Legal Obligation and Ability

Abstract: In Wilmot-Smith's recent "Law, 'Ought', and 'Can'," he argues that legal obligation does not imply ability. In this short reply, I show that Wilmot-Smith's arguments do not withstand critical scrutiny. In section 1, I attack Wilmot-Smith's argument for the claim that allowing for impossible obligations makes for a better legal system, and I introduce positive grounds for thinking otherwise. In section 2, I show that, even if Wilmot-Smith had established that impossible obligations make for a better legal system, his subsequent attack on OIC fails.

Keywords: ought implies can; legal ought implies can; OIC; LOIC; legal obligations; debt obligations; duties of care; legal coercion; legal guidance

In Wilmot-Smith's recent "Law, 'Ought', and 'Can'," he argues that legal obligation does not imply ability. His argument is divided into two parts. In the first part, he argues that "a legal system which allows impossible legal obligations is better qua legal system than one which does not," and he uses this to mount an attack on the correlative moral principle, "ought implies can" (OIC).[1] In the second part, he argues that, contrary to prevailing scholarly opinion, (legal) duties of repair are not grounded on the ability to fulfill primary obligations, thereby attempting to rebut a popular presumption in favor of the principle that legal ought implies can (LOIC).

In this short reply, I show that the arguments in the first part of Wilmot-Smith's article do not withstand critical scrutiny.[2] In section 1, I attack Wilmot-Smith's argument for the claim that allowing for impossible obligations makes for a better legal system, and I introduce positive grounds for thinking otherwise. In section 2, I show that, even if Wilmot-Smith had established that impossible obligations make for a better legal system--he has not done so, but overlooking that fact--his subsequent attack on OIC fails.

Section 1 Impossible Legal Obligations

Wilmot-Smith's argument for impossible legal obligations focuses on two kinds of duties: duties of care, and debt obligations. I assess the respective considerations Wilmot-Smith advances for these different kinds of duties in the order in which he presents them.

Subsection 1.1 Duties of Care

Wilmot-Smith's argument concerning duties of care may be reconstructed as follows:

1. One reason not to have impossible legal obligations is that such obligations cannot provide guidance for those enforcing or for those subject to the law.
2. If legal standards systematically ensured possible compliance, then duties of care would be harder to ascertain.
3. If duties of care are harder to ascertain, then it is harder for these legal obligations to provide guidance for those enforcing or for those subject to the law.
4. Therefore, systematically ensuring possible compliance to legal standards is self-defeating.

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[1] (Wilmot-Smith, 2023, p. 543).

[2] My silence on the arguments in the second part of Wilmot-Smith's article should not be interpreted as endorsement.

5. Therefore, a legal system which allows impossible legal obligations is better qua legal system than one which does not.[3]

Wilmot-Smith defends this argument using two examples.

The first example involves car insurance. According to Wilmot-Smith, if legal standards systematically ensured possible compliance, then, in order for an insurance agency to determine whether it is liable for damages, it would have to determine, in every accident, whether the insured was able to comply with her duty of care at the time of the accident. But, "[f]acts about individual capacity are difficult to ascertain, especially facts about capacity at a particular moment in time."[4] So, systematically ensuring possible compliance makes it harder for insurance agencies to comply with their legal obligations (it would make it more difficult for the insurance agency to determine whether the insured complied with their duties of care and, thus, whether the agency needs to make payment).

The second example involves liability for negligence. Wilmot-Smith considers a court case in which defendant left his hayrick at the edge of his land. The hayrick spontaneously ignited, and defendant's neighbor's house burned down in the conflagration. The court ruled that, although defendant did not possess ordinary intelligence, nonetheless, in ascertaining negligence, the standard that should be applied is that of the ordinary reasonable person. Wilmot-Smith asserts that the "reasonable person" standard is easier for courts to apply than trying to determine whether, given defendant's level of intelligence, defendant was being negligent. Thus, systematically ensuring possible compliance would make it harder for those tasked with enforcing the law to do so.

However, there are at least four problems with Wilmot-Smith's argument.

First, as may be seen from premise 1 of my reconstruction of Wilmot-Smith's argument, he begins from the claim that providing guidance (henceforth: the guidance proviso) is *one* reason for ensuring there are no impossible legal obligations. But, this cripples the argument: in order to defend the claim that a legal system with impossible obligations is better than one without such obligations, Wilmot-Smith must show, if not that *every* reason in favor of LOIC can be overturned, at least that the *balance of reasons* in favor of LOIC can be overturned. In other words, even if the rest of Wilmot-Smith's argument is successful (i.e., even if he establishes that the guidance proviso actually militates against LOIC rather than in favor of it), it falls (far) short of presumptive, much less conclusive, grounds against LOIC. That is, even if Wilmot-Smith successfully shows that the guidance proviso is *one* reason in favor of LOIC can be overturned, this falls far short of showing that the balance of reasons in favor of LOIC can be overturned. I want to strengthen this point by considering a rejoinder.

Some might object by asking the following question: what is stopping Wilmot-Smith from strengthening premise 1--why not say that the guidance proviso is the *only* reason for ensuring that there are no impossible legal obligations? If the guidance proviso is the only reason in favor of LOIC, then overturning it would show that the balance of reasons in favor of LOIC can be overturned.

