws coordinating efficient uses of curbside are useful, it would be morally permissible for a political community to choose not to have such

³³ For example, there is arguably no universally valid moral principle about how long someone should wait for an acceptance after making an offer by mail. At what point may the offeror assume that the recipient of this offer is not interested and offer his goods or services to another potential business partner?

³⁴ Respecting this obligation is consistent with breaching contracts in some circumstances. For instance, in *Steas v. Leonard*, 20 Minn. 449 (1874), breaching a contract to build a house and compensating the promisee was an ethically appropriate response to the discovery that the lot had miry soil. Respecting the law of contract requires three things: acknowledging the existence of a valid agreement where the law of contract says it does, and either performing or recognizing the need for remedy, complying with the judgments of courts in disputes, and refraining from breach when the law unambiguously treats breach as wrong. For reasons to think that American contract law does not currently treat breach of contract as wrong, though it perhaps should, see Seana Valentine Shiffrin, "The Divergence of Contract and Promise," *Harvard Law Review* 120 (2007): 708-753.

laws. Few people, if any, engage in activities that strictly require widespread compliance with these laws.

The behavior of competitors affects whether firms and their agents have a moral obligation to obey laws organizing cooperation that is not morally or rationally mandatory but that is beneficial for the community. If a firm's competitors comply with laws organizing cooperation that is socially beneficial but not rationally mandatory, the firm and its agents do have an obligation to comply, at least if they accept the benefits of cooperation. Accepting the benefits of cooperation involves normatively expecting others to follow the social rules required to produce these benefits. If one normatively expects others to take themselves to have reason to follow these rules, one should take oneself to have the reason to follow the rules as well.

Consider again the one-hour parking law. Among the people who benefit from this law are people who drive trucks for moving companies. Moving truck drivers have an interest in having regular turnover of parking in busy areas. If everyone or nearly everyone complies with the rules limiting parking on busy streets to one-hour intervals, unless one gets a special permit for a longer stay, everyone benefits, including the truck drivers. It would be wrong for an individual driver to try to make faster deliveries by parking in violation of the rules that benefit everyone while expecting others to comply with those rules.

Matters are different for the firm with law-breaking competitors. Suppose that one moving company adopts a business model that is incompatible with the parking laws. This company makes cross-country moves using a truck that makes multiple deliveries, and each truck makes those deliveries as quickly as possible. Since the time required to make a delivery is unpredictable, the company cannot give customers more than a day's notice of delivery. Neither the firm nor its customers can give a city parking authority the notice required to secure a special

permit for parking more than one hour on a busy street. So the firm chooses to ignore one-hour parking restrictions. Once this firm has started breaking the parking regulations, may other cross-country moving firms operating in the same market follow suit? To follow parking regulations to the letter would require scheduling deliveries several days in advance. To do that, a moving company would need a less compressed delivery schedule. It would thus be unable to compete on price with the firm that violates parking regulations and can thus compress its delivery schedule. Must competitors of the law-breaking firm obey the parking regulations even if (because of competitive pressure) obeying all parking regulations would result in the company's failure or a major loss of market share?

A moving company's business requires the availability of parking, but it does not absolutely require maximally fair and efficient parking. Its employees and its owners thus are not rationally committed to general compliance with regulations that make street parking maximally fair and efficient. These regulations are not essential in the way that the opportunity to have publicly recognized and respected property interests is essential to business (and to many other activities). So a moving company and its agents could coherently abandon the interest in maximally fair and efficient parking. It is not wrong or irrational to decline to pursue maximally fair and efficient parking if pursuing this good by complying with regulations would jeopardize a firm's market position or its continued viability. So a moving company is not required to cede a competitive advantage to another moving company that is breaking parking laws. Once one competitor defects, other firms may follow suit to protect their market position. Their aim is not to free-ride, but to avoid making themselves "prey to others." So it appears that firms and their agents are sometimes justified in breaking the law. Or, at least, neither the Kantian argument, nor

a fair play account, nor any defense of a merely *pro tanto* duty to obey the law can explain why firms should obey the law in cases like this one.

The conclusion that firms are sometimes justified in breaking the law is uncomfortable. Fortunately (from a non-anarchist's perspective), the scope of the moral permission to break the law under competitive pressure is limited. A wide range of legal requirements applicable to firms are of not of this type, but of the type discussed earlier; they are laws that play a direct role in allocating rights to use physical or financial resources free from substantial interference. Consider overtime laws, such as the provisions of the U.S. Fair Labor Standards Act that require employers to pay overtime to certain classes of workers. This is a prime example of an incompletely enforced law. The effectively available remedies for a first offense are limited to double back wages, court costs, and attorney's fees.³⁵ An unscrupulously profit-maximizing employer may judge that the probability of successful enforcement (either via lawsuit or via a federal enforcement action) is low enough that it is financially worth running the risk. Employers thus face an ethical question whether to obey overtime law for reasons other than narrow self-interest. Does the knowledge that many competing businesses violate overtime law justify an employer in following suit?³⁶

³⁵ 29 U.S.C. §§ 207, 215(a)(2), 216. Though civil monetary penalties are theoretically available as an additional remedy for willful first-time violations, in practice, it is rare for civil monetary penalties to be imposed for a first offense. David Weil, "Enforcing Labour Standards in Fissured Workplaces: The US Experience," *The Economic and Labour Relations Review* 22(2011): 33-54.

³⁶ For evidence that this law is frequently but not universally broken, see Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, Center for Urban Economic Development, University of Illinois Chicago/National Employment Law Project/UCLA Institute for Research on Labor and Employment, 2009.

The answer is no. Employers ethically must obey overtime laws, even if competitors shirk these laws with impunity. Overtime laws are directly concerned with resource allocation: they give certain classes of workers a right to receive certain resources from their employers when certain conditions obtain. Even if non-payment of overtime cannot be prosecuted as theft, calling it “wage theft” is morally fitting. Non-payment of overtime deprives people of resources to which they are legally entitled. Firms necessarily claim rights to property, and they cannot coherently demand that others respect their property rights unless they respect others’ legitimate legal claims to resources. So it is wrong for firms to violate resource-allocation laws, including the resource-allocation rules presented in labor law. Competitive pressure may justify firms in breaking some relatively minor laws, but it does not justify breaking labor laws and other laws that play a role in allocating economic resources between and among firms and individuals.³⁷

³⁷ I am grateful to Herbert Hovenkamp, Sarah Light, Eric Orts, Amy Sepinwall, Alan Strudler, all the members of the Wharton LGST junior faculty workshop, and audiences at the 2017 Transatlantic Normative Business Ethics Conference, the 2017 Susilo Symposium, and the 2017 Philosophy of Management International Conference. My research is supported in part by the Claude Marion Endowed Faculty Scholar Award of the Wharton School.