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The State Obligation to Protect

A dissertation submitted in partial satisfaction of the  
requirements for the degree Doctor of Philosophy  
in Philosophy

by

David Louis Attanasio

2015

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## ABSTRACT OF THE DISSERTATION

The State Obligation to Protect

by

David Louis Attanasio

Doctor of Philosophy in Philosophy

University of California, Los Angeles, 2015

Professor Seana Shiffrin, Chair

This dissertation proposes an explanation of why the state has a special moral obligation to protect individuals in its legal territory against violence committed by private actors. Having an explanation of this obligation will allow us to better determine a number of its major characteristics, including to whom the state owes this obligation—the scope of the obligation—apart from those persons actually located in the state’s legal territory. It argues that the state has a special moral obligation to protect because the state is the fiduciary of those individuals in its legal territory and has a fiduciary obligation to advance their purposes reasonably. Since obtaining security from violence is a normal and fundamental purpose of individuals, the state has a fiduciary obligation to protect them from private violence.

To support this conclusion, the dissertation evaluates whether the most plausible explanations of the special obligation to protect can account for our moral intuitions. Apart from the fiduciary explanation, it considers and rejects four alternatives. First, the obligation to protect might arise as an application of an inherent duty to promote justice, including by protecting against acts of violence. Second, it might arise because

the state normally contributes causally to the harm from most or all acts of violence that occur in its territory, so it has an obligation to protect against that harm. Third, it might arise because the state implicitly promises to protect by communicating a claim that it has a monopoly on the legitimate use of force. Fourth, it might arise because the exercise of coercive political control is legitimate only if the state simultaneously protects against violence. After rejecting these alternatives, the dissertation explains, defends, and applies the fiduciary account to the question of the scope of the special obligation to protect.

The dissertation of David Louis Attanasio is approved.

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## CHAPTER 1: OVERVIEW

### I. INTRODUCTION

Non-state actors commit many of the most serious acts of violence and oppression in many regions of the world.<sup>1</sup> States must decide what measures of protection to implement when confronted with drug cartels and other militarized criminal organizations, domestic violence targeting women and children,<sup>2</sup> state-aligned paramilitary organizations,<sup>3</sup> racist resistance to a civil rights movement,<sup>4</sup> violence against women in society at large,<sup>5</sup> random acts of violence,<sup>6</sup> and other problems of violence between private individuals. These circumstances motivate investigating what

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<sup>1</sup> As an empirical matter, I believe Leslie Green exaggerates, at least when we consider issues of personal security at the global level, when he says that “Hobbes’s fear of anarchy, for instance, now seems to be an absurd starting-point for a theory of the state: so far from being a constantly looming threat, the state of nature would be very difficult to reach from our present position.” LESLIE GREEN, *AUTHORITY OF THE STATE* 2 (1988). Weak, failing, and failed states are a substantial contemporary practical problem at the global level. INT’L CRISIS GROUP, *POLICING URBAN VIOLENCE IN PAKISTAN* (2014); INT’L CRISIS GROUP, *GOVERNING HAITI: TIME FOR NATIONAL CONSENSUS* (2013); INT’L CRISIS GROUP, *SOMALIA: AN OPPORTUNITY THAT SHOULD NOT BE MISSED* (2012). See also Found. for Peace, *The Failed States Index Rankings*, <http://ffp.statesindex.org/rankings> (2013).

<sup>2</sup> See, e.g., *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. 1 (2009) (considering domestic violence targeting women); *Z v. United Kingdom*, App. No. 29392/95, Eur. Ct. H.R. 1 (2001) (considering domestic violence targeting children).

<sup>3</sup> See, e.g., *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006) (considering a paramilitary attack on a town in Colombia); *Koku v. Turkey*, App. No. 27305/95, Eur. Ct. H.R. 1 (2005) (concerning a forced disappearance during the Kurdish conflict in Turkey); *Akkoç v. Turkey*, App. Nos. 22947/93 and 22948/93, Eur. Ct. H.R. 1 (2000) (concerning an extrajudicial execution presumably by a state-aligned group during the Kurdish conflict in Turkey); *Kılıç v. Turkey*, App. No. 22492/93, Eur. Ct. H.R. 1 (2000) (concerning an extrajudicial execution presumably by a state-aligned group during the Kurdish conflict in Turkey); *Mahmut Kaya v. Turkey*, App. No. 22535/93, Eur. Ct. H.R. 1 (2000) (concerning a forced disappearance and extrajudicial execution presumably by a state-aligned group during the Kurdish conflict in Turkey).

<sup>4</sup> See, e.g., ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* xiii-xxxiv (1990); Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 1966 DUKE L.J. 415, 417-19.

<sup>5</sup> *González (“Cotton Field”) v. Mexico*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 280-84 (Nov. 16, 2009) (considering the forced disappearance and murder of three women in Ciudad Juarez, Mexico).

<sup>6</sup> *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 116 (1998) (considering an attack on a family, including the murder of a family member, by a mentally ill school teacher in England).

considerations underlie the state's special obligation to protect people in its territory against acts of violence and oppression from other private persons. When protection efforts (or non-efforts) are unsuccessful, advocates for constitutional and human rights must often then decide whether the state acted as it should have. Frequently, such matters end up in front of courts, which must then cast judgment on the legality of the state action, a decision often infused with intuitions about state moral obligations.<sup>7</sup> Despite the necessity of drawing on a theory to apply the obligation to protect in a principled way in such circumstances, we currently lack a clear normative theory of the state's obligation to protect, or even a well defined set of normative options.<sup>8</sup> This dissertation will provide theoretical resources for such decisions by evaluating possible explanations of the state's moral obligation to protect.

The proper role of the state in providing for individual security through fulfillment of its state obligation to protect is not a new issue. Early modern political philosophers like Hobbes and Locke viewed the state as, at least in part, a solution to problems of individual security that would exist in the state of nature. In their understandings of the state, an important reason that individuals have to enter or submit to a state is to escape the lack of security they would face without its power to protect. On Hobbes's view, rational individuals have sufficient reason to submit to the state (or sovereign) because the state's power is necessary to escape the state of war that would arise in the state of nature.<sup>9</sup> While Locke was primarily interested in exploring the conditions for state legitimacy,<sup>10</sup> he also understood that the insecurity people would

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<sup>7</sup> See, e.g., *supra* notes 2-5.

<sup>8</sup> Instead, we have an international jurisprudence with many areas of confusion, tension, or even contradiction. See David L. Attanasio, *Militarized Criminal Organizations in Latin America and Human Rights Court Oversight of State Protection Efforts: Evidence from Colombia*, 41 FLA. ST. U. L. REV. 370-75 (2014).

<sup>9</sup> See, e.g., THOMAS HOBBS, *LEVIATHAN* ch. XVII (1651); see also JOHN RAWLS, *LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY* 73 (2007).

<sup>10</sup> See, e.g., JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶¶ 95 (1689); see also JOHN RAWLS, *LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY* 105-06, 122 (2007).

face in a state of nature is a principal reason why they would enter into a state.<sup>11</sup> However, despite defending the idea that providing a solution to the problems of physical security is an important part of the moral justification for the state, neither Hobbes nor Locke wrote extensively on why a state has to protect individuals against violence from others once the state and the society it constitutes are ongoing concerns.<sup>12</sup>

The absence of sustained argument on the issue, not only in Hobbes and Locke but also in the writings of later theorists, is unfortunate. There are many important unanswered questions about the state obligation to protect that a more developed understanding of its foundations could help resolve. Among the questions: What should the obligation require when it conflicts with the right to privacy or the right to an independent family life, such as if protection requires intrusive surveillance or interference with parental decisions? When exactly should state resource limitations excuse or justify the failure to fulfill the state obligation to protect?<sup>13</sup> How should we determine whether the state has fulfilled the obligation in challenging circumstances—a

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<sup>11</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶¶ 126, 131, 134 (1689).

<sup>12</sup> Following Hobbes and Locke, the attention of European and U.S. political philosophers shifted from considering questions suggested by problems of security in the absence of a consolidated state to those of rights and social justice within a consolidated state. Even a straightforward comparison of the role of insecurity in motivating the social contract in Hobbes, Locke, Rousseau, and Kant might indicate this trend. And at no point did any of these philosophers, including Hobbes or Locke, devote substantial attention to analyzing why the state has an obligation to protect individuals against violence from private persons. THOMAS HOBBS, *LEVIATHAN* ch. XXI, ¶ 21 (1651); THOMAS HOBBS, *ON THE CITIZEN* ch. XIII, ¶ 3 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge University Press 1998) (1642); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶ 131 (1689). JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT*, in *THE BASIC POLITICAL WRITINGS* 139, 150 (Donald A. Cress trans., 1987) (1762).

<sup>13</sup> For example, in which of the following situations would the failure to fulfill the obligation be justified?

1. Current budgetary allocations do not permit the state to fulfill the requirements of the obligation to protect, but different allocations would allow for its fulfillment.
2. Current state revenues do not permit the state to fulfill the requirements of the obligation to protect, but a different taxation policy would allow for its fulfillment.
3. Potential state revenues under some taxation policy would permit the state to fulfill the requirements of the obligation to protect, but only at the expense of some other important or compelling public policy, such as economic growth, anti-poverty programs, or drug prohibition.
4. State revenues under no potential taxation policy would permit the state to fulfill the requirements of the obligation to protect.



substantial deviation from what is reasonable or any such deviation? And should we require the state to have special skills or simply ordinary technical ability? Is it sufficient that the state has a reasonable process for making decisions regarding protection or must the decisions it makes be reasonable? May individuals waive state protection against violence or must the state protect against acts of violence performed with consent? Is it permissible, and in what circumstances, for the state to delegate the fulfillment of its obligation to protect to private persons or organizations?

Despite the broad range of questions, this dissertation will primarily direct its theorizing toward addressing the question of scope. Although we intuitively accept a state has a special obligation to protect those in its *legal* or *national* territory in normal conditions, in exceptional circumstances our intuitions provide less guidance as to whom a state owes this special obligation. For examples of these exceptional circumstances, suppose a state has effective control of a foreign territory because of its military presence in that territory, in that the military forces normally repress the use of force against it and act to eliminate the capacity of organizations to use such force.<sup>14</sup> Or suppose a state effectively controls the borders of a foreign territory, without maintaining military presence in the territory itself.<sup>15</sup> Or the state has part of its national territory occupied by another state. Or a state takes physical custody of persons in a foreign territory not subject to its control, during either a legal extradition or during extraordinary (illegal) rendition. Or a multinational corporation incorporated or headquartered in a state commits human rights violations abroad. Or illegal groups operating in one state launch cross border attacks from the territory of a state. Although our moral intuitions indicate that the state normally has a special obligation to protect all those within its national territory and normally has no such obligation abroad absent

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<sup>14</sup> This description might correspond to situations of military occupation or colonialism. See *also infra* ch. 4 Part III.B.2.b.

<sup>15</sup> This description might correspond to the relationship of Israel to the Gaza strip until mid-2014.

a substantial relationship to the violence, they leave unresolved a range of interesting cases that a theoretical explanation may help address.

But, intuitively, what is the state's special moral obligation to protect against private acts of violence and oppression in its national territory? What does it require of states?<sup>16</sup> To protect against an event is to take some action—a protective measure—aimed at preventing or stopping the occurrence of that event or at reducing the harm resulting from that event.<sup>17</sup> So if a state sends the police to stop an act of domestic violence or enacts criminal sanctions for such violence aimed at providing a disincentive for its occurrence, the state protects against it. Acts of violence and oppression (violence for short) include those that violate rights to life, personal integrity, and physical liberty, such as murder, torture, kidnapping, or rape. The state must, at a minimum, both implement systematic measures of protection, like law enforcement and criminal and civil justice systems, and take operational measures in response to risks known on the basis of direct evidence like a reported threat or attack, such as by sending the police or investigating.<sup>18</sup> Operational protection measures are required, at a minimum, whenever the state knows or should know, on the basis of direct evidence, of a risk to a specific person or persons that he or she will be subject to an act of violence or oppression.<sup>19</sup> In principle, it may be permissible for the state to delegate the execution of

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<sup>16</sup> See also *infra* Part III.

<sup>17</sup> One pair of crime prevention scholars propose the following definition: “crime prevention is defined as: ‘the total of all private initiatives and state policies, other than the enforcement of criminal law, aimed at the reduction of damage caused by acts defined as criminal by the state.’” Jan J.M. van Dijk & Jaap de Waard, *A Two-Dimensional Typology of Crime Prevention Projects; With a Bibliography*, 23 CRIM. JUST. ABSTRACTS 483, 483 (1991).

<sup>18</sup> See *infra* Part III.A.

<sup>19</sup> See *infra* Part III.A. Additionally, a better understanding of the foundations will contribute to determining exactly when the state must take operational protective measures—measures responsive to a particular risk like sending in the police. For example, the state might have to take such operational measures when it knows of a violent group likely to commit future acts of violence and oppression even absent knowledge of who is the target of the risk. Cf. David L. Attanasio, *Militarized Criminal Organizations in Latin America and Human Rights Court Oversight of State Protection Efforts: Evidence from Colombia*, 41 FLA. ST. U. L. REV. 341, 375-95 (2014). And it should help us understand in much more detail what operational protective measures the obligation requires: whether the obligation simply requires doing something in

some or all measures of protection to private parties but the state itself is ultimately subject to the obligation to protect, and violates that obligation if adequate protection is not provided.

This obligation is a special obligation to protect those persons present in the state's territory against acts committed other private persons. While I call it an obligation to protect, I will not distinguish obligations and duties in any technical sense in this text, such as on the basis of whether or not they are acquired voluntarily.<sup>20</sup> Unexceptionally, the state has an obligation not to harm and to avoid being the cause of harm, which explains why it must protect against violence from its own agents or, more simply, not harm through their actions.<sup>21</sup> More interesting is why the state has a special role, here understood as a special obligation to protect, in ensuring that people present in its territory are not subject to acts of violence or oppression. The obligation is special in that a state does not generally have to take operational protective measures whenever a person not present in its territory is known to be at risk of suffering an act of violence or oppression. Nor does a state normally have to implement systematic protection measures for those outside its territory.<sup>22</sup> While in some exceptional cases, a state may have moral obligations to protect or contribute to protection abroad, it does not have the same general obligation to protect persons abroad in these ways.

The state's special obligation to protect is not, at its core, an obligation to establish or maintain a just normative framework for a society, although it may require

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response to a risk, whether the state must do all it can to prevent the risk from materializing, or some other option.

<sup>20</sup> For example, in Chapter 2, I consider an attempt to explain the special state obligation to protect in terms of an inherent duty of justice, incumbent on all agents in virtue of their moral agency. See *infra* ch. 2.

<sup>21</sup> See *infra* ch. 3 Part II.

<sup>22</sup> For more on this point, see *infra* III.C. I do not believe the limits of the special moral obligation are entirely clear. A person who resides and is physical present in a state's territory clearly benefits from the special moral obligation. A person who does not reside in and is not present in the territory, and also is not a citizen of the state, clearly does not benefit from the special obligation. The reach of the special obligation is unclear for persons who combine these characteristics.

the state to execute or implement the normative framework. Much recent political philosophy has emphasized the basic structure of a society, plausibly understood as the set of social norms, including those of a legal or customary character, that apply to that society.<sup>23</sup> A state has an obligation to enact legal norms that prohibit violence because basic justice requires such legal norms and the state normally makes the law.<sup>24</sup> However, there is a distinct question as to why the state must protect against violence, which is not primarily a question of norm-setting or maintenance but instead of norm-execution or implementation, whether the norms are moral or positive in character.<sup>25</sup> Even if the state is the only entity that can make law, it is not the only actor that could potentially protect against violence: protection could be a communal obligation shared by all, for example.<sup>26</sup> So, although it may be obvious that the state must prohibit violence because only it can, it is not obvious why the special obligation to protect against violence ultimately falls upon the state.

Similarly, it does not directly resolve the problem to observe that the state has a monopoly on the use of physical force or a monopoly on the *legitimate* use of physical force, arguing that if no one other than the state is able or permitted to use force, the state must protect.<sup>27</sup> Even though many states fail to have a complete monopoly on the

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<sup>23</sup> John Rawls is most directly responsible for this reorientation of political philosophy with his emphasize on the basic structure. See JOHN RAWLS, *A THEORY OF JUSTICE* 7 (1971). He says, “by an institution I shall understand a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like.” *Id.* 55.

<sup>24</sup> This suggestion bears a passing resemblance to Leslie Green’s category of task efficiency explanations of the duty to govern. Leslie Green, *The Duty to Govern*, 13 *LEGAL THEORY* 173 (2007) (“the task [of governing] falls to those who can as a matter of fact effectively settle problems of coordination for the common good.”).

<sup>25</sup> It may be partly an issue of norm setting, insofar as state executive action is governed by norms. For example, the establishment of police may require norms. These norms do not govern the conduct of private persons but instead the conduct of the state.

<sup>26</sup> For historical examples, see David Sklansky, *The Private Police*, 46 *UCLA L. REV.* 1165, 1195-97 (1998); Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 282-90 (2011) (relying on the community to enforce punishments).

<sup>27</sup> For the idea that a state claims a monopoly on legitimate force, see MAX WEBER, *Politics as a Vocation*, in *THE VOCATION LECTURES* 32, 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., Hackett 2004) (1919).

use of physical force, we continue to accept that they have an obligation to protect against private violence. Thus, the obligation to protect cannot arise from the mere fact that the state prevents anyone else from protecting. And the obligation to protect also does not arise directly from a monopoly on the *legitimate* use of force. Both law and morality normally permit self-defense and defense of others with force—individuals are not completely deprived of the moral or legal permission to protect themselves and others. Thus, the obligation to protect cannot arise from the mere fact that others are normatively prohibited from protecting. Even if state has some sort of monopoly on force that is relevant to establishing the obligation to protect, the connection is subtler than the mere fact that no one else is capable or permitted to protect as a result.<sup>28</sup>

Explaining in a satisfactory way our intuitions about the state obligation to protect is more difficult than it seems, reflected in an unrecognized disagreement among philosophers and other theorists.<sup>29</sup> For example, Allan Buchanan proposes that individuals have a natural duty to “help ensure that . . . rights are respected”, which would plausibly imply a natural duty to protect.<sup>30</sup> Jack Beermann suggests that the state obligation to protect exists because the modern state ultimately contributes causally to the harms arising from most acts of violence, either by causally contributing to the commission of the acts of violence themselves or by causally contributing to the

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<sup>28</sup> In effect, both Chapters 3 and 4 consider subtler connections.

<sup>29</sup> No one has attempted to systematically argue about the best explanation for our intuitive view of the obligation, or even whether our intuitions are ultimately defensible. Additionally, understanding the foundations of the state obligation to protect will clarify the moral bonds between state and individuals. The state and those in its territory are bound together in a special moral relationship, with various reciprocal rights and obligations, such as the individual’s obligation to obey the state’s laws and commands and the state’s obligation to protect. Both the issues of why individuals have an obligation to obey and of why states have an obligation to protect concern fundamental aspects of this moral relationship between the state and those in its territory. Political philosophers have recognized the importance of understanding the relationship, as they have given extensive attention to the individual’s obligation of obedience, attempting to understand why individuals are (or are not) bound to their states via a moral obligation. See, e.g., A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 79 (1979); LESLIE GREEN, *AUTHORITY OF THE STATE* (1988); WILLIAM A EDMUNDSON, *THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY* (1998).

<sup>30</sup> Allan Buchanan, *Political Legitimacy and Democracy*, 112 *ETHICS* 689, 704 (2002).

displacement of protection against those acts.<sup>31</sup> Jeremy Waldron implies that protection is a necessary condition for the legitimate exercise of coercive political control.<sup>32</sup> In turn, Locke could be read to suggest that the state obligation arises either as state promissory obligation or as fiduciary obligation of the state.<sup>33</sup> A contemporary promissory explanation might claim that the state implicitly promises to protect through its expressed claim of a monopoly on the legitimate use of force.<sup>34</sup> A fiduciary account would argue that the state is the fiduciary of those in its territory and its fiduciary obligations require it to protect—an obligation that arises neither because of a promise nor the exercise of political control itself but because of the power the state assumes over those in its territory.

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<sup>31</sup> Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078 (arguing that the U.S. Supreme Court's *DeShaney* decision, concerning protection against child abuse, was wrongly decided because the state was entangled in the harm that befell the child). There have been several partial attempts to theorize the state obligation to protect—or at least U.S. constitutional doctrine on the issue—in response to *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989). Perhaps the most important of these writings are Barbara E. Armacost, *Affirmative Duties, Systematic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982 (1996) (defending the *DeShaney* decision on grounds of institutional competence); LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *The State Action Paradox*, in REMNANTS OF BELIEF 49 (1996) (considering the state action principle as developed in *DeShaney*); Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95 (1994) (arguing that the *DeShaney* decision did not advance any individual interest in freedom from government regulation); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1992) (providing evidence that a state obligation to protect has historically been accepted in English and U.S. legal culture); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. R. 53. See also Julie Shapiro, *Snake Pits and Unseen Actors: Constitutional Liability for Indirect Harm*, 62 U. CIN. L. REV. 883 (1994); Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. CONST. L.J. 750 (2001).

<sup>32</sup> See Jeremy Waldron, *Safety and Security*, 9 NEB. L. REV. 454, 461-473 (2006).

<sup>33</sup> Nozick provides a Lockean account where state agreements to protect partly explain the obligation. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 12-17 (1974). Cf. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶ 131 (1689).

<sup>34</sup> For criticisms of this approach in the context of the obligation of political obedience, see MARGARET GILBERT, A THEORY OF POLITICAL OBLIGATION 71 (2006); A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 79 (1979); Mark C. Murphy, *Surrender of Judgment and the Consent Theory of Political Obligation*, 16 LAW & PHIL. 115, 116, 135-36 (1997); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 960 (1973).

## II. THEORETICAL INTEREST OF THE STATE OBLIGATION TO PROTECT

The central question of this dissertation, why the state has a special obligation to protect those persons in its territory against violence, lies at the intersection of two different contemporary philosophical debates. The first concerns whether and why individuals have special obligations to their fellow citizens or fellow residents, in the sense that these obligations differ from or perhaps take priority over the obligations they owe to foreigners. The second concerns the appropriate assignment of positive obligations correlative with human rights, such as the obligations to protect civil and political rights or to fulfill economic social and cultural rights.

### A. SPECIAL OBLIGATIONS TO COMPATRIOTS

There has been an important debate in recent years as to whether, why, and to what extent a person has special obligations or duties to those with whom one shares a state, either as co-citizens or co-residents.<sup>35</sup> Many accept that there are special obligations to those who share a state when providing charity, acting beneficently, promoting justice, and the like. At the same time, most believe that we have moral obligations to contribute in these ways to people abroad as well, but that these moral obligations differs from the special obligations either in content or priority. The problem arises from the fact that special obligations to our fellow residents seem to stand in some tension with the fundamental idea that morality requires equal concern or equal respect for all persons. This idea seems to tell against moral distinctions between those who share a state and those who do not, and, at a minimum, demands an explanation for the

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<sup>35</sup> See SAMUEL SCHEFFLER, *BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* (2001); Kok-Chor Tan, *Patriotic Obligations*, 86 *MONIST* 434, 434 (2003); Christian Coons, *Wellman's "Reductive" Justifications for Redistributive Policies That Favor Compatriots*, 111 *ETHICS* 782, 782 (2001); Christopher Heath Wellman, *Relational Fact in Liberal Political Theory: Is There Magic in the Pronoun 'My'?*, 110 *ETHICS* 537, 537-39 (2000); Richard Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 *PHIL. & PUB. AFFAIRS* 202, 203 (1998); Andrew Mason, *Special Obligations to Compatriots*, 107 *ETHICS* 427, 427 (1997); Robert E. Goodin, *What Is So Special about Our Fellow Countrymen?*, 98 *ETHICS* 663, 663 (1988); David Miller, *The Ethical Significance of Nationality*, 98 *ETHICS* 647, 647 (1988).

disparate obligations. But despite the tension, the moral intuition that we have special obligations to fellow state citizens or residents is so strong that some theorists have given up the moral commitment to equal concern or respect in order to make sense of the special obligations.<sup>36</sup>

But why is it important to understand whether and why there are such special obligations? Wellman says that the apparent lack of space in liberal universalism for special obligations “is thought to be fatal because no state can survive without requiring its citizens to make special sacrifices on behalf of their fellow citizens.”<sup>37</sup> This thought puts the cart before the horse. The real issue is that we intuitively think there are special obligations to fellow residents, but it is very difficult to explain why given the liberal commitment to equal respect or concern for all.<sup>38</sup> For this reason, it is difficult to determine whether or not we actually have such special obligations, an issue the resolution of which would have substantial consequences for our moral obligations in a globalizing world.<sup>39</sup> If we have special obligations to fellow citizens or residents, at a minimum, the character of what we must do for them is different from what we must do for people in other states. This fact is not in and of itself all that problematic. The difficulty for many is the additional claim that we must do more for fellow citizens or residents than for other people.<sup>40</sup> And still more troubling is that the obligations to fellow citizens or residents may take priority over the obligations to residents of other

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<sup>36</sup> Richard Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 PHIL. & PUB. AFFAIRS 202, 204 (1998).

<sup>37</sup> Christopher Heath Wellman, *Relational Fact in Liberal Political Theory: Is There Magic in the Pronoun ‘My’?*, 110 ETHICS 537, 538 (2000).

<sup>38</sup> Cf. SAMUEL SCHEFFLER, *Liberalism, Nationalism, and Egalitarianism*, in BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT 67 (2001) (observing a deep tension between the liberal values of autonomy, equality, and loyalty).

<sup>39</sup> Richard Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 PHIL. & PUB. AFFAIRS 202, 203-04 (1998). Some even connect this issue to that of global justice, e.g. *id.* 204, although I do not believe the issue is the same.

<sup>40</sup> I do not assume this. I think it is possible that the obligations can be different without it being a necessary consequence of the difference that one requires more than the other.



states.<sup>41</sup> It seems that the problem Wellman identifies—that some people are led to reject a certain form of liberalism in the attempt to defend special obligations to fellow residents<sup>42</sup>—is no more than a secondary issue.

Despite the clear importance of the issue, the debates on the proper explanation of the obligation have been inconclusive. Those committed to the idea of special obligations to fellow residents continue defending this view, although often now in the context of the related but distinct debates over international distributive justice.<sup>43</sup> Others remain unconvinced that there are special obligations to fellow residents. And few would claim that clear or definitive answers have emerged as to why and to what degree a person may have special obligations to fellow residents, even accepting that such obligations exist.

The central question of the dissertation, why do states have a special obligation to protect those persons in its territory, addresses this issue, albeit from a different angle. Although the debate has generally been framed in terms of special obligations to fellow residents, an important aspect of the question has to do with what states ought to do for their residents, and what they ought to do for non-residents. Many participants in the debate seem to accept that the state ought to act on the special obligations of its citizens or residents to their fellow citizens or residents. But this conclusion depends on a two step inference: first, one must assume that individuals have a special obligation to

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<sup>41</sup> I do not assume this. I think it is possible that the obligation to residents and foreigners are different but both must be strictly fulfilled. *See also* Kok-Chor Tan, *Patriotic Obligations*, 86 *MONIST* 434, 434 (2003) (arguing that special obligations do not take precedence).

<sup>42</sup> Christopher Heath Wellman, *Relational Fact in Liberal Political Theory: Is There Magic in the Pronoun 'My'?*, 110 *ETHICS* 537, 540-43 (2000).

<sup>43</sup> This debate, although hard to characterize precisely, might be seen as one about the content of the obligations of justice owed to foreigners. *See, e.g.*, Arash Abizadeh, *Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice*, 35 *PHIL. & PUB. AFFAIRS* 318 (2007); Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 *PHIL. & PUB. AFFAIRS* 3 (2007); A.J. Julius, *Nagel's Atlas*, 34 *PHIL. & PUB. AFFAIRS* 176 (2006); Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 *PHIL. & PUB. AFFAIRS* 147 (2006); Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFFAIRS* 113 (2005); Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 *PHIL. & PUB. AFFAIRS* 257 (2001).

fellow citizens or residents, and, second, one must assume that the state has an obligation to act on such obligations of its citizens or residents. In this way, the debate over the special obligations of individuals to fellow citizens or residents can be seen as a way of considering the basis of state special obligations to those in its territory, specifically its citizens and residents.

Additionally, the obligations that individuals have to fellow residents may vary depending on the obligations that states have to those in their territory. The state appears to have special obligations to those in its territory, and hence its residents, that it must fulfill either with some priority over or independently of its obligations to those outside its territory. As Pogge comments, “a person’s human rights impose positive duties on her government-and thereby, mediately, on her fellow citizens, who must give political and economic support to the governmental protection of human rights.”<sup>44</sup> To understand those special obligations that fall on individuals derivatively because they support or otherwise participate in a state, we should begin with the obligations of the state itself as the ultimate source of some special obligations of individuals. And if individuals have no special obligations at all, or even if they have some special obligations independently of the state, understanding the special obligations of the state to those in its territory will illuminate the broader issue of the special obligations that exist in virtue of the fact that a state organizes a group of people.

Although there may be connections, especially at the level of arguments, the

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<sup>44</sup> Thomas Pogge, *Severe Poverty as a Human Rights Violation*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 11, 23 (Thomas Pogge ed. 2007). Richard Miller observes “that there is no broad, deep-seated consensus that cosmopolitanism in individual charity is wrong.” Richard Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 *PHIL. & PUB. AFFAIRS* 202, 206-07 (1998). There is nothing morally wrong in writing a check to Oxfam without enquiring whether the funds will be spent domestically or internationally, even if this is a person’s only act of charity. One might doubt whether this intuition applies in any context, or is instead a consequence of the fact that domestic charity overwhelms international charity. See Comment from Seana Shiffrin to author (May 5, 2014) (on file with author). However, insofar as it is context independent, it may make sense to begin any exploration of individual special obligations by understanding the special obligations of the state.

state's special obligation to protect raises different problems than does international distributive justice. The central question of international distributive justice is who must be taken into account in determining whether or not a given distribution or distributive system is just or unjust, that is, the question of its scope. Several writers have argued that the boundaries of a state do not limit who must be taken into account in this evaluation, so global wealth or income inequalities may imply distributive injustice. Despite appearances, such claims have no direct implications as to whether a state has a special obligation to protect those in its territory. Suppose, for instance, a just distributive system requires that wealthy individuals in one state contribute resources to impoverished individuals in another state.<sup>45</sup> Nonetheless, a given state may normally be required to enforce the norms of the distributive system only against those in its national territory, even if this enforcement involves requiring those individuals to send resources abroad. The issue of the state obligation to protect primarily concerns who is responsible for enforcing rights and under what circumstances, while that of international distributive justice concerns the content of norms or rights.<sup>46</sup> A territorial

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<sup>45</sup> Abizadeh makes an important distinction between the site and the scope of justice:

“the site of justice refers to the *kinds of objects* (individuals' actions, individuals' character, rules, or institutions, and so on) appropriately governed by principles of justice, that is, to which the principles of justice rightly apply, whereas the scope refers to the *range of persons* who have claims upon and responsibilities to each other arising from considerations of justice.” Arash Abizadeh, *Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice*, 35 PHIL. & PUB. AFFAIRS 318 (2007).

Although his distinction is important, the formulation is a bit problematic: he defines the *scope of justice* in terms of the persons who have rights and duties of justice, which does not seem meaningfully different than the question of the site of justice, what is governed by the principles of justice. Instead, I believe it is necessary to recognize that the principles of justice at issue are *comparative* not *absolute*, in that they are concerned with how one individual fares in comparison to others. In light of this, the *scope of justice* is the range of persons whose relative success determines whether the *site of justice* fulfills the principles of justice. I believe this interpretation accurately describes the use to which the concept is put in Abizadeh's article and other writing in the international distributive justice debate.

<sup>46</sup> This point may become more intelligible if we make a similar distinction in the context of the familiar debate on international distributive justice. Following Rawls, it is often claimed that the subject of distributive justice is the basic structure of society:

“For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I

special state obligation to protect is compatible with the idea that everyone in the world has rights that prohibit violence against them.

It is worth emphasizing that a territorial special state obligation to protect is also compatible with other obligations to contribute to the realization of such rights against violence everywhere in the world. A special state obligation to protect those in its territory is compatible with other state protection obligations. These might include a state obligation to do its part in providing for the protection of those abroad—including those in states that are ineffective in protecting against violence and those states that are abusive—as well as a state obligation to protect against certain risks of violence that the state itself engenders abroad. The special state obligation to protect differs from these other obligations to protect in that it normally requires protecting all those persons in the state’s territory, while the other obligations would presumably be more selective in their focus. Moreover, the fact of its existence implies nothing in and of itself about the relative priority of the different protection obligations in those cases where they conflict, when it is impossible or unreasonable to simultaneously satisfy all of them. For these reasons, the issue of the foundation of the special state obligation to protect is, at the outset, analytically independent of the debates about moral obligations to reform the current international order. For example, Philip Pettit argues that we should attempt to ensure that all states enjoy freedom from domination by other states and that we should facilitate the establishment of states that do not dominate their

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understand the political constitution and the principal economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions.” JOHN RAWLS, *A THEORY OF JUSTICE* 7 (1971).

The principles of distributive justice, then, are principles for such a basic structure, and, applied to it, determine whether it is just or unjust. They do not directly specify the rights and obligations of individuals with respect to justice, although we might suppose that each individual has a right to a just basic structure.

peoples.<sup>47</sup> Even if these moral requirements are primarily incumbent on states, those states may still be subject to special obligations like the obligation to protect.

### *B. OBLIGATIONS CORRESPONDING TO HUMAN RIGHTS*

The issue of scope of the state obligation to protect is connected to a second debate about how positive human rights obligations are assigned to agents because it concerns the assignment of a specific positive human rights obligation to a particular agent. A number of philosophers working on the theory of human rights accept that many or all human rights, whether civil and political or economic, social, and cultural, imply both negative and positive obligations.<sup>48</sup> On the civil and political side, rights such as the right to life require not only respect but also actions to protect and to guarantee them. These measures may include actions aimed directly at stopping third parties from depriving persons of the right's object (e.g. life) as well as more general measures to facilitate the secure enjoyment of the right such as by changing social attitudes.<sup>49</sup> Henry Shue noted that it is commonly accepted that even these so-called negative rights

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<sup>47</sup> See Philip Pettit, *A Republican Law of Peoples*, 9 EUR. J. POL. THEORY 70, 82-85, 88-90 (2010). For similar reasons, a special state obligation to protect is also compatible in principle with Pogge's proposal that state sovereignty should be partly disarticulated and political authority dispersed. See generally Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48 (1992).

<sup>48</sup> See e.g., JAMES GRIFFIN, ON HUMAN RIGHTS 96 (2008); Henry Shue, *Mediating Duties*, 98 ETHICS 687, 688 (1988); CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 161 (2009). This is not to claim that philosophers universally hold such views of human rights. Some, such as Robert Nozick, would deny that there genuinely are economic, social, and cultural rights, see generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149-231 (1974), and others express skepticism about positive obligations associated with rights, Onora O'Neill, *The Dark Side of Human Rights*, 81 INT'L AFFAIRS 430 (2005). Beitz comments on O'Neill's views:

"A skeptical view of this kind has been pressed by Onora O'Neill. She distinguishes between "normative" and "aspirational" views of rights and argues that a value cannot count as a right, on a "normative" view, unless it can be seen as the ground of a claim that specific others have obligations to act or refrain from acting in ways that would result in the claimant's having or being able to enjoy the value." CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 164 (2009).

<sup>49</sup> Cf. U.N. Comm. on Econ., Soc., and Cultural Rts., *General Comment No. 12: The Right to Adequate Food (Art. 11)*, U.N. Doc. E/C.12/1999/5, ¶ 15 (1999) (adopting this framework for the right to food).

require an expansive state apparatus to guarantee them.<sup>50</sup> On the economic, social, and cultural side, rights to food or to health may require the provision of food or healthcare, but they also require respect, in the sense that no one act in a way that negatively affects the object of the right. In this sense, the right to food could be violated if someone physically takes food away from a person who needs it.

Now, it is relatively easy on most views to determine who has the negative obligations correlative with a particular right: these can be, and are, incumbent on all persons, states, and, presumably, other relevant actors.<sup>51</sup> But positive obligations are more difficult: it appears that the positive obligations cannot apply universally in an unrestricted and preinstitutional form. Shue considers the case of fulfilling the right to food. The right to food cannot require an ordinary person to take action independent of institutions, however small, with respect to every hungry child in the world, because an ordinary person simply does not have the resources to act with respect to every hungry child in the world. There are far too many.<sup>52</sup> So it appears that each person's right to food cannot impose a positive obligation that actually demands independent and direct action of every other person to satisfy that right by providing food, as opposed to, say, supporting policies or institutions.<sup>53</sup> This conclusion is not limited to positive obligations

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<sup>50</sup> Henry Shue, *Mediating Duties*, 98 ETHICS 687, 688 (1988) (“Even those who believe all so-called negative rights to have some special priority over all so-called positive rights normally think that governments are necessary to guarantee the negative ones, and I know nothing more expensive to operate than a contemporary government with the power actually to guarantee even the so-called negative rights to its constituents.”).

<sup>51</sup> “O’Neill thinks it obvious that the familiar “rights of man” to freedom, property, and security can count as rights on a “normative” view because the inferences about the deontic situations of other agents are clear: everybody has an obligation to respect them.” CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 164 (2009) (citing Onora O’Neill, *The Dark Side of Human Rights*, 81 INT’L AFFAIRS 430 (2005)).

<sup>52</sup> Henry Shue, *Mediating Duties*, 98 ETHICS 687, 688 (1988) (“If a universal right to food meant that I ought to provide something toward the nutrition of every hungry child, however distant a stranger that child and her parents are to me, then presumably I would owe each child at least one penny-or should, anyhow, invest at least one penny on behalf of each child, even if the way to invest in that child is not to give money directly to her. The number of hungry children in the world times one penny is, however, far more than any ordinary person is worth.”).

<sup>53</sup> A person could for example vote for a new state policy or advocate for the creation of a new global institution.

correlative to the right to food: any positive obligation correlative to any human right will be equally impossible for each ordinary person to fulfill *by herself* with respect to all other persons.