What stops Wilmot-Smith from doing this is that it would turn a formal problem into a substantive one: the guidance proviso is *not* the only reason for ensuring that there are no impossible legal obligations. For example, another reason is that, as Wilmot-Smith himself asserts, "legal duties may be (and are) enforced by the state using coercion."[5] If it is impossible for an agent to X, then (*a fortiori*) it is impossible to coerce that agent to X. So, the coerceability of legal obligations (henceforth: the coerceability proviso), like the guidance proviso, suggests that legal obligations must be possible to fulfill. From this it may be seen that Wilmot-Smith faces a dilemma: either premise 1 is too weak to get him to his desired conclusion, or it is false. The are at least two

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[3] Wilmot-Smith, 2023, p. 537: "in seeking to ensure that all norms are feasible the ideal motivating that ambition would become indirectly self-defeating: the norms would be less effective as guides...I will offer examples of this at the individual and institutional levels...if legal standards were systematically leveled to each individual's abilities, certain facts about the content of those legal obligations would be harder to ascertain. This would make it harder for individuals to be guided by law."

[4] (Wilmot-Smith, 2023, p. 538).

[5] (Wilmot-Smith, 2023, p. 534).

reasons, the coerceability proviso and the guidance proviso, for subscribing to LOIC, and overturning only one of them does not show that the balance of reasons militates against LOIC.

Second, as may be seen from premise 3 of my reconstruction, Wilmot-Smith thinks that epistemic problems associated with ascertaining ability can make it more difficult for legal obligations to provide guidance to those enforcing *or* to those subject to the law. The problem is that, even if we confine ourselves to the guidance proviso (i.e., even if we ignore other reasons for LOIC, such as the coerceability proviso), premise 3 does not suffice to show that systematically ensuring possible compliance of legal obligations is self-defeating. Let me explain.

In any given instance of a legal obligation, there are multiple parties that need to be taken into consideration for the guidance proviso: there might be multiple parties tasked with enforcement, and there might be multiple parties tasked with compliance. In order to show that ensuring possible compliance undermines the guidance proviso, it does not suffice to show that ensuring possible compliance makes it more difficult for legal obligations to provide guidance for *one* party; it must be shown that ensuring possible compliance makes it more difficult for legal obligations to provide guidance *on balance*, even if, perhaps, not for all parties. But, Wilmot-Smith's argument fails to take this into consideration, and this is on full display in his two examples: in his insurance example, Wilmot-Smith looks only at the effect of ensuring possible compliance on insurance companies, and, in his hayrick example, Wilmot-Smith looks only at the effect of ensuring possible compliance on the court system. But, even if he had succeeded in showing, in both of these cases, that ensuring possible compliance makes it more difficult for a legal obligation to provide guidance to one party, Wilmot-Smith would not have succeeded in showing that, when we confine ourselves to the guidance proviso, ensuring possible compliance of legal obligations is self-defeating. Let me try to make this more concrete.

Consider, first, Wilmot-Smith's insurance example. According to Wilmot-Smith, it is more difficult for insurance agencies to ascertain whether duties of care have been fulfilled if duties are indexed to individuals' abilities. Thus, he argues, if we allow violations of LOIC, it will be easier for the insurance agencies to ascertain whether duties of care have been fulfilled. On these grounds, he concludes, violating LOIC allows the law to provide more guidance for insurance agencies. Now, I am going to argue below that this conclusion is mistaken: violating LOIC does not allow the law to provide more guidance for insurance agencies, at least not for the reasons cited by Wilmot-Smith. But, putting that to the side for the moment, the point I want to make is that Wilmot-Smith arrives at this conclusion by comparing (i) a situation in which there is less guidance for the insurance agency with (ii) a situation in which there is more guidance for the insurance agency. In so doing, he neglects to consider the guidance provided to the person who is in the accident. For that person, we must compare (i) a situation in which the law provides guidance for her duties of care (because these duties are indexed to her abilities) to (ii) a situation in which the law provides zero guidance (because, *ex hypothesi*, she has duties of care that are unfulfillable).[6] But, when we add this second comparison to the mix, it sums, straightforwardly in my view, in favor of ensuring possible compliance, at least if we are confining ourselves to the guidance proviso (and, apropos of the first problem I raised above, we need not, and should not, confine ourselves in this way; we need to consider also, for example, the coerceability proviso). So, even if we grant that retaining LOIC makes things harder for insurance agencies--and, again, as I am going to argue below, this should not be granted--once we take into consideration all the parties involved (not only the insurance agencies but also the person in the accident), it may be seen that the guidance proviso still militates in favor of LOIC: the insurance example does not work.

Now let us turn to Wilmot-Smith's negligence example. Wilmot-Smith argues that ensuring possible compliance with duties of care would make it more difficult for the court to determine defendant's legal obligations

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[6] Note that the *ex hypothesi* here is on Wilmot-Smith's part: if it were possible for the person to comply with her duty of care in this case, then the example falls apart: there is no longer a violation of LOIC.

and, perforce, to enforce the same. The idea is as follows.[7] If the court ensures possible compliance with duties of care in this case, then it will have to assess negligence on the basis of defendant's level of intelligence, whereas if the court does not ensure possible compliance with duties of care in this case, then it can use a "reasonable person" standard. But, assessing negligence on the basis of defendant's level of intelligence is, according to Wilmot-Smith, more difficult for the court to do than using a "reasonable person" standard. On these grounds, Wilmot-Smith concludes that violating LOIC allows the law to provide more guidance for the court and, therefore, ensuring possible compliance with duties of care in this case undermines the guidance proviso.