Thus, there is a central problem in human rights theory in determining who has positive obligations with respect to the human rights of which other persons, and what exactly the positive obligation incumbent on a particular actor demands. James Griffin emphasizes the difficulty of the problem:

“It is characteristic of the work involved in identifying duty-owners that it . . . can be long, hard, and contentious. I think that sometimes it will prove impossible to make a clearly successful case for holding anyone in particular the appropriate duty-owner. Sometimes the identification will have elements of arbitrariness and convention in it. Sometimes it will be subject to negotiation in a particular place or time. We can know that there is a moral burden, without yet knowing who should shoulder it.”<sup>54</sup>

At once, it should be made clear that the problem is not simply one of matching rights-holders with obligation-holders, but also one of specifying the content of the obligation that a particular obligation-holder has to a particular rights-holder. Given that there may be multiple obligation-holders correlative to a given human right of any particular person, it is possible that a given obligation-holder has an obligation to fulfill only certain aspects of a right. For example, with the right to food, perhaps the state has the obligation to provide food when a person is unable to acquire it herself, a NGO has the obligation to provide education necessary to produce or acquire food, and some foreign

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<sup>54</sup> JAMES GRIFFIN, ON HUMAN RIGHTS 103 (2008); *see similarly* CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 163 (2009) (“Why should we consider anti poverty rights a hard case? . . . First, in the nature of the case, it is not clear how it should be decided which outside agents have reasons to act. Second, it is not clear what kinds of reasons might arise for these agents or whether they would normally be weighty enough to require action.”); Henry Shue, *Mediating Duties*, 98 ETHICS 687, 689 (1988) (“Yet, in order for everyone to have a certain right, such as a right to food, it is not necessary for everyone else to have all the duties required to fulfill the right-it is necessary only for some others to have each of the duties required. On the side of duties there can be a division of labor. . . . For every person with a right, and for every duty corresponding to that right, there must be some agents who have been assigned that duty and who have the capacity to fulfill it.”) (Shue goes on to treat the assignment of duties as a practical moral problem, without considering whether morality itself might assign some or all of the duties).

states have an obligation to step in when there is a failure by any of these other obligation-holders.

While the dissertation will not resolve the general issue of the correct assignment of human rights obligations, it will provide a start by explaining why the state has an obligation to protect. Determining why the state—often thought to be the primary bearer of both negative and positive human rights obligations for those in its territory—has the obligation to protect against violence would provide an example of the assignment of positive human rights obligations.

### III. THE STATE'S SPECIAL OBLIGATION TO PROTECT

This section will consider the main desiderata for an explanation of the state's special obligation to protect that will form the starting point for the dissertation's analysis.<sup>55</sup> The development of the desiderata in this section will come from our moral intuitions about the special state obligation to protect. They constitute features that an explanation of the state obligation to protect would ideally reproduce unless it turns out to be impossible to account for them. An explanation will be more fully adequate insofar as it can account for them. I will ultimately defend an explanation of the obligation that can reproduce and defend these main characteristics of our intuitions about the obligation.

Although the dissertation will consider the state's special moral obligation to protect, and not its legal obligations, I frequently consider court decisions. These decisions can be helpful either because they provide examples of cases that draw out our moral intuitions about the obligation or because they offer relevant perspectives on the

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<sup>55</sup> This section is not aimed at giving definitive arguments in favor of the suggested contents of the state's obligation to protect. It, instead, attempts to show that the suggested contents are sufficiently plausible to constitute a reasonable starting point for an analysis of the obligation. In this sense, the idea is to draw out their intuitive appeal, not to provide absolutely conclusive arguments that these are the correct contents. The rest of the dissertation will complement and strengthen the conclusions in this section, assuming that it succeeds in identifying one or more adequate justifications for the suggested contents of the state obligation to protect.



content or justification of the obligation. The jurisprudence of the regional human rights courts is helpful for the former, but, significantly, also for the latter.<sup>56</sup> It adopts basic assumptions about the content of the obligation to protect that, although perhaps weaker than the moral obligation, share with it a commitment to imposing strong requirements on the state.<sup>57</sup> Of course, this jurisprudence considers the legal obligation to protect while the dissertation will consider a moral obligation, but the legal obligation often seems to be a manifestation of court intuitions about the moral obligation as it applies in particular circumstances. Nevertheless, I do not cite to the court decisions primarily as an appeal to authority but instead because the situations that these decisions consider frequently elicit specific moral intuitions. The views of the courts themselves provide at most secondary support for the conclusions that I will draw about our moral intuitions and morality itself.

The first part of this section will explain why the *object* of the obligation is limited to violence committed against individuals in the state's territory by non-state actors. The second part will consider the desideratum for an explanation that it shows why the obligation requires certain means of protection of the state. The *required means*, at a minimum, should include that the state take operational protection measures when it knows on the basis of direct evidence of a risk to a specific person or persons, as well as implement systematic measures like effective law enforcement and

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<sup>56</sup> In contrast, the U.S. Supreme Court's *DeShaney* majority opinion rests on implausible reasoning, *see generally* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *The State Action Paradox*, in *REMNANTS OF BELIEF* 49, 49-71 (1996), as well as drawing a conclusion contrary to most people's moral intuitions. The dissenting opinions are much more helpful.

<sup>57</sup> The regional human rights courts have determined that the state has an obligation to take reasonable measures to prevent the realization of a risk when the state knows or should know of the risk of violence to a particular person or limited group of persons. *See* *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (Jan. 31, 2006); *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 116 (1998). State responsibility requires, in addition to a violation of the obligation, that (1) the measures not taken would have had a reasonable chance of preventing the violence, and that (2) the risk of violence materialized in an act of violence against a victim. *See* *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (Jan. 31, 2006); *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 116 (1998).

criminal and civil justice systems. The third part will present the desideratum limiting potential *justifications* for failures to fulfill the obligation, reflecting the fact that the obligation is only *pro tanto* in character, with the consequence that the failure to fulfill it can be justified in some circumstances. The fourth part will explain the main desideratum for the *scope* of the obligation, that the obligation applies principally to acts of violence against people in a state's national territory, and does not apply to those lacking any substantial connection to the state.

#### A. THE OBJECT OF THE OBLIGATION

While the state's obligation to protect those in its legal territory may range more widely, the dissertation will limit its focus to protection against acts of violence and oppression, not other sorts of rights violations like theft, unjust discrimination, and invasions of privacy. There is a substantial philosophical consensus<sup>58</sup> and strong moral intuitions that the obligation to protect those in its territory requires protection against this coherent category of acts.<sup>59</sup> For the purposes of this dissertation, acts of violence and oppression ('violence' for short) include those intentional acts that intentionally cause, or create a substantial risk of, death, bodily or psychological harm, physical suffering, slavery, or deprivation of physical liberty.<sup>60</sup> Acts of violence also include

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<sup>58</sup> There is a long and durable consensus among philosophers and people more generally that states have obligations, or at least a special role, with regard to such violence: "It is widely accepted that citizens' human right to physical integrity gives them a moral claim against their government to operate an effective criminal justice system that prevents and deters assaults." Thomas Pogge, *Severe Poverty as a Human Rights Violation*, in FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? 11, 23 (Thomas Pogge ed. 2007). Philosophers and others who might otherwise be inclined to deny that there are many positive obligations accept that this positive obligation exists and that the state is the principal actor with the obligation to protect those in its territory. For example, even Nozick considered the state's obligation to protect in an attempt to explain why it is morally permissible to redistribute resources for state protective services. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 110-113 (1974).

<sup>59</sup> The remainder of this section will defend the existence of the moral intuitions and the coherence of the category.

<sup>60</sup> Cf. WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH (Etienne G. Krug *et al.* eds., 2002) ("The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high

threats to commit these actions. So, extrajudicial execution, torture, massacre, murder, forced disappearance, rape, enslavement, and false imprisonment all constitute acts of violence, as would threats to commit those actions.<sup>61</sup> It is important to note that some acts of violence may be justified, or at least excused, such as force used in legitimate self-defense or force used by state agents to confine a person duly and justly convicted of a crime. While the state may have an obligation to protect against certain justified acts of violence, like lethal self-defense when harm to all those involved can be prevented, it presumably has no obligation to protect against other sorts of justified acts of violence, like the forcible confinement of a person duly convicted.

Strong moral intuitions support the existence of a special state obligation to protect against these acts of violence and oppression. Waldron provides an excellent example suggesting that we believe that a state has an obligation to protect those in its territory, even when this entails substantial sacrifice of resources:

“The sustained campaign by British police and security forces to protect Salman Rushdie after a fatwa was issued against his life in 1988 is a clear example. The resources assigned to Rushdie’s protection involved an enormous and sustained expense for many years, and there was no reason to suppose that making him more secure made anyone else more secure. Quite the contrary-cutting him loose and leaving him to his fate might well have reduced the danger to others, especially his police bodyguards.”<sup>62</sup>

Similar support for our intuitive acceptance of a state obligation to protect comes, counter intuitively, from the U.S. Supreme Court’s *DeShaney* case.<sup>63</sup> *DeShaney* concerned a department of child service’s failure to remove Joshua DeShaney from the

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likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.”). Johan Galtung, one of the leading experts on peace research, proposes a much more expansive definition that does not match our ordinary usage. Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167, 168 (1969) (“violence is present when human beings are being influenced so that their actual somatic and mental realizations are below their potential realization”).

<sup>61</sup> Many other sorts of rights violations might also involve acts of violence. Forced displacement is often accomplished by the threat of murder, physical injury, or torture, and one way of violating freedom of speech or assembly is through the use of threats to silence people or keep them apart.

<sup>62</sup> Jeremy Waldron, *Safety and Security*, 9 NEB. L. REV. 454, 479-80 (2006).

<sup>63</sup> *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989).

custody of his father despite the repeated physical abuse he suffered at his father's hands.<sup>64</sup> Eventually, his father beat Joshua so severely that he was left severely mentally disabled due to brain damage.<sup>65</sup> Although the U.S. Supreme Court held that there is no general constitutional right to state protection,<sup>66</sup> the widespread condemnation of the decision indicates that the legal academy found the result morally unacceptable.<sup>67</sup> In fact, this and one later, similar U.S. Supreme Court decision are the main cases that might reflect contrary moral intuitions, but these cases were resolved primarily on textual, historical, and precedential grounds without focusing on a moral perspective.<sup>68</sup>

Even beyond such cases of highly specific risks, we are inclined to accept that the state must take protective actions when possible. For example, the Inter-American Court in *Pueblo Bello Massacre* considered a 1990 attack by a paramilitary organization against the town of Pueblo Bello, in Urabá, Antioquia, during which 43 men were abducted, six of whom were immediately murdered and the rest disappeared and later murdered.<sup>69</sup> Uniformed paramilitaries violently entered the town, established roadblocks to prevent escape, and systematically searched for guerrilla supposedly hidden among the population.<sup>70</sup> The Court held that the state was responsible for failure

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<sup>64</sup> *Id.* at 191-94.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 203.

<sup>67</sup> *See supra* note 31.

<sup>68</sup> *See generally* *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989); *Castle Rock v. Gonzales*, 545 U.S. 748 (2005). *DeShaney* did in fact state that “[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them,” which implies that the analysis rejected taking a moral perspective. *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 203 (1989).

<sup>69</sup> *Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140*, ¶¶ 95(33), 95(35), 95(40) (Jan. 31, 2006).

<sup>70</sup> *Id.* ¶¶ 95(30)-95(44). While in *Pueblo Bello* case there were military forces present nearby, *id.* ¶ 95(42), one notable characteristic of paramilitary attacks is that they often took place in regions with limited state presence. In many such attacks, the central state may not have had territorial control over the region of the attack and those people subject to the violence might have been living beyond the effective law and control of the state. Such events were unfortunately not isolated in Colombia at the time or in the subsequent years. The violence had

to protect despite failing to conclude that the state had specific knowledge of the impending attack, although it did decide that the state had knowledge of the paramilitary group's activity in the area.<sup>71</sup> The result in this case seems deeply consonant with our moral intuitions: the state must take active measures to protect against such acts of violence. Another set of examples comes from the Civil Rights Movement in the United States, which confronted horrific violence from, among others, southern racists who resisted the extension of basic human rights to African Americans.<sup>72</sup> In one particular case, President Kennedy sent 400 federal marshals to Mississippi in 1962 to protect James Meredith when he enrolled in the University of Mississippi as its first African-American student, an event that resulted in mass riots and the dispatch of thousands of federal troops.<sup>73</sup> More generally, given that southern state governments were not providing protection against private racist violence, and in fact were often participating, it seems that the federal government was morally required to protect in order to discharge the state's moral obligation.

Apart from constituting an area of strong moral intuitions about the state's obligation to protect, the category of violence picks out an important and coherent set of acts against which the state must protect.<sup>74</sup> The category is coherent in that all acts of violence essentially involve an attack on the person considered as a physical being, even

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its origins in a fairly limited number of paramilitary organizations that, by the end of the 1990s, had united into a national organization, the United Self-Defense Forces of Colombia (AUC).

<sup>71</sup> See *id.* ¶ 140.

<sup>72</sup> See, e.g., ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* xiii-xxxiv (1990); Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 1966 DUKE L.J. 415, 417-19.

<sup>73</sup> Mitchell F. Crusto, *Federalism and Civil Rights: The Meredith Case*, 11 NAT'L BLACK L.J. 233, 233, 240-45 (1989).

<sup>74</sup> Additionally, protection against acts of violence might be morally less complicated than protection against, say, acts of discrimination, invasions of privacy, or limitations of freedom of speech. To understand the object of protection in those cases requires a complex and potentially controversial theory of what constitutes an impermissible act of discrimination, invasion of privacy, or limitation of freedom of speech.

if some acts of violence simultaneously have other characteristics.<sup>75</sup> Although persons have different sorts of interests, many of which do not arise from their physical natures, the interest in not being subject to attacks on their physical beings is of great importance.<sup>76</sup> In this sense, the category of violence is coherent and distinguishes the object of protection from acts against property rights or freedom of speech, since an act that violates property rights or freedom of speech need not attack the person as a physical being. Of course, acts of violence may be used to infringe these rights—they often are so used—but the essence of a violation of the property rights or freedom of speech is not a physical attack. The connection to the physical nature of a person is relevant to an obligation to protect because attacks on a person’s physical nature are usually not effectively remediable after the fact, in contrast to the common case for property rights or (perhaps) the right to free speech. While not always the case, often returning the property or allowing subsequent speech can effectively remedy an attack on property rights or free speech.

#### *B. REQUIRED MEANS OF PROTECTION*

A primary desideratum for an explanation is that it show why the special obligation to protect demands the state take certain intuitively required measures of protection. According to this desideratum, the state must, at a minimum, (1) take operational protective measures when it knows based on direct evidence of a risk of violence to specific persons *and* (2) implement effective systematic protection measures, such as law enforcement and criminal or civil justice systems.<sup>77</sup> Operational measures

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<sup>75</sup> For example, torture has both physical and non-physical aspects, in that the physical attack aims to break the will of the victim in some sense.

<sup>76</sup> However, Waldron remarks, “[a] plan for security that did not propose to protect property would be regarded by most of us as pretty impoverished.” Jeremy Waldron, *Safety and Security*, 9 NEB. L. REV. 454, 466 (2006).

<sup>77</sup> It is worth mentioning that there could be less demanding state obligations to protect. For example, an obligation could require protective measures only when the threatened act of violence is part of a pattern or practice of violence. For example, in its landmark *Velásquez*

consist of steps to protect against a particular risk that use the direct knowledge the state has of the risk; they are independent of the general deterrence effect of the criminal or civil justice systems. Systematic protection measures aim to reduce the occurrence of violent acts without focusing on particular known risks of violence, and normally will take the form of systems such as law enforcement and criminal and civil justice. However, the obligation to protect does not demand that the protection measures are successful, only that the state tries adequately to protect against acts of violence.<sup>78</sup> In this sense, the obligation to protect is satisfied, at least according the minimum requirements of the desideratum, if the state implements adequate systematic and operational protective measures, regardless of whether those measures actually succeed in protecting against particular acts of violence. The desideratum establishes only minimum requirements for the state obligation to protect; the actual obligation may well require more of the state.

State measures concerning violence may be *prospective* or *retrospective*. *Retrospective* measures that states might take are aimed at repairing, correcting, or otherwise responding to the acts of violence committed, but are not necessarily aimed at protecting against them. The law of injury (tort law or law of extra-contractual responsibility), criminal law, and perhaps social programs to support victims of violent acts have strong retrospective elements aimed at responding to the past act or wrong. In contrast, *prospective* measures attempt to prevent acts of violence from occurring or to

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*Rodríguez* decision, the Inter-American Court appears to have based state responsibility for a forced disappearance in Honduras on the existence of a broader practice of such disappearances. *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 126 (July 29, 1988) (“If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission’s allegations will have been proven to the Court’s satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this.”) Although the Court did not hold that the practice of disappearances was an official practice of the Honduran state, it nonetheless strongly implied that it believed but could not prove that this was the case. *See id.* ¶¶ 147-48.

<sup>78</sup> For an explanation of when systematic and operational measures are adequate, see *infra* notes 87-89, 94-99 and surrounding text.

less the harm from future acts of violence, rather than simply establish a remedy for acts that have already occurred. Protective measures are intrinsically prospective, because they aim to prevent acts of violence or reduce the resulting harm before they happen, not respond to the acts that have already occurred.

Within the category of prospective protective measures, there are *systematic* and *operational* measures. *Systematic* measures do not respond to particular risks of violent acts but instead are measures primarily aimed at reducing overall levels of violence without relying on foreknowledge of particular acts of violence. They include establishing adequate law enforcement mechanisms and adequate criminal or civil justice systems.<sup>79</sup> These major current systematic measures function by creating negative consequences in general for committing acts of violence, a prospective aspect of measures like criminal justice that may also have strong retrospective aspects.<sup>80</sup> While other social policies such as job creation or welfare programs might also reduce acts of violence, they would not normally constitute systematic measures of protection against violence in this sense insofar as their primary aim is not to reduce violence.<sup>81</sup> In contrast, *operational* measures respond to particular risks of violent acts known on the basis of direct, not statistical evidence, such as a report of a threat or an ongoing attack. For example, the physical intervention by a police officer to stop an attack in progress is an operational measure, as are providing bodyguards to the person or persons known to

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<sup>79</sup> See David L. Attanasio, *Militarized Criminal Organizations in Latin America and Human Rights Court Oversight of State Protection Efforts: Evidence from Colombia*, 41 FLA. ST. U. L. REV. 341, 365-66 (2014) (citing *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 115 (1998) (but not finding a violation of the right to life); *González (“Cotton Field”) v. Mexico*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 285 (Nov. 16, 2009).

<sup>80</sup> Note that a criminal justice system with punishment can be both a prospective measure and a retrospective measure, depending on how it is understood. If the function of punishment is general deterrence of crime, it is a prospective measure, while if the function is retribution, it is a retrospective measure.

<sup>81</sup> This is not to assume that the obligation to protect will never require such social policies to reduce violence. If we can understand when and why the obligation requires systematic measures of protection, we may well also determine when the obligation requires such social policies.



be at risk because of threats and investigating the source of the risk in order to eliminate it.<sup>82</sup>

The special obligation to protect intuitively requires that some *systematic* measures of protection be in place and effective, presumably including the establishment of law enforcement, criminal and civil justice, and the like. Law enforcement normally involves patrolling and investigation activities,<sup>83</sup> criminal justice normally involves investigation, prosecution, and punishment where relevant, and civil justice normally involves judicial or administrative remedies for victims. Consider a state that simply abandons part of its territory, such as a poor neighborhood in an urban area or a section of the rural countryside, withdrawing the police, leaving the region to lawlessness.<sup>84</sup> We might call these regions ‘brown zones’ for an imaginary map that colors areas blue, green, or brown depending on the level of presence and functionality of state institutions in enforcing the law or, more generally, rights.<sup>85</sup> At least if the state has no justification for doing so, the presence of brown zones without at least some level of police presence seems to constitute a fundamental abdication of its moral obligation.

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<sup>82</sup> See David L. Attanasio, *Militarized Criminal Organizations in Latin America and Human Rights Court Oversight of State Protection Efforts: Evidence from Colombia*, 41 FLA. ST. U. L. REV. 341, 366 (2014) (citing *Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 124 (Nov. 24, 2011)); *González (“Cotton Field”) v. Mexico*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 283 (Nov. 16, 2009); *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 139 (Jan. 31, 2006); *Kılıç v. Turkey*, App. No. 22492/93, Eur. Ct. H.R. 1, ¶ 76 (2000); *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 115 (1998) (but not finding a violation of the right to life)).

<sup>83</sup> Cf. David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1225-27 (1998).

<sup>84</sup> The existence of such regions is not a hypothetical problem, but one that is relatively common in many states. Mark Unger, *Democracy, Law, and Order*, 44 LATIN AM. RES. REV. 235 (2009); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1725 (2006); Jeremy J. Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 456 (2001); Guillermo O’Donnell, *On the State, Democratization, and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries*, 21 WORLD DEV. 1355, 1359-61 (1993). For an instructive empirical analysis of state presence and absence in Colombia, see MAURICIO GARCÍA VILLEGAS & JOSE RAFAEL ESPINOSA R., *EL DERECHO AL ESTADO: LOS EFECTOS LEGALES DEL APARTHEID INSTITUCIONAL EN COLOMBIA* 40-121 (2014).

<sup>85</sup> Guillermo O’Donnell, *On the State, Democratization, and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries*, 21 WORLD DEV. 1355, 1359-61 (1993).

A failure to maintain a minimal criminal justice system, including criminal investigations, prosecutions, and some form of accountability seems similarly problematic. That is, it is intuitively plausible that the state must implement some minimal level of systematic measures to protect against violence. Although one might think that systematic measures would include the promulgation of laws prohibiting violence, I will exclude such measures to focus on the obligation to execute moral or legal norms and not on the obligation to establish legal norms, which raises different issues.<sup>86</sup>

But when are these systematic measures of protection sufficient? Defining the sufficiency of such measures is quite difficult, as David Sklansky observes with regards to minimally adequate policing.<sup>87</sup> I would like to offer a tentative, albeit abstract, proposal. The Inter-American Court commented that the measures must “create the necessary conditions for the effective enjoyment and exercise of the rights established in the Convention.”<sup>88</sup> This idea by itself is not particularly helpful because it is unclear what it means to effectively enjoy and exercise one’s rights. Inspired by Waldron, we might say that such a requirement is fully met when the systematic measures create conditions in which each person has assurances sufficient to eliminate reasonable fears that he or she will be subject to acts of violence.<sup>89</sup> In this way, the systematic measures must enable persons to exercise his or her rights free from reasonable fear (as made possible by the assurances) that he or she may be the victim of violence. However, the systematic measures cannot always be required to create such conditions immediately,

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<sup>86</sup> This obligation seems less difficult to explain, as the state is normally the only entity that can make or change the laws regulating interactions between private persons, and so much ensure that their content is adequate.

<sup>87</sup> David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 1285-87 (1998) (noting that this is not just a problem of specifying the resources that should be devoted in terms of police officers or funds, but also of assuring that policing is conducted in a manner that actually improves security).

<sup>88</sup> Valle Jaramillo v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶ 187 (Nov. 27, 2008).

<sup>89</sup> Cf. Jeremy Waldron, *Safety and Security*, 9 NEB. L. REV. 454, 466-73 (2006) (specifying that security may involve freedom from fear, assurances of safety, and other goods).

because in many states *no* set of systematic measures could immediately eliminate reasonable fears of violence. Many states have problems of violence that are too deep set. Instead, the systematic measures must make reasonable progress towards bringing about such circumstances.

In turn, the state obligation to protect intuitively requires *operational* protective measures at a minimum, when the state knows of a risk to a specific person based on direct evidence like a reported threat. The 1998 European Court of Human Rights decision in *Osman v. United Kingdom* helps illustrate.<sup>90</sup> The case concerned an attack by a possibly mentally ill teacher on the family of one of his pupils—with whom he had developed an obsession—that resulted in the murder of the student’s father and serious injury to the student himself.<sup>91</sup> The Court held that the authorities fulfilled their obligation to protect despite failing to take protective measures because they lacked knowledge of the risk that the teacher posed to the family.<sup>92</sup> However, the Court indicated that the state would have been required to protect if it had or should have had knowledge of the “real and immediate risk to the life of an identified individual or individuals . . . .”<sup>93</sup> And this result seems right from a moral perspective, even if the state has well-functioning law enforcement, criminal justice, and civil remedies in place. The state would have acted wrongly if it had known the teacher was (probably) going to attack the family and did not take operational protection measures to stop him.

The specific operational measures that a state might take can vary substantially depending on the details of the known risk. For example, the Inter-American Court’s *Cotton Field* decision concerned a pattern of disappearances and murders committed

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<sup>90</sup> This decision inaugurated the current era of human rights jurisprudence on the obligation to protect. See David L. Attanasio, *Militarized Criminal Organizations in Latin America and Human Rights Court Oversight of State Protection Efforts: Evidence from Colombia*, 41 FLA. ST. U. L. REV. 341, 368 (2014).

<sup>91</sup> *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 56 (1998).

<sup>92</sup> See *id.* ¶ 116.

<sup>93</sup> *Id.* ¶ 116.

against young and poor women in Ciudad Juarez, Mexico.<sup>94</sup> The victims in the case were three women, two of whom were minors, who were abducted, raped, possibly tortured, and murdered, and whose bodies were then left in a cotton field.<sup>95</sup> The Court emphasized that, once the authorities learned of the disappearances, they had to initiate an exhaustive investigation and search to locate the missing women prior to their deaths, measures that Mexico had not implemented.<sup>96</sup> Alternatively, in a case where there is a threat against a specific person or small group of people, it may be appropriate to assign bodyguards or special police protection, as the U.K. did in response to the threat to Salman Rushdie.<sup>97</sup> In other cases of threats, where the importance of the threat has to do with the anonymity of the source, protection may involve launching an investigation to determine who is responsible for the threat.<sup>98</sup> The specific appropriate operational measures, consequently, can vary substantially depending on the details of the risk of violence, but in all cases they are specific actions taken to reduce or eliminate based on what is known of it.<sup>99</sup>

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<sup>94</sup> González (“Cotton Field”) v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 164 (Nov. 16, 2009).

<sup>95</sup> *Id.* ¶¶ 165-67, 209-21.

<sup>96</sup> *Id.* ¶¶ 283-84.

<sup>97</sup> Jeremy Waldron, *Safety and Security*, 9 NEB. L. REV. 454, 479-80 (2006); Barrios Family v. Venezuela, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 129-30 (Nov. 24, 2011).

<sup>98</sup> Barrios Family v. Venezuela, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 124 (Nov. 24, 2011).

<sup>99</sup> This desideratum for an explanation of the special obligation to protect constrains, but does not entirely determine, when the state must take operational measures pursuant to the obligation. For example, while it seems relatively clear that the state must take operational protective measures—sending in the police or the like—when it knows of a risk to a specific person or persons, there could be other sorts of knowledge sufficient to require operational protective measures:

1. when the state has knowledge of a likely specific impending act of violence.
2. when the state has knowledge of a likely source of future violence.
3. when the state should know of future violence given its current information collecting capabilities.
4. when the state likely could know of future violence if it had reasonable information collecting capabilities.

### C. JUSTIFICATIONS AND EXCUSES

A second desideratum for an explanation is that the resulting state obligation to protect constitutes only a *pro tanto* obligation, albeit one that the state may only fail to fulfill in limited circumstances. A *pro tanto* obligation is an obligation supported by reasons for action that would give rise to a requirement in at least some circumstances, while an *all things considered* obligation is one for which the reasons applicable in the actual circumstances do give rise to the requirement.<sup>100</sup> As the state obligation to protect is *pro tanto*, the state normally must take operational protective measures, at a minimum, in response to a known risk to specific persons. There are at least two important circumstances in which the state is justified in failing to protect despite the *pro tanto* obligation to protect.

First, the obligation to protect does not normally trump the obligation to respect certain human rights, such as the rights to life and humane treatment (and possibly others like the rights to equal treatment and to privacy).<sup>101</sup> Instead, the obligation to respect such human rights will normally trump the obligation to protect. As a pure moral matter, many (but not all) believe that the obligation to respect these rights normally trumps the obligation to protect. Consider the classic direct confrontation between such human rights and the obligation to protect: the ticking-time bomb

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<sup>100</sup> This definition follows closely that of Shelly Kagan, but replacing '*prima facie*' with '*pro tanto*' and 'duty' with 'obligation.' SHELLY KAGAN, *NORMATIVE ETHICS* 181 (1998); see also SHELLY KAGAN, *THE LIMITS OF MORALITY* 17 (1989) (defining *pro tanto* reasons). M.B.E. Smith (exchanging '*prima facie*' for '*pro tanto*' and 'reason' for 'obligation') offers a similar idea: a state has a *pro tanto* obligation "to do an act X if, and only if, there is a moral [obligation] for S to do X which is such that, unless he has a moral [obligation] not to do X at least as strong as his [obligation] to do X, S's failure to do X is wrong." M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950, 951 (1973).

<sup>101</sup> These rights are considered non-derogable in international human rights law. *Cf., e.g.*, American Convention on Human Rights art. 27, Nov. 22, 1969 (life, human treatment, equality, and many others); Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention] art. 15, Nov. 4, 1950 (life, human treatment, slavery, and punishment only pursuant to prior law); International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966 (life, humane treatment, slavery, punishment only pursuant to prior law, and others). Non-derogable human rights are those the respect for which cannot be suspended in times of emergency, such as war or public danger. See, *e.g.*, American Convention on Human Rights art. 27(1), Nov. 22, 1969.

scenario. This hypothetical case envisions that a terrorist has placed a time bomb in some public place, and the only way to stop the bomb before it goes off is to extract its location from the terrorist via torture.<sup>102</sup> Although the correct resolution of the ticking-time bomb scenario has grown more controversial in the post-9/11 United States, many continue to hold the view that torture is wrong even in this circumstance. And the controversy and hesitation among even many who think it may be permissible in some circumstances serves to show that, intuitively, in the normal case the obligation not to torture trumps the obligation to protect.<sup>103</sup>

Second, the lack of resources necessary to protect may justify the failure to fulfill the obligation to protect in some limited circumstances. The Inter-American Court in *Pueblo Bello* commented: “In this case, the State has not proved that its security forces were constrained by having to adopt measures to protect another village from an attack at the same time as the one that occurred in Pueblo Bello on the day of the facts.”<sup>104</sup> This remark implies that, if the available security forces had been occupied protecting another village, the state would not have been responsible for a failure to protect on the grounds that those forces did not act. A result of this sort seems right as a moral and not just as a legal matter. If the state has security forces in a region that are normally sufficient to respond to the risks that are typical of the region, but, extraordinarily, two such risks arise at the same time, the state is justified in failing to protect against one if it uses the resources to protect against the other.

However, this sort of circumstance has limited power for justifying a failure to

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<sup>102</sup> In effect, this situation played out week after week on the television program *24*.

<sup>103</sup> The human rights courts do not appear to have squarely confronted this issue in their jurisprudence, but given that one of their major concerns has been ensuring respect for human rights even when the state asserts that it is protecting essential (security) interests, it is highly unlikely that the courts would allow the obligation to protect to trump the obligation to respect these rights. Moreover, a direct implication of norms from human rights treaties and other sources concerning derogation is that the response even to a serious emergency cannot justify violations of the non-derogable human rights.

<sup>104</sup> *Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 134 (Jan. 31, 2006)*.

take the measures that otherwise would have been required of the state. As the Inter-American Court also asserted, “if . . . at that time and in that zone, its security forces directed all their operations against guerrilla groups, this meant that the State was neglecting its other obligations of prevention and protection of the inhabitants of that zone with regard to the paramilitary groups.”<sup>105</sup> This statement implies that the constraints of having to provide protection elsewhere can only function in exceptional cases, not as a matter of course. And again, this result seems right morally. Attending to other risks of violence is not a justification for failure to take protective measures due to lack of troops when the security force levels in the region are *not* normally sufficient to protect against the range of risks typical to the region. Presumably, in such a situation, the state is instead obligated to increase the resources available to provide protection.

More generally, the fact that the measures required by the obligation to protect are costly does not function as a justification for failure to fulfill the obligation. Consider again the case of Salman Rushdie, where providing protection was “an enormous and sustained expense for many years . . . .”<sup>106</sup> Since protecting someone in Rushdie’s circumstances is not regularly required of the state, we might expect that such expense necessitated changes to the relevant state budgets. But the need for such changes would not justify the failure to protect Rushdie. The state obligation to protect clearly does not require spending a certain fixed amount on security; instead the resources that must be spent depend on what is necessary to take adequate protective measures. Now, we must distinguish a state that is simply overwhelmed by the obligation to protect, most likely because of pervasive security problems.<sup>107</sup> Where the state simply cannot muster the budget to fulfill the obligation to protect or where budgetary effects of the obligation to protect begin to seriously affect other similarly important obligations of the state, there

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<sup>105</sup> *Id.* ¶ 134.

<sup>106</sup> Jeremy Waldron, *Safety and Security*, 9 NEB. L. REV. 454, 479 (2006).

<sup>107</sup> Perhaps Guatemala in recent years, under massive pressure from drug cartels, is an example.

may well be a justification for the failure to fulfill the obligation.

#### *D. THE SCOPE OF THE OBLIGATION*

The last principal desideratum for an explanation is that the resulting obligation (1) require equal protection of the form previously described for all persons in the state's legal territory, and (2) not require protection of this sort for persons lacking a substantial connection to the state. In this sense, the obligation is quite demanding, in that the state must take operational protective measures in response to direct knowledge of risks of violence to *any* specific person located in its territory. But it is also strongly exclusive, in that there are large categories of people for whom the state need not provide protection of this sort, people not located in the state's legal territory who lack substantial connections to the state. However, the state may have other obligations to protect such persons, not necessarily weaker or with lower priority, but simply different in their demands.<sup>108</sup> To take an easy example, it is widely believed that the western powers failed in an important and potentially demanding moral obligation when they failed to intervene to stop the Rwandan genocide in 1994.<sup>109</sup> This part will explain the intuitive scope of the state's special obligation to protect, although it is worth emphasizing from the start that there are substantial gray areas that the explanations developed in this dissertation will help clarify.

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<sup>108</sup> The state's special obligation to protect its residents may be more or less demanding than the obligations to protect non-residents, depending both on the content of the later obligation and the problems of security that exist within and outside the state's territory. If the state's society is very peaceful and the rest of the world is not, the requirements imposed by the obligation to non-residents may be strong. I do not believe that the state's special obligation to residents demands less just because there are other claims for the state's attention. *See supra* Part III.B. I also suspect, but have not argued, that the obligation to non-residents does not shift significantly in its requirements merely because the state's special obligation is particularly demanding. In this sense, it does not appear to me that there is priority between the demands of the obligations to residents and non-residents: at least so long as the state is able to fulfill both without any substantial sacrifices, they do not trade off against one another.

<sup>109</sup> *See, e.g.,* SAMANTHA POWERS, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002).



A long philosophical tradition has accepted that the state has a special obligation to protect those in its territory that differs from obligations, if any, to protect those outside of its territory. The point is mostly made implicitly, and with some differences in exactly how the distinction is drawn.<sup>110</sup> Hobbes connects the sovereign's need to ensure safety specifically to the safety of his or her subjects.<sup>111</sup> Rousseau, despite adopting a theoretical perspective quite different from Hobbes, concurs that the body politic has a duty to protect its members.<sup>112</sup> Waldron apparently adopts a view of this sort. He indicates that the state's obligations concerning safety must give some sort of preference to those in the state's territory, claiming it is one requirement for the legitimacy of the state.<sup>113</sup>

These points of agreement about the fact that the obligation under consideration is a special obligation to protect members, rather than non-members, reflect our intuitive understanding. The U.K. rightly provided police bodyguards for Salman

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<sup>110</sup> Although several prominent historical philosophers have suggested that the obligation is owed specifically to citizens or subjects, this seems to be remnant of the social contract model they use, in which rights and obligations run principally among parties to the contract. Once we focus on the fact that the social contract is hypothetical, a point that Kant makes clear, there is a substantial moral question as to who should be considered a party to that hypothetical contract. It is not at all obvious that only legal citizens of a state should be parties. These views, based on a social contract model of the state, do not necessarily identify citizens as those persons who are citizens according to *positive* law but instead as those who must be considered parties to the contract. Consequently, while these views do indicate that the state obligation to protect respects some distinction between members and non-members, they are compatible with the idea that the distinction is primarily territorial in nature.

<sup>111</sup> THOMAS HOBBS, ON THE CITIZEN ch. XIII, ¶ 3 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge University Press 1998) (1642) ("By people here is meant not one civil person, namely the commonwealth itself which rules, but the crowd of citizens who are ruled. For a commonwealth is formed not for its own sake but for the sake of the citizens. Not that notice should be taken of *this* or *that individual* citizen. The sovereign as such provides for the citizens' safety only by means of laws, which are universal. Hence he has done his duty if he has made every effort, to provide by sound measures for the welfare of as many of them as possible for as long as possible; and to see that no one fares badly except by his own fault or by unavoidable circumstances; and it is sometimes good for the safety of the majority that bad men should do badly.").

<sup>112</sup> JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT, *in* THE BASIC POLITICAL WRITINGS 139, 150 (Donald A. Cress trans., 1987) (1762).

<sup>113</sup> See Jeremy Waldron, *Safety and Security*, 9 NEB. L. REV. 454, 490-91 (2006) ("We should consider the positive effects of something that calls itself a government on the safety of individuals in its territory and balance those effects against the negative effects of this entity on the safety of the individuals in its territory.").

Rushdie at great expense when he was threatened.<sup>114</sup> But it could do something similar for people in other parts of the world subject to comparable risks, since hiring private bodyguards is generally legal<sup>115</sup> even if somewhat expensive. Nonetheless, the U.K. does not act wrongly when it does not hire the bodyguards for foreigners abroad, while it would have acted wrongly if it had not taken at least some measures of protection for Rushdie in response to the fatwa.<sup>116</sup>

The moral result about the special obligation seems to be primarily based on physical location, not on citizenship. Although Rushdie was a naturalized U.K. citizen at

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<sup>114</sup> *Id.* at 479.

<sup>115</sup> David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1171-82 (1998).

<sup>116</sup> The European Court of Human Rights has confirmed this moral posture to a degree. In the few cases that have considered the issue of the scope of the state obligation to protect, the European Court has repeatedly indicated that the obligation to protect “can only arise in respect of acts which occurred on [the State’s] territory” or within its jurisdiction. *Rantsev. v. Cyprus and Russia*, App. No. 25965/04, Eur. Ct. H.R. 1, ¶ 304 (2010); *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H.R. 1, ¶ 38 (2001); *M v. Italy and Bulgaria*, App. No. 40020/03, Eur. Ct. H.R. 1, ¶ 124 (2012). This view seems to go so far as to reject the idea that a state may have an obligation to take measures within its jurisdiction to protect against an action that may occur outside its jurisdiction, such as warning a young woman that she may become a victim of human trafficking if she travels to Cyprus to be an ‘artiste’ in a cabaret. *Cf. Rantsev. v. Cyprus and Russia*, App. No. 25965/04, Eur. Ct. H.R. 1, ¶ 305 (2010). It is worth mentioning that the Court generally made these statements in determining whether the state had positive obligations distinct from protection, such as an obligation to investigate. *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H.R. 1, ¶ 40 (2001) (obligation to provide a civil remedy); *M v. Italy and Bulgaria*, App. No. 40020/03, Eur. Ct. H.R. 1, ¶ 126 (2012) (obligation to investigate). In the one case where it did consider the obligation to protect against an act that occurred outside the state’s jurisdiction, there were reasons other than physical location to conclude the state did not need to take protective measures. *Rantsev. v. Cyprus and Russia*, App. No. 25965/04, Eur. Ct. H.R. 1, ¶ 305 (2010).