However, even if we accept Wilmot-Smith's conclusion that violating LOIC allows the law to provide more guidance for the court--I am going to argue below that we ought not to accept this, but that will be later--it may be seen that Wilmot-Smith has neglected to consider whether ensuring possible compliance makes things more difficult for defendant. If defendant's duty of care is indexed to her level of intelligence (i.e., if possible compliance is ensured, as per LOIC), then the obligation can provide guidance. If defendant's duty of care is *not* indexed to her level of intelligence--if the "reasonable person" standard is applied--then the obligation cannot provide guidance at all: it is, *ex hypothesi*, impossible for defendant to comply with it.[8] In other words, on the one hand, if we ensure possible compliance, then we have guidance for defendant and less guidance for the court, and, on the other hand, if we do not ensure possible compliance, then we have no guidance for defendant and easier guidance for the court. Thus, once again, even if we confine ourselves to the guidance proviso (a mistake), and even if we accept that LOIC entails providing less guidance for the court in the negligence example (another mistake), the guidance proviso nonetheless balances out in favor of LOIC: the negligence example does not work.

With the third and fourth problems I raise for Wilmot-Smith's argument, I am going to try to make good on my claims above, that Wilmot-Smith has failed to show that ensuring LOIC results in less guidance for insurance agencies and for the courts. Note that this is *not* the same as the first or the second problem I have raised.

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[7] My reconstruction above is a paraphrase of the following paragraph from Wilmot-Smith's article:

> In *Vaughan v. Menlove*, the defendant—a man of below-average intelligence—put his hayrick at the edge of his land. The hayrick spontaneously ignited, and his neighbor's house burned down. The claimant sought damages from the defendant and succeeded at a trial before Patteson J. The defendant argued that this should be set aside on the grounds that he "ought not to be responsible for them is fortune of not possessing the highest order of intelligence." Tindal CJ rejected this argument. "Instead…of saying that the liability for negligence should be co-extensive with the judgment of each individual," he said, "we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." The defendant's argument was that this standard was more difficult for the court to apply than their proposed subjective standard. But the opposite is true for the same reason that the objective standard of care is easier for the insurer to apply. (Wilmot-Smith, 2023, p. 538)

I note two things in passing.

First, Wilmot-Smith's defense of the claim that ensuring possible compliance with duties of care undermines guidance in this case is remarkably thin (it is contained entirely in the assertion in the final sentence of the excerpt above), remarkable given that this is precisely what he needs to show, the crux of his argument. In my view, the argumentative burden of proof lies firmly on Wilmot-Smith, and he has not met it--and this is so entirely independently of the failure of the insurance example to which Wilmot-Smith appeals in that sentence.

Second, Wilmot-Smith's analogy (in the final sentence of the excerpt above) between the court and the insurance agency does not work. For the court, there is no question of physical ability; the question is purely epistemic (i.e., there is no question of whether defendant was able to move his hayrick; the question is whether it should have occurred to defendant that his placement of the hayrick posed a risk to his neighbor's property). By way of contrast, for the insurance agency, there is, perhaps, an epistemic question (Wilmot-Smith does not fill in the details of the case sufficiently to determine this one way or another), but there is also, more obviously and more pertinently, a question of physical ability. This breakdown of Wilmot-Smith's analogy is deeply problematic for his argument inasmuch as, in debate about OIC, only a small minority of OIC defenders argue that ability must be indexed to epistemic ability (rather than merely to physical ability). Indeed, Wilmot-Smith himself does not seem to think that OIC requires epistemic ability; he asserts that "an agent is "able" to [fulfill their duty] only if they are physically and psychologically able to do so and have the relevant opportunity" (Wilmot-Smith, 2023, p. 532). (Some might think that psychological ability includes epistemic ability. But, generally, psychological ability in this context refers to things like desires and (absence of inner) compulsion or coercion.)

[8] Once again, the *ex hypothesi* here is on Wilmot-Smith's part: if it were possible for defendant to comply with his duty in this case, then the example no longer contains a violation of LOIC.

The first problem has to do with the fact that Wilmot-Smith moves from the claim that the guidance proviso does not provide us with a reason to subscribe to LOIC to the conclusion that the balance of reasons comes out against LOIC, and he does so without considering other reasons that might tip the balance back in favor of LOIC. The problem is that this move is either formally or substantively flawed--it is either based on fallacious reasoning, or it relies on a false implicit premise (namely: that there are no other reasons, other than the guidance proviso, in favor of LOIC).[9] The second problem is that, even if Wilmot-Smith had succeeded in showing that systematically ensuring possible compliance makes it harder for insurance agencies to comply with their legal obligations, this does not show that systematically ensuring possible compliance makes it harder for *all* agents to comply with these legal obligations (in particular: it does not show that it is harder for the person who is actually in the accident or who is accused of negligence to comply with her legal obligations--and, indeed, it could not do so, for it is precisely these people who, in Wilmot-Smith's examples, are tasked with doing the impossible) and, therefore, it fails to show that the guidance proviso militates against LOIC, much less that there is overriding reason to reject LOIC. However, what I aim to show now is that Wilmot-Smith does not establish even this more limited result, that ensuring possible compliance makes it harder for insurance agencies to comply with their legal duties.

The third problem is one of burden of proof--not for Wilmot-Smith, but for the agents who putatively have more guidance when LOIC is violated (i.e., the insurance agency in the insurance example, and the court in the negligence example).

Wilmot-Smith assumes that, if we have a legal system that ensures possible compliance, then, in any given car accident, the burden of proof is on the insurer to ascertain whether the insured did everything that she was required to do in order to avoid the accident, paying out only if the investigation shows that she did not. But, this assumption is unnecessary and unrealistic. A superficial investigation might be sufficient to establish a presumption that then can be challenged, if one of the parties so desires--as in fact happens. To put this another way: there simply is no good reason (*pace* Wilmot-Smith) why systematically ensuring possible compliance would make things more difficult for insurance agencies--and, we may add, in order to drive the point home, if the burden of proof is high, then establishing compliance with a duty of care is a difficult task regardless of whether the duty is indexed to ability. In other words, what makes compliance complicated for insurers in such cases has everything to do with burden of proof and nothing to do with LOIC. Let me try to make this more perspicuous by making it more concrete.

Suppose that Rolly gets into an accident, and suppose that the insurer is trying to determine whether Rolly fulfilled her duty of care. Depending on the burden of proof, it might suffice, even if this duty is indexed to Rolly's abilities, to show that, in general, all else being equal and under normal conditions and the like, a normal individual would have been able to exert more care than Rolly did and, therefore, Rolly did not fulfill her duty of care. The reason that this does not amount to a rejection of LOIC is that, although it establishes a presumption against Rolly, this presumption is rebuttable. How does Rolly rebut it? Again, this is a question of burden of proof. Perhaps it would suffice for Rolly to show that, in general and under normal conditions, her abilities diverge from those of a normal person and, so, in general and under normal conditions, she would not be able to satisfy the duty of care that the insurance agency has established. This, then, would establish another presumption, this time in favor of Rolly. This presumption is, in turn, rebuttable by the insurance agency. How so? Perhaps they could show that, although Rolly's abilities generally diverge from those of a normal person, in this particular instance, this divergence was negligible. More could be said here, but hopefully this is sufficient to illustrate why LOIC need not make things more difficult for insurance agencies, except inasmuch as it enables people who get into accidents to fight unjust rulings, rulings based on standards that are (*ex hypothesi*) impossible for them to fulfill. And an exactly analogous point can be made about the court in the negligence example. A prosecutor might establish a rebuttable presumption against defendant by showing that it would have occurred to a reasonable person that a hayrick would be a fire hazard. The defendant could rebut this presumption by showing that his intellect diverges from that of a

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[9] Some might object that the burden of proof is on me to provide evidence that this implicit premise is false: if I merely assert that there might be other reasons for subscribing to the LOIC, without evincing any such reasons, then my first criticism is weak. However, I have met this burden of proof via the coerceability proviso.

reasonable person and, so, in general and under normal conditions, it would not have occurred to him that a hayrick would be a fire hazard--and so on. Ensuring a just outcome by ensuring possible compliance with the law does not require giving up on guidance for any of the parties involved, let alone all, or even most, of them.

The fourth problem has to do with the ease with which general standards can be employed. The problem is that the "ordinary person's" capacities standard (in the insurance example) and the "reasonable person" standard (in the negligence example) are not only indeterminate, but also quite difficult to apply in a defensible way. Both the indeterminacy and the difficulty of application associated with these standards stem from the same thing: they are, at least in part, empirical. Let me explain, focusing on the reasonable person standard.

On the indeterminacy side of things, we need to fill in details about the population we are using in order to determine what counts as a reasonable person. To start, we need to know what time period and what geographical region we are looking at. One piece of evidence for this, of especial relevance to the *Vaughan v. Menlove* decision (from Wilmot-Smith's negligence example), can be worked up from the fact that, although concepts like spontaneous combustion (e.g., spontaneous generation) were common currency in the first half of the 19th century, they have been largely superseded today, at least in the Western scientific tradition. So, although spontaneous combustion might occur to a reasonable person, or at least to a reasonable person who read novels, in certain contexts in the UK or in Russia in the first half of the 19th century--it was used in Dickens' *Bleak House* and in Dostoyevsky's *Crime and Punishment*--it might not occur to a reasonable person in either of these countries today. So, spontaneous combustion might occur to a reasonable person in some times and places, but it equally well might not occur to a reasonable person in other times and places. From this it may be seen that, when we use the reasonable person standard, we need to specify time and place.[10]

Along the same lines, we are likely to get different results in using the reasonable person standard depending on whether we restrict ourselves to members of a certain class or profession. For example, if we confine ourselves to the class of firefighters, when asking about what an ordinary person would judge regarding the hazards associated with parking a hayrick close to someone's house in hot weather, we might not get the same result as we would get if we confine ourselves to ivory tower academics with little to no experience of such things. Thus, when we talk about the "reasonable person" standard, we have to fill in various details about which population we have in mind. Sanity might not be statistical (*pace* O'Brien), but "ordinary" is, and it is the latter that is used to explicate the "reasonable person" standard.