The territorial nature of the obligation emerges from a general clause in the human rights treaties that establishes the state obligations with respect to human rights. For example, the European Convention says: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights] art. 1, Nov. 4, 1950. The understanding of when a person is subject to the state’s jurisdiction is often taken to depend on the specific state obligation at issue, so the applicability of the state obligation to protect may deviate from any broader principles that might exist. The European Court in its recent *Al-Skeini* decision said that “whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation . . . to secure to that individual the rights and freedoms . . . of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored’ . . . .” *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. 1, ¶ 137 (2011) (rejecting *Bankovic v. Belgium and Others*, App. No. 52207/99, Eur. Ct. H.R. 1, ¶ 75 (2001)). So despite the fact that state obligations receive their limited applicability from a single treaty clause, it is entirely possible that different obligations will require different forms of state jurisdiction.

the time of these events, the U.K. would have been wrong not to protect him even if he had been a resident alien. In this sense, Richard Miller rightly comments:

“[A]s recent American controversies over denials of benefits to resident aliens imply, there is no broad consensus that mere law-abiding, long-term residents deserve much less concern than those with further accoutrements as fellow-citizenship or fellow-membership in a cultural or ethnic community that predominates within the country’s borders . . . .”<sup>117</sup>

It also seems plausible that the state must protect even temporary visitors to its legal territory against acts of violence, including by taking operational protection measures in response to known risks. Even if Rushdie had not been a resident of the U.K., it would have been morally obligated to take protective measures so long as he remained in its legal territory.

These remarks about the desideratum leaves substantial gray area concerning its scope, which the theoretical resources developed in the dissertation will help resolve in part.<sup>118</sup> The state normally has the special obligation to protect all persons present in the state’s legal territory, and normally does not have this obligation for people outside of the state’s legal or effective territory who lack other substantial connections to the state. The following are some possibilities for the extra-territorial application of the special state obligation to protect:

1. The state never has the special obligation to protect those outside of its legal territory.
2. The state has an obligation to protect its citizens and resident aliens when they are located abroad.
3. The state has an obligation to protect a person outside of its legal territory when it exercises control over that person.

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<sup>117</sup> Richard Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 PHIL. & PUB. AFFAIRS 202, 205 (1998).

<sup>118</sup> A parallel issue for the international human rights obligation to protect has provoked a significant amount of theoretical attention. See, e.g., MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011).

4. The state has an obligation to protect a person outside of its legal territory when that person is located within an area subject to the state's control.
5. The state has an obligation to protect a person outside of its legal territory when that person is located within an area from which other states are excluded.

Understanding why the state has an obligation to protect in its legal territory should help us understand when the state should have an obligation to protect extraterritorially. If state protection is a necessary condition for the justified exercise of political control, then whenever the state exercises that political control it will have to protect. If the state obligation to protect arises from a promise, the state will have an obligation to protect outside its legal territory if it promises that it will.

#### IV. THE STRUCTURE OF THE DISSERTATION

While I will ultimately argue that the most adequate explanation of the state special obligation to protect is that it is a fiduciary obligation of the state to those in its legal territory (and perhaps elsewhere), I will not claim that fiduciary duty is the unique source of obligations related protect. I accept that states have obligations to protect for a variety of reasons,<sup>119</sup> and that these other reasons may explain state obligations to protect in other circumstances. The discussion will evaluate the extent to which a given candidate explanation can adequately account for the state obligation to protect, by assessing its compatibility with both the identified desiderata and generally accepted moral principles. An explanation is fully adequate in this sense if, were it the only justification of the state obligation to protect, it would portray the obligation and its foundations as appropriately compatible with the intuitive desiderata and with relevant

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<sup>119</sup> Cf. George Klosko, *Multiple Principles of Political Obligation*, 32 POL. THEORY 801, 801-804 (2004) (rejecting the tacit assumption in the political obligation literature that a single theory must answer all applicable questions).

liberal moral principles concerning the state.<sup>120</sup> Following this overview, the dissertation will be developed across five additional chapters that consider a range of different candidate explanations of a state obligation to protect. Each candidate explanation attempts to connect the state obligation to protect to a different normal or necessary characteristic of the state.

The second chapter, *The Inherent Duty of Justice*, will consider an explanation of the state obligation to protect in terms of the inherent duty of justice, a representative of a class of inherent duties that the reader might think can explain the obligation. Inherent duties are those that an agent has simply in virtue of being a moral agent and that are owed in principle to all other agents. The duty of justice is one such duty, which requires promoting justice, while other inherent duties may include duties of beneficence and Samaritanism. Inherent duties simply requiring doing a sufficient amount to advancing their ends—justice, the needs of others, etc.—, an amount that may vary depending on the reasons for the obligation.<sup>121</sup> Because the state is an agent, it has an inherent duty of justice that requires it to protect against some acts of injustice, which include normal acts of violence. However, the Chapter will argue that the resulting obligation to protect looks very different from the intuitive special state

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<sup>120</sup> The primary, and general, restriction that arises from the liberal tradition is that the obligation to protect should not be understood as an incidental obligation of the state but rather should be related in some way to the fundamental moral relationship of the state to those in its territory, correctly understood. Some other pertinent aspects of traditional liberal understandings may include the idea that states must be able to justify to individuals their exercise of coercive political power against them, Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127 (1987); see also JOHN RAWLS, POLITICAL LIBERALISM 217 (1993), and perhaps the idea that the state must “serve the interests, . . . or realize the will of [its] citizens.” Cf. Allen Buchanan, *The Internal Legitimacy of Humanitarian Intervention*, 7 J. POL. PHIL. 71, 73 (1999); LESLIE GREEN, AUTHORITY OF THE STATE 66 (1988) (“It is a major normative assumption of democratic political theory that the state is not entitled to protect its interests as ends in themselves; it must act so as to protect the interests of its citizens.”).

<sup>121</sup> They may impose some requirements on those duty-fulfilling actions, such as that they be efficient ways to fulfill the end, be distributed impartially among potential beneficiaries, or be prioritized in terms of the urgency of the underlying interest. Once a sufficient amount has been done, the natural duties normally require nothing further.

obligation to protect, as it is not primarily territorial in nature and does not require that the state provide a minimal level of protection for each person.

The third chapter, *Potential Causation of Harm*, will consider whether the fact that the modern state contributes to many acts of violence and displaces many sources of protection might adequately explain the obligation to protect. Jack Beermann is perhaps the most direct proponent of this sort of argument,<sup>122</sup> while the argument also reflects Thomas Pogge's ideas about positive human rights obligations globally.<sup>123</sup> It rests on the moral principle that an agent has an obligation to protect against the harm from those risks of violence to which its positive actions causally contribute. The fundamental insight is that the modern state, because of its pervasive intervention in society, might be thought to causally contribute to most or all harms from acts of violence in its territory and so must protect against the acts.<sup>124</sup> However, the Chapter will argue that this sort of account fails to explain the special state obligation: the state does not causally contribute to most acts of violence in its territory sufficiently directly for it to have an obligation on this basis to protect against them.

The fourth chapter, *Promises and Related Phenomena*, will pick up a thread possibly suggested by the social contract tradition: that the state may have an obligation to protect because of promises it makes to protect.<sup>125</sup> A primary challenge is to identify a

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<sup>122</sup> Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1089. This form of argument is also present in Sharon Dolovich's ideas about the basis for an obligation to protect those in prisons: their dependence and vulnerability. Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 913 (2009).

<sup>123</sup> See, e.g., Thomas Pogge, *Shue on Rights and Duties*, in GLOBAL BASIC RIGHTS 113 (Charles R. Beitz & Robert E. Goodin eds., 2009); Thomas Pogge, *Severe Poverty as a Human Rights Violation*, in FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? 11 (Thomas Pogge ed., 2007).

<sup>124</sup> The modern state's actions may causally contribute to potential harms from acts of violence in two principal ways: by blocking alternative means and sources of protection (dependence) or by creating social circumstances that lead to the commission of violent actions (vulnerability).

<sup>125</sup> Nozick's development of a quasi-Lockean theory implies an obligation of this form, as proto-states form when individuals voluntarily contract with private protection agencies for

plausible mechanism through which the state can be said to have made a promise that would generate a state obligation to protect.<sup>126</sup> The chapter will evaluate the view that the communicatively claimed or asserted monopoly on the use of force gives rise to a state obligation to protect because the state effectively assures individuals that it will not permit violence. It understands the claim of a monopoly on the legitimate use of force literally, as a communicative assertion the state makes that it holds a monopoly on the legitimate use of force, an assertion that does not directly imply the existence of an actual monopoly.<sup>127</sup> The chapter argues that such a promissory account of the special obligation to protect fails. It protects the wrong interest of individuals— that of having certain expectations fulfilled, not the interest in physical security. It also improperly assumes that the state may freely decide what interests or ends it will pursue.

The fifth chapter, *Legitimacy of Political Control*, will criticize the idea suggested by Hobbes' work, recently endorsed by Waldron, that the state obligation to protect can be explained because protection is a necessary condition for the legitimate exercise of coercive political control.<sup>128</sup> The idea is not that the state obligation to protect is an independent moral obligation that forms one of the necessary conditions for this legitimacy. Instead, providing protection is a necessary condition for the legitimacy, and so the state has an obligation to protect as a result of exercising coercive political control. The Chapter considers three different arguments to this effect, one that the state can justify political control to individuals only if it protects, one that to allow systematic private violence is to impose a system of domination or oppression, and one

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protection. *See generally* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). In a sense, the idea here is the same as finding an obligation to obey the law based on consent or promise.

<sup>126</sup> Although in some states, officials may make explicit promises or agreements to protect, to identify a plausible promise that most or all states have made would require looking to certain state actions or statements that constitute tacit or implicit promises.

<sup>127</sup> I do not consider an actual monopoly on the legitimate use of force as a basis for the state obligation to protect for the reasons advanced above. *See supra* notes 27-28 and surrounding text.

<sup>128</sup> *See* THOMAS HOBBS, *LEVIATHAN* chs. XVII, XXI (1651); Jeremy Waldron, *Safety and Security*, 9 NEB. L. REV. 454, 461-473 (2006).

that it is permissible to exercise political control only if those subject to it are provided guarantees they will benefit from it. However, the arguments suffer from a number of problems in their attempts to explain the state's special obligation to protect. First, the resulting requirements for protection are not sufficiently intensive: the state need only eliminate pervasive patterns of violence in the society. Second, the requirements for protection do not constitute a genuine obligation to protect, since they are simply necessary conditions for the legitimate exercise of political power.

The sixth and final chapter, *Fiduciary Obligations and the Scope of the State Obligation to Protect*, will take as its starting point the suggestion in Locke that the state is a fiduciary of its citizens,<sup>129</sup> and so has certain fiduciary duties. Fiduciary duties arise from a fiduciary relationship, which is a relationship in which one party, the fiduciary, has assumed power in some general domain over the decisions of another, the principal.<sup>130</sup> An assumption of power—which can occur absent the right to assume the power—does not consist in any actual use of the power but instead in treating the use of the power as permissible. As a result of the assumption of the power, the fiduciary acquires a set of obligations that require the fiduciary to use the assumed power loyally and with care to advance the purposes of the principal.<sup>131</sup>

On a fiduciary view, a state enters into a fiduciary relationship with those in its territory when it assumes political power within a given territory, treating the people in that territory as subject to its exercise of political control.<sup>132</sup> Assuming political power

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<sup>129</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶ 149.

<sup>130</sup> See Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 1011 (2013); cf. Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 311 (2009).

<sup>131</sup> See Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 975-980 (2013). Although Miller identifies controversy over whether there are legal fiduciary duties of care and interest promotion, I do not believe the controversy is problematic for my purposes. It is clear that the core legally recognized fiduciary duty, that of loyalty, is aimed at assuring that the fiduciary promotes the interest of the principal and no other interest.

<sup>132</sup> Cf. Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 314 (2009).



consists merely in subjecting persons to potential exercises of political control—the state’s preparedness to use coercion—but it does not require any actual exercise of political coercion or control, nor does it require that the state actually establish a monopoly on the use of force, nor does it require any claim about such monopolies. To assume political power is to assume power over those individuals<sup>133</sup> in the state’s territory, so the state must reasonably advance their purposes, including those connected to security, by implementing systematic and operational measures of protection. Importantly, the fiduciary theory explains the normal scope of the state’s special obligation to protect, since the state assumes political power in its entire national territory. It also resolves the scope in abnormal circumstances, such as military occupations, by looking to whether the state has assumed political power over a given person.

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<sup>133</sup> Non-residents present in the territory may not be subject to the same effective assumption of power over their interests, as they presumably (or, perhaps, by definition) intend to leave the territory.

## CHAPTER 2: THE INHERENT DUTY OF JUSTICE

### I. INTRODUCTION

A recurring inclination among political philosophers has been to explain special obligations of persons or states to particular groups of people—such as individuals in a particular territory—as a consequence of general moral duties owed equally to all. This chapter will argue that the intuitive state obligation to protect is not susceptible to an explanation in terms of an inherent duty of justice, nor by extension in terms of any other inherent duty. The inherent duties are those that a person, state, or other actor has simply by virtue of existing to take actions that promote the interests of others. Although the duty of justice—a duty to promote justice—is simply one of a number of duties owed to all others, the argument rejecting this duty as an explanation of the special state obligation to protect is of broader application. In this sense, the chapter attempts to show that the intuitive state obligation to protect is not a result of such inherent duties. Instead, the explanation of the obligation must be in terms of moral principles that take as morally fundamental certain aspects of the relationship between state and individuals in its territory.

Explaining the state's special obligation to protect those in its territory in terms of the duty of justice, or perhaps some other inherent duty, has a certain appeal. The duty of justice requires the state to do enough to promote the realization of justice, such as by defending the rights of others or fulfilling social or economic rights. But one might argue that the state ought to fulfill the duty in such a way that it becomes a special obligation to protect those in the state's territory. The duty may become territorial because acting in the state's territory is the most efficient way to fulfill the duty or because there is a division of labor among states in fulfilling it, where each state has a special obligation for its own territory. The duty may become one of protection against violence because

acts of violence are particularly grave injustices and the state ought to prioritize its efforts to fulfill the duty of justice based on gravity. Such an explanation in terms of the duty of justice, or other inherent duties, would be a particularly easy way to account for the state obligation to protect, if it succeeds. It is commonly accepted that we have inherent duties, so assimilating protection efforts to such actions would neither require complicated causal premises nor assumptions about unfamiliar moral concepts and principles.<sup>134</sup>

But beyond these theoretical attractions, a number of writers have defended inherent duty accounts of positive special obligations, albeit not specifically of the state obligation to protect. Robert Goodin, in a seminal paper, attempted to show that special obligations to one's 'countrymen' could be derived from general (natural) duties, specifically via a division of moral labor where responsibility for discharging the inherent is divided (presumably) along territorial lines.<sup>135</sup> His view is a sophisticated representative of a family of views that explains why the state has special obligations within its territory. Martha Nussbaum has similarly argued that "the primary reason a cosmopolitan should have for [giving special attention to our own families and to our own ties of religious and national belonging] is not that the local is better per se, but rather that this is the only sensible way to do good."<sup>136</sup> More recently, philosophers such as Christopher Wellman and Richard Miller have attempted a similar reduction of

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<sup>134</sup> For example, there would be no need to posit state promises, nor elaborate causal paths between states and violence, nor relatively exotic moral concepts, like fiduciary duties. *See infra* chs. 3, 4, 6.

<sup>135</sup> Robert E. Goodin, *What is So Special about Our Fellow Countrymen?*, 98 *ETHICS* 663 (1988).

<sup>136</sup> Martha Nussbaum, *Reply*, in *FOR LOVE OF COUNTRY?* 131, 135-36 (Joshua Cohen ed., 1996). Responding to Nussbaum, Samuel Scheffler points out that it is possible to have ethically important relationships with everyone in the world and different relationships that are also ethically important with some subset of those people. SAMUEL SCHEFFLER, *Conceptions of Cosmopolitanism*, in *BOUNDARIES AND ALLEGIANCES* 111, 115 (2001). In effect, this dissertation will ultimately adopt Scheffler's proposal and attempt to explain why the state has a different, ethically important relationship with those persons in its territory.

general duties to special obligations.<sup>137</sup> Both relied in part on values concerning collectivities, such as the importance of social trust and equality in social groups, to explain why natural obligations become particular to fellow group members.<sup>138</sup> They indicated that because social trust and equality are important, inherent duties normally ought to be discharged first for compatriots.<sup>139</sup>

Such reductive explanations<sup>140</sup> of special moral requirements are distinctive in that they avoid relying on moral principles independent of inherent duties. For example, they do not supplement the use of an inherent duty with the idea that promises give rise to obligations or that an agent who sets in motion a risk must protect against it.<sup>141</sup> Instead, reductive explanations normally attempt to identify factual circumstances that might explain why the fulfillment of an inherent duty for a particular group of people has priority. For example, the fact that a state has law enforcement and criminal justice systems in place in its territory might focus its protection efforts in fulfillment of the duty of justice on that territory, where it can use those systems.<sup>142</sup> In contrast, a non-reductive explanation relies on moral principles that give rise to new moral obligations, such as a principle that a person has an obligation to fulfill his or her promises. While an inherent duty like that of justice might be subject to allocative principles that

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<sup>137</sup> Christopher H. Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. 211 (1996); Christopher Heath Wellman, *Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun 'My'?*, 110 ETHICS 537 (2000); Richard W. Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 PHIL. & PUB. AFF. 202 (1997).

<sup>138</sup> Christopher H. Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. 211 (1996); Christopher Heath Wellman, *Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun 'My'?*, 110 ETHICS 537 (2000); Richard W. Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 PHIL. & PUB. AFF. 202 (1997).

<sup>139</sup> Christopher H. Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. 211 (1996); Christopher Heath Wellman, *Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun 'My'?*, 110 ETHICS 537 (2000); Richard W. Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 PHIL. & PUB. AFF. 202 (1997).

<sup>140</sup> See Christopher Heath Wellman, *Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun 'My'?*, 110 ETHICS 537, 537 (2000).

<sup>141</sup> For more on these explanatory approaches, see *infra* chs. 3 and 4.

<sup>142</sup> See *infra* Part III.A.

determine or guide how one must fulfill the pre-existing duty, these principles do not give rise to new duties or obligations.

While this chapter will specifically argue that these reductive explanations are inadequate to explain both the territoriality and the content of the intuitive state obligation to protect, its purpose is broader. The arguments apply not only to it and to other accounts based on inherent duties, but to more general potential philosophical perspectives on state obligations. On the one hand, the arguments indicate that the intuitive special state obligation to protect is *prima facie* incompatible with a consequentialist explanation of state obligations, where the state obligation to protect is a direct consequence of a duty to promote certain states of affairs in the world—specifically the absence of rights-violating acts of violence. Of course, the obligation to protect is inevitably concerned with acts of violence, but it is not merely an obligation to promote the absence of such acts.<sup>143</sup> On the other hand, the arguments also show that the state obligation to protect cannot be explained in terms of an unsophisticated equal concern for all persons that requires an equal distribution of state protection. Clearly, morality does require some sort of equal concern for all, but equal concern translates into specific moral requirements that are more complicated than simply requiring the equal distribution of positive actions.<sup>144</sup> There is more moral structure to equal concern, and, in effect, the rest of this dissertation is devoted to untangling that moral structure for the case of the state obligation to protect.

## II. THE DUTY OF JUSTICE AND THE STATE OBLIGATION TO PROTECT

This section will present the positive argument for why one might think the state's obligation to protect can be explained in terms of the state's inherent duty of

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<sup>143</sup> See *infra* chs. 3-6.

<sup>144</sup> Cf. Barbara Herman, *The Scope of Moral Requirement*, 30 PHIL. & PUB. AFF. 227, 245-55 (2001).

justice. The duty of justice is owed to all persons equally and requires efforts that further the realization of justice in general, not the protection against violence in particular. Nonetheless, one might argue that discharging the duty of justice is subject to allocative principles, which determine how the state must apportion its efforts to discharge the duty. It is plausible that these principles will include efficiency, favoring action where efforts may best further the realization of justice, and gravity, favoring actions like protection that avoid the most grave injustices. One might think that the duty of justice gives rise to the special state obligation to protect because these allocative principles require the state to focus on protecting against violence in its territory. The section will first explain the nature of the duty of justice and then will explain how the obligation to protect might follow from it.

#### *A. CHARACTERISTICS OF THE DUTY OF JUSTICE*

A state's duty of justice is a moral duty to contribute to the realization of justice, including to help "ensure that all persons" have their rights respected and fulfilled.<sup>145</sup> The duty of justice is general in that, in principle, all states (and other agents) owe it to all persons simply because the state is an agent, not because it has any special relationship to the persons.<sup>146</sup> The duty adheres to all agents in virtue of their agency, including artificial agents like states, because all agents must recognize the equal moral worth of persons.<sup>147</sup> It is an imperfect duty in the sense that, even if owed to all persons, it requires only that the state make a sufficient effort to help ensure that justice is realized and rights are respected; it does not necessarily require state action with

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<sup>145</sup> Cf. Allen Buchanan, *Political Legitimacy and Democracy*, 112 *ETHICS* 689, 703-04 (2002). This duty is distinct from Rawls' natural duty of justice, which requires an agent to support just institutions, not to help to ensure rights are respected and fulfilled. JOHN RAWLS, *A THEORY OF JUSTICE* 335 (1971).

<sup>146</sup> Cf. Massimo Renzo, *Duties of Samaritanism and Political Obligation*, 14 *LEGAL THEORY* 193, 198-202 (2008); Henry Shue, *Mediating Duties*, 98 *ETHICS* 687, 688 (1988).

<sup>147</sup> See *infra* notes 153-157 and surrounding text.

respect to every person and every potential or likely injustice.<sup>148</sup> And finally, it is a positive duty in that fulfilling the duty “requires [the state] to do or provide things,” not to simply refrain from doing things.<sup>149</sup> While the state has a negative duty to respect the rights of all persons, the duty of justice requires that the state take positive measures to promote justice, including measures to ensure that rights are respected and fulfilled. A state could promote justice by, for example, providing food to those who have an unsatisfied right to food or by stopping an act of violence that threatens to violate the rights of another.

The duty of justice is one of a family of similar obligations that might explain why the state has a special obligation to protect individuals in its territory. Other inherent duties are similar, in that they normally are general, imperfect, and positive obligations that are fulfilled by doing enough to promote the interests of others, include the duty of beneficence, the duty to assist, the duty of charity, and Samaritan duties. The duty to rescue, which requires that one aid another in peril, differs from the more typical inherent duties in that it often imposes definite requirements on persons, at least when a single person is specially positioned to rescue.<sup>150</sup> This chapter will focus on the duty of justice to illustrate the problems with explaining the state’s special obligation to protect in its territory in terms of an inherent duty. It uses the duty of justice to illustrate the problems because one might think that it is the most demanding of the natural obligations, as it is connected to justice and perhaps is correlated with rights held by potential beneficiaries of the duty.<sup>151</sup> One might also be more inclined to think that it is permissible to compel the fulfillment of the duty of justice than, say, the

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<sup>148</sup> Cf. Henry Shue, *Mediating Duties*, 98 ETHICS 687, 688 (1988).

<sup>149</sup> *Id.* at 688.

<sup>150</sup> See Robert E. Goodin, *What is So Special about Our Fellow Countrymen?*, 98 ETHICS 663, 679-80 (1988).

<sup>151</sup> See Allen Buchanan, *Justice and Charity*, 97 ETHICS 558, 562-69 (1987) (accepting that duties of justice are correlative with rights).

duty of beneficence.<sup>152</sup>

Apart from having a theoretically desirable form, there is some reason to think that a duty of justice exists. Allen Buchanan argues that individuals have a natural duty of justice because “equal regard for persons requires helping to ensure that their rights are respected.”<sup>153</sup> He assumes that a fundamental principle of liberalism is that persons are morally equal and entitled to “equal concern and respect” as a result of their moral equality.<sup>154</sup> Buchanan also believes that human rights protect morally important human interests, implicitly assuming that rights are connected to or arise from certain interests.<sup>155</sup> These two considerations combined establish certain general positive duties with respect to rights:

“If I refuse to prevent you from having your most basic human rights violated [without incurring any risk to myself or indeed any inconvenience or cost of any kind], I could not reasonably expect you or anyone else for that matter to believe that I do in fact recognize you as entitled to equal concern and respect.”<sup>156</sup>

This sort of argument establishes that (but only that), if there are no other relevant considerations at issue, the failure to prevent violations of certain human rights is incompatible with the entitlement to equal concern and respect.<sup>157</sup> It applies to all

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<sup>152</sup> Allen Buchanan, *Political Legitimacy and Democracy*, 112 *ETHICS* 689, 703-04 (2002); Allen Buchanan, *Justice and Charity*, 97 *ETHICS* 558, 562-69 (1987) (accepting that fulfillment of duties of justice may be compelled while criticizing the view that duties of charity may not).

<sup>153</sup> Allen Buchanan, *Political Legitimacy and Democracy*, 112 *ETHICS* 689, 704 (2002).

<sup>154</sup> *Id.* at 705.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* In support of this claim, he adds:

“Assertions of human rights signal that certain basic human interests are of such profound moral importance that they merit the extraordinarily strong protection that the recognition of rights accords. . . . But surely if those interests are so extraordinarily important that the corresponding rights should not be violated even when violating them would produce more social utility, then recognizing their importance requires not only refraining from violating the corresponding rights but also doing something to ensure that these rights are not violated by others.” *Id.*

<sup>157</sup> This argument does not indicate how strong or demanding the duty of justice is, that is, how much effort it requires in order to be fulfilled. Clearly it is incompatible with the entitlement to equal concern and respect for an agent to do nothing to prevent a rights violation when there are no opposing considerations. However, when there are opposing considerations, Buchanan’s argument does not resolve whether giving them prominence over a rights violation is incompatible with the entitlement to equal concern and respect. That depends on what exactly is involved in granting equal concern and respect to all persons and also on the moral weight that



agents, including the state, because all agents must respect the equal moral worth of persons.

### *B. PROTECTION AND THE DUTY OF JUSTICE*

The duty of justice requires that the state, as an agent, make sufficient efforts toward the realization of justice in general, but it does not directly specify for whom the state must act. However, it is quite plausible that the duty of justice subjects these efforts to allocative principles, in that an agent is not free to satisfy the duty with just any efforts. Massimo Renzo notes that, “[f]or, all things being equal, we have a stronger . . . duty to help X rather than Y if X is in a worse situation than Y (provided that Y’s condition is over a certain threshold).”<sup>158</sup> Or, “all things being equal, we have a stronger . . . duty to help X rather than Y if” it is less expensive to help X than it is to help Y. Or, “all things being equal, we have a . . . duty to help” all persons equally. Any such allocative principles must be based not on affiliation but on the supposition of moral equality, and from that perspective, all other things being equal, it does seem that the peril faced or cost of aid should be a tiebreaker.

These allocative principles may convert a duty that initially looks quite unlike the intuitive special state obligation to protect against violence into a duty that appears to impose similar requirements. First, the duty of justice might be thought to require territorially limited actions even though it is not intrinsically territorially limited. One might argue that the most efficient way for a state to discharge a duty to promote justice is to focus its efforts in its national territory, where it has the infrastructure to

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should be given to considerations like the cost of a given preventative measure. If a person receives equal concern and respect when her interests are granted any positive weight at all in deliberation, then the duty will be weak. If equal concern and respect demands some minimum positive weight for those interests in deliberation, then the duty could be much stronger.

<sup>158</sup> Massimo Renzo, *Duties of Samaritanism and Political Obligation*, 14 *LEGAL THEORY* 193, 200 (2008).

protect.<sup>159</sup> Or one might argue that there is an implicit division of labor among states in discharging the duty of justice along territorial lines, where, for the sake of promoting more justice than would otherwise be possible, each state acquires a special obligation in its own national territory.<sup>160</sup> Both of these arguments use allocative principles, such as efficiency, to explain why the duty of justice imposes requirements that are territorial in nature, given empirical circumstances.

Second, the duty of justice might be thought to require the provision of protection against violence over other justice-promoting actions, also on the basis of allocative principles. The duty of justice could be discharged, for example, by providing resources to fulfill social and economic rights, by changing institutional structures to promote distributive justice, or by promoting the formation of just institutions for purposes other than protecting. Gewirth suggests one consideration that might justify this assumption of priority for protection: “since the purpose of the human rights is to protect or secure persons’ abilities of agency, those rights whose objects are more important because more needed for action take precedence over rights whose objects are less needed for action.”<sup>161</sup> Protection against violence may not always secure the rights whose objects are the most needed for action (such as in the case of a starving person), but it often will. Alternatively, one might argue that the duty of justice as applied to states is sufficiently demanding that it requires the state to take most justice-promoting actions, and so will normally require the state to provide protection.<sup>162</sup>

### III. RECONSTRUCTING A SPECIAL TERRITORIAL OBLIGATION

Perhaps the most obvious feature of a state’s duty of justice is that it does not seem to require any special attention to those persons within a state’s own territory. The

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<sup>159</sup> See *infra* Part III.A.

<sup>160</sup> See *infra* Part III.B.

<sup>161</sup> Alan Gewirth, *Ethical Universalism and Particularism*, 85 J. PHIL. 283, 290 (1988).

<sup>162</sup> See *infra* Part IV.C.

duty of justice is not intrinsically limited to a particular geographical area, but in principle may be satisfied by protecting against rights violations for anyone in the world at risk.<sup>163</sup> The state could pay for bodyguards when a person abroad is at known risk or it could financially support the public security forces in a region where many persons lack security.<sup>164</sup> So a principal problem for explaining the state obligation to protect in terms of the state's duty of justice is to show that it makes a distinction between the state's national territory and those territories to which it has no relationship, in order to satisfy a primary desideratum for an account of the obligation to protect. This section will consider and reject two arguments that the duty of justice makes such a distinction, one based on the increased efficiency of protecting within the state's national territory and another based on a moral division of labor among states in providing protection.

#### A. *EFFICIENCY OF PROTECTION*

Some have suggested that considerations of efficiency may explain why the state ought to preferentially discharge inherent duties, like that of justice, in its territory.<sup>165</sup> Other things being equal, one ought to promote the object of an inherent duty, such as justice or well being, in the manner in which it is most efficient to do so, in terms of the benefit achieved versus the expenditures of time, effort, and resources required. Efficiency in discharging the inherent duties is particularly important because the inherent duties can demand only so much activity or effort from a given agent. For these reasons, the duty of justice ought to be fulfilled in the most efficient manner, balancing the benefits for justice in a given act of protection against the costs of providing that protection. The benefits will plausibly depend on the number of individuals protected

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<sup>163</sup> Cf. LIAM MURPHY, *MORAL DEMANDS IN NONIDEAL THEORY* (2000) (making similar points about the duty of beneficence); Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229 (1972).

<sup>164</sup> It is based on the concern and respect that a given state must show to all persons in virtue of their humanity, and humanity does not stop at state boundaries. See *supra* Part II.A.

<sup>165</sup> See, e.g., Christopher H. Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. 211 (1996).

and the gravity of the risk to their rights. In this sense, protecting the life of one person against violent homicide may be more of a benefit to justice than protecting five people against being violently scratched.

### *1. Impossibility of protecting abroad*

Some have argued that it is simply impossible to protect abroad, with the consequence that a state would have to discharge the duty of justice within its territory. For example, according to Gewirth, “[t]hat the minimal state secures rights only for persons living within its territory is a practical limitation deriving from the fact that the state’s functions must operate in relation to persons who are physically present in a specific physical area . . . .”<sup>166</sup> Massimo Renzo adds:

“most of the perils that our states are meant to save us from are those of lawlessness and lack of coordination. These problems can be resolved only through a coercive imposition of an authoritative set of rules, and obviously Italy lacks the authority to impose such a set of rules in the Third World; therefore Italy cannot rescue people living in the Third World from these kinds of peril.”<sup>167</sup>

Even if some protection measures are possible abroad, perhaps it is not possible to coercively impose rules abroad, a task at the heart of providing effective protection.

This sort of argument is much weaker than it appears. Contrary to the implications of Renzo’s comment, it is possible to address and resolve perils of lawlessness abroad, even when this requires the coercive imposition of rules. At the level of protecting against specific risks, it is perfectly possible for a state to pay for private protection abroad. Many or most states permit private security firms to operate in their territory, and private security personnel often outnumber state police.<sup>168</sup>

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<sup>166</sup> Alan Gewirth, *Ethical Universalism and Particularism*, 85 J. PHIL. 283, 300 (1988).

<sup>167</sup> Massimo Renzo, *Duties of Samaritanism and Political Obligation*, 14 LEGAL THEORY 193, 201 (2008).

<sup>168</sup> See David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1174-76, 1181-82 (1998).

At the level of systematic protection, it is not impossible for a state to do anything about general problems of lawlessness abroad.<sup>169</sup> Perhaps one state may not, pursuant to international and foreign law and politics, enter another state's territory without its permission and set up laws, law enforcement, security forces, and criminal justice.<sup>170</sup> But this observation does not resolve the issue. On the one hand, a state may do so with the permission of another state, although genuine cases in which one state permits another to enter its territory and establish large-scale protection systems are admittedly rare.<sup>171</sup> Limited cases, where some foreign security personnel are permitted in a territory, are perhaps more common, as many states around the world host U.S. security forces.<sup>172</sup> On the other hand, a state can protect in the territory of another state, not only by establishing law enforcement and security forces that are under its direct control, but also by designating funds and training to strengthen systems under the immediate control of the host state (or other actors). For example, the U.S. did something like this through its Plan Colombia, where it granted certain funds to aid Colombia in its internal armed conflict against leftist guerilla and in its anti-narcotic efforts.<sup>173</sup>

One might object that the mere provision of resources for protection is not a case of the state protecting abroad because it does not act through its own state officials. But it is hard to see why it matters whether the state performs the obligation through its officials or through private parties. In both cases the state uses a certain quantity of

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<sup>169</sup> Contrary to what Massimo Renzo appears to believe. See Massimo Renzo, *Duties of Samaritanism and Political Obligation*, 14 LEGAL THEORY 193, 201 (2008).

<sup>170</sup> See U.N. Charter art. 2, para. 4.

<sup>171</sup> Perhaps the U.S. intervention in South Vietnam was a pseudo-case of this sort; 'pseudo' in that there are serious questions as to whether the South Vietnamese government was sufficiently (morally) legitimate. See MICHAEL WALZER, *JUST AND UNJUST WARS* 97-101 (4th ed., 2006).

<sup>172</sup> See, e.g., U.S. Dep't of Def., *Active Duty Military Personnel Strengths by Regional Area and by Country* (Dec. 31, 2011), available at <http://www.protothema.gr/files/1/2012/05/28/usa%20ARMY%202011.pdf>.

<sup>173</sup> Security Assistance Monitor, *Data: Latin America and the Caribbean*, <http://www.securityassistance.org/latin-america-and-caribbean/data> (last visited July 27, 2014) (enter in "Date Range" the years 1999 and 2014).

resources, imposing a burden on the state, and those resources translate into certain acts of protection, at least if the resources are well spent. State officials are merely agents of the state, not the state itself, so it does not seem morally important that they, as individuals, bear some personal burden in providing protection. It is important that the state bear the burden of providing protection, but its burden is not equivalent to the burden imposed on those individuals that act on its behalf. Its burden is better understood in terms of the resources, whether financial, reputational, influential, or of other types, required to produce protection, where these resources are understood as those of the institution itself. In this sense, providing protection through third party intermediaries requires the same resources and imposes the same burden on the state as providing protection through state officials.

## *2. Two reasons for efficiency*

Even if it is possible for the state to protect outside its territory, one might argue that it is normally more efficient to protect those within the state's legal territory than those abroad. First, the costs of a given protection measure may be lower when protecting those within the state's territory. Although a state may pay for private protection, or contribute to public institutions outside its territory, within its territory the state may be able to use its own existing security forces, law enforcement, criminal justice, and the like.<sup>174</sup> Since the state has trained personnel at home, it may be cheaper to protect using them rather than training new personnel to protect abroad. Similarly, providing protection through an intermediary state or private organization likely adds administrative costs, as there is an additional intermediary. Second, the protection measures may more effectively protect against violence at home rather than abroad. Richard Miller claims that, "on the whole, people have a better understanding of

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<sup>174</sup> Federal states may complicate this matter somewhat because they nominally divide the state into independent entities.

compatriots' needs, and can more easily provide aid to the needy within the nation's borders."<sup>175</sup> The state may better understand the needs and opportunities for protection, as well as the cultural and political dynamics, within its own territory than it does abroad. It will better know where to deploy resources and those resources may be more effective once deployed, other things being equal.

Although it may be more efficient to protect within a state's territory than abroad, other things being equal, other things are typically not equal. The efficiency of adding protection will plausibly depend on the frequency of acts of violence where the protection is deployed. Where there are more acts of violence, a given expenditure on personnel or other means of protection is likely to provide for more protection than it would in an area with fewer acts of violence. Take, for example, Japan, a country with a very low per-capita intentional homicide rate (0.3 per 100,000 persons in 2011), and Honduras, a country with a very high per-capita intentional homicide rate (91.6 per 100,000 persons in 2011).<sup>176</sup> A police officer added in Japan likely will have many fewer opportunities to protect against intentional homicide than a police officer added in Honduras because there are so many fewer such homicides in Japan than in Honduras. Even under the implausible assumption that an additional police officer costs the same in Honduras and in Japan, it would more efficient to add a police officer in Honduras than in Japan, other things being equal. Given the much greater probability that the deployment of a particular police officer will protect in Honduras than in Japan, for the deployment to be more efficient in Japan than Honduras the cost of that police officer would have to be much higher in Honduras. This consideration applies equally to the redeployment of

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<sup>175</sup> Richard W. Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 PHIL. & PUB. AFF. 202, 203 (1997).

<sup>176</sup> United Nations Office on Drugs and Crime, *Intentional homicide, count and rate per 100,000 population (1995 - 2011)*, [http://www.unodc.org/documents/data-and-analysis/statistics/crime/Homicide\\_statistics2013.xls](http://www.unodc.org/documents/data-and-analysis/statistics/crime/Homicide_statistics2013.xls).

resources. It would also increase the efficiency of future protection for Japan to remove a police officer in Japan and add (or pay to add) one in Honduras.

Costs and effectiveness weakly support the greater efficiency of protecting at home rather than abroad, but this effect is swamped in the actual world by the wildly different levels of violence in different states. If the levels of violence were more equal, these factors might support an efficiency-based distinction between foreign and domestic territory in the fulfillment of the duty of justice. But the empirical assumption of the efficiency argument is unlikely to be true, given the vastly different rates of violence in different states. These conclusions about the most probable efficient uses of protection resources are likely to be true even if the marginal effect on levels of violence from adding or removing police may be unpredictable. Even without assuming that adding police consistently reduces levels of violence by a predictable amount, it is unlikely to be more efficient to spend resources combating violence in the territory of a state with very low levels of violence when there are much greater levels of violence in the territories of other states. One obvious reason is that a country like Japan with 0.3 homicides per 100,000 persons has less space for improvement as well as incredibly dispersed homicides in comparison with a country like Honduras where there are 91.6 per 100,000 persons. Although adding police may not necessarily improve the homicide rate, it makes sense to assume that using resources in Honduras and not Japan for anti-violence efforts will be more efficient at the margin. And even if this assumption is not true for a particular pair of states, it seems even more unlikely that it is universally false for all pairs of states, which is required for considerations of efficiency to require that all states protect at home rather than abroad.