Moving from indeterminacy to difficulty, it should suffice to note that, once our "reasonable person" standard has been made determinate, whoever seeks to apply it needs actually to see some data about the population in question, and this, then, calls for large-scale empirical studies.

But, I will be told, studies like this never have been done, much less appealed to, by the courts--and the courts have been using the "reasonable person" standard all the same. Thus, someone might object, surely I am mistaken: none of this is requisite in order to apply the standard.

However, I think there are two flaws in this objection. One flaw is that studies of this kind have been done, and the courts do pay attention to them. For example, in *Weems v. United States*, SCOTUS ushered in a progressive interpretation of the 8th amendment prohibition on cruel and unusual punishment, a precedent solidified in subsequent decisions (such as *Trop v. Dulles*) as the "evolving standards of decency" interpretation--and later case law, especially capital punishment case law, has appealed to various gauges of popular opinion, from trends in legislation, to polling data (e.g., *Atkins v. Virginia*, at 314-317 and 316-317n21, respectively), in order to understand what the evolving standards of decency actually are. If this kind of empirical work has been missing in applications of the "reasonable person" standard, it is arguably because the latter term is better at concealing the need for it: the reasonable person standard is as much normative as it is empirical.

The other flaw with the objection is that it assumes that the courts' use of the "reasonable person" standard in the absence of such empirical work is defensible, an assumption that, given the foregoing, I see no

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[10] Similarly, we are likely to get different results if we consider all humans that ever have lived on earth up until the time of the application of the standard as opposed to, say, all humans that have gone through the public school system in the last five years in the country (or locale) where the standard is applied.

reason to grant and every reason to reject.[11] Of course, a court, or a lawyer, might engage in armchair theorizing about what a "reasonable person" might know or be aware of--but this is only marginally easier than actually interviewing the defendant, as would have been required in Wilmot-Smith's example, and it is no easier than armchair theorizing about what should have occurred to defendant--and, more problematic still, it is entirely unclear why we should regard such hand-waving as carrying any weight on the scales of justice.

Alternatively, I might be told (and have been told) that the question is not whether the reasonable person standard is straightforward to apply; we are dealing, here, rather, with the comparative question of whether it is easier to apply the reasonable person standard than to relativize this standard to the subject in question.

However, this objection, I think, misses the mark. Again, if we are talking about armchair theorizing, it seems to me that it is just as easy to make conjectures about the reasonable person standard as it is to make conjectures about a standard that is relativized to the agent in question. If, by way of contrast, we are talking about empirically grounded assertions about the reasonable person standard, as compared with empirically grounded assertions about a more relativized standard, then, it seems to me, the comparison comes down in favor of the latter. The former is a moving target that requires large-scale, timely, and energy-intensive empirical study; the latter requires some engagement with an agent who, at least in *Vaughan v. Menlove*, is directly at hand. To assert that the reasonable person standard was easier to apply in this particular case is, it seems to me, in clear contravention of the facts. Moreover, an exactly analogous point can be made about the "ordinary person's" capacities standard. For example, suppose that the agent who gets into a car accident is 60 years old. Is the general capacity that Wilmot-Smith wants to appeal to (rather than the individualized capacity) a sort of weighted average of all driving adults, or only of 60 year old driving adults (or 55-65 year old driving adults, etc.)? The standard is indeterminate, and its application promises to be more, not less, difficult to apply in a given case: it is easier to study a single individual in front of you than a large number of individuals not present.

To summarize: I have raised four objections to Wilmot-Smith's argument for the claim that, when considering duties of care, a legal system that allows for impossible obligations is better than one which does not. First, I noted that the only reason Wilmot-Smith considers for barring impossible obligations is the guidance proviso, and I also noted that there are other, arguably weightier, reasons for barring such obligations (namely: the coerceability proviso). Second, I pointed out that Wilmot-Smith's arguments about the guidance provided by legal obligations, when we systematically ensure possible compliance, are one-sided: he omits consideration of the obligee. Third, I argued that Wilmot-Smith's examples fail because he neglects to consider burdens of proof and rebuttable presumptions. Fourth, I argued that Wilmot-Smith's examples fail because he has mistaken ideas about general standards, like the "ordinary person's" capacities standard and the reasonable person standard. All four of these problems are individually fatal to Wilmot-Smith's argument. I conclude that Wilmot-Smith's attempt to use duties of care to argue for impossible legal obligations does not work. Let us turn to Wilmot-Smith's discussion of debt obligations to see whether it is more successful.

Subsection 1.2 Debt Obligations

Wilmot-Smith's argument concerning debt obligations may be reconstructed as follows:

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[11] Indeed, we might reject the decision in *Vaughan v. Menlove*, the case Wilmot-Smith appeals to for his liability for negligence example (see note 7 above), as unjust on precisely these grounds. More, this decision is often cited as having first introduced the "reasonable person" standard and, therefore, may be cited as the progenitor of a tradition of irresponsible legal reasoning and decisions.

I might be told (and, indeed, have been told) that the objections I raise in this footnote are pure assertion. However, that is not so. Indeed, the point I am making is that, to date, claims about the reasonable person standard, used to justify legal decisions in the tradition of *Vaughan v. Menlove*, are pure assertion, and that they are so in a context in which this assertion cries out for defense.

To make this concrete: I see no reason to accept that it would occur to a "reasonable person" that a hayrick, parked near a neighbor's house in hot weather, is a fire hazard. Of course, I might be wrong about this (i.e., about whether a reasonable person would take a hayrick to be a fire hazard). But, that is illustrative of, and not a problem for, the point I am trying to make. We do not seem to have infallible epistemic access to what should (or should not) occur to a reasonable person in a given context, and, because the legal decisions that have been based on this standard have so much consequence, at least for those involved in the trials, it seems to me that more work needs to be done to justify what heretofore have been pure assertions about what follows from this standard.

1. If there are no impossible legal obligations, then there are no impossible debt obligations.
2. To say that there are no impossible debt obligations is counterintuitive.
3. If there are no impossible debt obligations, then the legal institutions of guarantee and bankruptcy are incoherent.
4. To say that the legal institutions of guarantee and bankruptcy are incoherent is counterintuitive.
5. Therefore, a legal system which allows impossible legal obligations is better qua legal system than one which does not.[12]

Wilmot-Smith supports premise 2 with an appeal to past and present legal systems: "no legal system in history has taken the mere fact of insolvency to affect the content of an insolvent's debts."[13] In order to support premise 3, Wilmot-Smith argues, first, that a guarantee is a contract in which one party promises to pay a debt should the principal debtor fail to do so and, thus, "if impossibility erased the principal debtor's obligation, there would be no obligation for the surety to secure."[14] Wilmot-Smith then argues, second, that the institution of bankruptcy, which is intended to enable a debtor to escape the burdens of debts and, in addition, to distribute the debtor's (limited) funds to creditors (in a just manner), presupposes an inability to meet one's obligations, so, if there were no impossible debt obligations, then "there would be no need for an institution of bankruptcy."[15]

However, there are at least three problems with Wilmot-Smith's argument.

The first problem with Wilmot-Smith's argument is with premise 2. As recent defenses of OIC reveal, debt obligations are considerably more complicated than Wilmot-Smith allows. To see why, suppose that Miyu contracts a debt for $300 on Monday, to be paid on Sunday, and suppose, further, that there are various actions that Miyu must perform or omit in order fulfill this obligation. For example, perhaps Miyu must bake a cake for someone (in order to get paid), and Miyu also must refrain from going on a shopping spree (spending the money instead of repaying it). In that case, willfully omitting any of the actions that must be performed, or willfully performing any of the actions that must be omitted, constitutes a willful infringement of the original obligation–– and there is nothing counterintuitive about an obligation that ceases to be binding once it has been violated. Indeed, that seems to be the nature of obligations, as does the fact that, when an agent willfully violates an obligation in this way, various duties of repair then come into play.

But, I will be told, this is, at best, only a partial reply to Wilmot-Smith. After all, OIC applies not only to cases of culpable inability, but also to cases of inculpable inability. Thus, Wilmot-Smith might concede the point just made––and nonetheless contend that applying OIC to cases of inculpable inability is counterintuitive. Is there anything that can be said against this?

In fact, there is.

Suppose that Miyu does everything within her power to meet her debt obligation, but suppose that life does not cooperate. Perhaps the person who promised to pay for the cake does not do so; perhaps Miyu's bank goes out of business and Miyu loses all of her money; or perhaps Miyu is robbed while en route to pay the debt. In any of these scenarios, OIC entails that Miyu's debt obligation is morally cancelled. However, OIC does not entail

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[12] Wilmot-Smith, 2023, p. 540: "[T]he OC critique must hold that all debts which are impossible to perform are, for that reason, morally indefensible. This places substantial intuitive pressure on the OC critique. That pressure is increased by the wider counterintuitive implications the OC critique seems to warrant when applied to debts. If an individual cannot pay their debts at *t*, the OC critique suggests that the individual cannot, morally, have a duty to pay at *t*. The obligation ought, therefore, to be canceled. This would render incoherent legal institutions—like bankruptcy, insurance, and guarantee—which presuppose the validity of such obligations. I have already discussed obligations of insurance; let me, then, turn to bankruptcy and guarantee."

I note in passing that Wilmot-Smith's reference to his previous discussion of obligations of insurance is quite awkward inasmuch as there is no obvious way to bring his insurance example, which was used to illustrate duties of care, to bear on the present issue. For that reason, I have declined to include the legal institution of insurance in premises 3 and 4 of my reconstruction above.

[13] (Wilmot-Smith, 2023, p. 540).

[14] (Wilmot-Smith, 2023, p. 541).

[15] (Wilmot-Smith, 2023, p. 542).

that the moral landscape remains unchanged: Miyu might have other obligations that arise as a result of her inability. For example, Miyu might be obligated to undertake to pay her debt at a later date, perhaps with interest. Indeed, it is hard to see how we could make sense of such an obligation if her original obligation stands uncanceled: do we really want to say, e.g., that Miyu is obligated to pay back $300 on Sunday *and* she is obligated to pay back that same $300 (plus interest) the following Sunday? This seems absurd. Thus, if I am right about this, then not only is Wilmot-Smith mistaken in asserting that it is counterintuitive to block impossible debt obligations, but, more, to allow impossible debt obligations is itself counterintuitive.