### *3. Lower effective cost for territorial protection*

There is an additional way to defend the efficiency argument: through the assumption that expenditures on persons within the state's territory have a lower



effective cost. When the required expenditures benefit persons within the state's territory, those benefits should perhaps be deducted from the costs when determining the efficiency of a given measure of protection that fulfills the duty of justice. If the efficiency principle claims that an agent should discharge the duty of justice in the manner that produces the most protection for a given effective cost, then there may be some bias toward the state's own territory in the provision of protection. Wellman observed, considering the inherent duty of Samaritanism, that if some of the effort expended fulfilling such a duty redounds on the agent, it lowers the effective costs of the effort: "the reasonableness of the chores we must perform is measured in terms of the burdens we endure minus the benefits we receive."<sup>177</sup> Combining this moral accounting principle with that of efficiency, protection should be allocated in the most efficient manner, taking into account the lower effective costs of protection that the state provides to persons in its territory.

This type of argument contains a minor ambiguity. Wellman's thought was that if members of a society contribute to fellow members of a society, some of the benefits of that contribution will accrue to the contributing member, not just the receiving member. But a state is not strictly a member of the society, and it is not obvious that it, as such, benefits from a greater security environment, at least once the society is secure enough that the state's position is not threatened. Thus, when a state contribution to protection exceeds the level that ensures state stability, it is not possible to directly subtract any benefits to the state from the costs to the state to determine the effective costs.<sup>178</sup> But it

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<sup>177</sup> Christopher H. Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. 211, 233 n.28 (1996); cf. Richard W. Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 PHIL. & PUB. AFF. 202, 203 (1997) ("Tax-financed giving to compatriots is more apt than tax financed giving to foreigners to be part of an arrangement in which, over the long run, the contribution of each is compensated by proportionate benefits.").

<sup>178</sup> Renzo makes an analogous point about an open-ended Samaritan duty, not one limited to protection:

"Italy, like any other state, supplies two main sorts of benefits to its citizens: those connected with political stability (security, order, etc.) and those connected with

may be possible to think about this indirectly. Assuming that the state must impose the costs of protection on persons within its territory, there are presumably moral limits as to what costs the state may permissibly impose on those persons. And these moral limits will translate to limits on what the state may be morally required to do in the service of protection. But if a protection measure benefits persons in the territory, then the effective cost of providing that protection measure will be lower.

This argument works only if the amount the state must spend on protection is constrained by the costs that it is permissible to impose on those in its territory. We may accept that the state may demand only so much of individuals without accepting that this is the effective limit on the discharge of the duty of justice. For example, perhaps the state does not rely on those in its territory for funds because it is a petrostate whose wealth literally flows out of the ground, and so has no need for taxation.<sup>179</sup> Such a state presumably still has limits on its duty of justice, but those limits cannot come from the burden on persons in its territory, because there is none. The effective cost of providing protection would not be lower when the protection promotes the interests of individuals in the state's territory in such circumstances. The burden on individuals does not limit the state spending on protection, and the idea of the effective cost is that the state can spend more on protection in total if some benefits can be subtracted from the total in determining the effective burden imposed on contributing individuals, which may not exceed a certain threshold. So the argument has limits: it applies only to those states that impose their operating costs on persons in their territories (and to those states where security threatens the state itself).

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redistributive policies. While all Italian citizens benefit from political stability, redistributive policies are meant to benefit only (or at least mostly) the Italian needy *once* political security is ensured." Massimo Renzo, *Duties of Samaritanism and Political Obligation*, 14 LEGAL THEORY 193, 203 (2008).

<sup>179</sup> The government of Alaska, although not a state in the sense considered here, actually pays its residents an annual dividend from oil revenues, as part of the Permanent Fund Dividend program. See Alaska Dep't of Revenue, Permanent Fund Dividend Division, <http://pfd.alaska.gov/> (last visited July 28, 2014).

But even for those states where the burden of protection does ultimately fall on individuals in the territory, for whom I will assume this point about the effective costs makes a substantial difference in efficiency, it is not at all obvious that protecting in its territory is the only time that protection benefits persons in its territory. According to the U.S. government, security in Afghanistan or Iraq affected security in the United States. Or consider the destabilizing causes and effects of the international drug trade, where the lack of law and order in one state lacks may affect law and order in others. And while many are skeptical about such claims in those particular cases, surely the broader point is right: sometimes instability abroad affects security at home. So expenditures on protection abroad may well benefit persons in the state's territory. To sustain the claim that effective cost dictates protection at home requires showing either that (a) there are few situations in which protecting abroad has significant benefits at home or (b) even if there are significant benefits at home, these benefits are normally lower than those from protecting at home, at least given the relative costs. Both propositions are controversial at best.

However, even supposing that protecting abroad does not benefit individuals in the state's territory, having a greater effective cost than protecting in a state's own territory, we cannot ignore the vastly different needs for protection. For Honduras and Japan, the cost of protection in Honduras need only be approximately less than 305 times the cost of protection in Japan for it to be more efficient to discharge the obligation in Honduras than in Japan. To overcome the factor of 305, the benefit in Japan would have to very nearly equal the burden in Japan. When we think about the question in these terms, it becomes less clear what we have in mind as burdens and benefits: whose benefits count? Suppose that any benefit to anyone in Japan who contributes to protection is a relevant benefit and the contributions are the relevant burdens. Despite this, at the margin, the total burdens on such persons may well be much greater than

the benefits in Japan even when Japan protects solely in its territory, given the expense of law enforcement in a relatively peaceful society. It seems doubtful that the cost of the last police officer actually pays for itself (or nearly so) in Japan in terms of the resulting protection.

But the comparison brings out a deeper problem: suppose the benefits and burdens were nearly equal, sufficiently so that it is as efficient or more so to protect in Japan rather than Honduras. This equivalency emphasizes a problem with the previous claims about efficiency. Actions that protect or benefit oneself should not count as fulfilling the duty of justice; it is an other-directed moral duty. This and other inherent duties specify what we owe to others, in the form of providing them with benefits. When determining whether the duty has been satisfied, only those acts of protection that benefit others should count. But if only benefits to others count, then any plausible account for the efficiency of state protection that could potentially render the duty territorial cannot consider the benefits and burdens on persons in the state's territory to be benefits and burdens of the state. From the perspective of the state and those in its territory as a collectivity, the duty would be intrinsically non-territorial. But, as previously indicated, a normal state that is not weak or failing probably does not itself benefit substantially from most of the protection it provides.

### *B. MORAL DIVISION OF LABOR*

It also is not possible to account for the special attention the state must pay to those in its territory via the idea of a moral division of labor in discharging the duty of justice. A number of different writers have claimed that there is (or should be a moral division of labor) that might explain special obligations.<sup>180</sup> For example, Robert Goodin

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<sup>180</sup> Cf. Henry Shue, *Mediating Duties*, 98 ETHICS 687, 689 (1988) ("On the side of duties there can be a division of labor. I have duties toward the rights of some people, and you have duties toward the rights of some people, although your duties can be toward different people. For every person with a right, and for every duty corresponding to that right, there must be some agents

defended the view that “special duties are . . . merely devices whereby the moral community’s general duties get assigned to particular agents.”<sup>181</sup> If a moral division of labor exists for the duty of justice, each state could be assigned the obligation to discharge the duty with respect to some problems of justice, and generally may leave other such problems to other states. Applied to protection, each state would have the primary obligation to provide protection against acts of violence in certain areas (such as its territory), with other states holding at most secondary obligations to protect should the state with the primary obligation fail.<sup>182</sup>

While there might be different reasons to assign the fulfillment of the duty of justice to different agents,<sup>183</sup> one commonly recognized reason is efficiency.<sup>184</sup> A division of labor is efficient because it avoids potential *duplication* of effort, the likelihood that multiple simultaneous protection efforts might *interfere* with one another, and the possibility that multiple obligation-holders will fail to intervene thinking that someone else will (*full coverage*).<sup>185</sup> It may also allow individual actors to *specialize*, with the result that they can provide protection at a lower cost or with greater effectiveness than if they remain generalists, or avoid an unmanageable *overload* of information about the

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who have been assigned that duty and who have the capacity to fulfill it. We have no reason to believe, however, that everyone has burdensome duties toward everyone else if everyone else has meaningful rights.”)

<sup>181</sup> Robert E. Goodin, *What is So Special about Our Fellow Countrymen?*, 98 ETHICS 663, 678 (1988).

<sup>182</sup> Cf. Jennifer Welsh, *Implementing the Responsibility to Protect: Where Expectations Meet Reality*, 24.4 ETHICS & INT’L AFF. 418 (2010).

<sup>183</sup> Shue also argues that a moral division of labor provides respite for duty-holders: “Those who are fearful that the acknowledgment of positive duties to foreigners will yield overwhelming burdens may take some comfort in the psychological buffer constituted by institutions established for the purpose of coordinating individual responses.” Henry Shue, *Mediating Duties*, 98 ETHICS 687, 696 (1988).

<sup>184</sup> Robert E. Goodin, *What is So Special about Our Fellow Countrymen?*, 98 ETHICS 663, 681 (1988) (“A great many general duties point to tasks that, for one reason or another, are pursued more effectively if they are subdivided and particular people are assigned special responsibility for particular portions of the task.”); Henry Shue, *Mediating Duties*, 98 ETHICS 687, 696 (1988) (“The more restricted are individuals’ duties—that is, the less time, energy, money, and so forth each is bound to invest in the fulfillment of rights of others—the more vital it is that whatever is invested in right fulfillment be used efficiently for that purpose.”).

<sup>185</sup> See Henry Shue, *Mediating Duties*, 98 ETHICS 687, 690 (1988).

cases requiring protection.<sup>186</sup> In short, a division of labor in providing protection allows individual actors to fulfill the duty of justice with higher quality protection, less wasted effort, and fewer neglected cases.

Although an effective moral division of labor has potential advantages, it is less clear how it is to be implemented. Henry Shue seems to think that the implementation of a moral division of labor must be through a deliberate decision, not simply a consequence of existing facts, and so his perspective is less helpful for explaining special state obligations absent such a deliberate decision.<sup>187</sup> However, Goodin proposes that different sorts of facts, both natural and social, may effect the division. For example, the natural fact of being closest to a drowning person may realize the assignment of a special obligation, while the social fact of being a lifeguard may do the same.<sup>188</sup> And in the case of states,

“[n]ational boundaries, I suggest, perform much the same function. The duties that states (or, more precisely, their officials) have vis-a-vis their own citizens are not in any deep sense special. At root, they are merely the general duties that everyone has toward everyone else worldwide. National boundaries simply visit upon those particular state agents special responsibility for discharging those general obligations vis-a-vis those individuals who happen to be their own citizens.”<sup>189</sup>

In effect, the moral division of labor is an instrumentally valuable way for states to simultaneously satisfy their duties of justice. Kok-Chor Tan makes the more general point about the relationship between an instrumental strategy and its moral goal in the following terms:

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<sup>186</sup> Robert E. Goodin, *What is So Special about Our Fellow Countrymen?*, 98 ETHICS 663, 681 (1988) (“Sometimes the reason this is so has to do with the advantage of specialization and division of labor. Other times, it has to do with lumpiness in the information required to do a good job, and the limits on people’s capacity for processing requisite quantities of information about a great many cases at once. And still other times it is because there is some process at work (the adversarial system in law, or the psychological processes at work in child development, e.g.) that presuppose that each person will have some particular advocate and champion.”).

<sup>187</sup> See Henry Shue, *Mediating Duties*, 98 ETHICS 687, 698 (1988).

<sup>188</sup> Robert E. Goodin, *What is So Special about Our Fellow Countrymen?*, 98 ETHICS 663, 679-80 (1988).

<sup>189</sup> *Id.* at 681-82.

“But . . . the instrumental argument succeeds in defending special obligations only in as far as giving compatriots special consideration does in fact satisfy the general duties people owe to each other. Because special obligation, on this view, is ultimately a *strategy* for meeting the goals of greater justice, a ‘sensible way to do good’ . . . , any practice of patriotic concern that subverts or contradicts this general end straightaway loses its moral ground.”<sup>190</sup>

In this sense, the moral force of a moral division of labor exists only so long as it is in fact optimal to pursue the ultimate goal on the basis of the moral division. This requires, first, that full compliance with the moral division of labor would optimally discharge each state’s duty of justice and, second, that each state optimally discharges its duty of justice through observance of the terms of moral division under the actual conditions of partial compliance.

### *1. Observance under partial compliance*

A partial compliance poses an initial problem for a moral division of labor explanation in the circumstances of the actual world. A moral division of labor might make it permissible for a state not to discharge the duty of justice abroad, at least when other states fully comply with the division of labor. However, absent full compliance—meaning that some other state is not fully discharging its duty of justice according to the division—a state may be required to discharge the duty abroad, the division of labor notwithstanding.

Imagine the following analogy. An elementary school classroom has three teachers assigned to a group of students, presumably giving each certain positive obligations with respect to all of the students—stopping fights, ensuring attention to the studies, helping explain difficult concepts, etc. Among themselves, the teachers decide that teacher one will be responsible for students with names A-H, teacher two for I-P, and teacher three for Q-Z, establishing a division of labor for the discharge of their obligations. However, if teacher one observes that teacher three is not fulfilling his duty

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<sup>190</sup> Kok-Chor Tan, *Patriotic Obligations*, 86 *MONIST* 434, 437 (2003).

to the children, it is implausible that teacher one may rely on the division of labor to deny fulfillment of his or her duties to the children assigned to group three. Each child would perhaps receive better attention under an effective division of labor among the teachers, but the agreement does not imply that teacher one may ignore his duty to the children. The teachers may not contract out of their duties to the children, a limitation which makes sense given that the other teachers do not have the authority to determine who owes what to which child. However, the point does not depend on a quasi-contractual division of labor; even if the teachers naturally gravitate to different groups of students, the implicit division of labor does not eliminate their duty to the other children.

Supposing that a moral division of labor is optimal, why ought a particular state discharge its duty of justice in accordance with the division? To answer this question, we require some moral principle internal or external to the duty that determines how the state ought to allocate the actions that discharge the duty. Obviously internal principles of allocation that allow for unguided discretion or demand equal distribution of protection across persons will not explain why the state ought to comply with the moral division of labor. Perhaps if states enter into an agreement, the combination of permissible discretion and the agreement will explain why the state ought to discharge the duty in accordance with the division of labor: it promised to do so. But it is implausible that the state has unguided discretion in discharging the duty. The duty is directed at the end of eliminating actions of injustice, which would seem to impose by itself the idea that the actions taken are designed to advance that end. It seems implausible that the state may permissibly promise to discharge the duty in a way incompatible with the duty's requirements for the allocation of state efforts. In any event, there is no indication that states have promised to discharge the duty in accordance with a moral division of labor; if it exists, it is implicit.



The goal directed character of the duty of justice suggests that a principal concern in determining how to allocate acts that discharge the duty will be the efficiency of those actions, understood as the benefit divided by the cost. When a division of labor is in place, each state may assume that other states will discharge their duty of justice within their territories. Because the other states will discharge their duties of justice in their territories, it is most efficient for the state to do the same. Among other reasons, it will be efficient because no other state will discharge the duty of justice with respect to that population, meaning that protection efforts will more likely translate into actual protection in the territory without duplication of efforts or interference. In this sense, the moral division of labor determines that each state ought to discharge its duty of justice in its territory because that is the optimal response when the other states will do the same.

However, when some other states are not expected to discharge their duty of justice in compliance with the division of labor, the optimal strategy for efficiently discharging the duty involves contributing abroad. Other states may fail to discharge the duty by not directing their efforts exclusively towards their territories, or, more likely, by simply failing to expend the required effort in providing protection within their territories. Consider the example of a state that is probably doing less than it should to discharge its duty of justice within its territory: in Colombia, many parts of the territory have been effectively abandoned to illegal armed groups, forming brown zones without state protection institutions.<sup>191</sup> Colombia experienced 33.2 intentional homicides per 100,000 inhabitants in 2011.<sup>192</sup> But it nonetheless has a reasonably

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<sup>191</sup> See *supra* notes 84-85 and surrounding text; Guillermo O'Donnell, *On the State, Democratization, and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries*, 21 *WORLD DEV.* 1355, 1359-61 (1993).

<sup>192</sup> U.N. Office on Drugs and Crime, *Intentional Homicide Count and Rate per 100,000 Population (2000-2012)*, [http://www.unodc.org/documents/gsh/data/GSH2013\\_Homicide\\_count\\_and\\_rate.xlsx](http://www.unodc.org/documents/gsh/data/GSH2013_Homicide_count_and_rate.xlsx) (last visited July 27, 2014).

functional central state with substantial resources at its disposal (or potentially at its disposal via revised taxation policy), making it a state that probably should do more to provide protection.<sup>193</sup> Given such failures by Colombia, which perhaps translate into an elevated intentional homicide rate, it will often not be optimally efficient for other states to limit their protection actions to their territory, even taking into account the various advantages in not dividing efforts.<sup>194</sup>

Now, when considering a moral division of labor in the discharge of the duty of justice, it is not necessary to assume that the allocation of protection be fundamentally based on concerns of efficiency. It is possible, instead, that the duty of justice requires a state to distribute protection equally, but that a secondary consideration of efficiency supports a division of labor. By dividing labor, states can equally distribute protection while also increasing the total amount of protection provided. Each state in effect subcontracts its equal obligations abroad to other states in exchange for being their subcontractor in its territory. They swap parts of their obligations. In this way, states, either through their primary activity or through their subcontractors, may provide equal protection to all persons. But because each state is the exclusive provider of protection in its own territory and provides no protection in any other, they may provide more protection than would otherwise be possible. There will be no duplication of efforts or interference, and each state may specialize and acquire information relevant to providing protection in a particular territorial context. In this way, each state may provide more protection than it otherwise would, while still fulfilling the obligation to distribute that protection equally among all persons.

But much the same problems arise here as with a pure efficiency account. When

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<sup>193</sup> There are a number of reasons why it may systematically provide less protection than it should, particularly against violence from illegal armed groups. David L. Attanasio, *Militarized Criminal Organizations in Latin America and Human Rights Court Oversight of State Protection Efforts: Evidence from Colombia*, 41 FLA. ST. U. L. REV. 341, 381-86 (2014).

<sup>194</sup> Cf. *supra* Part III.A.2.

other states are not fulfilling their part of the moral division of labor, the duty of justice will require that a given state take measures to protect within the territory of the non-compliant state, even if a full effective division of labor would otherwise alleviate its need to do so. The state has the primary obligation to fulfill the duty of justice, and, while it may discharge that duty through subcontractors, it ultimately is incumbent on the state to provide the protection. The difference between a pure efficiency principle of allocation and an equality-based principle is the analysis of what the state must do when a subcontracting state fails to do its part of the division of labor. Efficiency requires that the state step in to take the efficient protection actions, while equality requires that the state ensure that those in the territory of the subcontracting state receive equal protection. In practice, working out what this requires against the background of an otherwise-operative division of labor will be complicated. What is not complicated is that a state may not simply ignore the failures of other states when the discharge of the duty of justice is subject to a division of labor.

## *2. Full compliance and optimal discharge*

A separate issue concerns whether a moral division of labor would be an optimal way for states to discharge the duty of justice in actual international circumstances, assuming that all states fully comply. Dividing labor along state boundaries is (supposedly) the best way to ensure that for each act of violence there is some state that will attend to it, and that the total resources required of all states will be sufficient to protect against all acts of violence.

However, it is not at all obvious in the current world circumstances that a moral division of labor on the basis of state boundaries will result in the most efficient protection against violence. Two aspects of actual world circumstances are particularly pertinent. First, different states have different capacities to act to protect against violence, putting to one side whether they actually fulfill their potential. For example,

Norway is presumably much better equipped than Somalia to protect against acts of violence, if for no other reason than differences in financial capacity. Presumably, the demands of the duty of justice are dependent on the capacities of states; the duty does not demand more protection than a state has the capacity to provide, and if it demands less, the demand is proportional to state capacity. Second, the territories of different states have different problems of violence, both as a matter of degree and kind. Many more acts of violence per capita occur within the borders of Somalia than within the borders of Norway,<sup>195</sup> and probably those acts of violence in Somalia are more extreme on average than those within Norway.<sup>196</sup>

A division of labor based on territory matches a state with its territory, not taking into account the fit between a state's capacity to protect (and the extent of its duty of justice) and the need for protection within a given territory. But even a casual review of intentional homicide rates and state strength will indicate that there is little correlation between the two. In fact, it appears that intentional homicide and state strength are inversely correlated on whole. If it is more efficient to pair a strong state with a high-violence territory, then a division of labor based on territories gets the division almost completely wrong. For example, is it really true that it would not be more efficient for Norway to be assigned responsibility for protecting in the territory of

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<sup>195</sup> The U.N. Office on Drugs and Crime reports that, in 2009 and 2010, Norway experienced 0.6 intentional homicides per 100,000 persons (2011 was abnormally high, at 2.3, because of the massacre committed by Anders Behring Breivik) while Somalia reportedly experienced 8.0 intentional homicides per 100,000 persons in 2012. U.N. Office on Drugs and Crime, *Intentional Homicide Count and Rate per 100,000 Population (2000-2012)*, [http://www.unodc.org/documents/gsh/data/GSH2013\\_Homicide\\_count\\_and\\_rate.xlsx](http://www.unodc.org/documents/gsh/data/GSH2013_Homicide_count_and_rate.xlsx) (last visited July 27, 2014). It is worth noting that the statistics for Somalia may not be highly reliable as they are based on a statistical model subject to important limitations. U.N. OFFICE ON DRUGS AND CRIME, *GLOBAL STUDY ON HOMICIDE 2013* 99-101 (2014). Statistics may also not be directly comparable across states because of differences in the definition of intentional homicide, which ought to exclude lawful killings. *Id.* 102-03. "Consistently with the definition of intentional homicide, killings directly associated with the operations of war are not considered to be intentional homicide . . ." *Id.* 104. So for those states like Somalia with ongoing armed conflicts, these figures should understate, perhaps substantially, the death rate from violence.

<sup>196</sup> Somalia continues to suffer from state collapse and armed conflict. See INT'L COMM. OF THE RED CROSS, ICRC ANNUAL REPORT 2013 192-98 (2014); INT'L CRISIS GROUP, *SOMALIA: AN OPPORTUNITY THAT SHOULD NOT BE MISSED* (2012).

Somalia rather than in its own territory? Even if weak states (low capacity) do not correlate with high violence territories, it seems implausible that on whole the most efficient way to protect against violence is to divide protection by territory. There are many weak states with highly violent territories, which by itself would render inefficient a division of labor based on territory.

A similar point applies if the duty of justice primarily requires equality in the allocation of protection, not efficiency. It is now important to distinguish two different forms of equal distribution: equal distribution of the means of protection and equal distribution of acts of protection. Equal distribution of means of protection would require that each person receive the same expenditures on protection, such as equal distribution of police based on population. Equal distribution of acts of protection requires that each person is equally likely to be the beneficiary of an act of protection when subject to an act of violence. The equal distribution of acts of protection will require more resources in more violent areas: the greater the rate of violent acts, the greater the protection expenditures necessary to ensure an equal probability of protection against a violent act. On either understanding of equal distribution of protection, a division of labor based on territory is unlikely to achieve equality. A territorial division of labor is unlikely to achieve an equal distribution of means of protection because different states have very different capacities to protect (or act more generally), and these capacities are not proportional to their populations. A territorial division also will probably not achieve an equal distribution of acts of protection because of the general mismatch between state strength and rates of violence.

#### IV. THE CONTENT OF THE OBLIGATION TO PROTECT

Apart from showing that the duty of justice is, in effect, territorially limited, a defense of the current explanation of the state obligation to protect must also show that the duty of justice requires the state to protect in accordance with our intuitions. The

primary strategy is to argue that the allocative principals for the duty of justice normally require protection against violence because acts of violence are particularly serious injustices. This section will show that this argument does not work, both because the resulting obligation to protect has the wrong characteristics and because it is implausible that there is a general preference for protection against violence over other ways of promoting justice.

#### A. *EXHAUSTION OF THE OBLIGATION*

A first problem for the duty of justice explanation arises from the fact that the duty of justice and a state obligation to protect are exhausted in different ways. A duty is exhausted when the duty or obligation ceases to make it the case that its subject ought to act or omit. But this may happen for different reasons. The duty may impose a requirement to act or omit that is justified or excused or it may cease to impose any requirement at all. One desideratum of an account of the state obligation to protect is that it implies that a state remains subject to a moral obligation to protect even when a lack of resources justifies or excuses non-performance of that obligation.<sup>197</sup> But when the duty of justice is exhausted for lack of resources, its non-performance is not merely excused; it imposes no further requirements on such a state. The duty of justice requires only that the state does enough to further justice, depending on its ability to act, so a lack of resources indicates that the duty has been exhausted and that it requires nothing more.

The duty of justice is a limited duty—even if potentially demanding—in the sense that it does not require a person or state to ensure that the world is perfectly just, even though the aim of the duty is to achieve justice. At some point, a person or state will have done enough. When a person has performed sufficient actions to promote justice, the duty requires no further actions to eliminate remaining unjust actions or

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<sup>197</sup> See *supra* ch. 1 Part III.C.

circumstances. The failure to achieve, for example, a minimal level of security for everyone in the world is not a violation in itself of the duty; the duty simply requires that a person or state do enough to promote this end. Once the person or state has done enough, the failure to do more is not morally wrong or a breach of the duty because the duty imposes no requirement to do more. The duty-holder is not simply justified or excused in making no further efforts; there is no further requirement to combat injustice after the duty-holder makes a sufficient effort.

Such a view is almost necessary, lest the instances in which the duty of justice is unfulfilled swamp those in which it is fulfilled. There are vastly more opportunities to promote justice than a person or a state can be expected to perform; the world unfortunately is large and, on whole, not particularly just. A person or state that tried to resolve all problems of justice would quickly run out of the funds necessary to do so.<sup>198</sup> But, if the duty of justice imposed a requirement on an individual person or state to resolve all such problems, a person or state would of necessity not comply with most of the requirements imposed by the duty. In fact, the unfulfilled requirements would likely eclipse the fulfilled requirements. An interpretation of the duty of justice that had this consequence would be strange. While a person or state would perhaps be justified in the failure to fulfill those requirements, and so the failure would not be morally wrong, it is in itself bizarre and perhaps unacceptable to interpret morality as imposing a duty that even the best and most conscientious leave largely unfulfilled under normal circumstances. We should instead understand the duty of justice to require only that a person do enough to promote justice, not eliminate all instances of injustice; the duty is exhausted when enough is done.

This manner of exhaustion of the duty of justice contrasts with the manner in which classical negative duties—such as the duty not to kill—are plausibly exhausted. A

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<sup>198</sup> Cf. Henry Shue, *Mediating Duties*, 98 *ETHICS* 687, 689 (1988).

person whose brakes fail on his car has a duty not to hit pedestrians. However, if he arrives a crosswalk full of people, making it impossible to avoid hitting everyone, we can sensibly say that his duty not hit and kill pedestrians has been exhausted if he steers away from the largest group of people (and perhaps even if she does not<sup>199</sup>). Under the circumstances, hitting the lone pedestrian would not be wrong. The reason it would not be wrong is not that the driver's duty imposed no requirement—that he is subject to a requirement is indicated by his special moral obligation to aid the injured pedestrian after hitting her and an obligation to make amends, perhaps by apologizing profoundly.<sup>200</sup> Instead, the act of hitting the pedestrian is not wrong because the driver has an excuse for his failure to fulfill the requirement: the impossibility of fulfilling the requirement for all the pedestrians.

A plausible state obligation to protect, of the sort described in the introduction,<sup>201</sup> is exhausted like the classical negative duties, even though it is a duty to take positive measures. For example, if state officials know about an impending attack by a non-state violent group, they normally have an obligation to take operational protection measures to protect against it.<sup>202</sup> This can be inferred from the appropriateness of a severe public response against the officials involved and the state itself if the state fails to take measures in the face of such knowledge. It is also reflected in the concrete liability standards the various international bodies have announced, which clearly require that the state take action in response to known risks.<sup>203</sup> These intuitions do not change simply because the state has already devoted substantial resources to protecting, or to

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<sup>199</sup> See, e.g., Judith Jarvis Thomson, *Turning the Trolley*, 36 PHIL. & PUB. AFF. 359 (2008).

<sup>200</sup> See Barbara Herman, *The Scope of Moral Requirement*, 30 PHIL. & PUB. AFF. 227 (2001).

<sup>201</sup> See ch. 1 Part III.

<sup>202</sup> Cf., e.g., *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 116 (1998); *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (Jan. 31, 2006); Jeremy Waldron, *Safety and Security*, 9 NEB. L. REV. 454, 479-80 (2006) (considering the British response to the fatwa against Salman Rushdie).

<sup>203</sup> See, e.g., *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 116 (1998); *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (Jan. 31, 2006).



other justice promoting activities. In fact, as argued in the introduction, it takes a substantial countervailing consideration, such as an unforeseeable lack of resources with which to protect, to defeat the moral wrongness of failing to protect.<sup>204</sup> However, these facts by themselves show only that the state has an obligation to take protective measures in the face of a known risk; it does not show how the obligation is exhausted.

But when a state lacks the resources to protect, it is clear that the obligation is exhausted because the state has a justification or an excuse for not fulfilling its requirements, not because the obligation ceases to impose requirements. If the state lacks the resources to protect due to the scale of the violence—for example if it only has a single military unit equipped for counter-terrorism operations—it may not be able to protect all vulnerable groups at the same time. For example, if a state has a substantial problem of violent groups that are carrying out a steady stream of atrocities, it is at least conceivable that the public security forces could be unable to protect everyone subject to risk. However, the lack of resources to protect everyone does not indicate the state has satisfied all requirements arising from the obligation to protect. At a minimum, the state must try to develop adequate resources to protect those known to be at risk from non-state violent groups<sup>205</sup> and it will appropriately suffer close public scrutiny over whether it was culpable for the failure to have sufficient resources dedicated to protection.<sup>206</sup> Additionally, even when the state had a valid justification or excuse in the form of a lack of resources to protect, sincere apologies to or even

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<sup>204</sup> See ch. 1 Part III.B.

<sup>205</sup> Cf. *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 124-40 (Jan. 31, 2006).

<sup>206</sup> For example, Human Rights Watch condemned the lack of police presence in many neighborhoods in Buenaventura, Colombia suffering an epidemic of forced disappearances by militarized criminal organizations. HUM. RTS. WATCH, *THE CRISIS IN BUENAVENTURA* (2014), available at [http://www.hrw.org/sites/default/files/reports/colombia0314webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/colombia0314webwcover_1.pdf).

reparations for the victims based on the failure to protect seem appropriate.<sup>207</sup> From these facts, we can infer that the exhaustion of the obligation to protect is by way of justification or excuse, not because of a lack of a requirement arising from the obligation.

The point being made is relatively simple: that the state obligation to protect is exhausted differently from the duty of justice when the state lacks the resources to do protect. The duty of justice ceases to impose requirements at that point, while the obligation to protect continues to impose requirements, even though fulfillment of those requirements is either justified or excused. However, one might object that the distinction between ways of exhausting an obligation is less relevant because the state need only discharge the duty of justice within its national territory. If the state, let us suppose, must focus all of its justice promoting activities on its territory by protecting, then wouldn't the state be less likely to be justified in its failure to protect? Making a sufficient effort to fulfill the duty of justice would probably require it to protect against most or all of the acts of violence in its territory, since this will be less demanding than protecting against most or all acts of violence in the world at large. Such a move might explain away cases like that of the state that does not protect against violent groups in its territory: the reason we think that the state had a requirement in that case is that it actually had such a requirement. The state has to devote all of its resources in fulfilling the duty of justice to protecting within its territory, and if it does so, there would be more than sufficient resources to protect against all such problems.

There are two responses to the objection. First, this objection preserves the existence of a moral requirement to protect in the case at the expense of changing the moral evaluation of the case. It assumes that the state acted wrongly in not fulfilling the

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<sup>207</sup> *Cf.*, e.g., Law 1448 (2011) (Col.) (although the law denies general state responsibility, it establishes state reparations even for victims of non-state actors, a provision that only seems reasonable if the state in some way failed to fulfill an obligation to protect).

requirement to protect against the violent group. But this is not the natural interpretation of the case. While the state had a moral requirement to protect, the state was justified in not fulfilling that requirement because of the lack of available resources, and so did not act wrongly. Perhaps the objection could be that the state *would* have had available resources were it attending only to its territory; the deployment of resources abroad could be the explanation of why the state could not protect. Because of the resources deployed abroad, the state did enough to fulfill its duty of justice, and so did not act wrongly, but it might have better fulfilled the duty of justice by deploying those resources in its territory. For this reason, it seems that the duty was fulfilled but something was lacking morally nonetheless. But why must we assume in the case that the state had protective resources deployed abroad? The United States is abnormal in the substantial number of security personnel stationed abroad and the amount of resources, albeit inappropriately low, that it contributes as foreign aid.<sup>208</sup> While many states contribute troops to the United Nations in exchange for financial compensation (with, if anything, a net positive contribution to domestic protection resources), the numbers are not comparable to those for U.S. military deployments abroad.<sup>209</sup>

Second, even if the objection correctly claims that we can appropriately account for the moral requirement in the case by attending to the limitation of the duty of justice to state territory, that limitation does not change the character of the underlying duty. That duty is not exhausted in the same manner as the state's special obligation to protect, so the justification of the special obligation in terms of the duty is unacceptable.

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<sup>208</sup> Org. of Econ. Cooperation & Dev., *Statistics on Resource Flows to Developing Countries, Table 3 - Total Net Flows by DAC Country* (Dec. 23, 2013), <http://www.oecd.org/dac/stats/TAB03e.xls>; U.S. Dep't of Def., Defense Manpower Data Center, *Total Military Personnel and Dependent End Strength* (Dec. 31, 2013), [https://www.dmdc.osd.mil/appj/dwp/getfile.do?fileNm=SIAD\\_309\\_Report\\_P1312.xlsx&filePathNm=milRegionCountry](https://www.dmdc.osd.mil/appj/dwp/getfile.do?fileNm=SIAD_309_Report_P1312.xlsx&filePathNm=milRegionCountry).

<sup>209</sup> United Nations Peacekeeping, *Monthly Summary of Contributions (Police, UN Military Experts on Mission and Troops)* (Feb. 2014), [http://www.un.org/en/peacekeeping/contributors/2014/feb14\\_1.pdf](http://www.un.org/en/peacekeeping/contributors/2014/feb14_1.pdf).

In more practical terms, in a case of exhaustion, even if these are rare, the special obligation and the duty of justice are subject to different moral analyses. Some states, particularly states with limited capacity, will likely exhaust the duty of justice before establishing appropriate minimal levels of protection and without providing protection in the face of specific risks.

More ambitiously, one might object that since states do not have countervailing obligations to themselves, their protective obligations under the duty of justice will *never* be exhausted. The responses are much the same. First, even if the state does not have obligations to itself that limit what it can be required to do for others, a state does have limited actual and potential resources to spend on protection. Obviously, at any point in time, a state has only so many police and soldiers, and even were it to expand the number of police and soldiers, there are limits to how many it can provide, normally because of limitations on the costs it may impose on its subjects. Perhaps the thought is that the state did not devote sufficient resources to police and soldiers in this case, but, even so, we could identify similar cases in which it did. Second, even if it is more difficult for a state to exhaust its duty of justice than for an individual, the point here is that the duty of justice is exhausted differently than the obligation to protect. They simply have different moral structures.

#### *B. ALLOCATION OF PROTECTION*

Another problem, closely related to that of exhaustion, but logically distinct, is that of the allocation of protection. A primary desideratum for an explanation of the state obligation to protect is that it entails that the state must provide a minimal level of protection for each individual in the state's territory. But the duty of justice requires at most that each individual receive equal protection from a fixed pool of resources. While it might require that the state apply the available (and required) protective

resources equally to each person, it does not require a given level of protection independent of available resources.

An adequate account of the state's obligation to protect must show why the state is required to protect all individuals in the state's territory, not just some of them. On such an account, the state must provide each individual in its territory with a certain non-comparative level of protection, including adequate systematic protection measures and operational protective measures against known risks of violence. However, the duty of justice simply requires allocating a certain total amount of protection among some set of people, here assumed to be those persons present in a given state's territory. In principle, if that total protection is exhausted before each person has received protection, then there will be no requirement that those remaining receive state protection. In this sense, an obligation to protect based arising from the duty of justice would not correctly require that each person be protected.

However, the duty of justice, if it requires some form of equal distribution of protection resources, may impose similar demands on a state. A plausible way to achieve an equal distribution (and an efficient use of resources) is to establish a system of protection, such as a police force, prosecutorial group, and courts. Even if these measures primarily function to disincentivize violence, they will also provide personnel who can intervene in specific acts. As they are not primarily responsive to particular risks of violence but instead benefit all in the territory, they may well constitute an equal distribution of resources. The requirement to such measures of protection would much resemble the desired requirement that the state establish sufficient measures of protection and to a lesser extent the desired requirement that the state take operational protective measures in response to known risks. A police force, if properly instructed, would frequently respond to specific threats with appropriate investigation, personalized protection, or other actions.

But, assuming that the duty of justice establishes the desired requirement for systematic measures, it is still unlikely that it would require the right allocation of operational protection measures. If the duty of justice requires an equal distribution of protection, would this mean that the state must save some of its protective budget in case a given person who has not yet received protection needs protection at some point in the future? Dedicating a great quantity of those resources to protecting someone who is at great risk, like Salman Rushdie,<sup>210</sup> might mean that sufficient resources will not remain to protect others also subject to known risks.

Moreover, there is a fundamental problem with recreating an appropriate distribution of state protection by supplementing the duty of justice with a principle of equal allocation. An equal distribution principle would knock a hole in most plausible defenses of a territorial distinction in the provision of protection. A major theoretical problem for explaining the state obligation to protect in terms of the duty of justice is accounting for why this obligation is in some sense special for those in the state's territory. Although I previously argued that this problem is difficult to overcome, let us suppose that there is some solution. But once we add an equal allocation principle to the duty of justice, that solution will almost certainly fail. To achieve an approximation of the desideratum for the state obligation to protect, the equal allocation principle would have to be a dominant consideration in the distribution of protection. But if it is the dominant principle concerning distribution, it will be incompatible with a territorial distinction in the allocation of protection. Thus, it is difficult or impossible to simultaneously explain why protection should be allocated primarily among those in the state's territory and why all those persons should receive equal protection.

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<sup>210</sup> *See supra* ch. 1 Part III.B.

### C. COMPETING MEANS OF PROMOTING JUSTICE

An analysis of the state obligation to protect in terms of the duty of justice suffers from a final content-related problem: protection competes with other forms of promoting justice when determining if the duty of justice has been exhausted. This problem does not concern how the duty of justice is fulfilled, but whether it will actually require *sufficient* (or any) acts of protection in its discharge. The fundamental problem is that protecting is not the only way of fulfilling the duty of justice. Protection competes with other methods of discharging the duty of justice, such as providing food, healthcare, or shelter, different from our intuitive understanding of the state obligation to protect.

Protecting against acts of violence is only one of many ways a state might discharge its duty of justice. Without a doubt, protecting against violence is one way of promoting justice: violent acts normally violate rights,<sup>211</sup> so protecting against them promotes justice by preventing rights violations. But other acts, events, and circumstances may also be contrary to rights. The duty of justice could be discharged by giving aid in a number of forms, such as by providing food, clothing, and shelter to the poor of the society whose economic and social rights are violated by the deprivation. If the state's duty of justice requires only that the state dedicate a certain amount of resources or effort to promoting justice, then promoting justice by providing food to those who have unfulfilled rights to food may offset any requirement to provide protection. But if food assistance may offset protection requirements, then the duty of justice *might* not require substantial protection from a state; perhaps the duty could be primarily fulfilled by providing food (or other forms of economic and social aid). But even if the duty of justice requires substantial protection, it may not require protection sufficient to explain the general moral intuition that the state must protect against most known risks of violent acts.

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<sup>211</sup> Cf. *supra* ch. 1 Part II.B.

However, perhaps there is a principle internal to the duty of justice that dictates the prioritization of actions that discharge the duty. In the context of human rights, Alan Gewirth suggested that

“a significant criterion for resolving conflicts of human rights, whether between rights of one person or of different persons. For, since the purpose of the human rights is to protect or secure persons’ abilities of agency, those rights whose objects are more important because more needed for action take precedence over rights whose objects are less needed for action.”<sup>212</sup>

Now, we do not necessarily have to understand Gewirth’s principle of precedence in terms of what is most needed for a person’s action, although this strikes me as a *prima facie* reasonable criterion. Instead, we might merely assume that the duty of justice ought to prioritize the promotion of considerations of justice securing the more important interest of a person over considerations of justice securing the less important interest. Justice’s prohibition of violent acts secures particularly important interests, those of life and physical integrity, so one might think that the duty of justice ought to prioritize protection against violent acts.

But, although this principle of precedence might require prioritizing justice-promoting activities based on the importance of the interest at stake, it is not clear that protection should generally win out. First, the extreme poverty is unjust because it affects interests that are as important to a person as (and perhaps even identical to) those that acts of violence affect. A person who cannot obtain food or health care because of extreme poverty suffers setbacks to a range of interests, including possibly interests in physical integrity and life, depending on the gravity of the deprivation. But interests in physical integrity and life are presumably central interests that also explain why it is unjust to commit acts of violence against a person. Second, it is not clear that the principle of precedence functions in isolation; there may also be some (countervailing)

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<sup>212</sup> Alan Gewirth, *Ethical Universalism and Particularism*, 85 J. PHIL. 283, 290 (1988).



attention to efficiency in allocating justice-promoting activities.<sup>213</sup> For example, if it is extremely expensive to maintain public security forces, especially in a context of widespread violence, it may well be more efficient to spend the resources on food, clothes, or shelter. At the margins, after minimal public security forces are in place, the state perhaps ought to discharge the duty of justice by providing social and economic aid in these forms.

One might object that this argument assumes that the obligation to protect is not so demanding as to require the state to take nearly all possible actions that promote justice. Perhaps the state must take advantage of nearly all opportunities to protect and all opportunities to provide social and economic aid. Then there would be no effective tradeoff between the different ways of discharging the duty of justice. But the problem with such an objection is that, while it might save the duty of justice account from this tradeoff problem, it will almost certainly destroy any territorial limitation on the natural duty of justice. If the duty demands so much of the state that it cannot ignore any opportunity to act at home, it is highly likely that it will have to act abroad as well. For this objection to succeed without destroying territoriality, one would have to assume that *every or almost every* justice promoting action in a state's territory is normally more efficiency than *any or almost any* justice promoting action abroad. But such a premise is even more implausible than the same idea in the weaker forms previously criticized, and for the same reasons.<sup>214</sup>

Finally, it is worth emphasizing that, at least according to our intuitions about the state obligation to protect, there normally is no competition between providing protection and other justice-promoting activities,<sup>215</sup> unlike with the duty of justice. The requirements established by the special obligation to protect do not depend on

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<sup>213</sup> See, e.g., *supra* Part III.

<sup>214</sup> See *supra* Part III.

<sup>215</sup> See *supra* ch. 1 Part III.B.

considerations of resources but instead on the need for protection.<sup>216</sup> The special obligation requires the state to provide this protection, generally independent of cost and the like. Of course, if the state budget is insufficient to cover the costs, at least when there is no alternative budget that could do so without sacrificing other morally important policies, the state might be justified in not protecting.<sup>217</sup> But there is no direct competition between providing protection and other justice-promoting activities when a state has sufficient resources to fulfill all its obligations. The point is not that protection should be prioritized over expenditures on food, clothing, shelter, and the like. Instead, the point is that protection and these other social programs should not be put into direct competition with one another for a fixed pot of resources. A state's moral obligations intuitively do not work this way.

## V. CONCLUSION

This chapter has argued that the duty of justice does not provide a convincing account of the state's special obligation to protect those persons in its territory. The duty of justice cannot be limited territorially on the basis of efficiency or a moral division of labor. Fundamentally, the problem is that the need for protection abroad will, for many states, be so much greater than the need for protection in its territory that it will neither be efficient to protect only at home nor be permissible to implement a moral division of labor. The duty of justice also cannot reproduce the content of the state's special obligation to protect. The lack of further capacity to protect simply justifies or excuses non-fulfillment of the special obligation to protect, but does not waive its requirements. The special obligation to protect requires an absolute level of protection for each person, while the duty of justice requires at most an equal allotment of available resources. And

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<sup>216</sup> *See supra* ch. 1 Part III.A.

<sup>217</sup> *See supra* ch. 1 Part III.B.

the duty of justice implies problematic tradeoffs between protection and other ways of fulfilling the duty, such as provision of economic or social aid.

However, it is worth emphasizing that the duty of justice may not be irrelevant as a source of requirements to protect: it may provide a better analysis of the state protection requirements in the world at large, against the background of a separate account of the state obligation to protect persons in its territory. For the world at large, the principles concerning allocation of protection on the bases of efficiency, equality, or urgency may make more sense of when and where the state seems morally required to protect abroad (or intervene with other forms of aid). It may require, for example, a state to intervene in mass atrocities, based on some of the allocative principles considered here. It is somewhat plausible that intervention in mass atrocities abroad should be guided by considerations of efficiency. It may also be sensible to think that a state does not owe persons abroad any absolute level of protection, but instead must simply deploy available resources according to the applicable allocative principles. And it seems much less problematic to think that protection and other forms of aid might compete in state efforts abroad. Such moral requirements could, in principle, be more demanding than those from the special obligation to those in a state's own territory, depending on the content of the duty of justice and the problems of violence at home and abroad.

## CHAPTER 3: POTENTIAL CAUSATION OF HARM

### I. INTRODUCTION

This chapter will consider a justification for the state obligation to protect based on the idea that all actors have an obligation to protect against harm when there is a foreseeable and avoidable risk that their actions will causally contribute to that harm. The application of the idea may be particularly intuitive in the context of prisons because of the state's role in rendering prisoners both "wholly dependent on the state for the means of their survival and deeply vulnerable to harm."<sup>218</sup> Those placed in prisons are effectively deprived of the means to protect themselves from violence as well as, say, health problems and hunger. They are also placed in dangerous conditions, in that prisons are notoriously violent places. Because exposing prisoners to these conditions causally contributes to the harms that the prisoners suffer, the state must protect them against those harms. The challenge of this chapter is to determine whether the application of this causal protection principle can be generalized beyond the context of a prison in order to explain the state obligation to protect in general.

Several authors have developed this idea outside of the prison context.<sup>219</sup> Perhaps the most direct accounts are by Jack Beermann and David Strauss, in their articles on

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<sup>218</sup> Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 913 (2009) (explaining the foundation of the state's obligation to prisoners, albeit without emphasizing that the state placed prisoners in such conditions).

<sup>219</sup> As expressions of the idea that positive obligations may arise from the fact that an agent's actions caused or threatened to cause a harm, these arguments are of a piece with Thomas Pogge's analysis of positive human rights obligations. Pogge (and others) defends the thesis that some positive obligations correlative with human rights are best understood (both pragmatically for human rights activists and morally for philosophers) as arising from the fact that people or institutions via their positive actions cause or threaten to cause those rights to be unfulfilled. He focuses specifically on how the institutions that create global economic markets contribute to global excesses of poverty because the norms they establish for those markets are less favorable to the very poor than possible alternative norms. See, e.g., Thomas Pogge, *Shue on Rights and Duties*, in GLOBAL BASIC RIGHTS 113 (Charles R. Beitz & Robert E. Goodin eds., 2009); Elizabeth Ashford, *The Alleged Dichotomy Between Positive and Negative Rights and Duties*, in GLOBAL BASIC RIGHTS 92 (Charles R. Beitz & Robert E. Goodin eds., 2009). When, on

*DeShaney v. Winnebago County*.<sup>220</sup> This U.S. Supreme Court decision held that a child, Joshua DeShaney, had no constitutional right pursuant to Fourteenth Amendment substantive due process that the state's child services protect him against abuse by his father, at least when there were civil and criminal remedies available.<sup>221</sup> Beermann, for example, focused on the institutional context in which the child was located when developing a criticism of the decision:

“All institutions—including the family, the corporation, and the school system—structure themselves in response to the institutions that surround them. As government agencies become more pervasive and more powerful, the ethical argument in favor of a governmental responsibility to intervene becomes stronger: Other institutions develop around those agencies . . . .”<sup>222</sup>

In general terms, Beermann suggested that this context, following the massive expansion of state services devoted to protection and the resolution of a range of other social problems during the 20<sup>th</sup> century, generates obligations that would not otherwise

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his view, a positive action “foreseeably and avoidably” results in a deprivation of the substance of a human right, the agent of that action commits a human rights violation. Thomas Pogge, *Severe Poverty as a Human Rights Violation*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 11, 16, 30 (Thomas Pogge ed., 2007). The activity of current international order, in his view, “foreseeably produces a reasonably avoidable excess of severe poverty and of mortality” because the institutions favor the interests of the affluent over those of the poor, such as in trade tariff requirements. He concludes from these causal facts that the current international order must be changed to stop violating human rights around the globe. *Id.* at 30.

However, Pogge infers from such causal chains both an obligation not to perform the initial action *and* an obligation to protect against the harms that may result once the causal chain is set in motion. Thomas Pogge, *Shue on Rights and Duties*, in *GLOBAL BASIC RIGHTS* 113, 129 (Charles R. Beitz & Robert E. Goodin eds., 2009). In this sense, he directly defends a moral principle equivalent to that considered in this chapter even though he is not specifically interested in how it might justify the state obligation to protect. He, of course, wants to argue that there are human rights obligations on the global scale to eliminate poverty. His view is not strictly incompatible with the idea that the state normally has a special obligation to individuals in its territory on the basis of a causation principle, as he locates the focus of the negative human rights obligations in global institutions, not individual states. It is possible that global institutions have obligations on the basis of a causal principle to most or everyone in the world while states have obligations on the same basis but primarily to those in its territory.

<sup>220</sup> Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078; David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. R. 53.

<sup>221</sup> *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 203 (1989). However, this holding is potentially limited to circumstances in which there has been no breakdown of retrospective state remedies, such as criminal and civil justice. David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. R. 53, 56.

<sup>222</sup> Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1089.

exist.<sup>223</sup> Even if the state would, absent the expansion of state services, have no obligation to protect a child like Joshua DeShaney against child abuse, the state is now deeply involved in the harm that the child may suffer. The modern state contributes to the social conditions that cause individuals to act violently and also creates social conditions that decrease the protection available other than from the state.<sup>224</sup>

The idea underlying these views has intuitive force: one must often protect when one sets in motion a causal sequence that will likely result in harm. In fact, many courts have interpreted *DeShaney* as admitting a ‘snake pit’ exception for those cases in which the state itself created the risk at issue, thereby causally contributing to the resulting harm, although they have not extended the exception to require protection for all or nearly all acts of violence.<sup>225</sup> This chapter will argue that this idea—that the state must protect against what it causes—cannot provide a fully satisfactory explanation of the special state obligation to protect because the resulting accounts are ultimately incompatible with one or more of three desiderata for an explanation. First, causal explanations normally cannot justify an adequate distinction between the state’s obligations to protect within and outside its territory. While a causal justification may focus the state’s protection obligation on its territory to some degree, the protection requirements will tend to bleed over the territorial limits. Second, a causal justification often cannot explain why the state’s obligation to protect would be an obligation owed equally to all those within the state’s territory. The urgency of the obligation would plausibly vary with the closeness of the causal connection between the state’s action and a given risk of violence. Third, a causal justification usually does not explain why the obligation to protect is in some way an essential, or at least ubiquitous feature, of the

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<sup>223</sup> *Id.* at 1089-91.

<sup>224</sup> *See id.*

<sup>225</sup> Karen M. Blum, *DeShaney: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435, 437-38 (1994).

state. Instead, it is depicted as an accidental and unstable consequence of certain state activities.

## II. CAUSATION AND PROTECTION

A simple moral principle, which I will call the causal protection principle, underlies the idea that the state normally has an obligation to protect against the harms from private acts of violence when its actions would causally contribute to the occurrence of those harms: a state—or any other agent—normally has an obligation to protect against a harm when his or her action will causally contribute to that harm.

Thomas Pogge observes:

“Those who are contributing to depriving others of the substances of their rights have a duty, of course, to discontinue this contribution. But they also have more stringent duties (than uninvolved bystanders similarly placed) to protect and to aid the deprived. The man who has, in a fit of jealous rage, sent poisoned chocolates to his rival has a more stringent duty to intercept the package, and a more stringent duty also to aid the victim (if the harm has already been done), than some uninvolved third person who also knows about the attack.”<sup>226</sup>

The principle is connected to the more general obligation not to harm. The obligation not to harm, of course, requires that one not intentionally cause harm to another. But it may impose additional demands even when one complies with that requirement. Pogge indicates that, “the rationale for these duties has a negative element: we have a general duty, insofar as we reasonably can, to avoid making uncompensated contributions to the deprivation of others . . . .”<sup>227</sup>

### A. CAUSATION, OUTCOME RESPONSIBILITY AND PROTECTION

But why is the harm or other outcomes that an agent causes relevant to the moral assessment of the agent, whether for determining responsibility or for assigning

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<sup>226</sup> Thomas Pogge, *Shue on Rights and Duties*, in GLOBAL BASIC RIGHTS 113, 129 (Charles R. Beitz & Robert E. Goodin eds., 2009).

<sup>227</sup> *Id.*

an obligation to protect?<sup>228</sup> One plausible explanation—extensively developed by Stephen Perry—is that our moral thinking contains a concept of outcome-responsibility, which connects a person’s agency to certain outcomes in the world.<sup>229</sup> Perry identifies embedded in our moral thought a basic concept of outcome responsibility, a form of responsibility for certain casual outcome of a person’s actions. In this sense, we evaluate our own actions and those of others partly on the basis of certain causal outcomes of those actions.<sup>230</sup> As an example, Perry notes that, while attempted murder normally is subject to a negative moral evaluation, a successful murder is normally subject to a harsher moral evaluation, apparently on the basis of outcome responsibility.<sup>231</sup> Potential outcome responsibility can give content to the general obligation not to cause harm to others through one’s positive actions by explaining when the harms that others suffer are morally relevant to the assessment of the initial action.<sup>232</sup>

Perry provides an explanation for why we have the moral concept of outcome responsibility, and why we make moral assessments on that basis. His idea is that that to be an agent requires “accepting, in some very fundamental sense, that we are responsible for the consequences of the choices we make.”<sup>233</sup> Agency is partly about changing the external world, so we do not morally ignore certain changes that occur as a

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<sup>228</sup> This question raises the foundational issue of why an agent has moral obligations that arise from the potential causal outcomes of an action. The philosophical theory of tort law (the law of extra-contractual responsibility), ARTHUR RIPSTEIN, *Foresight and Responsibility*, in EQUALITY, RESPONSIBILITY, AND THE LAW 94 (1999); Stephen Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); Tony Honoré, *Responsibility and Luck*, 104 LAW Q. REV. 530 (1988), and the literature on moral luck, BERNARD WILLIAMS, *Moral Luck*, in MORAL LUCK 20 (1982); Thomas Nagel, *Moral Luck*, 50 PROC. ARISTOTELIAN SOC. 137 (1976), have devoted substantial attention to this issue.

<sup>229</sup> This moral idea has received several different interpretations in the philosophical and legal literature, including ideas from Tony Honoré, Stephen Perry, and Arthur Ripstein. ARTHUR RIPSTEIN, *Foresight and Responsibility*, in EQUALITY, RESPONSIBILITY, AND THE LAW 94 (1999); Stephen Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); Tony Honoré, *Responsibility and Luck*, 104 LAW Q. REV. 530 (1988).

<sup>230</sup> Stephen Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 493 (1992).

<sup>231</sup> *Id.* at 493-94.

<sup>232</sup> However, the concept of outcome responsibility does not necessarily imply that a person has obligations whenever he or she would be outcome responsible for an event.

<sup>233</sup> Stephen Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 489-90 (1992). (characterizing Honoré).



result of an exercise of that agency, even when those changes are not intended. However, the origin of outcome responsibility in agency limits those causal outcomes for which an agent can be outcome-responsible. The exercise of agency is about making a difference in what occurs in the world, so outcome-responsibility is limited to those circumstances in which a change in the world can be traced back in the right way to the exercise of agency.<sup>234</sup> In Perry's view, making a difference in an outcome is principally (or perhaps exclusively) about control: either the actual control one has or the control that an idealized agent would have.<sup>235</sup>

### *B. CAUSATION AND THE STATE OBLIGATION TO PROTECT*

The fundamental insight of the arguments criticized in this chapter is that the state is not like other actors because it is generally much more expansive and active.<sup>236</sup> The modern state engages in a wide variety of activities that constitute interventions in the lives and actions of those persons in its territory. These activities include taxation, creation and application of private law, creation and application of criminal law, social security and health measures, and monetary policy, among many others. These activities are primarily carried out in the state's national territory and primarily concern those people that are present in that territory. While many states act abroad as well, we might view most such actions abroad as exceptional. For example, a state may invade and occupy another under special conditions but such foreign administration is not the normal condition for a state. States do normal act abroad in certain limited ways, such as by establishing embassies and consulates and by regulating the activity of their

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<sup>234</sup> *Id.* at 505.

<sup>235</sup> *Id.* To have such control over an outcome of an action requires the ability to *avoid* that outcome by acting differently, and, consequently, the ability to *foresee* the outcome, since it is impossible to avoid deliberately an outcome that one cannot foresee.

<sup>236</sup> Of course, some modern corporations rival some states in size, comparing corporate revenue to GDP. Vincent Trivett, *25 US Mega Corporations: Where They Rank If They Were Countries*, BUSINESS INSIDER, June 27, 2011, available at <http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1>.

citizens abroad. But the expansive set of actions that intervene in the lives of individuals are normally carried out in the state's territory.

Because of the great number of such activities, which are primarily oriented toward the state's territory, one might think that the state causes most or all harms from acts of violence that occur in that territory, and so has an obligation to protect against them. The state might cause the acts themselves. It may cause the conditions that instigate the actions, such as when economic or other policy contributes to poor economic conditions that impose stress on individuals who respond with violence. Or it may more directly enable the violent actions, such as by placing a child in the legal custody of an abusive father.<sup>237</sup> Alternatively, the state might block protection that would otherwise intervene to stop acts of violence. It might prohibit certain means of self-defense—such as certain arms or group structures—that would be effective in protecting against the harms from violence. Or it may prohibit alternative sources of protection, such as by excluding foreign states from its national territory. All of these are ways in which one might think that the state causally contributes to the harms from violence in its territory.

This explanation of the state obligation to protect differs from the duty of justice account in the last chapter in that it ties the obligation to protect to the state's contribution to the harms from violence. The duty of justice account supposes that a state as an agent has a general duty to promote justice the extent of which is roughly based on its ability to protect. In contrast, the state's contribution to the problem is the basis for the explanation in this chapter, where the causal protection principle is a manifestation of the more general obligation not to cause harm through one's actions. The relevance of the state's contribution to the violence might be explained in terms of Perry's ideas of outcome responsibility as a fundamental category of our moral thought

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<sup>237</sup> See, e.g., *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 191 (1989).

connected to the idea of agency. From this perspective, what is important is how a given exercise of agency changes the world. It is not permissible to make certain changes to the world, such as changes that involve certain harms to other agents. The obligation to protect from this perspective arises because the state's exercises of agency will, absent protection, make impermissible changes to the world.

### III. CONTRIBUTION TO VIOLENT ACTS

This section will consider the ways in which the state might causally contribute to acts of violence themselves, as opposed to ways in which it might cause the resulting harms by blocking protection against violence, the topic of the next section. It will argue that the special state obligation to protect in cannot be justified simply in light of the fact that the state causally contributes to the commission of most acts of violence in its territory. It will first consider the simplest form of a causal theory in the form of an argument proposed by Beermann that general state policy-making, such as economic policy, might be thought to cause acts of violence in a society and so the state must protect against those acts. After rejecting that simple explanation as inadequate, it will then complicate the account. It will consider the more specific idea that the state, through its law-making activity, causally contributes to acts of violence by constituting the social categories and relationships in which that violence is embedded. The section will conclude that, although causally contributing to a risk of violence may sometimes generate a state moral obligation to protect, this fact cannot satisfactorily explain the general state obligation to protect within its territory.

#### *A. GENERAL STATE POLICY AND THE CAUSAL MORAL PRINCIPLE*

One might think that the state causally contributes to conditions that instigate most acts of violence in its territory. In one thread of his argument, Beermann suggested that general state policy, such as its economic policy, might be sufficient to generate an

obligation to protect against violence because it ultimately causes that violence.<sup>238</sup> According to him, the modern state is so broadly active that its policies create the social conditions that cause many if not most private acts of violence.<sup>239</sup> About the *DeShaney* case, he said:

“Government economic and financial policies purport to balance economic growth against inflation fears, thereby affecting the availability of jobs and the distribution of wealth, factors that might easily contribute to conditions that lead to abuse within families and pressure to relocate away from established family and social support systems.”<sup>240</sup>

The same could be said for a range of social problems. For example, the availability of jobs and the distribution of wealth are factors that might contribute to a range of other acts of violence inside the family—such as domestic violence against children. They might also contribute to systematic problems of societal violence against women, such as were observed in the Inter-American Court’s *Cotton Field* decision, concerning the forced disappearance, rape and murder of three women as part of a societal epidemic of such acts.<sup>241</sup> Thus, “[i]n most cases in which non-government agents inflict harm, government policies are implicated.”<sup>242</sup>

This part will show that Beermann’s argument picks up on a causal connection between state action and private acts of violence that is too fragile to generate the right

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<sup>238</sup> See Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1092 (“[T]he pervasiveness of government involvement creates responsibilities. The more government involvement shapes society, the more responsibility government bears for social dislocations that contribute to private harms.”).

<sup>239</sup> See *id.* at 1091.

<sup>240</sup> *Id.*

<sup>241</sup> González (“Cotton Field”) v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 164 (Nov. 16, 2009).

<sup>242</sup> Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1091.

sort of obligation to protect.<sup>243</sup> The resulting explanation does not fulfill one of the principal desiderata of an account of the state's special obligation to protect, that the obligation normally requires the state to protect all persons in its territory against most acts of violence and normally, absent substantial state activity abroad, is limited to acts of violence in the state's territory. The general causal effects of state policy will not strictly respect national borders, even if they may be more concentrated within the state's territory. But it is not possible to explain on the basis of such causal effects an obligation that is territorially limited, much less one that requires the state to protect against all acts of violence in its territory.

### *1. The territorially-limited nature of the obligation*

To start, even if the general effects that economic and other state policy has on societal violence could justify protection obligations, they are inadequate as the causal predicate of the intuitive state obligation to protect: they cannot explain why the state has a protection obligation that is normally limited to its territory. Fundamentally, this explanation of the obligation is based on the plausible factual assumption that particular economic policies affect the availability of jobs and of wealth, factors that cause stress in or pressure on individuals, who may then lash out violently in response.

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<sup>243</sup> In effect, Beermann sought a causal connection to a state action by dramatically expanding the frame of reference. Finding a causal connection to a positive action—thereby transforming what seems to be a pure positive obligation into one arising from affirmative causation—depends crucially on the frame of reference taken into account. For example, a pure omission from a limited perspective may become a failure to protect against a chain of events that the state set in motion via a positive action. If we focus narrowly on the specific event in which DeShaney's father beat Joshua so badly that he suffered permanent brain damage, then it looks like the state simply failed to act, an omission. But if we expand the frame of reference to include the entire sequence of events that produced the beating and even the social context in which the beating occurred without anyone intervening, it may appear that the state did in some way cause either the beating itself or the lack of outside intervention. Pogge makes a similar point about international poverty. If we look narrowly at the current states of affairs, it looks like the rest of the world simply omits to provide aid or otherwise intervene in severe poverty. Thomas Pogge, *Severe Poverty as a Human Rights Violation*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 11, 21 (Thomas Pogge ed., 2007). But if we expand the frame of reference to include historical events, it may come to appear that the rest of the world causes global poverty through the global economic system, the history of colonialism, or other actions by foreign states. *Id.* at 21.

By changing monetary policy, public employment, and the like, the state sets in motion a chain of events and reactions by individuals that eventually terminates in layoffs or lack of hiring. But such chains of events almost certainly do not stop at national borders. For example, a change in U.S. economic policy that results in less consumer purchasing power will likely have effects in parts of Canada or Mexico, just as it will in the U.S. itself. Given that borders are more or less open to commerce and the existence of industries in both countries in large part serving the U.S. market, there is no reason to suspect an abrupt or discontinuous change in the effects of economic policy just because a border has been crossed. The distal effects of such policies on societal violence cannot easily distinguish domestic and foreign territory as objects of the state obligation to protect.

An easy objection to this point is that the United States may not be able to protect abroad exactly because there are borders, so the resulting obligation is in effect limited to its territory. However, even assuming that a state is normally limited to protecting within its borders,<sup>244</sup> this fact does not show that there is no obligation to protect abroad. Supposing that the causal chains are sufficient to generate an obligation to protect against those acts of violence, it seems perfectly clear that there is an obligation to protect against those acts even when they occur abroad. The United States could protect by contributing financially or otherwise to foreign state protection systems and efforts.<sup>245</sup>

And even if that were not possible, the most plausible interpretation of borders and the limitations they impose is that they eliminate the wrong of not fulfilling the obligation, not that they undermine the existence of the obligation. The fact that the state is prevented from fulfilling the obligation might constitute a justification or an

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<sup>244</sup> I argue in Chapter 2 that there are ways in which a state can protect abroad. *See supra* ch. 2 Part III.A.1.

<sup>245</sup> For more on this point, see *supra* ch. 2 Part III.A.1.

excuse, with the result that it does not act immorally by failing to fulfill the obligation. Consider a variation of the classic tort case *Montgomery v. National Convoy*,<sup>246</sup> where a driver's truck breaks down, blocks the road, but (contrary to the actual case) some third party forcibly prevents the driver from warning passing vehicles of danger. The driver has not acted wrongly in not protecting, but it seems he nonetheless owes at least an apology to the victim of a crash, if not some form of compensation. This lingering moral remnant implies that impossibility does not completely defeat the obligation. The desideratum is that the obligation stop at state borders, not that non-performance is excused or justified beyond state borders.

## 2. *A non-territorial obligation to protect?*

The more challenging response to the point about territoriality is that, instead of rejecting the causal protection principal as an explanation of the state obligation to protect, we ought to reject the desideratum that the state borders normally make a difference to the obligation to protect. Because of the violence one state's economic policy causes in another, it may have "to relax immigration constraints or train foreign police forces or send financial aid to other countries in order to reduce the violence caused by our economic policies."<sup>247</sup> This response is particularly challenging because, even if one wants to defend the normal territoriality of the state's *special* obligation to protect, one might not want to reject the idea that causing violence in abroad can generate obligations in some circumstances. For example, even if you think that there is a special state obligation to protect in its territory, you might think that if a state deliberately (or

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<sup>246</sup> *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (S.C. 1938). See *infra* note 255 for a description of the case itself.

<sup>247</sup> Comment from Seana Shiffrin to author (July 24, 2014) (on file with author).

not) foments an insurgency abroad, it may have special obligations to stop that insurgency.<sup>248</sup>

However, even if we are prepared to give up the claim that the state normally has an obligation to protect only in its territory, I think we are more deeply committed to the claim that the state normally has an obligation to protect all of those persons in its territory. And this claim is difficult to sustain on a causal protection account of the state obligation to protect. At bottom, and as will be explained in more detail, the account faces a dilemma. On the one hand, if causation generates an obligation to protect only when the causal chains connecting state action and an act of violence are relatively short, then the state will not have an obligation to protect all persons in its territory. On the other hand, if causation by itself generates an obligation to protect even when the causal chains are long, the state will at most have an obligation to do its fair share to protect against those acts of violence to which it contributes. Because there is no reason to think that these will primarily occur in the state's territory, an additional explanation is needed for why the state would have to protect against all those violent acts in its territory. But, for the reasons laid out in detail in Chapter 2, it is unlikely that such an explanation is forthcoming on the grounds of efficiency or equality.

Assume that only short causal chains are sufficient to generate a state obligation to protect. A causal chain between a state action and an act of violence is short if it picks out the state as the dominant causal factor for the act other than the person who commits the violent act. It is *prima facie* plausible that the state must protect against the violence it actions it causes via short chains because the chain itself picks out the state above all others as the cause of the action. But the problem with the short chain assumption is that many violent actions in a state's territory are not connected to state

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<sup>248</sup> For a discussion of a state fomenting an insurgency abroad, see *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).



action by a short chain. Take, for example, domestic violence. While it may be possible to identify causal chains that connect child or spousal abuse to some state action, in general (but not universally) these chains will not be short. For example, we might think that state economic policy is connected in some way to some acts of domestic violence, because economic conditions will put individuals predisposed to violence under additional stress. But the effect is indirect, in that the economic conditions that cause stress are mediated not only by state economic policy but by the actions of many other individuals and corporations. It is also indirect in that economic conditions are not the only factor; macro-level factors like cultural attitudes towards children or women and individual factors like prior victimization may also be relevant.<sup>249</sup>

To explain the state's obligation to protect against all acts of violence in its territory, it seems we must resort to long causal chains. A causal chain between a state action and an act of violence is long if it picks out the state as only one causal factor among others similarly significant, excluding again the person who commits the violent act. When we resort to long causal chains for protection obligations, it is unlikely that the causal chain itself can establish that the state must directly protect against a given act of violence, such as by sending in the police. First, because long causal chains are long, many actors will stand in the same relationship to a given act of violence to the state, so some consideration other than causation is necessary to explain who must directly protect. Second, when long causal chains are involved, it will often be difficult or impossible to determine who must protect. Neither consideration shows that causation is irrelevant to protection obligations, but it does mean that causation itself at best establishes an obligation to do one's part in responding to the violence.

Let's start by considering the fact that multiple actors will stand in the same causal relationship to a given act of violence if the causal chains that generate

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<sup>249</sup> WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 12-15 (2002).

protection obligations are permitted to be long. Elizabeth Ashford provides a helpful case of what I call long causal chains:

“Let us suppose . . . pollution is caused by a huge number of factories. Suppose too that the pollution they each cause in isolation causes no serious health problems. Nevertheless, it is entirely predictable that when all these pollutants mix their chemical combination will have the same devastating effect on the local population. . . . In the absence of institutional arrangements to determine how the shared responsibility for the harm is allocated among the factory owners in order to redress the claims of those harmed, it is indeterminate against which particular agent or agents a particular victim has a claim.”<sup>250</sup>

The state contribution to violence through economic and other policy is broadly analogous to this example. It results in violence only in combination with a large number of other factors, including decisions of private persons, corporations, and foreign states, in part dependent on and in part independent of state policy choices, as well as the similar policies decisions of many other states. The state cannot be singled out as the primary agent of protection on the basis of such long causal chains alone. It is in the same position as many other agents with respect to any given act of violence it causes via a long causal chain. As a practical matter, not all of these similarly situated agents can be the primary agent of protection for all acts of violence, both because the efforts would conflict or be redundant and because such obligations would most likely be overwhelming and over-demanding for each agent.

Now consider the typical epistemic circumstances of a state with respect to long causal chains: the state will not be able to determine which acts of violence it causes. Because these causal connections are complex and depend on a number of factors other than the state policy itself, the state is effectively unable to foresee the general characteristics of the particular causal sequence, much less which specific acts of violence will result. Let us distinguish between general and specific foreseeability: a

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<sup>250</sup> Elizabeth Ashford, *The Duties Imposed by the Human Right to Basic Necessities*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 183, 198 (Thomas Pogge ed., 2007).

harm is *generally* foreseeable as the consequence of an action if it can be foreseen statistically that some harm of that type might result from the action; a harm is *specifically* foreseeable if it can be foreseen that a particular causal connection between the action and the harm will arise. In this sense, it may only be *generally* foreseeable that state economic policy will cause some acts of violence and harms, but not *specifically* foreseeable through what causal chain those acts of violence will arise.<sup>251</sup> As Pogge suggests, it is generally foreseeable that our actions cause harm all over the world, establishing an effectively unlimited set of risks against which the state would have to protect. It is literally impossible for the state to protect against such a large class of risks, and, even if it were possible, such a moral obligation would be unreasonably demanding. It would likely swamp all of the state's other commitments.

Now, the facts that long causal chains fail to pick out the state as the primary agent of protection and that they may often be epistemically indeterminate does not

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<sup>251</sup> But if the state cannot specifically foresee this, it will not be reasonably possible to protect against a particular harm. If a person cannot foresee through which path her actions will contribute to causing a harm, that person will normally be unable to protect against the specific harm his or her actions cause. She normally will not be able to foresee when the harm will occur, nor who will be the victim, nor who will be the immediate agent of the harm. Of course, it may not follow that, absent such specific foreseeability, it is literally impossible to protect against the effects of an action. As a *prophylactic* measure, a person may protect against all harms that might possibly be the result of his or her actions. But it is worth emphasizing that we are considering circumstances in which the effects of an action are not specifically foreseeable, in part because they combine in complex ways with the decisions and actions of many other people. Given these facts, the set of threats that might be the effect of a given action may range from very large to effectively unlimited.

Sometimes a harm that is merely a generally foreseeable outcome of an action will become specifically foreseeable as events unfold. In that case, it may become possible at a later point in time to take reasonable protection measures against the outcome. And sometimes the initial action may even have been permissible because the potential harm, while foreseeable and avoidable (and so a harm for which the agent is potentially outcome responsible), was not so likely as to constitute a substantial risk. But subsequent events may convert what was at the time of the action a merely foreseeable and avoidable risk into a specifically foreseeable substantial risk that requires the agent to take protection measures. For example, the classic tort case of *Montgomery v. National Convoy* held that the driver of a vehicle that broke down and blocked the road had to place some sort of indicator to protect against an accident. *Montgomery v. Nat'l Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (S.C. 1938). Similarly, the *Pueblo Bello* case would seem to confirm the idea that no intent to bring about the result is necessary for the contribution to a risk to generate a moral obligation, as the Court did not indicate any intent by the Colombian state to bring about massacres of peasants. See *Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 126* (Jan. 31, 2006).

mean that causation is irrelevant to protection. The state could have an obligation to do its fair share to protect, along with all of the other agents that contribute causally to acts of violence. But there is no obvious reason at this point why the state would normally be required to protect against all acts of violence in its territory. When the causal chains lack the characteristics necessary to pick out the state as the primary agent of protection, the primary agent for protection against a given act of violence must be determined on some moral basis other than causation. That is, the obligation to protect against a given act of violence must be assigned to one of the agents that caused it (or might have caused it), but the causal relations do not distinguish between those agents. The set of possible agents for protection will plausibly be large since a given state will likely have such causal connections to acts of violence all over the world. And for the same reason a given state will be an eligible candidate to protect against acts of violence all over the world.

The consequence of this situation is that the state must decide how to do its fair share to protect against acts of violence, and it is unlikely that the state ought to decide to protect against all acts of violence in its territory. The potential options for determining when a given state ought to protect against a given act of violence in these conditions are much the same as those considered in Chapter 2: efficiency and equality of protection. While causation might be relevant to pick out a set of states as potential agents of protection, it cannot determine which of those states ought to protect against which acts of violence. Some other principle is required, and the principles from Chapter 2 are the most likely candidates. But neither efficiency in the provision of protection nor equality in the provision of protection is likely to require states in general to protect against all acts of violence in their territory for the reasons previously considered in that

chapter.<sup>252</sup> When the world has such vastly different levels of violence in different state territories and different state capacities to address the violence, it is not plausible that the normal state ought to focus protection efforts on its own territory for efficiency reasons. And equality in the provision of protection simply does not support a territorial protection effort at all.

#### *B. STATE CONSTITUTION OF SOCIAL RELATIONS AND THE CAUSAL PROTECTION PRINCIPLE*

Although the simplest causal theory of the state obligation to protect fails for a number of reasons, a more complex understanding of the connections between state action and violence might be thought superior. Let us return to the *DeShaney* case.<sup>253</sup> Different theorists have noted that we need not focus on the general economic policy background to conclude that the state contributed to the harm to Joshua DeShaney.<sup>254</sup> State family law as applied by a state court to Joshua gave legal custody of Joshua to his father, legally constituting the custody relationship that made possible his abuse, and the state is deeply involved in creating the institution of the family through its law and policy.<sup>255</sup> On facts of this sort, it is very difficult to deny that the state causally contributed to creating the circumstances in which Joshua was harmed. When we look at how state law as applied by state courts directly constitutes the circumstances that made the violence possible, the worries previously considered seem somewhat beside the point.

One might think that, since this sort of causal predicate for the state obligation to protect circumvents the problems previously identified, the state should have the

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<sup>252</sup> See *supra* ch. 2 Part III.

<sup>253</sup> *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989).

<sup>254</sup> Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1091; LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *The State Action Paradox*, in REMNANTS OF BELIEF 49, 57 (1996); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. R. 53, 65.

<sup>255</sup> David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. R. 53, 65-66.

obligation to protect against acts of violence arising from those circumstances it creates.<sup>256</sup> First, the causal chain between the state action and the harm is quite short: state law gave DeShaney's father custody over him, placing him in harm's way.<sup>257</sup> The short causal connection also should help support a distinction between obligations within and outside of the state's territory. Second, the state's contribution to the harm is not an insignificant or minor aspect of what happened. Although it may seem so ordinary that we do not normally attend to it, the fact that DeShaney was in his father's *legal custody*<sup>258</sup> is a significant part of the explanation as to why the father was able to beat him. Absent that custody, the child would not have been exposed to his father's violence.

### *1. The territorial nature of the obligation*

A first problem is that, while the background law may contribute to forming relevant social categories and relationships for some acts of violence in a society, it will not do so in general. For those acts of violence where the background law does not play such a role, the causal protection principle would generate no obligation to protect on this basis. If this is so, the resulting state obligation to protect will not fulfill the desideratum that the obligation to protect is normally owed equally to all persons in a state's territory.

The justification is strong in cases of domestic violence because of the role of state family law and private law in constituting the family. Many theorists remind us that the private law (whether judge-made common law or civil codes) is always present as a background state action that structures social relationships.<sup>259</sup> For example, Mark

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<sup>256</sup> Strauss seems to make exactly this argument in which he tries to generalize from the state's involvement in the *DeShaney* case to its involvement in most or all acts of violence. David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. R. 53, 67.

<sup>257</sup> *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 191 (1989).