However, Wilmot-Smith might contend, as per premise 3, that impossible debt obligations are nonetheless necessary in order to render the legal institutions of guarantee and bankruptcy coherent. But, what I want to show now is that premise 3 is false.

Consider, first, guarantee. As noted above, Wilmot-Smith maintains that, if there were no impossible legal obligations, then, when it is impossible for Miyu to pay her debt, the guarantor no longer has an obligation to secure. However, in the legal institution of guarantee, the guarantor never undertakes to secure the original *obligation*. For example, if Miyu had a guarantor, the latter would not have contracted to force Miyu to pay the $300. Indeed, if *that* were the point of the legal institution of guarantee, then impossible obligations would render the institution incoherent: to recall a point made in subsection 1.1 of this article, there is no way to coerce someone to do the impossible. The guarantor, rather, undertakes to secure the original *debt*, and this obligation is "activated" if, but only if, the original debtor defaults. But, this "activation" has nothing to do with why the original debtor defaults, whether through inability or any other reason, nor does it have anything to do with whether the original debtor is to blame for their default. Moreover, it is counterintuitive to say that the original debtor and the guarantor *each* owe the amount of the original debt, which is what we seem to be forced to say if, with Wilmot-Smith, we maintain that the original debtor's obligation is not cancelled by inability to pay. From this it may be concluded that, first, LOIC does not undermine the legal institution of guarantee and, second, allowing impossible debt obligations, in conjunction with guarantee, is counterintuitive.

Consider, now, bankruptcy. According to Wilmot-Smith, if there were no impossible legal obligations, there would be no need for an institution of bankruptcy because the "law of insolvency presupposes an inability to meet one's obligations."[16] But, this is mistaken. The law of insolvency presupposes, not that one is unable to meet one's obligations, but that one is unable to pay debts that one has contracted to pay, and it can be seen precisely as formal, institutional recognition of the fact that this inability cancels any obligation to pay these debts.

Here is an alternate way to put the point. It makes little sense to say that someone who has declared bankruptcy still has the debt obligations that drove her to this declaration. Indeed, Wilmot-Smith himself maintains that "a just system of insolvency should provide a debtor with the ability to escape from the burdens of debts."[17] So, either debt obligations are cancelled *before* one declares bankruptcy, *at the time when one is unable to fulfill them*, or debt obligations are cancelled *at the time when one declares bankruptcy*, even if inability preceded this time. However, it is useful to recall, at this point, what was said in the previous subsection of this article: there are burden of proof considerations that are relevant. Merely declaring oneself insolvent does not suffice; an agent who wants to avail herself of bankruptcy laws must *prove*, to the satisfaction of the court, insolvency. This does not mean that the legal obligations persist through this period (i.e., until inability has been satisfactorily proven). It means, on the contrary, that the institutions that are tasked with enforcing legal obligations are not omniscient, even if they recognize that one cannot get water from a stone. But, what these institutions are doing in such cases is, arguably, formally recognizing that the bankrupt's debt obligations are not binding on account of inability to pay--and this would be incoherent if the debt obligations were not cancelled by virtue of the inability (rather than by *fiat* by the court). And if I am right about this, then the institution of bankruptcy gives the lie to Wilmot-Smith's claim, reproduced above, that "no legal system in history has taken the mere fact of insolvency to affect the content of an insolvent's debts."

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[16] (Wilmot-Smith, 2023, p. 542).

[17] (Wilmot-Smith, 2023, p. 542).

However, these three problems are conjointly fatal for Wilmot-Smith's debt obligations argument. Thus, it seems to me that Wilmot-Smith's debt obligations argument is no more successful than his duties of care argument. More, in the course of showing this, I have uncovered presumptive reasons for thinking that systematically ensuring possible compliance with legal obligations makes for a better, rather than a worse, legal system, exactly the opposite of what Wilmot-Smith wants to show. For example, we saw that there are reasons other than the guidance proviso for ensuring possible compliance; we saw that the guidance proviso itself militates in favor of ensuring possible compliance; we saw that maintaining impossible debt obligations has counterintuitive implications; and we saw that the legal institutions of guarantee and bankruptcy make most sense if we assume that there are no impossible legal obligations.

I conclude that Wilmot-Smith's attempt to show that impossible obligations make for a better legal system does not withstand critical scrutiny and, more, that there are at least presumptive grounds, stemming from the very considerations that Wilmot-Smith introduces, for concluding the opposite, that allowing for impossible obligations would make for a worse legal system.

Section 2 The Attack on OIC

As noted in the introduction of this article, Wilmot-Smith uses his attack on LOIC in order to mount an attack on OIC: Wilmot-Smith argues that, if allowing for impossible legal obligations makes for a better legal system, then we have reason to reject OIC. I have shown that Wilmot-Smith's arguments for the antecedent of this conditional fail, and I have introduced presumptive grounds for thinking that it is false. However, I want to shelve those concerns for the moment. What I want to show now is that, even if a legal system should allow for impossible obligations, Wilmot-Smith's attempt to use this against OIC does not work.