<sup>258</sup> *Id* at 191.

<sup>259</sup> Erwin Chemerinsky suggests that, given the theoretical suppositions of the modern state, omissions to protect, just as well as actions, can deprive a person of a constitutional right. The

Tushnet comments that, “[t]he critical analysis that undermined classical constitutional theory demonstrated that background rights of property, contract, and tort all can be defined differently, with different consequences for the distribution of wealth and power.”<sup>260</sup> This critical analysis makes the point, obvious once noted, that the private law is not a natural or inevitable state of affairs, but instead, first, is a product of the state, and, second, need not have the content it has. The importance of Tushnet’s point is that state law is not a distant background to society, lurking at the level of complex decisions regarding the economy and the like. Instead, state law, primarily but not exclusively private law (property, contract, tort, family law, and the like), is an omnipresent background to our social interactions.

But despite the dramatic coverage of private law, not all acts of violence have such close connections to the law as those in *DeShaney*. For example, the decision of the European Court of Human Rights in *Osman* concerned an attack by a mentally ill teacher on the family of one of his students, where legally created categories and

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central argumentative step is the claim that “the state can be said to authorize all conduct that it does not prohibit.’ That is, the state’s common law implicitly gives an individual the right to do that which is not forbidden . . .” Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 521 (1985). Partial support for this premise comes from the fact that the state “has the [legal] power to prohibit private violations of individual rights.” *Id.* This premise explains why the state can be said to authorize *all* and not *some* conduct that is not prohibited, because if the state does not have the legal power to prohibit, the lack of a prohibition cannot directly imply authorization.

Although Chemerinsky’s argument applies directly to private actions that are not prohibited by the law, its relevance is less clear for those actions that are prohibited, which is generally true for the acts of violence of concern. For while it perhaps can be said that the state authorizes all actions that are not prohibited by the law, whether statutory or common, when the state fails to protect against an action prohibited by the law, the situation is more complicated. On the one hand, the fact that the law prohibits the action implies that the action is not authorized by the state. On the other hand, the fact that the state fails to protect against it—to take measures to stop its occurrence—*might* be understood as some sort of tacit authorization. But it would be a mistake to understand the failure to protect against a legally prohibited action as tacit authorization. First, the mere failure to protect does not entail that there will be no criminal or civil remedies available or imposed for the offending action. Second, the failure to protect does not in and of itself constitute authorization, independently of the explanation of the failure to protect. While a deliberate failure to protect against a desired action might constitute a form of authorization, such a failure when inadvertent or through negligence does not.

<sup>260</sup> MARK TUSHNET, *The State Action Doctrine and Social and Economic Rights*, in *WEAK COURTS, STRONG RIGHTS* 161, 189 (2008). *See also* David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. R. 53, 67.

relationships seemed less at issue.<sup>261</sup> This is not to say that it is impossible to posit any connection to the state: the assailant perhaps would never have met the victim if not for their encounter in the public school where he worked. And the social statuses of student and teacher are a result of state law and other policies, and we might think that these social statuses contributed in some way to the teacher's obsession with the student. Similarly, while theft and property crimes—not technically acts of violence in this dissertation—may have closer connections to law because property itself might be a product of law, it is sufficient for the argument that many acts of violence lack any such close connection to the law.

But, as described in the *Osman* decision itself, the teacher had no particular reason for his obsession with the student and his family, and there is certainly no indication that it had to do with the social relationship of teacher and student.<sup>262</sup> While need not limit ourselves to the Court's interpretation of events, it is not hard to think of cases that definitively eliminate these elements. We could imagine a case where the assailant, instead of meeting Osman in a state-created institutional setting with state-determined social roles, knew Osman because they lived in the same part of the city. Here the state law makes only the most indirect contribution to the act of violence. Perhaps it could be said that particular patterns of settlement—the choice of housing etc.—is a consequence of state policy and private law that determines the social distribution of wealth and social statuses. But these social statuses would not need to play any important role in the act of violence itself; they may be simply irrelevant to why the assailant develops an obsession and subsequently launches an attack. That is to say, we are pushed back from the close connection suggested by Tushnet and others to a more distant one. The state would be involved only insofar as its law causally affects

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<sup>261</sup> See *Osman v. United Kingdom*, App. No. 23452/94, Eur. Ct. H.R. 1, ¶ 56 (1998).

<sup>262</sup> See *id.*



who come into contact with whom, a fact that seems unable to support a state obligation to protect, and suffers many of the problems identified for economic policy as a causal factor.<sup>263</sup>

A similar but stronger point might be made even about acts of violence associated with street crime. It simply does not seem that state law constitutes in a direct way social relationships or understandings that are relevant to a mugging. First, while property law establishes the rights of ownership, rights incompatible with the mugger's intentional action, the rights of ownerships are not the objective of the typical mugger's action; a mugger is typically not making a political statement about those rights. Instead, a normal mugger is interested in obtaining the physical object subject to those rights. The rights, in the normal course of events, play a limited role in the choice to steal, and that limited role is likely to be the mugger's consideration of the negative consequences of violating property rights (prison, etc.). Second, wealth distributions, including patterns of poverty, may be a substantial factor in determining who will be a victim or perpetrator of a mugging, and those wealth distributions are undoubtedly strongly affected by law. But the connection between law and other economic policy and a mugging, even taking into consideration wealth distributions, is subject to the problems previously considered for the effects of economic policy on acts of violence.<sup>264</sup>

The causation of violence via legal formation of social categories and relationships is still less likely in those regions of a state's territory where state law is not applied or enforced—brown zones<sup>265</sup>—, not simply because the law is irrelevant but because it is non-existent. For example, in many cases like *Pueblo Bello*, the case

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<sup>263</sup> See *supra* Part II.A.

<sup>264</sup> See *id.*

<sup>265</sup> See *supra* notes 84-85 and surrounding text; Guillermo O'Donnell, *On the State, Democratization, and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries*, 21 WORLD DEV. 1355, 1359-61 (1993).

concerning a paramilitary massacre in a peasant village in rural Colombia,<sup>266</sup> it is simply not obvious that state private law is generally effective. While Colombian civil code nominally applies to the entire national territory,<sup>267</sup> it is well known that there are large parts of the territory where property law has been largely ineffective—holdings are primarily informal—and enforcement of other parts of private and public law is limited or non-existent. Many of the peasant communities most exposed to paramilitary massacres and other violent acts were in these regions where the state and its law were not a practical reality. In such circumstances, the state simply does not make a legal contribution to constituting social relationships or social statuses that would generate an obligation to protect.<sup>268</sup>

## *2. Equal obligation owed to all persons in a state's territory*

A second, and perhaps more fundamental, problem is that the content of the obligation to protect resulting from the law's causal contribution to an act of violence should vary with the significance of that contribution. The causal protection principle, unlike the general duty of justice from Chapter 2,<sup>269</sup> is inherently based on the agent's contribution to the violence and not on the agent's ability to protect.<sup>270</sup> But one of the desiderata for a justification of the state's special obligation to protect is that it explains why the obligation is normally, absent additional morally-relevant facts, owed equally

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<sup>266</sup> *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 95(33), 95(35), 95(40) (Jan. 31, 2006).

<sup>267</sup> See COD. CIV. art. 2, 18 (Col.).

<sup>268</sup> Similarly, the Inter-American Court in *Pueblo Bello* carried out no analysis whatsoever of the law's reach at the site of the massacre, implying that it was irrelevant to the state's obligation to protect. Cf. *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 105-140 (Jan. 31, 2006). The European Court seems to have made a similar assumption in *Ilașcu*. See *Ilașcu v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R. 1, ¶ 333 (2004) (deciding that a state has positive obligations even in regions where it is unable to exercise authority). Of course, as previously mentioned, the *Pueblo Bello* case independently suggested that the state contributed to the formation of the paramilitary groups, so perhaps in that case it was simply irrelevant whether the state had contributed in other ways to the massacre. However, it is hard to imagine that the Inter-American Court would find this factor decisive, given the stability of the protection obligation in both its jurisprudence and that of the European Court across a wide variety of circumstances.

<sup>269</sup> See *supra* ch. 2 Part II.

<sup>270</sup> See *supra* Part II.

and in the same form to each person in the state's territory. Although the state normally owes the special obligation equally and in the same form to everyone in its territory, it may have a heightened obligation or a distinct obligation with different foundations in some special circumstances, such as in prisons. While the causal protection principle might explain such heightened obligations, it does not explain the equal background obligation to all those in the state's territory.

The problem here is not only that a small contribution does not seem sufficient to establish a state obligation to protect, but that the actual obligation that results from a contribution ought to vary on this sort of justification with the significance of the contribution. Since the state causal contributions to potential acts of violence may vary quite substantially based on the ways in which it contributes to social categories and relations, the obligation ought to vary as well. A very minor contribution to a risk should not generate unlimited obligation to protect against that risk.

Applying this idea to the previous cases, it seems that in the *DeShaney* case the state will have a very great protective obligation because its family law is a central factor in making possible the violent actions. In contrast, in a case like *Cotton Field*, concerning violence directed against young, poor women, state law makes only the most indirect contribution to the violence through the way it molds social categories and relations, such as categories of wealth and poverty and the social status of women.<sup>271</sup>

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<sup>271</sup> In the *Cotton Field* case, young, poor women were the kidnapped, raped, tortured, and killed in Ciudad Juarez, Mexico. González (“Cotton Field”) v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 165-67, 209-21 (Nov. 16, 2009). Given that neither family members nor acquaintances of the victims appear to have been responsible, *see id.* ¶¶ 165-67, 209-21, one might wonder how social relations constructed by the private law might be implicated. The women in these cases were apparently targeted, or at least vulnerable to the attacks partly because of their poverty, as well as because of their gender. *See id.* ¶¶ 165-67, 209-21. As Tushnet has emphasized, the distribution of wealth in a society, which constitutes social positions and categories, depends on the substantive content of private law, as well as perhaps other social and economic policies of the states. MARK TUSHNET, *The State Action Doctrine and Social and Economic Rights*, in *WEAK COURTS, STRONG RIGHTS* 161, 189 (2008). Moreover, other aspects of private law, such as family law, may contribute to social categories and understandings of gender or be the focus of popular struggle to define these categories. *See*

While it is perhaps plausible that state law makes a contribution to the social understanding of the poor and women, in this case by affecting the social value placed on those in the category, the effect is weak. It seems implausible that, as a moral consequence of its causal contribution to the potential acts of violence, the state has the same moral burden in *Cotton Field* as in *DeShaney*.

But the state's special obligation to protect persons in its territory does not vary in this way; it is a general obligation to implement systematic protection measures and to take additional operative measures when appropriate. It intuitively does not vary based on the degree of the state causal contribution to the resulting act of violence. The obligation is to take measures sufficient to eliminate the risk when the state knows of a risk, and, apart from known risks, to implement effective law enforcement and criminal justice systems. And, more generally, whatever exact characteristics one thinks that the state obligation to protect has, they do not depend on the degree of state involvement in creating the risk.

### C. CONCLUSION

This section has set out reasons why state causation of particular acts of violence does not adequately explain why the state has an obligation to protect. Apart from doubts as to whether some postulated causal connections generate any obligation to protect at all, the resulting obligations do not fulfill several core desiderata of an account. First, they are unlikely to produce an obligation that makes a sufficiently sharp distinction between domestic and foreign territory because the causal chains will either be so long that they do not stop at the borders or too short to capture all violence against individuals in its territory. Second, the fact that the causal connections vary in significance indicates that the protection obligations should also vary in strength.

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*generally* ISABEL CRISTINA JARAMILLO, DERECHO Y FAMILIA EN COLOMBIA (2013). Perhaps this crucial aspect of the events, which explains why the particular victims were at heightened risk, was a result of social statuses constituted in part by the private law.

However, this is contrary to the desideratum that the account explain why states normally have the same protection obligation for all those in its territory, one that does not vary depending on the significance of state involvement in the act of violence. If a causal account is to work, it is unlikely that it can be based on the state's causal contribution to the acts of violence themselves.

#### IV. DISPLACEMENT OF PROTECTION

This section will turn to the idea that the state causes or contributes to injuries via its positive actions because it effectively displaces other sources and means of protection. Brennan's dissent in *DeShaney* exemplifies this line of argument. He focused on how the state may have displaced private actors from protecting Joshua DeShaney from his father:

“Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap.”<sup>272</sup>

He makes this argument in order to assimilate the *DeShaney* case to the Court's line of cases concerning the state obligation to protect in institutional settings, where the state effectively denies the victim any alternative sources of protection.<sup>273</sup> In this sense, he is not claiming that the state contributes to creating the risk of violence itself, but instead that the state deprives the victim of other source of protection. In his view, the court ought to focus on the various ways in which the state caused the injury by displacing other sources of protection, not on the narrow fact that the state omitted protection.<sup>274</sup>

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<sup>272</sup> *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 209-10 (1989).

<sup>273</sup> *See id.* 210.

<sup>274</sup> *Cf.* LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *The State Action Paradox, in* REMNANTS OF BELIEF 49, 55 (1996) (“What appears to be ‘mere’ state inaction is always embedded in a network of state action. Courts will always have to choose whether to focus on the network or the ‘inaction.’”).

The general moral principle reflected in this reasoning is utterly simple: if a person's actions cause other potential agents of protection not to protect, then that person must provide protection. This principle is an application of the same general idea considered in the last two sections that a person must not allow her actions to cause harm, and so must take protective measures to prevent the risks of violence she sets in motion from materializing or to reduce the resulting harm. If a state takes a measure that deprives another of a source of protection, that measure will be a causal factor in the resulting harm. Consequently, the state must then provide protection against the resulting harm. There is, then, a deep similarity between the justification considered in this section and the last, differing primarily in how the state contributes to the potential harm, by contribution to the primary risk of violence or by contributing to the lack of protection against that risk.

#### A. BEERMANN ON DISPLACED PROTECTION

Beermann develops a simple and expansive version of Brennan's argument about displaced protection. He suggests that the reason why the state contributes causally to harms from violence is that the pervasive modern state supplants other sources of protection.<sup>275</sup> In this picture, state action is pervasive and obvious in society, and often is aimed at alleviating social ills and risks to individuals of violence. The effect of such pervasive and obvious state activity is to justify the belief for private persons that someone else, specifically the state, is addressing risks of violence against individuals. Private persons may then infer that they need not act in response to those risks, because the state is taking care of the problem. Because of its obvious and extensive activity, the

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<sup>275</sup> Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078, 1093 ("Further, within the fabric of a society in which government action is pervasive, the consequences of government failure to act can be much worse than if government were totally out of the picture; thus ethical problems with government failure to act assume greater importance.").

state effectively displaces other sources of protection, causally contributing to the harms from acts of violence. Thus, the state has an obligation to protect.

This version of a displaced protection argument would not be satisfying as the sole justification of the state obligation to protect for a number of reasons. First, it does not fulfill the desideratum that a justification of the state obligation to protect shows it to be either essential to the state or at least ubiquitous. The argument limits the obligation to protect to modern states with pervasive activity, which means that many historic and even contemporary states have no such obligation. It is implausible that only states in a relatively specific category have an obligation to protect. As indicated in the introduction, a long historical tradition, dating to well before the birth of the modern, expansive state has accepted that the state has an obligation, or at least a primary function, of providing protection.<sup>276</sup>

Second, the argument rests on dubious factual assumptions. Although it may not be immediately obvious, the argument draws an assumption parallel to one made by some conservative commentators who argue that if we just cut back or eliminate the welfare state, private charity will fill in.<sup>277</sup> The assumption may only be roughly parallel because one might argue either that state expansion caused private protection to dry up or that rolling back the state would increase protective actions by private persons. But, the assumption seems weak in either form.<sup>278</sup> Seidman and Tushnet observe that “[o]ne of the difficulties with this sort of counterfactual is that it is very hard to know, or even

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<sup>276</sup> See *supra* ch. 1, Parts I, III.

<sup>277</sup> Olivia Kittel, *The Daily Show Is Not The First Time Forbes’ John Tamny Has Condemned “Cruel” Food Stamps*, Media Matters for America, Dec. 18, 2013, <http://mediamatters.org/blog/2013/12/18/the-daily-show-is-not-the-first-time-forbes-joh/197337>; Jordan Weissman, *Why Charity Can’t Replace the Safety Net*, Slate.com, March 21, 2014, [http://www.slate.com/blogs/moneybox/2014/03/21/private\\_charity\\_and\\_the\\_safety\\_net\\_why\\_philanthropy\\_can\\_t\\_replace\\_government.html](http://www.slate.com/blogs/moneybox/2014/03/21/private_charity_and_the_safety_net_why_philanthropy_can_t_replace_government.html).

<sup>278</sup> That part of the assumption is problematic was illustrated by the fact that U.S. food banks ran bare when federal food stamps were cut back in November 2013. Amanda Marcotte, *Food Banks Are Running Out of Food*, Slate.com, Jan. 23, 2014, [http://www.slate.com/blogs/xx\\_factor/2014/01/23/food\\_banks\\_in\\_new\\_york\\_city\\_are\\_running\\_out\\_of\\_food\\_more\\_demand\\_after\\_cuts.html](http://www.slate.com/blogs/xx_factor/2014/01/23/food_banks_in_new_york_city_are_running_out_of_food_more_demand_after_cuts.html).

guess with some confidence how people would act in the radically different alternative world we are asked to imagine.”<sup>279</sup> It is, at best, highly speculative to assert that the modern state in general actually decreases the individual propensity to watch out for the well-being or security of others and to intervene when they are endangered.<sup>280</sup>

There are different sorts of problems with determining what the state has actually caused with respect to propensity to protect. On the one hand, if the causal evaluation is carried out counterfactually, by considering what would otherwise be the case, we need to determine which is the relevant comparison: no government, ideal government, or something else? Even if we reject counterfactual evaluations of causation, it would be extremely difficult to disentangle the expansion of the state from other factors that might affect the propensity to protect. Among other problems, even if people are less inclined to protect when they are subject to a pervasive state, do we know whether that is a cause or effect of the pervasive state? Perhaps the state expanded *because* insufficient protection and other forms of aid were forthcoming from other members of society.

On the other hand, putting to one side these causal problems, are we even sure that people are less disposed to protect than they were in the absence of the pervasive modern state? It appears that, if anything, general concern for children’s welfare has increased during the post-New Deal period, and perhaps some of this increased concern is a result of the establishment of agencies devote to the issue. Perhaps the creation of child welfare services (and the expansion of government more generally) has made people more attentive to the issue of child abuse and has emphasized its moral

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<sup>279</sup> LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *The State Action Paradox*, in REMNANTS OF BELIEF 49, 56 (1996).

<sup>280</sup> This point only applies in general, which is all that is needed to reject the account as a general explanation of the special state obligation to protect. There are circumstances, such as prisons, in which it is much more plausible that state interventions have had this sort of effect.



seriousness. Moreover, state attention to other problems, such as domestic violence, may have a similar effect in increasing concern for social problems.

Absent an empirical resolution of these matters, we need a more direct way to connect state activity with displaced protection than simply claiming that a large and pervasive state will cause private persons to protect less.

## *B. DISPLACED PROTECTION AND THE STATE*

Instead, the modern state might be thought to displace more directly the ability of individuals to protect themselves as well as obtain satisfactory alternatives to state protection. The state may displace protection by prohibiting certain means of protection like self-defense militias and heavy arms or by prohibiting certain alternative sources of protection like intervention by other states. Because these effects are more direct, it should be easier to evaluate whether they can adequately explain the state obligation to protect.

### *1. Forms of displacement*

It is possible to make a rough distinction between two ways in which state prohibitions deprive individuals in its territory of protection. It may deprive them of certain means of protection, methods that can be used to protect against violence, or it may deprive them of certain sources of protection, agents that could protect. The distinction admits some overlap, in that some means of protection may involve forming new agents of protection.

First, there are often prohibitions on certain *means* of protection. States often prohibit the formation of private defense organizations as well as the possession and use of certain arms.<sup>281</sup> For an example of prohibitions on arms, it is currently illegal in most cases under U.S federal law to possess fully automatic rifles, let alone more exotic,

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<sup>281</sup> These prohibitions are, in my opinion, highly commendable measures of public policy; the question of whether they render the individual partly dependent on the state for protection is a distinct matter.

military-grade weaponry.<sup>282</sup> For an example of a prohibition on self-defense organizations, consider self-defense forces in Michoacán, Mexico. Until recently the Mexican state prohibited citizen militias or self-defense forces in Michoacán, Mexico, where people have been subjected to sometimes-extreme violence by the Knights Templar drug cartel.<sup>283</sup> Despite the prohibition, some of those subject to the violence organized themselves into self-defense organizations capable of repelling attacks and ridding parts of Michoacán of cartel presence.<sup>284</sup> Although the Mexican state unfortunately legalized these self-defense forces,<sup>285</sup> most other states continue to prohibit such forces.

A prohibition on such arms and self-defense organizations, if effective because of enforcement or respect for the law,<sup>286</sup> deprives individuals of a means of self-defense that may be necessary to reasonably protect oneself or others against certain sources of violence. When confronted with, for example, violence from drug cartels and other militarized criminal organizations, the individual self-defense typically permitted (or at least excused) under criminal law would likely be insufficient to protect successfully. For example, contemporary drug cartels like the Knights Templar are structured organizations that exercise violence through trained and specialized operatives frequently working in groups, not dissimilarly from a military squad. It is highly improbable that a lone individual would be capable under normal circumstances of protecting him or herself against these groups; some sort of organization is needed.

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<sup>282</sup> 26 U.S.C. § 5845(b) (defining ‘machinegun’); 18 U.S.C. § 921(a)(4) (defining ‘destructive device’ as including certain explosives, and high-caliber rifles); 18 U.S.C. § 922(a)(4), (b)(4) (prohibiting transportation and sale of machine guns and destructive devices in interstate or foreign commerce).

<sup>283</sup> See, e.g., Manu Ureste, *The Risks and Benefits of Legalizing Mexico’s Vigilantes*, INSIGHTCRIME.ORG, Feb. 5, 2014, <http://www.insightcrime.org/news-analysis/the-risks-and-benefits-of-legalizing-mexicos-vigilantes>.

<sup>284</sup> See, e.g., *id.*

<sup>285</sup> See, e.g., *id.*

<sup>286</sup> A mere *de jure* prohibition that is ineffective would, of course, have no effect on the ability of people to defend themselves.

Similarly, ordinary weaponry, like a semi-automatic rifle, would likely be insufficient for protection when confronted with gunmen armed with automatic rifles. Thus, such prohibitions, if effective, displaces alternative means of protection needed against such violence, at least on the assumption that individuals would otherwise organize themselves into effective self-defense forces and employ heavy arms.

Second, states typically exclude alternative *agents* of protection. Perhaps the clearest example is the normal exclusion of foreign state agents from the national territory, with limited exceptions. A foreign state that sends without permission or consent its armed forces to intervene in an internal security situation normally would commit an armed attack justifying the use of force in self-defense, as a matter of international law.<sup>287</sup> From a domestic perspective, whether or not domestic law directly addresses such a situation, the political leadership of the state will likely also consider the uninvited intervention of another state in its internal security to be a hostile act. An alternative to sending the military would be to send police, which might not constitute an act of aggression or other breach of international law, depending on how they enter. For example, if police were sent through normal channels of international travel, their entry might not by itself violate international law. However, they certainly would have no more legal power to protect than any other private individual in the receiving state, and perhaps less for being foreigners. Moreover, once the receiving state realized that the donor state was sending police without consent, an international incident would be likely, even if the police were conforming to all relevant domestic norms in the recipient state.

Sometimes states do consent to outside contributions to protection. For example, the U.S. provides substantial security assistance around the world with the consent of

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<sup>287</sup> Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX). Annex art. 3 (1974); U.N. Charter art. 51, June 26, 1945.

host governments (albeit not usually aimed at protecting civilians). But these forces are relatively small, and typically have fairly limited and specific mandates, based on the interests of the donor state and to some extent on the interests of the host state. States are more likely to receive foreign funds on a large scale than foreign personnel, for use in developing their domestic security forces. The fact that a state receives contributions or limited assistance in personnel from foreign states does not change the fact that it normally excludes direct interventions by foreign states. And in this sense, it continues to displace international sources of protection in favor of its own agents. The bottom line is that under normal conditions, states do not permit the entry of significant foreign agents that might protect their population.<sup>288</sup>

## *2. Actual and potential causation*

The main problem for an explanation of the state obligation to protect on the basis of such facts is that it is not obvious that these state prohibitions actually contribute causally to the harms from acts of violence. The reason is simple. While states without a doubt limit or prohibit certain means and sources of protection, it is not so obvious that these prohibitions normally deprive people of alternative means and sources of protection. People normally would not or could not avail themselves of this protection even were it not prohibited.

Most people are not going to form self-defense forces or benefit from their protection, whether or not they are legally permitted. For example, in 1994, Colombia created a legal framework for private self-defense forces that came to be known as CONVIVIR ('to coexist' in Spanish), and were aimed at protecting primarily wealthy

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<sup>288</sup> An important potential exception involves international peacekeeping forces, such as those of the United Nations. However, international peacekeeping typically occurs only when a society is emerging from an international or non-international armed-conflict. U.N. DEP'T OF PEACEKEEPING OPERATIONS & DEP'T OF FIELD SUPPORT, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES 18 (2008). In this sense, it is not directly relevant to protecting against less organized forms of violence, from violent crime to domestic violence. Current U.N. doctrine indicates that peacekeeping forces are to be deployed only with the consent of all parties to the armed conflict. *Id.* at 31-33.

rural landowners against various leftist guerrilla forces.<sup>289</sup> This may constitute an example of the sort of legal self-defense forces needed to provide meaningful protection against an armed group, in that these forces were permitted to patrol and intervene in areas of significant guerrilla activity, with the expectation that they would engage in hostilities with some regularity.<sup>290</sup> State officials also frequently supplied them with military-grade weapons.<sup>291</sup> But, while a self-defense force of this character is probably necessary to protect effectively against an armed group like the FARC, most people neither participated in nor benefited from the legal opportunity to organize self-defense forces. In fact, the main effect of the program was to augment the waves of terror that the various actors in the Colombian armed conflict committed against the civilian population. Human Rights Watch documented a series of representative acts of massacre, murder, and torture that the groups committed against the civilian population.<sup>292</sup>

Similarly, most people are not going to acquire heavy weaponry, regardless of prohibitions on owning such weaponry. In the United States, approximately 34.4% of households had a firearm in 2012.<sup>293</sup> While this figure may seem high, it implies that 65.6% of household had no firearm of any sort, let alone heavy weaponry. This is important because the United States has relatively lax gun laws compared to most of the world, and even permits private ownership of borderline military-grade rifles, such as the AR-15 which is a semi-automatic version of the M-16 military rifle. Now, the United States may not be representative of what people would acquire in a state in which there was actually a need for weaponry for self-defense purposes: the United

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<sup>289</sup> Decree 365 (1994) (Col.); HUM. RTS. WATCH, WAR WITHOUT QUARTER 89 (1998).

<sup>290</sup> *Id.* at 89-90.

<sup>291</sup> *Id.* at 94-95 (“[T]hree of the forty-seven CONVIVIRs registered with his signature received weapons that year that were restricted for the sole use of the armed forces, including Galil rifles, mortars, grenades, and M-60 machine guns.”).

<sup>292</sup> *Id.* at 100-103.

<sup>293</sup> *United States — Gun Facts, Figures and the Law*, GunPolicy.org, <http://www.gunpolicy.org/firearms/region/united-states> (accessed April 6, 2014).

States currently has limited organized violence by private parties. But the United States has the greatest number of firearms per capita in the world.<sup>294</sup> It seems plausible that even in conditions of complete deregulation of firearms, many people would not acquire the heavy weaponry that is currently prohibited in most state, such as fully automatic rifles.

Moreover, many or most states allow some variations of these means of private protection. Because these means are adequate to protect against the standard risks of violence that exist in most societies, the prohibitions do not causally contribute to a lack of protection. First, private protection agencies are typically permitted and in fact are currently extensive, and in many states provide more security personnel than do the state police agencies.<sup>295</sup> Such private security seems sufficient for the risks of violence that occur in most societies not in a state of armed conflict or near armed conflict, as they perfectly well can protect against an individual who wishes to commit an act of violence. Second, many states permit private gun ownership, even when they do not allow ownership of military-grade firearms like fully automatic rifles. But absent widespread attacks with military-grade weapons, there does not seem to be a need for anything more to effectively protect oneself against acts of violence.<sup>296</sup>

These comments do not show that states never causally contribute to a lack of protection by outlawing private self-defense forces or the ownership of heavy weaponry; for some people in some circumstances the state might do so. While the state does have to protect people when it deprives them of effective alternative means of protection, the

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<sup>294</sup> SMALL ARMS SURVEY, GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 47 (2007), *available at* <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2007/en/full/Small-Arms-Survey-2007-Chapter-02-EN.pdf>.

<sup>295</sup> See David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1174-76, 1181-82 (1998).

<sup>296</sup> Even pro-firearm sources lean toward handguns as optimal for self- or home-defense. See, e.g., Richard Nance, *G&A Basics: How to Choose Your First Home Defense Gun*, GUNS & AMMO.COM, Feb. 21, 2013, <http://www.gunsandammo.com/2013/02/21/ga-basics-how-to-choose-your-first-home-defense-gun/>.

modern state does not deprive people of such protection in general. Any causal contribution the state makes to depriving people of protection is far too limited to constitute a general explanation of the special state obligation to protect. Some people are exposed to risks of violence that they would otherwise combat through the formation of self-defense forces and others would respond to the risks by acquiring fully automatic rifles. But for many, if not most, people the regulations make no difference to their ability to defend themselves alone or in groups, both because they would not avail themselves of the prohibited opportunities and because they are not exposed to the risks for which the prohibited means of self-defense are relevant. The state does not causally contribute to depriving many people of protection by implementing these prohibitions, even if it may do so for some. As a general explanation of the state obligation to protect, the fact that the state causally contributes the injuries from acts of violence by prohibiting certain means and sources simply will not cover a sufficient number of cases.

Turning to the typical prohibition on international intervention in internal security matters, it seems highly unlikely that that international forces would intervene in a matter that is less substantial than an outright armed conflict (and even then the chances are probably low). Perhaps the most famous example of collective failure to intervene in security matters was the lack of an adequate international response to the 1994 Rwanda genocide. And while the failure in Rwanda triggered a substantial amount of collective soul-searching, it is not obvious, to say the least, that states are more likely in 2014 than they were in 1994 to intervene even in the face of such extreme events. Since Rwanda, for example, there was a well-publicized armed conflict and genocide in Darfur, Sudan, in which foreign states did not take significant actions until after the primary phase of the crisis was over and a ceasefire agreement had been reached.<sup>297</sup> When foreign states do intervene in armed conflicts and other internal situations, it is

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<sup>297</sup> INT'L CRISIS GROUP, DARFUR: THE FAILURE TO PROTECT (2005).

frequently to defend interests different from that of the security of individuals. An example is the U.S. financial and training support in Colombia, which seems to have been motivated more by U.S. interests in protecting an allied government and in its global narcotics policy than any genuine interest in security for individuals.<sup>298</sup>

Thus, while the fact of state borders seems morally important, it does not establish that the state causes the acts of violence that occur within its borders by displacing protection against those actions.

## V. CAUSATION AND OTHER STATE OBLIGATIONS TO PROTECT

The arguments in this chapter show why the state special state obligation to protect in its territory is not well explained by the causal protection principle. However, the principle may more convincingly explain certain specific state obligations to protect those outside its borders. For one type of case, consider the following situation: a risk of violence originates from the territory of a foreign state and can only be stopped at its point of origin. An example might include a cross-border assault by a non-state armed group that can only be protected against in the state of origin because, while the location of their camp is known or predictable, the location of a given attack is not. Another might be a cross-border rocket attack by a non-state actor that can only be stopped before rocket launch.<sup>299</sup> The state from whose territory the attack will be launched deprives the foreign state of the ability to protect, and would probably thereby causally contribute to the ultimate harm. As a result, it ought to protect in the stead of the foreign state.

For another type of case, consider states that intervene abroad, militarily or otherwise, and cause breakdowns of law and order in the foreign territory. Some specific

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<sup>298</sup> See James Petras, *Geopolitics of Plan Colombia*, 35 *ECON. & POL. WEEKLY* 4617 (2000).

<sup>299</sup> For example, rocket attacks from the Gaza strip directed against Israel. See, e.g., INT'L CRISIS GROUP, *GAZA AND ISRAEL: NEW OBSTACLES, NEW SOLUTIONS* (2014).



examples, putting aside complicating details, might include the U.S. invasions of Iraq and Afghanistan, which have had lasting and deleterious effects on internal security in both of those countries. Another example might be the actions of Russia in Eastern Ukraine, where Russia's actions have led to extended civil strife and perhaps even internal armed conflict. In these cases, there is a clear causal link between the state and violence that singles out a particular state as the primary causal factor. In such circumstances, it is plausible that the state has a specific obligation to act to protect against the circumstances of violence that it created.

These sorts of arguments do not run afoul of the considerations used to reject causation as an explanation of the state's special obligation to protect in its territory. First, since there is no obvious pressure to explain a general and equal obligation to all persons in a territory, the arguments do not suffer from one of the main problems identified in this chapter.<sup>300</sup> The obligation to protect in Iraq, for example, might well not extend to the entire territory. Perhaps it excludes the Kurdish areas in the North that were not under the control of Saddam Hussein in 1993 and that seem to have suffered less violence as a result of the invasion.<sup>301</sup> Moreover, the obligation may not even be an obligation with respect to all acts of violence but instead an obligation simply to eliminate those patterns of violence that resulted from the U.S. invasion.<sup>302</sup> In fact, these properties of the obligation arising from applying the causal protection principle to the U.S. intervention in Iraq seem to match reasonably well our rough intuitions about U.S. obligations in Iraq: undo the damage the invasion caused.

Second, the two types of cases of extraterritorial protection seem to involve clear lines of causation between state actions and the harms from violence, in contrast to

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<sup>300</sup> See *supra* Parts III.A, III.B.2.

<sup>301</sup> Compare with *supra* Part III.A (noting that the causal protection principle cannot explain a general obligation to protect against all acts of violence in a territory).

<sup>302</sup> Compare with *supra* Part III.B.2 (noting that the causal protection principle does not generate an equal obligation when the causal contribution differs).

some of the arguments considered in this section.<sup>303</sup> With attacks launched from a state's territory by non-state actors, it may well often be the case that the state where the victims are located would take actions to protect were it not for the fact of borders. In many cases of foreign intervention, there is a fairly clear causal connection between state actions and the resulting insecurity. But apart from the presence of an actual causal connection, the causal connection is often a short chain, specific enough to pick out a particular state as the primary agent of protection.<sup>304</sup> For example, U.S. actions were plausibly the dominate cause of massive insecurity in Iraq and Afghanistan, which makes it likely that the U.S. is not simply one among many actors that had to contribute to protecting.

## VI. CONCLUSION

This chapter has considered whether some application of the causal protection principle might explain the state's special obligation to protect against violence in its national territory. The results were primarily negative. However, the negative results were not tied to the underlying characteristics of the causal protection principle, but instead to its inability to reproduce some of the main intuitive features of the state's special obligation to protect in its territory. The principle may well generate state obligations to protect under certain circumstances, just not the special territorial obligation.

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<sup>303</sup> *See supra* Part IV.B.

<sup>304</sup> *See supra* Part III.A.2.

## CHAPTER 4: PROMISES AND RELATED PHENOMENA

### I. INTRODUCTION

This chapter will criticize the view that the state has an obligation to protect those persons in its territory from third party violence because it in some sense promises to do so. One important (and plausible) historical understanding of why states extended rights and services like protection to, at first, powerful constituencies and, later, broader segments of the population suggests they made implicit agreements with the population. In short, in order to extract increasing concessions from their populations—perhaps in the form of resources for war—the states had to in turn concede certain rights and services to their populations.<sup>305</sup> The populations first obtained concessions directly linked to the state demands—such as on taxation or military service—and later on other issues of interest—including “on employment, on foreign trade, on education, and eventually much more.”<sup>306</sup> In this way, states transformed from mere coercive organizations with “clear priority in some respects over all other organizations within substantial territories” to organizations that bring peace to a territory by generally limiting or prohibiting the use of private force.<sup>307</sup> Underlying this historical interpretation is the idea that the state has, in some sense, implicitly agreed to protect or bring peace to a territory, suggesting a promise-based explanation of the state obligation to protect.

This chapter will show what goes wrong with an attempt to explain the state obligation to protect in terms of an implicit state promise to protect.<sup>308</sup> It will formulate

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<sup>305</sup> See CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1990*, at 99-102 (1990).

<sup>306</sup> *Id.* at 120.

<sup>307</sup> *Cf. id.* at 53, 120.

<sup>308</sup> It is worth clarifying the use of vocabulary in this chapter. When theorists have attempted to explain political obligation in this way, they have typically used the term ‘consent’

a strong promise-based account that explains the state obligation to protect in terms of the implied promise to protect made when the state claims a monopoly on the legitimate use of force, which it typically does in its legal territory. Such an explanation comes close to adequately distinguishing between the obligation within the state's territory and any obligations that exist for those territories and persons to which the state has no special relationship, nearly satisfying a primary desideratum of an account.<sup>309</sup> Because of this near success, the chapter will focus its criticisms on more substantial problems with the explanation with implications for other explanations of the state obligation to protect. First, a promise-based explanation incorrectly presupposes that a state has a sphere of liberty in which it may assume new moral obligations. Second, a promise-based explanation in terms of expectations or assurances, moreover, incorrectly fails to make the individual interest in security a central part of the account.

## II. PROMISE-BASED EXPLANATIONS OF THE STATE OBLIGATION TO PROTECT

This section will set out a promised-based explanation of the state obligation to protect, arguing that the state's claim of a monopoly on the legitimate use of force constitutes an implicit promise to protect. However, before considering how the claim of a monopoly on the legitimate use of force generates an obligation to protect, it is worth explaining why the section will not consider other sorts of promises. After all, state

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to describe the basis of the obligation to obey the state. But there also seems to be some consensus that the term 'consent' typically applies when one authorizes another to do something normally prohibited. For understandings of consent along these lines, see Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 500 (2008); A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 76 (1979).

Neither political obligation nor a state obligation to protect has this form. A political obligation is commonly understood to be an obligation to comply with certain laws or commands of the state, while an obligation to protect is just that, an obligation to take measures to protect. Neither of these obligations involves granting another authorization to do something but instead they involve establishing new requirements to act in particular ways. For this reason, it seems more natural to talk about a promise, rather than consent, to comply with certain laws and commands of the state as the explanation of political obligation and a promise to protect as the explanation of an obligation to protect.

<sup>309</sup> It only comes close because a state may not claim a monopoly in all parts of its legal territory, limiting the special obligation to only certain segments of that territory.

officials make promises all the time, both in formal and informal formal capacities, and often these promises are related to protection. For example, the President of Colombia might be understood to have officially promised to protect against militarized criminal organizations and revolutionary guerrilla groups, as well as to protect the highways.<sup>310</sup> In the years following September 11, the Bush administration made a variety of promises related to protecting U.S. citizens against terrorism.<sup>311</sup> At least regarding high profile risks of violence, it is quite common for politicians and leaders to make explicit promises to protect.

Moreover, states might also make promises via formal legal means, such as when they enact constitutions, laws, and other binding or non-binding legal instruments. Other binding legal instruments may include executive orders or decrees, while in the U.S. non-binding legal instruments include congressional resolutions. Such instruments may constitute promises, and it is plausible that at least some of these promises will bind the state. For example, the U.S. Bill of Rights might plausibly be thought to be a promise (among other things) by the federal government to respect certain rights,<sup>312</sup> in addition to having legal effects within U.S. constitutionalism. Such promises may well be morally binding on the state in many circumstances.

Despite the frequency of such explicit or nearly explicit promises, there are a number of reasons to look elsewhere for an explanation of the state obligation to protect. First, an explanation based on explicit promises is overly contingent on the details of

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<sup>310</sup> See *Declaración del Presidente Juan Manuel Santos al concluir el Consejo de Seguridad en Quibdó*, PRESIDENCIA DE LA REPÚBLICA, Sept. 13, 2012, [http://wsp.presidencia.gov.co/Prensa/2012/Septiembre/Paginas/20120913\\_05.aspx](http://wsp.presidencia.gov.co/Prensa/2012/Septiembre/Paginas/20120913_05.aspx); *Palabras del Presidente Juan Manuel Santos en el Congreso Internacional para Autoridades Territoriales: 'La seguridad ciudadana, un compromiso de todos'*, PRESIDENCIA DE LA REPÚBLICA, Feb. 15, 2012, [http://wsp.presidencia.gov.co/Prensa/2012/Febrero/Paginas/20120215\\_08.aspx](http://wsp.presidencia.gov.co/Prensa/2012/Febrero/Paginas/20120215_08.aspx); *Presidente Santos anunció refuerzo de vigilancia en carreteras del Caquetá*, PRESIDENCIA DE LA REPÚBLICA, Aug. 29, 2011, [http://wsp.presidencia.gov.co/Prensa/2011/Agosto/Paginas/20110829\\_01.aspx](http://wsp.presidencia.gov.co/Prensa/2011/Agosto/Paginas/20110829_01.aspx).

<sup>311</sup> See *President Bush's Speech on Terrorism*, New York Times, Sept. 6, 2006, [http://www.nytimes.com/2006/09/06/washington/06bush\\_transcript.html?pagewanted=all](http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all).

<sup>312</sup> I do not want to suggest that the content and constitutional significance of the Bill of Rights is exhausted by the promises the state makes via that document.

particular states and their circumstances. Promises made by state officials vary substantially in content, as do the provisions included in law or in constitutions. And since the obligation that a promise generates is quite plausibly dependent on the content of the promise, the variation in content would make it difficult to say anything general about the content of the obligation. Importantly, our intuitions about the state obligation to protect suggest that there are general principles that apply across states. Second, promises made by state officials and, to a lesser extent, promises potentially present in legal documents like constitutions frequently lack the breadth necessary to establish a general obligation to protect. When officials make promises to protect, they often respond to specific, well-publicized instances of violence, while promises expressed in laws can range from quite general to very specific. But such variance is at odds with how we intuitively understand the state obligation to protect: the obligation is quite general in character, requiring state efforts to protect against a broad range of risks.

Thus, if a promise-based explanation is to be fully successful, it will need to exceed the limited obligations generated by such explicit promises, such as by making recourse to the promise implied by the state claim of a monopoly on the legitimate use of force. An implicit promise occurs when an agent's actions seem to generate moral obligations as with an explicit promise but do not follow the ordinary practice of making a promise.<sup>313</sup> This section will set out the idea of an implicit state promise to protect in

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<sup>313</sup> An implied state promise to protect might give rise to moral obligations for the same moral reasons that an ordinary promise gives rise to obligations—that is, an implied promise can “bind[] the actor morally to the same performance to which he would be bound if he had in fact [promised].” A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 89 (1979). John Simmons has notably argued that implied consent is not real consent (or for our purposes, implied promises are not real promises), and whatever moral weight it carries arises from considerations quite different from that of real consent. If this criticism is right, then implied promise would not provide an independent explanation of a state obligation to protect (or of political obligation). He distinguished three forms of implied consent:

1. Attitudes of Consent: A person's actions indicate that he “had attitudes which would lead him to consent if suitable conditions arose.”
2. ‘Committed’ to Consenting: A person's actions (including speech) were “pointless or hopelessly stupid unless the actor was fully prepared to consent . . . .”

the form of an argument that the state's claimed monopoly establishes an obligation because it creates a reasonable assurance of enforcement. When a state claims a monopoly on the legitimate use of force, it normally leads persons in its territory to be reasonably assured that it will enforce that monopoly, thereby establishing an obligation to enforce the monopoly. But the obligation to enforce the monopoly entails an obligation to protect against violence, so the state also has an obligation to protect.

Among the modern explanations of why promises create obligations, expectations- or assurance-based explanations seem most likely to explain the moral force of implied promises. An implied promise is not a real promise, in the sense that it does not follow the standard linguistic and other conventions for promising.<sup>314</sup> But this fact entails that it is not covered by the social convention of promising, which incorporates the linguistic practice. Since an implied promise is beyond the scope of a social convention of promising, a social convention-based explanation of the moral force of promises will not help. Conventionalists attempt to explain the moral obligation to keep promises in terms of the existence of a social convention or practice according to which individuals are to keep their promises.<sup>315</sup> Similarly, rights or authority transfer theories, even if otherwise quite appealing, seem implausible as explanations of implied promises because acts generating implied promises typically lack the will or intention to transfer rights or authority over an actions. Explanations based on a transfer of rights

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3. Morally Bound as with Consent: A person's actions "binds the actor morally to the same performance to which he would be bound if he had in fact consented."

Simmons accepts that these forms of implied consent may have moral force, but insists that the moral force does not arise from their similarity to consent. Instead, he insists that whatever moral force these forms of implied consent have depends on grounds independent of consent. *Id.* at 89-91.

<sup>314</sup> See *id.* at 89 ("In calling an act a 'sign of consent,' I mean that because of the context in which the act was performed, including the appropriate conventions (linguistic or otherwise), the act counts as an expression of the actor's intention to consent; thus, all genuine consensual acts are the givings of 'signs of consent.'").

<sup>315</sup> Some of the more notable conventionalists include Hobbes, Hume, and Rawls. The moral obligation to comply with the convention by keeping one's promise may be explained in various ways, such as by a general requirements of fairness, see JOHN RAWLS, *A THEORY OF JUSTICE* 96-98 (2d ed., 1999).

or of authority claim that the act of will involved in a genuine promise directly transfers a right to or authority over the promised performance from the promisor to the promisee.<sup>316</sup> While an implied promise indicates that a person might otherwise be disposed to form the intention or will to promise, it is merely implied because that disposition is not manifest in an act sufficient to constitute a promise according to linguistic or other conventions.<sup>317</sup>

In contrast to these views, an expectation or assurance-based theory seems more likely to succeed, as many actions and statements that fall short of a promise may create expectations or assurances of performance. Such theories attempt to explain the moral obligation to keep promises in terms of the expectations or assurances that promises create in the promisee.<sup>318</sup> In fact, these theories are sufficiently flexible that they may generate obligations even when the obligated actor may not have intended to acquire an obligation. They do not tie the generation of moral obligations to an existing practice of promising<sup>319</sup> and they do not necessarily require the intention or will to create an obligation.<sup>320</sup> For these reasons, the chapter will focus on how the state makes an implicit promise to protect when provides assurance it will protect, although the counter-arguments proposed here may well apply to conventionalist or rights-transfer analyses by analogy.

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<sup>316</sup> See Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481 (2008); David Owens, *A Simple Theory of Promising*, 115 PHIL. REV. 51 (2006). David Owens has since disclaimed rights-transfer accounts of promises.

<sup>317</sup> See A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 88-89 (1979).

<sup>318</sup> Thomas Scanlon has developed the dominant modern version of an expectationalist theory, substituting the concept of assurance for that of expectations. T.M. SCANLON, *Promises, in WHAT WE OWE TO EACH OTHER* 295 (1998); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS 199 (1990).

<sup>319</sup> See T.M. SCANLON, *Promises, in WHAT WE OWE TO EACH OTHER* 295, 296-302 (1998).

<sup>320</sup> See *infra* Part II.C. *But see* T.M. SCANLON, *Promises, in WHAT WE OWE TO EACH OTHER* 295, 304 (laying out a principle of fidelity as part of an assurance-based view that may require this intention).



## A. STATES AND THE CLAIMED MONOPOLY ON THE LEGITIMATE USE OF FORCE

Although the idea that states claim a monopoly on the legitimate use of force originates with Max Weber,<sup>321</sup> I will not necessarily follow his understanding and use of the notion. Max Weber asserted that “the state is the form of human community that (successfully) lays claim to the *monopoly of legitimate physical [force]* within a particular territory . . . .”<sup>322</sup> From the context, it is reasonable to understand Weber as saying that the state claims the monopoly in the sense of actually holding or possessing such a monopoly on the legitimate use of force in a territory.<sup>323</sup> In his development, it is key that the monopoly is on the legitimate use of force, not just any use of force, in that the state is the only organization with the ultimate permission to use force, even if the state may authorize others to use force as well.<sup>324</sup> He appears to understand legitimacy or permissibility as descriptions of the attitudes held by the society concerning when the use of force is legitimate or permissible, whether or not it is legitimate or permissible in a strictly moral sense.<sup>325</sup> Given that Weber’s primary claim is about the legitimate uses of force, it does not directly imply anything about a simple monopoly on the use of force, since a state may have a monopoly on legitimate force even if third parties use force extensively but illegitimately. Nonetheless, Weber seems to accept a secondary claim that the state holds a fairly general monopoly on the use of force in general, as he says that the state involves organized domination by force, which is not implied by a mere monopoly on the legitimate use of force.<sup>326</sup>

Although Weber says that the state is an organization that claims a monopoly on legitimate force in the sense of possessing such a monopoly, I will understand the sort of

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<sup>321</sup> MAX WEBER, *Politics as a Vocation*, in THE VOCATION LECTURES 32 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., Hackett 2004) (1919).

<sup>322</sup> *Id.* at 33.

<sup>323</sup> *See id.*

<sup>324</sup> *Id.* He claims as well that uses of force authorized by the state—which are presumably legitimate—do not violate the monopoly on the legitimate use of force.

<sup>325</sup> *See id.* at 34.

<sup>326</sup> *Id.* at 36.

claim involved to be communicative, an assertion that a state may make through a variety of means. Because the current chapter aims to develop a promissory account of a state obligation to protect, the assertions the state makes with respect to its monopoly on the legitimate use of force are of primary relevance. Even if, as Weber primarily held, the state possesses a monopoly on legitimate force (and perhaps on force in general), it may also communicate through a variety of means its assertion of a monopoly on legitimate force. These means may include explicit statements prohibiting unauthorized violence, aggregations of laws that together indicate the state claims such a monopoly, and regular actions taken to stop those who would use force without authorization. Insofar as the actual behavior of the state is necessary for its communication or assertion of a claim of monopoly on the legitimate use of force, there may be little space between the possession of the monopoly and an assertion of a monopoly.

The content of a communicated claim of a monopoly on the legitimate use of force could consist in at least two different propositions, both of which are variations on the proposition that individuals may not use force absent state authorization. First, it may involve the proposition that individuals are not permitted to use force (and *a fortiori* violence) unless the state has given permission or authorization for them to use it (the claimed monopoly as a claim of prohibition). Second, it may involve the proposition that the state *will* enforce the prohibition on the individual use of force without permission or authorization by the state (the claimed monopoly as a claim of enforcement). Modern states commonly seem to communicate both sorts of claims of monopoly, with the later claim perhaps the most clearly and directly communicated, in part because the communication of the later claim supports the communication of the former.

Claims of a monopoly on the legitimate use of force—whether understood as communication or as action—in a territory are relatively recent in the history of Western political development. As recently as the 1200-1300s C.E., feudal political

organization understood that the maximum political power—usually a king—would have limited direct control over the lowest ranks of society.<sup>327</sup> In this context, the maximum political power in this context might be understood as the person or entity with priority in the use of coercion over all others in the territory.<sup>328</sup> The direct vassals of the maximum political power—nominally inferiors but often in effect near equals—would have near complete discretion over their inferiors, owing only certain limited (and personal) duties to the superior.<sup>329</sup> In fact, the idea that political leadership was territorial in nature, rather than personal, was of secondary significance in the organizational schemes of the day.<sup>330</sup> Perhaps needless to say, the maximum political powers and even their nominal inferiors did not assert anything resembling a monopoly on the use of force.<sup>331</sup> In fact, private ownership of the means of coercion—swords and the like—as well as private warfare among the vassals of the maximum political power were often accepted.<sup>332</sup> Moreover, no one appears to have possessed a monopoly on the legitimate use of force. Although Weber claims that vassals derived the legitimate use of force from their maximum political power,<sup>333</sup> it seems to better reflect the power realities of the period to say that the direct vassals were their own source of legitimacy.

It was not until the era of absolutism—the 17<sup>th</sup> and 18<sup>th</sup> centuries—that political organization began to resemble modern states, and that these modern states began to assert a monopoly on the legitimate use of force. During this period, states started a process of disarming their civilians—most importantly the nobility—who constituted

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<sup>327</sup> See GIANFRANCO POGGI, *THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION* 20-25 (1978).

<sup>328</sup> See CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1990*, at 1-2 (1990).

<sup>329</sup> GIANFRANCO POGGI, *THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION* 20-25 (1978).

<sup>330</sup> See *id.* at 21-22.

<sup>331</sup> CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1990*, at 69 (1990).

<sup>332</sup> *Id.* at 69.

<sup>333</sup> MAX WEBER, *Politics as a Vocation*, in *THE VOCATION LECTURES* 32, 36 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., Hackett 2004) (1919).

potential domestic rivals, including the destruction of fortress-castles in the interior of state territory.<sup>334</sup> “[I]n urban regions, the installation of routine policing and the negotiation of agreements between municipal and national authorities played a major part, while in regions dominated by great landlords the disbanding of private armies, the elimination of walled, moated castles, and the interdiction of vendettas alternated between co-optation and civil war.”<sup>335</sup> Later complementing disarmament, states slowly expanded their control over individuals during this period and into the 19th centuries. “With the installation of direct rule came the creation of systems of surveillance and reporting that made local and regional administrators responsible for prediction and prevention of movements that would threaten state power or the welfare of its chief clients.”<sup>336</sup> At the culmination of this process, individuals developed the expectation that the state would respond to their requests for, among many other things, protection and adjudication.<sup>337</sup>

Although one may doubt whether a typical state at any point in this process explicitly announced a monopoly on the legitimate use of force, it is quite plausible that most modern states communicate such a message through a variety of statements, laws, policies, and actions that are now standard. It may be the case that no single act of communication by itself fully claims a monopoly, but the set of all such communications taken together expresses such a claim. The set of communicative acts that transmit the claim may include explicit statements by politicians or in constitutions and other laws, tacit statements made when prohibiting criminally or otherwise the use of force except

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<sup>334</sup> CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1990*, at 69-70 (1990).

<sup>335</sup> *Id.* at 70.

<sup>336</sup> *Id.* at 115 (“National police forces penetrated local communities . . . . Political and criminal police made common cause in preparing dossiers, listening posts, routine reports, and periodic surveys of any persons, organizations, or events that were likely to trouble ‘public order.’ The long disarmament of the civilian population culminated in tight containment of militants and malcontents.”).

<sup>337</sup> *See id.*

in limited conditions, and both prospective and retrospective actions to prevent and punish the use of force. Moreover, because of regular prospective interventions by public officials to stop the unauthorized or illegitimate use of force, the claims communicated seem to include the idea that the state will enforce the monopoly in part by operational protection measures.

#### *B. REASONABLE ASSURANCE AND MORAL OBLIGATIONS*

Why (and when) might a state obligation follow from the fact that the state has given persons in its territory reasonable assurance (or reasonable expectations) that it will enforce the monopoly? In general terms, expectation theories of promising claim that the moral obligation to satisfy certain expectations that one creates explains the obligation to fulfill promises. However, such theories suffer from the following problem: an obligation based on an expectation could be satisfied either by performance or warning (possibly with compensation).<sup>338</sup> Such a warning could adequately address the promisee's interest in avoiding reliance on or belief in reasonable but false expectations.

Scanlon has proposed the best-known quasi-expectation theory of promising, attempting to analyze the moral obligation to keep a promise in terms of the assurance the promisor provides to the promisee. To avoid the problem whereby performing the act or warning of non-performance can satisfy mere expectations, Scanlon bases his theory not on mere expectations but on assurances. Reconstructing the concept, it appears that when a person is assured of performance, that person believes that one will perform the act in question "unless you consent to my not doing so"<sup>339</sup> and not simply that one will perform or warn of non-performance. That is, the person will believe the other is committed to performing, and has not merely made a prediction about future behavior.

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<sup>338</sup> See T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 301 (1998); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS 199, 204 (1990).

<sup>339</sup> T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 302 (1998); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS 199, 206 (1990).

When such assurance is reasonable (in that it is elicited by another in the right way), the person who elicits the assurance will have a moral obligation to perform the action in question.<sup>340</sup> It is not possible to satisfy this moral obligation by simply warning of non-performance, in part because the assurance involves eliciting the specific expectation that one will not fail to perform even after giving such warning.

Assurance, when reasonable, is valuable to an individual for a number of reasons. First, assurance is valuable because people frequently want certain things to happen and the assurance can eliminate psychological worry or concern that a certain event will not occur.<sup>341</sup> Second, as Kolodny and Wallace point out, “[o]ur ability to plan effectively our own activities, and to coordinate them with the activities of others, is clearly enhanced when we obtain Scanlonian assurance that another person will do X, and not merely conditional assurance that fair warning and compensation will be provided if X is not done.”<sup>342</sup> In this sense, reasonable assurance of a future performance aids in the use of our agency because it allows us to make plans based on actions that ought to happen in the future.

For these reasons, it would clearly be valuable for those present in a state’s territory to be assured that the state will enforce the monopoly on the legitimate use of force. But does the state lead them to be reasonably assured in a way that will give rise to a moral obligation on that basis? Scanlon proposes a principle of fidelity to specify when a person has a moral obligation based on assurances:

“If (1) A voluntarily and intentionally leads B to expect that A will do X (unless B consents to A’s not doing so); (2) A knows that B wants to be assured of this; (3) A acts with the aim of providing this assurance, and has good reason to believe that he or she has done so; (4) B knows that A has the beliefs and intentions just

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<sup>340</sup> T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 303-04 (1998); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS 199, 208 (1990).

<sup>341</sup> T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 303 (1998); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS 199, 208 (1990); Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFFAIRS 119, 129 (2003).

<sup>342</sup> Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFFAIRS 119, 130 (2003).

described; (5) A intends for B to know this, and knows that B does know it; and (6) B knows that A has this knowledge and intent; then, in the absence of special justification, A must do X unless B consents to X's not being done."<sup>343</sup>

This principle establishes extremely stringent conditions under which a person's reasonable assurance gives rise to an obligation on the part of another. As Seana Shiffrin expounds the basic idea, a person who "creat[es] expectations of performance in [another] through the articulation of [an] intention to perform when this intention is transparently articulated for the purpose of assurance" normally has an obligation to perform.<sup>344</sup> One not only must lead the other to be reasonably assured, but in fact one must assure the person of the performance in this manner.<sup>345</sup>

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<sup>343</sup> T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 304 (1998); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS 199, 208 (1990).

<sup>344</sup> Seana Valentine Shiffrin, *Immoral, Conflicting, and Redundant Promises*, in REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON 155, 155 (R. Jay Wallace, Rahul Kumar, and Samuel Freeman eds., 2011).

<sup>345</sup> As an explanation of the moral force of promising, the principle of fidelity fails for reasons convincingly argued by Kolodny and Wallace. They note that a promise is distinctively capable of generating a moral obligation on the part of the promisor to perform the promised act even when the promisor neither has nor indicates she has other reasons to perform the promised act. *See, e.g.*, Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFFAIRS 119, 142 (2003). But it is normally reasonable for a person to expect or to be assured that the promisor will perform the promised act *only if* the promisor indicates that he or she has some prior reason for performing it. *See id.* at 141 (allowing that under very limited circumstances, the mere indication of a present intention to perform the promised action might be sufficient for reasonable assurance). The prior reason might, for example, take the form of an (strong) independent interest in performing the promised action. *See id.* at 151. However, the prior reasons cannot be the fact of the promise itself nor the concomitant obligation, since that obligation is exactly what the theory is trying to explain. *See id.* at 139-44. Thus, reasonable assurance may generate moral obligations, but it cannot by itself explain why a bare promise can generate moral obligation. *See id.* at 142.

However, even if Scanlon's assurance-based explanation of the obligation-generating force of promises fails for these reasons, reasonable assurance might still be helpful in explaining a state obligation to protect. An assurance-based explanation of certain moral obligations, and expectations-based explanations more generally, does explain the moral force of what might be considered close relatives of promises: other statements or actions that generate reasonable expectations. As the argument in the prior paragraph indicates, the problem for an assurance-based account of promises is that a theory of promises cannot make general reference to prior reasons to for the promisor to perform the promised action. However, if one is not interested in a theory of promises as such, one may make reference to how the communication of prior reasons for performing an action may lead to reasonable assurance of its performance. Thus, it is still possibly that reasonable assurance that the state will enforce the monopoly on the use of force gives rise to a state obligation to enforce that monopoly.

### *C. CLAIMS OF MONOPOLY AND REASONABLE ASSURANCE*

Although the state does not communicate a claim of monopoly on the legitimate use of force with the aim of providing assurances that it will protect individuals, there are two reasons why the state may nonetheless incur an obligation on the basis of its claimed monopoly. First, states normally fulfill the requirements of the principle of fidelity because states provide individuals with assurance when they warn them (or otherwise claim) that they will enforce the monopoly. Second, a state may form an obligation to enforce the monopoly even when its warnings and claims about enforcement fulfill a slightly relaxed version of the principle of fidelity, and warnings and claims normally do satisfy the applicable weaker requirements. This relaxed version of the principle is in fact defensible in light of the considerations that Scanlon advances.

Considering the first reason, when a state claims a monopoly on the legitimate use of force, the claim is in part a warning to individuals that it will stop unauthorized acts of violence. The state makes the claim without the aim of assuring individuals that it will in any way act on their behalf, but instead makes the claim with the aim of assuring them that they will be stopped from using force. It aims to address individuals as potential sources of violence, not as potential recipients of violence. However, in addressing assurances to individuals as potential sources of violence, the state voluntarily and intentionally creates expectations of action among them. The state has the aim of assuring individuals that it will so act and, if the claim of monopoly is made in a sufficiently public manner, the state will have reason to believe it has assured individuals that it will act. For the normal individual, he or she will understand that the state is aiming to assure and believes it has assured, since it is clear to normal



individuals that a state wishes to warn them. So states commonly go to great lengths to reasonably assure individuals that they will enforce the monopoly on violence.<sup>346</sup>

In fact, of all the elements of Scanlon's principle of fidelity, the only one potentially not satisfied is the element that the state knows individuals want to be assured that it will attempt to stop their acts of violence. The only reason why the state might not have an obligation is because individuals as potential sources of violence do not want the state to enforce the monopoly, so the state cannot know this fact. But an individual is an individual, whether as a potential source or as a potential recipient of violence. As a potential recipient of violence, the normal individual present in the state's territory would want to be assured that the state will enforce the monopoly on the legitimate use of force. Moreover, this fact is so obvious that a state can be presumed to know that individuals would want this assurance. Thus, it would seem that the state has satisfied all of the elements of the principle of fidelity, even if the state does not aim to assure individuals *because* individuals want the assurance.

However, one might object that the state acquires an obligation based on its assurance only when the state assures individuals *because* they want that assurance. The fact that the state is providing assurance because it wants to warn individuals and not because they want the state to enforce a monopoly on the legitimate use of force would be fatal on this objection. But why should that be? The state has otherwise led individuals in its territory to be assured that it will enforce the monopoly on the legitimate use of force. The fact that the state may not have done so out of a concern for the desire for assurance does not have obvious relevance to whether the assurance is reasonable. In fact, a state moral obligation to do what it has assured it would do seems all the more important under these conditions, because the state has made such efforts

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<sup>346</sup> Vera Peetz argues that a threat is not a promise, although it might generate an obligation to carry out the threatened act in certain circumstances. In effect, I am arguing that a threat does give rise to an obligation in these particular circumstances. Vera Peetz, *Promises and Threats*, 86 MIND 578, 581 (1977).

to give assurances to individuals in its territory but lacks substantial independent motivation to satisfy those assurances.

Considering the second reason why a state claim of monopoly is sufficient for an obligation, a state may form an obligation to enforce based on assurances even without satisfying the stringent requirements of the principle of fidelity. Under some circumstances, a state may provide individuals with reasonable assurance of performance, thereby creating a state obligation to perform, even when the state does not have the aim of assuring. Because a state issues a warning to individuals that it will enforce the monopoly on the legitimate use of force, it attempts to induce more than a mere expectation of enforcement. It attempts to convince individuals that it will definitely enforce the monopoly. From such an action, the state may reasonably anticipate that individuals will become assured that the state will enforce the monopoly. They may reasonably take the state's commitment to enforcing the monopoly, *inter alia*, as a fixed point in their deliberations and planning about future actions. They will normally eschew plans to commit acts of violence, because enforcement of the monopoly will render such plans dangerous or pointless. But they will also make other plans on the assumption that the monopoly will be enforced, meaning that their plans will not occur against a social background where the private use of force normally occurs.

The key question is whether it is possible to become morally bound by the assurances one induces without it being one's aim to provide assurances. Scanlon's main argument for a strong principle, where the obligation to perform exists only if one aimed to provide assurances is the following:

"A principle according to which the only way to avoid obligations as binding as those specified by Principle F is to avoid voluntarily creating any expectations about one's future conduct would be too limiting. It would mean, for example, that we could never tell people what we intend to do without being bound to seek their permission before changing course. . . . Principle F does not have this effect, however, since it applies only when A reasonably believes that B wants assurance, when A has acted with the aim of giving this assurance and has reason to believe that he or she has given it, and when this and other features of

the situation are mutual knowledge.”<sup>347</sup>

Surely Scanlon is right that it would be problematic if a principle establishing moral obligation to perform based on assurances of performance created obligations whenever one communicates intentions to perform. But requiring that a person aim to provide assurances in order to establish an obligation to perform is not necessarily the only way to avoid this problematic result. If some other morally plausibly limiting factor can be identified, it might still be possible to accept a slightly weakened version of the fidelity principle.

Without attempting to define the ultimate contours of assurance-based obligations, it is worth noting several features of the state claim of monopoly situation that distinguish it from a normal statement of intentions. First, when a state claims a monopoly on the legitimate use of force, it aims to convince individuals in its territory that it will enforce the monopoly. The fact that its individuals end up convinced of what the state will do is not merely a side effect of the communication; it is the point of the communication. Second, the state knows that when it makes such a statement that persons will be convinced based on its act of communication, regardless of whether or not it aimed to convince them. Third, the state claim of monopoly implies a statement regarding the definitive future behavior of the state, and does not consist either of a mere statement of present intentions nor a mere prediction future behavior (content of the communication). For any of these reasons, the fact that the state leads individuals to be reasonably assured of its enforcement could result in a moral obligation to enforce the monopoly without overly limiting the state’s ability to communicate its intentions.<sup>348</sup>

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<sup>347</sup> T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 304 (1998). Similarly Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS 199, 209 (1990).

<sup>348</sup> It is worth addressing an objection that Kolodny and Wallace propose for Scanlon’s assurance-based explanation of promises. See also *supra* note 349. They argue that a person can be obligated to perform because he or she assured another of the performance only if he or she has a sufficient prior reasons to carry out that performance. See Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFFAIRS 119, 131-32 (2003). They claim that an

#### D. CONCLUSION

An explanation of the state obligation to protect based on the promise implied in a claim of a monopoly on the legitimate use of force has a number of positive features. In general, such an explanation of the obligation to protect correctly reproduces an obligation with many of the features that the obligation intuitively has. First, the obligation will typically be limited to the state's legal territory, where a state typically claims a monopoly on the legitimate use of force, satisfying in part one of the primary desiderata of an adequate account. Second, the obligation to protect arising from the claim of a monopoly on the legitimate use of force may require that the state take operative protective measures to enforce the monopoly, potentially fulfilling a second desideratum. A normal state commonly takes measures to prevent or protect against the most flagrant violations of the monopoly, such as when it has clear knowledge of an immanent and open violation of the monopoly. This tendency may communicate that the state will enforce the monopoly through protective measures, determining the content of the assurances the state provides.<sup>349</sup> Finally, the explanation is potentially quite

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obligation arises “only if [one] has led [another] to believe, on the basis of evidence, that [one] will [perform].” *Id.* at 133. And a person can provide evidence that he or she will perform only if he or she has sufficient prior reasons to perform.

Such an objection does not cause substantial problems for inferring a state obligation to enforce the monopoly on the legitimate use of force from claims of such a monopoly. There is at least one convincing explanation as to why a state has prior reason to enforce the monopoly that could provide evidence that the state will do so. A claim of monopoly might be reasonably construed as an expression of the state's underlying interest in preserving its power against third parties. Such an interest, particularly if interpreted as fundamental, is grounds for belief that the state will enforce the monopoly. This interest is not a mere present intention, but a stable and durable feature of states that can explain the existence of future state reasons to enforce the monopoly on the legitimate use of force. In short, it provides individuals with a sufficient basis to be assured that the state will enforce the monopoly.

<sup>349</sup> I suggested earlier that the claim of a monopoly on the legitimate use of force involves the claim that the state *will* enforce the prohibition on the individual use of force without state authorization or permission. *See supra* § II(B). The manner in which the state enforces the prohibition will likely determine the content of the claim communicated to individuals. A normal state enforces the monopoly through both operative and systematic measures, relying on law enforcement and criminal justice to handle many violations of the monopoly but also normally taking measures to stop specific violations. A normal state takes measures to prevent or protect against the most flagrant violations of the monopoly, such as when it has clear knowledge of an immanent and open violation of the monopoly. Taking measures to protect or prevent in such

general, in that it would explain why many if not most states have an obligation to protect in some circumstances.<sup>350</sup> If we accept Weber's view that a state is an entity that successfully holds a monopoly on the legitimate use of force in some region, then a state will necessarily communicatively claim such a monopoly. But even if we strictly reject it, as I think we should, it is plausible that a normal state will successfully claim such a monopoly,<sup>351</sup> communicating its claim to those subject to the state.<sup>352</sup>

### III. THE ADEQUACY OF PROMISE-BASED EXPLANATIONS

This section will evaluate in two parts the adequacy of a promise-based explanation of the state obligation to protect. Part A argues that the moral interests that promissory obligations guard are fundamentally different from those guarded by the intuitive state obligation to protect. Part B argues that an obligation dependent on a voluntary act improperly assumes that the state has a sphere of freedom to pursue its own interests and ends and assume its own projects and commitments.

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circumstances may be necessary as a matter of psychological or sociological fact to maintain the state's credibility or reputation as the dominant authority in its territory. *Cf.* DIEGO GAMBETTA, *THE SICILIAN MAFIA: THE BUSINESS OF PRIVATE PROTECTION* 43-46 (1993).

<sup>350</sup> Moreover, the obligation will quite plausibly will be subordinated to the obligation to respect the non-derogable human rights, in that if the two obligations conflict, the obligation to respect normally must be fulfilled. Intuitively, a promise cannot create an obligation that overrides, for example, the obligation not to kill a person, other things being equal. There are various ways to understand what happens when a promise would seemingly entail such an obligation: there may be no promise at all, there may be a promise that generates no obligation, or the resulting obligation might be overridden.

Additionally, the obligation to protect that arises from the state claim of monopoly on the legitimate use of force will not be dependent on the cost of protection. The state normally claims it will enforce a monopoly on the use of force, which is an absolute claim. It does not normally claim that it will enforce the monopoly so long as it is cost effective or the need enforcement actions are otherwise limited to a certain cost. And this makes sense from the perspective of the reputation of the state as the dominant authority in the area. Fulfilling a claim to a monopoly on the legitimate use of force would be (much) more difficult and costly if the state had to constantly respond to challenges to the monopoly, whether major or minor. Instead, a normal state relies not only on its capacity and propensity to meet unauthorized use of force with enforcement measures, but also on its reputation for the capacity and propensity to do so. But a half-hearted response to clear challenges to the monopoly—in the form of open and notorious use of violence—would eat away at the state's reputation as the enforcer.

<sup>351</sup> This might be all that Weber really wanted to claim.

<sup>352</sup> Moreover, this understanding of the normal state is not merely normative but also captures a typical characteristic of states: most states claim a monopoly on the use of force. Among those that do not, most aspire to such a monopoly.

## A. INDIVIDUAL INTERESTS AND ASSURANCE OBLIGATIONS

In this part I will argue that there is a fundamental mismatch between the interests guarded by a state obligation to protect and those guarded by the obligations that arise from the implicit promise to protect. If the moral obligation arising from an implicit state promise to protect is explained in terms of the expectations or assurances it creates, the interests served by a state obligation to protect will not be of the right sort. Obligations based on assurances or expectations primarily guard an individual's interest in planning based on those expectations or assurances. Such obligations are not principally about guarding the promisee's interest in receiving the actual value of the performance that he or she was assured would be provided. In contrast, the primary interest served by the intuitive state obligation to protect is not a planning interest, but instead the individual's interest in actually receiving state protection against violence, independent of any plans or planning. Thus, an expectation or assurance-based account of the state obligation to protect incorrectly explains the moral significance of the state obligation to protect: it depicts it as an obligation to satisfy assurances of protection.<sup>353</sup>

### 1. *Interests in assurances and interests in personal security*

An assurance-based account of promissory obligations attempts to explain why an activity that might otherwise be discretionary becomes obligatory. The explanation centers on the general importance to individuals of having reasonable assurances fulfilled. There are a number of different potential reasons why individuals have an interest in the fulfillment of reasonable assurances. They may have such an interest because they allow them to make future plans on the assumption that another will

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<sup>353</sup> This objection is analogous to that mentioned by Scanlon to pure conventionalist accounts of promising, where those accounts misunderstand the wrong of not keeping promises. T.M. SCANLON, *Promises*, in *WHAT WE OWE TO EACH OTHER* 295, 316 (1998). See also Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 *PHIL. & PUB. AFFAIRS* 119, 125-26 (2003). My objection is that an assurance account of the state obligation to protect explains the obligation in terms of the wrong individual interests.

perform a certain action.<sup>354</sup> They may have an interest because assurances can provide peace of mind about the future, even when that peace of mind does not and cannot affect current planning or action.<sup>355</sup> They may have an interest in not suffering, experientially, the disappointment of certain expectations.<sup>356</sup> The importance of these interests converts an otherwise discretionary, albeit possibly valuable, action into an obligatory action.

However, the individual interest in having assurances fulfilled that makes a discretionary action obligatory cannot not arise directly from the interest in the underlying action that one is assured will be performed.<sup>357</sup> An assurance account of promises attempts to explain why creating reasonable assurances converts a discretionary action into a mandatory one, but the value of the underlying discretionary action cannot explain why it becomes obligatory in virtue of a promise. The action had that value independently of the promise, and that value did not make the action obligatory by itself. An example can illustrate the point. Suppose someone is going to give me a gift of \$1000, although he neither told me nor assured me that he will. When

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<sup>354</sup> Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFFAIRS 119, 128 (2003). See also Nicholas Southwood & Daniel Friedrich, *Promises Beyond Assurance*, 144 PHIL. STUD. 261, 265 (2009). Individuals have an interest in being assured of performance because it amplifies their agency, in that they can plan based on a wider array of fixed points of future events: they can plan based on the fact that the state will protect against violence. Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFFAIRS 119, 130 (2003). Now, when the state is not involved in making them assured it will protect, it incurs no obligation *on this basis* to ensure that those expectations against which planning occurs are fulfilled. But when the state is sufficiently and appropriately involved in leading individuals to be assured of future performance, it does incur an obligation to make sure that the expectations are fulfilled. Cf. generally T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 304 (1998); Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFFAIRS (2003); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS (1990). In either case, the reason why the state has such an obligation is because it has meddled with the agency of individuals by leading them to be assured of future performance.

<sup>355</sup> T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 303 (1998); Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFFAIRS 119 (2003); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS 199 (1990).

<sup>356</sup> Nicholas Southwood & Daniel Friedrich, *Promises Beyond Assurance*, 144 PHIL. STUD. 261, 265 (2009) (citing Jan Narveson, *Promising, Expecting and Utility*, 1 CANADIAN J. PHIL. 207, 214 (1971)).

<sup>357</sup> But see Nicholas Southwood & Daniel Friedrich, *Promises Beyond Assurance*, 144 PHIL. STUD. 261, 265 (2009) (claiming that the fulfillment of assurances satisfies the individuals interest in having certain events transpire, which may be true but is theoretically irrelevant for the reasons set forth in this paragraph).

he then assures me that he will give me the gift, the assurance allows me to plan for the future based on having increased resources, rather than wait until I actually receive them to incorporate them into my future plans. The assurance may also have an effect on my mental state. But my underlying interest in receiving the gift is independent of my interest in receiving the assurance that I will be given the gift. My interest in receiving the money has nothing to do with the ways in which I can predict the future and plan accordingly but instead arises from the expanded range of options that the gift allows once I receive it.

Certainly, a person can, under certain circumstances, have an interest in being assured that the state will protect him or her from violence because the assurance can facilitate the person's planning. Take, for instance, the assurance that the state will protect against non-state violent groups. Being assured of the state's protection against such groups may substantially affect or contribute to one's planning: a society in which the state offers such protection may present different options and possibilities for ordinary individuals than one in which it does not. If the state will not protect against such groups, one's plans may have to take into account the demands on individual behavior imposed by the groups and the ever-present potential for suffering violence at the hands of such groups. If the state will protect against such groups, individual plans may range more broadly, as they are not subject to the behavioral demands of the groups nor require measures to avoid possible acts of violence. Thus, receiving the assurance that the state will protect may facilitate individual planning. In fact, even the assurance that the state will not protect may facilitate individual planning, for it will eliminate some uncertainty as to the social background against which one must plan for the future.

However, the primary interest that individuals normally have in state protection has little to do with planning or peace of mind, but instead with receiving the benefits of



actual protection—personal security. Consider the following extreme example. A Colombian peasant who grows yucca or yams in the *Montes de Maria* near the Caribbean coast lacks a wide range of possibilities for alternative productivity plans, and hence, life plans more generally. Her productive skills are limited to certain sorts of agriculture, which means that she needs to exercise them in certain locations, which effectively means that she is limited to continuing with agriculture in her village (probably constituting an injustice beyond the scope of this project). Assurance that the state will protect her against, say, attacks from paramilitary forces does not substantially affect her planning, as her life conditions effectively limit her to certain plans. That is to say, her interests in planning are not substantially guarded or advanced by the fact that the state has assured her it will protect. However, her interest in personal security would be substantially advanced if the state actually protects against paramilitaries, independently of whether the state assures her it will do so: typical forms of paramilitary violence included massacres and forced displacement. Even if she had received no assurance of the state protection, the protection itself would be extremely valuable. Thus, the receipt of actual protection against such groups advances her interests even though receiving assurance does not.