Wilmot-Smith's argument may be reconstructed as follows:

1. If allowing for impossible legal obligations makes for a better legal system, then we must give up one of the following two theses: (A) a legal obligation is morally defensible only if there is a corresponding moral obligation, or OIC.
2. Giving up (A) comes at a cost.
3. Giving up OIC "is the route with least theoretical or explanatory cost."[18]
4. Therefore, we should give up OIC.[19]

Wilmot-Smith's defense of this argument has three prongs.

First, he defends premise 2:

> The idea that individuals might be justifiably required to act in certain ways, indeed coerced to act in those ways, even when it is not the case that they ought to act in those ways, is unappealing.[20]

The cost, then, of giving up (A) is that to do so is unappealing.[21] So, (A) should not be given up.

Second, Wilmot-Smith argues that, although there are alternative interpretations of OIC, none enables its defenders to skirt the problem he is raising. Wilmot-Smith considers one interpretation of OIC which says that it applies only to natural obligations--duties that are independent of status or past acts. He concedes that this

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[18] (Wilmot-Smith, 2023, p. 545).

[19] (Wilmot-Smith, 2023, pp. 542-545).

[20] (Wilmot-Smith, 2023, p. 543).

[21] Wilmot-Smith gives no examples to illustrate this claim, nor is it clear how unappealing (and, thus, how weighty the cost of) this is supposed to be.

interpretation of OIC would obviate his argument about debt obligations, which are incurred on the basis of past acts, but he contends that the "objective standard of care is a natural obligation," and, thus, this interpretation of OIC still would create tension for LOIC with duties of care.[22] Wilmot-Smith then considers another interpretation of OIC, one which says that "the time index of 'can' need not be synchronic with that of 'ought'."[23] Wilmot-Smith notes that this interpretation of OIC enables its defenders to say that debt obligations are not cancelled by inability at the time the debt is due provided that there was *some* time when these obligations were fulfillable. However, he also notes that this does not suffice to obviate the objections he raised against LOIC for duties of care or for debt obligations, for the former do not raise issues associated with time indices, and in at least some cases of the latter, "there is no way--and there is never any way--for the fraudster to meet all their obligations."[24] Thus, Wilmot-Smith concludes that "there does not seem to be any plausible account of O[I]C which can be used" to avoid creating problems for LOIC.[25]

Third, Wilmot-Smith points out that OIC "has come under widespread and sustained attack in recent philosophical work."[26]

On the basis of this three-pronged defense of his argument, Wilmot-Smith maintains that we should give up OIC.

However, as may be seen from the quotation in premise 3 of my reconstruction, Wilmot-Smith justifies giving up OIC on the basis of a *comparison* of the theoretical and explanatory costs associated with giving up (A). According to Wilmot-Smith, OIC is the loser in this comparison, and, therefore, we should give it up. But now consider that, as noted in the block quotation above, Wilmot-Smith finds giving up (A) unappealing because this would mean that individuals might be justifiably required, and even coerced, to act in certain ways even when it is not the case that they ought to do so. The problem is that, if we accept (A) but give up OIC (as Wilmot-Smith proposes), then individuals might be justifiably required, and even coerced, to act in certain ways *even when it is not the case that they are able to do so*. The former might be unappealing. But, the latter is incoherent. Thus, if we are, as Wilmot-Smith asserts, to compare the theoretical and explanatory costs associated with giving up OIC with those associated with giving up (A), then, given Wilmot-Smith's own arguments, we ought to cleave to OIC and reject (A), exactly the opposite of what he wants--and all of this is assuming, what I called into question in section 1 of this article, that Wilmot-Smith is correct in asserting that a legal system with impossible obligations is better than one without.[27]

Conclusion

In this short reply article, I defended both OIC and LOIC from Wilmot-Smith. I showed that Wilmot-Smith's attempt to use duties of care and debt obligations to argue that legal systems should allow for impossible obligations does not work, and I showed, independently of this first result, that Wilmot-Smith's attempt to undermine OIC on the basis of his rejection of LOIC does not work. However, Wilmot-Smith does get one thing

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[22] (Wilmot-Smith, 2023, p. 544).

[23] (Wilmot-Smith, 2023, p. 544).

[24] (Wilmot-Smith, 2023, p. 545).

[25] (Wilmot-Smith, 2023, p. 545). Although I have no intention of dwelling on it here, it is worth pointing out that this conclusion is false. Wilmot-Smith considers only versions of OIC for which ought logically entails ability. However, some philosophers defend a version of OIC which says that ought conversationally implicates ability, and this would obviate the problems he raises.

[26] (Wilmot-Smith, 2023, p. 545).

[27] The argument in this paragraph can be sharpened. The fact that OIC has come under widespread and sustained attack is not an explanatory or a theoretical cost. Indeed, given how philosophy journals and presses work, attacking OIC probably would not be popular and publishable if the principle were not widely held. So, not only does citing this widespread and sustained attack on the principle not evince a theoretical or explanatory cost associated with it, but it also does not show that the principle is unpopular (which itself would not be a theoretical or explanatory cost), and, in fact, may be cited as *prima facie* evidence to the contrary.

right: OIC has come under widespread and sustained attack in recent years. What is perhaps surprising is that, when we peak under the hood of these attacks, they come apart like wet tissue paper--this despite the fact that they are published by leading philosophers and in leading venues (like the journal *Ethics*). I leave it to others to conjecture as to the reasons for this.

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