Similarly, the individual interests concerning state protection will not always include obtaining peace of mind—one suggestion that Scanlon makes—that the state will protect them; sometimes the interest is simply in the protection itself. Consider the following cases. A state, perhaps via an official, may make a public promise to provide extensive protection to all against violent groups operating in the national territory, such as the drug cartels in Mexico. However, a particular individual may pay very little attention to current events, not reading the newspaper or watching television news, so she does not learn of the promise. As a result, he receives no peace of mind from the promise. Another individual in the state's territory does hear of the promise, but simply

does not believe the promise because the state has failed to fulfill such promises in the past. As a result, she receives no peace of mind from the promise. These cases are not only imaginable, but likely. It seems that these individuals continue to have an interest to be served by state protection—personal security, and that this interest is connected to the state obligation to protect.

An assurance-based explanation of the state obligation to protect is not principally connected to guarding the same interest as the obligation to protect: the individual interest in actually receiving state protection. The future performance by hypothesis is something for which the state has no promise-independent obligation, and to which persons have no corresponding right. Something must explain why the state acquires an obligation to perform the promised action. On an assurance account, that fact is the state's intervention in the agency of the individuals when it leads them to be reasonable assured of its performance. That intervention in the *agency* is why the state's performance becomes morally important. But its moral importance is limited to exactly those effects it has on the agency, specifically causing individuals (reasonably) to make plans that assume the state will perform.

## *2. Concrete consequences of the different interests*

The fact that an assurance-based explanation of the state obligation to protect serves only interests in planning and peace of mind has consequences for the shape of the obligation at odds with our intuitions. Fundamentally, the interest that the obligation serves also gives shape to the obligation, indicating when the state actually has an obligation to protect and perhaps how it interacts with other obligations. There are at least two concrete problematic consequences of the mismatch of interests served by the intuitive state obligation to protect and an obligation to satisfy assurances of protection.

First, if a particular individual does not believe the state's assurances, whether reasonable or not, that it will protect, it appears that the state would have no obligation to protect that person. Such a person normally will not make plans or achieve peace of mind based on an assurance of protection when he or she does not believe that the state will fulfill that assurance. But an obligation to satisfy assurances of protection serves the individual interest in planning or peace of mind based on assurances of protection. In such a case, there should be no obligation to satisfy assurances of protection because doing so does not serve the individual interests at stake. However, it is highly implausible that the state obligation to protect ceases to exist simply because an individual does not expect the state to protect. Intuitively, the mere fact that a person is paranoid, disbelieving even the state's reasonable assurances of protection, is not by itself sufficient to undermine the sense of or eliminate the state's obligation to protect.

Scanlon addresses a related objection to his assurance account of promising framed in terms of the profligate pal example:

“Your friend has been borrowing money from you, and from others, for years, always promising solemnly to pay it back but never doing so. Finally, you refuse to lend him any more money, and others do so as well. . . . [H]e comes to you on his knees, full of self-reproach and sincere assurances that he has turned over a new leaf. You do not believe this for a minute, but out of pity you are willing simply to give him the money he needs. You realize, however, that it would be cruel to reject his promises as worthless and offer him charity instead. So you treat his offer seriously, and give him the money after receiving his promise to repay the loan on a certain date, although you have no expectation of ever seeing your money again. Does he have an obligation to pay you back?”<sup>358</sup>

Scanlon proposes two responses to the fact that our intuitions seem to indicate an obligation in this case but the assurance account does not. First, he suggests that there intuitively is no promissory obligation because the pal received “a gift, tactfully described as a loan” and, second, he proposes that the pal has a non-promissory

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<sup>358</sup> T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 312 (1998).

obligation of gratitude.<sup>359</sup> Neither of these responses is helpful for an implicit promise explanation of the state obligation to protect.<sup>360</sup> The implicit promise account does not look to an exchange of a state promise for a promise or performance on the part of individuals. But that is essential to explaining away our intuitions about the obligation in the profligate pal case by saying it is a disguised gift. It is also essential to claiming that there is an alternative obligation of gratitude. While individuals perhaps have obligations to the state and are forced to do things for the state such as pay taxes, there is no direct exchange of these obligations and performances for an apparent state promise or action.

Relatedly, Judith Thomson considers what happens when the recipient of a promise has no interest in whether or not the promisor performs the promised action, and argues that a claim exists nonetheless.<sup>361</sup> This is not exactly our case, as a typical person *does* have an interest in whether or not the state protects, even when the interest that makes the promise obligatory is not present. She argues that once the promisee receives the promise, the promisor is morally at risk because the promisee is then entitled to act in reliance on that promisee, which is just to say that the promisee has a claim on the basis of the promise.<sup>362</sup> She changes reliance (or related ideas) from the basis of the promissory obligation, as we see in some expectation or assurance accounts, to the interest promoted by promissory obligations.

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<sup>359</sup> T.M. SCANLON, *Promises*, in WHAT WE OWE TO EACH OTHER 295, 314 (1998).

<sup>360</sup> For two responses among many to Scanlon's suggestions in the context of a theory of promising, see Nicholas Southwood & Daniel Friedrich, *Promises Beyond Assurance*, 144 PHIL. STUD. 261, 272-76 (2009); Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 487-89 (2008).

<sup>361</sup> JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 316-21 (1992).

<sup>362</sup> *Id.* at 319-20. She also argues that a deathbed promise creates problems for the idea that the promisee must have some further claim that would be infringed for the promise to generate a claim. For a dead person, there is no further claim yet we believe that deathbed promises generate claims. *Id.* at 318-19. But I am not invoking the moral principle concerning assurances as an explanation of promises. I assume that the state does not plausibly make an actual promise to protect, *supra* Part II, so the deathbed promise case could be explained by an alternative account of promises.

But, while the entitlement to rely seems plausible in the case of real promises, why think it is plausible in the case of the assurances that the state provides concerning protection? Thomson's model of a promise, where its moral force arises from the transfer of a claim to rely on the promisor's word, is most plausible when the promisor issues an invitation to rely that is accepted, as Thomson seems to recognize.<sup>363</sup> It is the intentional extension of an invitation to rely and its acceptance that transfers the entitlement to rely. But these features are not present in the case of state assurances regarding protection. The state does not issue an invitation to rely on its protection, even if its reasonable assurances make reliance reasonable. And in the case of the person who does not believe that the state will protect, there is no acceptance on the part of the individual. In contrast to Thomson's model of promises, the most plausible transfer of claims to performance in the case of state protection occurs when and because there is some form of actual reliance.

Second, when the obligation to satisfy assurances of protection conflicts with some other state obligation, it is likely that it will give way relatively easily.<sup>364</sup> Let us suppose that in a case of conflict of obligations, the obligation that serves the lesser interest should normally cede in front of the obligation that serves the greater interest. States have an international legal, and likely a corresponding moral, obligation to respect the freedom of movement of people,<sup>365</sup> an obligation that protects an important liberty interest of individuals. A state may well have a conflict between its obligation to respect the freedom of movement of, say, paramilitaries and its obligation to satisfy

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<sup>363</sup> *Id.* at 302.

<sup>364</sup> Nicholas Southwood and Daniel Friedrich consider a similar objection to Scanlon's assurance account of promises, noting that assurances may be dissolved more easily than promises, which are dissolved only when the promisee releases the promisor. Nicholas Southwood & Daniel Friedrich, *Promises Beyond Assurance*, 144 PHIL. STUD. 261, 267-68 (2009). However, their focus seems to be what suffices to eliminate an obligation altogether, not the priority for fulfillment in cases of conflicting obligations.

<sup>365</sup> Universal Declaration of Human Rights art. 13, Dec. 10, 1948; International Covenant on Civil and Political Rights art. 12, Dec. 16, 1966.

assurances of protection for some group of persons, if the most effective way to protect those individuals is to prevent the movement of the paramilitaries.<sup>366</sup> But the planning interest or interest in peace of mind of the individuals who will be attacked hardly seems equivalent in importance to the fundamental liberty interest of the paramilitaries in freedom of movement: plans get interrupted for all sorts of reasons on a regular basis, as does peace of mind. Thus, it seems that the obligation to respect freedom of movement should trump the obligation to satisfy assurances of protection. However, it is intuitively implausible that the obligation to respect freedom of movement should trump the obligation to protect: in fact, at least one international court has specifically held that the state violated its obligation to protect *because* it permitted freedom of movement to paramilitaries, whether intentionally or unintentionally.<sup>367</sup>

#### *B. THE STATE AND FREEDOM OF ACTION*

Some have indicated that it is theoretically desirable to explain the existence of the political obligation for individuals in terms of its adoption via a voluntary act like a promise.<sup>368</sup> However, this part will argue that the desirability of voluntary adoption does not apply to the same extent to a state obligation, such as the obligation to protect. Moreover, it will show that the idea that the state voluntarily adopts the obligation to protect is in substantial tension with the liberal conception of the state, according to which the state has limited or no space in which to pursue its own interests or ends.

##### *1. The absence of a need for voluntary state obligations*

A view that many writing about political obligation—the obligation to obey state commands—have found attractive is that individuals must voluntarily adopt that

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<sup>366</sup> *Cf.* Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 138 (Jan. 31, 2006).

<sup>367</sup> *Cf. id.*

<sup>368</sup> A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 62-63 (1979); MARGARET GILBERT, A THEORY OF POLITICAL OBLIGATION 66 (2006).

obligation.<sup>369</sup> The primary attraction of such a view comes from the assumption that people are naturally free and so should have an obligation to obey only as a result of a voluntary act. However, as I will argue, this assumption does not extend to states, so there is no pressure to explain the origin of state obligations in voluntary acts.

As Simmons interprets the natural freedom of persons, it consists of a “natural right to act as one chooses within the limits of natural law, without interference (in the form of coercion or restraint) from others.”<sup>370</sup> According to this view, while natural law imposes natural duties on individuals, a voluntary act is necessary to take on a special obligation that extends beyond those natural duties.<sup>371</sup> Simmons adds that we can assume political obligations are special in this sense because they are not obligations owed to every state but instead are particularized to the state in which one lives.<sup>372</sup> For similar reasons, many theorists have found it morally desirable to explain the acquisition of political obligations not merely as the result of voluntary act but through an act that intentionally adopts the obligation.<sup>373</sup> Such an explanation is desirable because the dependence on intentional acquisition augments the individual’s freedom to acquire or not to acquire the obligation in question. While an obligation assumed through voluntary action simply requires a lack of coercion or restraint in the action that generates the obligation, intentional acquisition requires the intention to assume the obligation.<sup>374</sup>

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<sup>369</sup> A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 62-63 (1979); MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION* 66 (2006).

<sup>370</sup> A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 62-63 (1979).

<sup>371</sup> *Id.* at 63-64.

<sup>372</sup> *Id.* at 64.

<sup>373</sup> See MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION* 64 (2006); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 64 (1979). While both report this inclination, they do not necessarily agree with it.

<sup>374</sup> On a view of this sort, “an individual cannot become obligated unless he intentionally performs an obligation-generating act with a clear understanding of its significance.” A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 64 (1979).

Despite the attractions of the idea of natural freedom, states are not plausibly considered naturally free: a state does not generally have moral permission to act as it chooses to pursue its interests or ends within the bounds of moral requirements.<sup>375</sup> To put the point differently, states are not presumed to have a substantial sphere of freedom in which to act as they choose. Imagine a standard contemporary electoral democracy. If such a state had a sphere of freedom in which to act—to set and pursue its ends—it would mean that the elected representatives would not always be morally constrained to act on behalf of persons in their territory (most importantly, citizens) or in response to other moral constraints. But when acting free of those constraints, how would the state decide what to do? Perhaps the state would pursue the private ends of the elected representatives or simply seek to increase its own power independently of the ends and interests of its citizens and other persons in its territory. The fundamental problem is that it would be hard to imagine an adequate justification to individuals in the state's territory for pursuing such projects: at a minimum, the state will normally use resources that come from those individuals via coercive taxation. And the lack of an acceptable justification to them violates a fundamental liberal requirement on state action.<sup>376</sup>

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<sup>375</sup> Green argues that, while states may have interests, their interests do not count when determining what they must do. See LESLIE GREEN, *THE AUTHORITY OF THE STATE* 66-67 (1988) (“The real worry of those who object to anthropomorphizing the state is a moral one. They suppose that to indulge in such personification is to risk committing oneself to the thesis that the state can not only act, but has interests which must be counted when considering questions of political morality. The objection fails, however, because the inference is invalid. While it is true that the state has interests it does not follow that we must give consideration to these interests and doubly false to think that they outweigh the interests of individuals. It is a major normative assumption of democratic political theory that the state is not entitled to protect its interests as ends in themselves; it must act so as to protect the interests of its citizens.”).

<sup>376</sup> See generally Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 *PHIL. Q.* 127 (1987). A second reason why many theorists have found explanations of political obligation in terms of voluntary acts to be appealing has to do with how such an explanation seems “to respect the self-interest or the perceived self interest of each of the parties.” MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION* 67 (2006). If political obligation depends on a voluntary act, individuals “decide both whether the state will serve their interests, and how to balance freedom within the state against benefits provided.” A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 68 (1979). A person's self-interest as he or she interprets it will normally determine



The conclusion that states do not enjoy a sphere of moral freedom to set and pursue their separate ends is independent of different views about the source of constraints on state action. Allen Buchanan identifies several different views about the source of constraints on state action. A common view, perhaps originating with Locke, is the idea that the state must act only in furtherance of the interests or ends of its citizens (or perhaps other persons within its territory).<sup>377</sup> Buchanan proposes an alternative view according to which the state has something like an obligation to act as an instrument for justice, whether for those within or without its territory.<sup>378</sup> This obligation arises from the fact that individuals have “a natural duty of justice that requires us to help ensure that all persons have access to institutions for the protection of their basic moral rights.”<sup>379</sup> It is fair to say that many liberals will accept a view according to which constraints and requirements on state action arise both from the interests or ends of those within the state’s territory and from moral requirements independent of those ends and interests. The fundamental point that the state lacks a sphere of freedom to set and pursue its ends is compatible with both views, and a number of others. The

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whether or not she is subject to a political obligation. *Id.* In this sense, an obligation established by a voluntary act respects the liberal idea that an individual should not be forced to act in a particular way, even if it serves his or her interests. *Id.* at 69. The choice of whether a particular commitment serves her interests is left to the individual.

But for reasons related to those discussed above, it seems implausible to claim that a state has self-interests that must be protected by limiting an obligation to protect based on voluntary acts. It is, at a minimum, unclear if a state has morally-relevant interests beyond acting on its duties and obligations to its subjects, and perhaps to other persons. If it lacks morally-relevant interests beyond acting on its obligations, there would be no (deep) conflict between the state obligation to protect and the state’s self-interest, because the obligation to protect would partly determine the content of that self-interest. But even if the state does have morally-relevant interests that extend beyond fulfilling its obligations to its subjects and other persons, it is highly implausible that a state may permissibly place those interests before what it owes to its subjects. On such an assumption, an argument that the state obligation to protect must respect state self-interest would presume that the obligation is in some sense secondary. But that effectively begs the question at issue in evaluating explanations of the state obligation to protect.

<sup>377</sup> See Allen Buchanan, *The Internal Legitimacy of Humanitarian Intervention*, 7 J. POL. PHIL. 71, 74-75 (1999).

<sup>378</sup> He may merely claim that the state citizens have a moral obligation to use the state as an instrument of justice. *Id.* at 83-87.

<sup>379</sup> *Id.* at 83.

argument requires only that the moral obligations of the state leave little or no freedom of action for the state.<sup>380</sup>

One might object that states apparently have wide areas of discretion in which to act, since once moral requirements, such as those reflected in a constitution, are exhausted, they are subject to no further requirements. However, we can distinguish two sorts of discretion that a state may possess: that which arises from the absence of any moral requirement within some sphere and that which arises when the moral requirements in some sphere are vague, controversial, or otherwise demand state judgment.<sup>381</sup> Even if states are morally constrained to act on behalf of their citizens (or others within their territory), they may have substantial need to interpret such a moral requirement. While the state's judgment of what is to be done will normally stand, the fact that the state has the last word or needs to exercise judgment in acting does not indicate that it acts independently of moral requirements.<sup>382</sup> Instead, the applicable moral requirements may simply be of such a character that makes this interpretation necessary. The argument simply needs to deny that there is a substantial sphere of state

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<sup>380</sup> What exactly is required of a state is an additional question beyond that of whether or not states are naturally free. Modern states are commonly thought to be subject to a number of different basic obligations commonly given voice in constitutions. One such moral obligation, the proper explanation of which is under consideration here, is the state obligation to protect. Others are those that restrict the state from deprivations of life, liberty, and property without due process of law or that require respect for freedom of speech. *Cf., e.g.*, CONST. amends. I, V (U.S.). Beyond these constitutional limitations, states may, depending on one's theoretical proclivities, have an obligation to maximize social welfare, to satisfy some egalitarian criterion, or to realize a social state of right. *Cf., e.g.*, CONST. art. 1 (Col.) ("Colombia is a social state of right organized in the form of a unitary republic, decentralized, with autonomy of its territorial units, democratic, participatory and pluralistic, based on respect for human dignity, on the work and solidarity of the individuals who belong to it, and the predominance of the general interest."). The may even have an obligation of beneficence to promote the well being of people in general, whether or not they are within the state's territory. The precise form of these more general obligations may be a matter of some controversy. But the basic fact that states have a very limited sphere of moral freedom to pursue their own ends or interests does not currently seem to be a widely controverted point of political theory.

<sup>381</sup> In fact, an interesting issue is the degree to which the state special obligation to protect leaves a space for state judgment concerning the discharge of its requirements. *See infra* ch. 7.

<sup>382</sup> *See* H.L.A. HART, THE CONCEPT OF LAW 138 (1961).

activity that is not governed by any moral requirements at all. It can accept that the state itself must interpret the moral requirements that apply.

Finally, even if we were to assume that states are naturally free, in the sense that they have a substantial sphere of activity not subject to natural duties, there is no reason to conclude that a state obligation to protect must then depend on a voluntary action. Simmons suggests that political obligation is not a natural duty because it is particularized: it is an obligation that an individual owes to a particular state, not to all states.<sup>383</sup> A person owes a natural duty, in contrast, to all persons (or states) equally because it is not dependent on the particularities of an individual's circumstances.<sup>384</sup> According to Simmons, all special obligations must arise from voluntary action because individuals are normally free to act as they like within the bounds of their natural duties.<sup>385</sup> Because of this freedom, a special obligation would have to depend on a voluntary action. Applying this idea to the state obligation to protect, one might think that, because that obligation is specially owed to persons within the state's territory, it must arise from a voluntary state action.

But a state could have particularized or special obligations simply in virtue of being a state. A state is different from an individual in that it is not possible for it to exist without relationships to individuals and territory: certain relationships are necessary for a proto-state to be a state. These relationships may include those of the state to a geographical territory and to a particular population, as well as control over that territory and law that applies to the population.<sup>386</sup> In contrast to a state, a person may not essentially have relationships to particular territory or particular other

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<sup>383</sup> A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 64 (1979).

<sup>384</sup> *Id.* at 63.

<sup>385</sup> *Id.* at 64-65.

<sup>386</sup> For example, Charles Tilly understands "states as coercion-wielding organizations that are distinct from households and kinship groups and exercise clear priority in some respects over all other organizations within substantial territories." CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1990*, at 1 (1990).

persons, even if it is essential to being a person that one can and will be inclined to form morally important relationships to places and persons. Many obligations of the state seem to be particularized according to the necessary relationships a state has: they are owed to those individuals in its territory simply because it is the territory of that state. Because of these necessary relationships of a state, the natural duties of a state (perhaps unlike an individual) could be particular, in the sense that they are addressed to a specific territory and specific individuals, and not to other territories and individuals.

## *2. The lack of state freedom to assume voluntary obligations*

The lack of state freedom not only excludes a reason to favor a promise-based account of the state obligation to protect; it makes such an explanation quite implausible. Fundamentally, the promise-based account of the state obligation to protect seeks to explain why a state has an obligation to protect when it otherwise would not. The particular version developed here claims that the state communication of a monopoly on the legitimate use of force will constitute an implied promise of state protection. But a state does not enjoy the freedom to assume new moral obligations because its actions are constrained by its existing moral obligations; it has no sphere of freedom to act. Again, this is not to say that the state's moral obligations will always clearly determine the actions the state must perform; there will often be room for discretion in the way the state pursues its morally defined objectives.<sup>387</sup> Instead, it is to point out that we have long rejected the idea that the state and its officials may act independently from morally defined obligations and ends.<sup>388</sup>

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<sup>387</sup> See *supra* Part III.B.1.

<sup>388</sup> Robert G. Natelson, in his survey of political thought influential at the time of the U.S. Constitution, shows the pervasiveness of the assumption that the state may not act to further private interests. See Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1095-1134 (citing, among many others, WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 10, 12-13, 48-50, 56, 161 (1765-69); MARCUS TULLIUS CICERO, DE OFFICIIS 87 (Walter Miller trans., Loeb ed. 1956) (44 BCE); JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND

The basic argument for why an implicit state promise to protect cannot adequately explain the state obligation to protect is quite simple. Fundamentally, acquiring a new obligation via a promise generally would require some sphere of freedom to act, so that a state may assume new moral commitments within this realm of discretion. But if the state has no sphere of freedom to act, it cannot make an implied promise to protect adequate to explain the state obligation. The state is constrained to act in accordance with its moral obligations and ends. It may make some promises or commitments that are compatible with and further its general moral obligations and ends—for example, by establishing treaties or new programs—and these promises may refine its general moral obligations and ends. But it may not simply assume new obligations that go beyond what morality already requires of it, because that would be to assume a sphere of freedom to act.<sup>389</sup> And if we are to explain the state obligation to protect in terms of an assumed obligation, it would be circular to assume that the

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TREATISE 18, 110, 113-15, 116-17, 144-45, 149, 183-86 (Russell Krik, intro. 1955) (1690); SAMUEL PUFENDORF, *THE WHOLE DUTY OF MAN, ACCORDING TO THE LAW OF NATURE* 215-220 (Andrew Tooke trans., Ian Hunger & David Saunders eds., 2003) (1691); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, in MONTESQUIEU/ROUSSEAU 9, 31, 56, 73 (Thomas Nugent trans., Encyclopedia Britannica ed. 1952) (1748); ALGERNON SIDNEY, *DISCOURSES CONCERNING GOVERNMENT* 21, 113, 185, 466, 530-31, 791 (Thomas West ed., 1996) (1689); EMMERICH DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 20-22 (Charles G. Fenwick trans., Carnegie Inst. 1916) (1758)).

<sup>389</sup> It is worth contrasting the argument here with an argument criticized by Allen Buchanan in *The Internal Legitimacy of Humanitarian Intervention*. Generally Allen Buchanan, *The Internal Legitimacy of Humanitarian Intervention*, 7 J. POL. PHIL. 71, 83 (1999). That argument concerned whether a state humanitarian intervention to protect those persons in the territory of another state is incompatible with its obligations to those within its own territory. The problem he considered was that a state may act only to further the interests or ends of those within its territory, which a humanitarian intervention normally does not. *Id.* at 74-77. He quite plausibly responds to this problem with the idea that, while the state does not have what I am calling a sphere of freedom to act, it may have duties and obligations to people other than those in its territory. *Id.* at 83-87. A humanitarian intervention thus need not be a violation of state duties and obligations. *Id.* at 83-87. In contrast, the issue considered here is whether an implicit state promise to protect can explain why a state has obligation to protect those within its territory when it otherwise would not. I assume that the state may have obligations both to persons in its territory and to others but that those obligations completely constrain state action: it has no sphere of freedom to act independent of its obligations. Buchanan's solution that state humanitarian intervention may be permissible because it may be an independent moral obligation of the state (or a way of fulfilling such an obligation) does not apply.

assumption of the obligation is a means of furthering a pre-existing obligation or end of the state.<sup>390</sup>

The remainder of the part will be dedicated to resolving three objections to this argument.<sup>391</sup> First, the implied promise to protect might further some other pre-existing state obligation or might be a consequence of actions that further such obligations, and such a promise can adequately explain the state obligation to protect. Second, the state might be unable to avoid making a promise to protect as a result of it being a state, and such a promise would be adequate to explain the state obligation to protect. Third, the argument might prove too much, in that it might also entail that the state may not establish a monopoly on the use of force in its territory.

a. Objection: The promise to protect may fulfill another obligation

First, is it not possible to understand the state promise to protect as a promise that furthers some other obligation of the state? The state may not permissibly make an

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<sup>390</sup> See *infra* Part III.B.2.a.

<sup>391</sup> A fourth possible problem for the argument is that it assumes a state cannot make a promise to protect in violation of its existing obligations, which completely occupy its permissible field of action. It may seem that, if this assumption is false, it poses no problem that the state was morally prohibited from making the promise, because it could perfectly well make the promise anyway. While this objection may not be the most appealing—few would want to claim that the promise to protect is immoral—it is one potential strategy to rescue an implicit promise explanation of the state obligation to protect.

However, this criticism assumes that the argument must show it to be impossible that a state could have an obligation to protect as a result of a promise to protect. Instead, the argument attempts to show that a promise to protect cannot provide an adequate explanation of the state obligation to protect. From that perspective, it is highly relevant that such an implicit promise is made in violation of the state's existing obligations at the time of its creation. The problem is not that such an implicit promise is incapable of forming new obligations, although many would argue that an apparent promise to perform a morally forbidden action does not establish an obligation. See Seana Valentine Shiffrin, *Immoral, Conflicting, and Redundant Promises*, in REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T. M. SCANLON 155, 159-63 (R. Jay Wallace, Rahul Kumar & Samuel Freeman eds., 2011); Kok-Chor Tan, *Patriotic Obligations*, 86 MONIST 434, 439 (2003); cf. LESLIE GREEN, THE AUTHORITY OF THE STATE 47 (1988). Instead, the problem is that such an explanation renders the state morally corrupt at its core: one of its fundamental obligations is to protect individuals in its territory against violence. We should not assume that a central obligation of the state is established in a morally impermissible way unless there is no alternative explanation. The state itself does not appear intrinsically morally impermissible or morally problematic to most, even if it can be, and even obligations such as that of providing protection are not only morally proper, but morally important.

implied promise to protect unless the promise (reasonably) furthers some other state obligation, and, in fact, it probably may not attempt even to establish a monopoly on the legitimate use of force unless doing so (reasonably) furthers some other state obligation. But the state apparently could make an implied promise to protect in order to further its other obligations, giving the state obligation to protect a derivative status.

It is, in fact, difficult to conceive of clear examples of how this would work, since it is hard to imagine the existence of the state absent an obligation to protect. However, let us suppose the state has an obligation to fulfill social, economic, and cultural rights (or perhaps Rawls' difference principle<sup>392</sup>), such as the right to food. Other state obligations independent of the obligation to protect could include providing courts, maintaining public infrastructure, or establishing a monetary system. A state may make a promise in furtherance of those obligations, such as if it promises that it will distribute food at a certain place. Now, could we argue that the state promise to protect is a way of furthering the obligations like the obligation to fulfill social, economic or cultural rights, such as the right to food? At first glance the answer seems to be no. Perhaps some minimal security is necessary to fulfill those rights, but the state could provide the security without making any promises and without assuming any new moral obligations. But this oversimplifies. It may be necessary not only to provide security, but also to tell the potential beneficiaries of the obligation to fulfill economic, social, and cultural rights that the state will provide security (in effect, that it will protect them).

However, there are a number of problems with this way of understanding the state obligation to protect. First, it is unappealing to explain the state obligation to protect in such a way that makes it dependent on some other state obligation. It is one thing to justify the criminal law in terms of securing liberty,<sup>393</sup> and another to view the

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<sup>392</sup> See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

<sup>393</sup> See JOHN RAWLS, A THEORY OF JUSTICE 241, 314-15 (1971).

obligation to protect as dependent on separate obligation. We intuitively accept that the state obligation to protect is at least as fundamental as an obligation to provide courts, maintain infrastructure, or fulfill social, economic, and cultural rights. It is aptly called “the first duty of government.”<sup>394</sup> And I don’t believe that this intuitive understanding is a mere product of habit or tradition. The state needs a minimum form of territorial control to exist and territorial control is a plausible necessary condition of providing protection—fulfilling an obligation to protect—against many forms of violence that occur between individuals in the state’s territory.<sup>395</sup> In contrast, it is not a necessary condition for fulfilling the other obligations mentioned. A humanitarian relief organization can provide food without asserting territorial control itself, and perhaps without anyone asserting territorial control asserted. An arbitral tribunal can provide court services without have a strong connection to any particular territory. Thus, it is natural to view the state—an essentially territorial entity—as having a special connection to the obligation to protect, even if for pragmatic reasons.

Second, an explanation of the state obligation to protect in terms of a promise that advances or fulfills some other state obligation is subject to a regress problem. If the state obligation to protect is explained in this way, we need to assume that the primary obligation—such as the right to food—is not explained in terms of a promise. For that promise would be subject to the exact same problem: the state does not generally have the freedom to make promises that do not advance its pre-existing obligations. The state does not have a sphere of freedom to pursue its own ends, interests, and projects, and to assume its own voluntary obligations. And, while it is possible that the obligation to protect arises from a promise and these other obligations do not, it is not clear why that would be the case. If anything, the state obligation to

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<sup>394</sup> Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

<sup>395</sup> See *infra* Part III.B.2.b.



protect should have a stronger foundation than many other positive state obligations, not the weaker contingent foundation of an obligation voluntarily assumed.

Finally, the state obligation to protect is apparently a very extensive and demanding obligation that would often be a cumbersome way of fulfilling another obligation. Perhaps we can understand a promise to protect as a way to facilitate the distribution of food in fulfillment of the right to food. But note the characteristics of the obligation arising from the communication of a monopoly on the legitimate use of force. It is geographically unlimited (within the territory where the state claims the monopoly). It apparently demands a very high level of protection, as the state is claiming an exclusive monopoly on the use of force. This implied promise and the consequent obligation is not tailored to fulfill any other obligation of the state. Returning to the right to food, a more carefully tailored promise might only generate an obligation to establish a monopoly near food distribution centers or only promising the elimination of major risks. It is one thing to promise that Somali warlords will not interfere with food distribution sites; it is another to promise that no acts of violence will occur anywhere in Somalia.

But, still, what if the promise to protect is permissible as a way to fulfill a general state obligation to promote the welfare of those persons in its territory? Such an obligation is at least as fundamental and broad ranging as the state obligation to protect, so the state obligation to protect would not (necessarily) be an overly demanding way of satisfying that obligation. Nor would there be the problem that the state obligation to protect is explained in terms of an obligation apparently less fundamental than the obligation to protect itself. While we might wonder whether a state really has a general obligation to promote the welfare of those within its territory, as opposed to more specific obligations to, say, fulfill specific social, economic, and cultural rights, it is not necessary to pursue this line of thought. Instead, the suggestion still runs afoul of

the regress problem: why would the state obligation to protect require an explanation in terms of a promise that fulfills some other obligation? Wouldn't that obligation—the general obligation to promote individual welfare for those in its territory—also require such an explanation? And if it does not, it would be equally plausible to explain the state obligation to protect directly in the same terms as the state obligation to promote the welfare of the population.<sup>396</sup>

b. Objection: The promise to protect is apparently unavoidable

A second problem for the argument is the fact that it may seem that the state cannot possibly avoid making a promise to protect. Control over a territory, in the form of a monopoly on the legitimate use of force, seems to be necessary condition for that territory to belong to the state. It is apparently difficult or impossible for a state to consolidate a monopoly on the legitimate use of force without communicating that fact—including that it will enforce it—, thereby leading those in the territory to be reasonably assured that the state will protect. In this sense, the implied promise to protect would constitute an originating promise of the state, one made as a necessary part of state formation. It is not a subsequent promise that the state makes after it is an on-going concern, which may create new state obligations but is not part of the act responsible for creating the state. But if the implied promise to protect is a necessary part of state formation, and so unavoidable, the promissory obligation would presumably be part of the default set of moral obligations of the state. And so the promise could be made without presuming that the state has a sphere of freedom to pursue its ends or interests.

However, the territorial control required for statehood need not be a monopoly on the legitimate use of force, but merely some lesser form of territorial control. It is

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<sup>396</sup> This point is connected to the intuitive feeling that explaining the state obligation to protect in terms of the state obligation to promote individual welfare is somewhat circular and extravagant. The obligation to promote individual welfare would more or less directly imply that the state ought to protect. The role and necessity of a promise is unclear.

perfectly compatible with the existence of a state that the state does not uniformly maintain a monopoly on the legitimate use of force. The failures may be geographical in nature—brown zones lacking substantial state presence or activity<sup>397</sup>—or simply based on other characteristics of the victims of violence. To take an example of a geographical failure, the state regularly failed to enforce a monopoly of violence against paramilitary organizations in Colombia, at least when their acts of violence targeted the right groups—such as *campesinos*, *indigenas*, and *afro-colombianos*.<sup>398</sup> For an example of a non-geographical failure, consider circumstances of rampant violent crime, either directed against vulnerable groups or simply pervasive in society.

Consequently, a near-perfect monopoly on the use of force cannot be a necessary condition for an organization to constitute the state in some territory. While some limitation on the use of force must exist for the organization to constitute the state in a particular territory, it cannot be that the organization must eliminate (or attempt to eliminate) all other unauthorized uses of force. The following criterion seems to capture central elements of the necessary relationship to the territory: the organization (1) is present in a given territory, (2) has a near-monopoly on the use of force against it and its officials in the territory, (3) normally responds with force to breaches of this monopoly, and (4) it normally acts to eliminate the capacity of rivals to use force against it and its officials in the territory.<sup>399</sup> This criterion is merely necessary, not sufficient for an organization to be the state in some territory, as it simply identifies the minimum conditions in which an organization has a sufficient relationship to a territory to be a state.

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<sup>397</sup> See *supra* notes 84-85 and surrounding text; Guillermo O'Donnell, *On the State, Democratization, and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries*, 21 *WORLD DEV.* 1355, 1359-61 (1993).

<sup>398</sup> GUSTAVO DUNCAN, *LOS SEÑORES DE LA GUERRA* (2006).

<sup>399</sup> Cf. CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1990*, at 1 (1990) (“Let us define states as coercion-wielding organizations that are distinct from households and kinship groups and exercise clear priority in some respects over all other organizations within substantial territories.”).

Considering again the examples of a state that lacks a monopoly on the legitimate use of force, we can also see that this relationship to a territory is not sufficient to reasonably assure those within its territory that the state will protect. In a geographical brown zone<sup>400</sup> where the monopoly on the legitimate use of force was not enforced against paramilitaries, it was probably not reasonable to assume that the state had implicitly assured that it would protect. Certain categories of potential victims—such as *campesinos*—in those regions affected by paramilitary violence could not reasonably expect (much less be reasonably assured) upon learning of the pattern of violence and impunity that the state would protect them from the paramilitary organizations.<sup>401</sup> Similarly, if a category of crime is normally met with impunity, as was the case with the pattern of violent crimes against women in Ciudad Juarez,<sup>402</sup> learning that fact should reduce or eliminate any reasonable assurances that the state will protect against violence that fits the pattern.<sup>403</sup> So it appears possible that a state may fail to claim a monopoly on the legitimate use of force in a territory even though it remains the state's territory.

But what if the state does not assert that it has an absolute monopoly on the use of force, but instead merely asserts that it is the only actor permitted to use force? If the latter is the purported content of the state communicative claims regarding the

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<sup>400</sup> See *supra* notes 84-85 and surrounding text; Guillermo O'Donnell, *On the State, Democratization, and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries*, 21 *WORLD DEV.* 1355, 1359-61 (1993).

<sup>401</sup> MAURICIO ROMERO, *PARAMILITARES Y AUTODEFENSAS 1982-2003* (2003). In fact, it is unlikely that *campesinos* in the most troubled regions of Colombia at the height of the armed conflict actually expected the police or military to protect them. They much more likely would have expected the local police or military to be tacitly or not so tacitly supporting the paramilitaries.

<sup>402</sup> *González ("Cotton Field") v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).*

<sup>403</sup> However, if the state is taking active measures to reduce or eliminate violent crime, and is trying to eliminate impunity for such crime, it may be more reasonable to be assured that the state will take measures to protect. For example, the U.S. response in the 1980s and 1990s to violent crime was consistent and aggressive, perhaps allowing U.S. citizens to be reasonably assured that the state would protect despite the allegedly substantial levels of violent crime. This comment is in no way intended to endorse the U.S. criminal policy and law that emerged during this period.

monopoly, it seemingly could be the case that a state necessarily makes the claim and provides reasonable assurance even though private actors may regularly commit acts of violence in its territory. These acts would not be legitimate and so would not undermine or contradict the asserted monopoly on the permission to use force. However, the problem is that not just any communicative of a monopoly concerning force will constitute an implied promise to protect; it is essential that the claim imply that the state will enforce a monopoly on the legitimate use of force. The claim that the state is the only actor permitted to use force does not imply that the state will enforce its monopoly on the legitimate use of force. The state could not assure individuals in its territory that it will protect by merely claiming that it is the only actor permitted to use force. So, even if the state necessarily claims a monopoly in this sense, it is not relevant to establishing a state obligation to protect.

c. Objection: Claiming a monopoly on the legitimate use of force is permissible

Finally, one might be tempted to object that the argument—that a state may not voluntarily assume an obligation to protect—cannot be right because the state *may* permissibly claim a monopoly on the legitimate use of force, which involves assuming the obligation to protect. However, the argument attempts only to show that a voluntary assumption of the obligation to protect cannot be its fundamental explanation, not that the state may never engage in actions that involve assuming the obligation. If the state is otherwise obligated to protect, and territorial control is a means of fulfilling that obligation, it is perfectly permissible for the state to make an implied promise to protect. A state *may* make promises to fulfill its moral obligations; what is prohibited are completely discretionary promises made for the state's (or its officials') own reasons. What exact moral function such apparently redundant promises and obligations have,

especially if they duplicate the precise content of the pre-existing obligation to protect, poses a theoretical problem.<sup>404</sup> But redundant promises are hardly impermissible.

#### IV. CONCLUSION

This chapter has shown that, although a promise-based account may be stretched further than one might initially assume,<sup>405</sup> it ultimately is theoretically unsound as an account of the state's special obligation to protect against violence. It suffers from two major problems. First, it depicts the state obligation to protect as essentially unconnected with the individual interest in security, as this interest plays no important role in explaining why the state has an *obligation* to protect. Apart from the intrinsic unpalatability of disconnecting the obligation to protect from individual security interests, the separation likely results in a theory that does not correctly analyze conflicts of obligations. Second, the account wrongly assumes that a state has a sphere of liberty in which it may acquire new obligations and commitments that are not derivative of the state's existing moral obligations and ends. Only if the promise-based account assumes this will it be able to non-circularly explain the existence of the state's special obligation to protect.

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<sup>404</sup> See Seana Valentine Shiffrin, *Immoral, Conflicting, and Redundant Promises*, in REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T. M. SCANLON 155, 165-71 (R. Jay Wallace, Rahul Kumar & Samuel Freeman eds., 2011).

<sup>405</sup> It can reproduce much of the content of the intuitive state obligation to protect, at least in those areas in which the state actually exercises a monopoly on the legitimate use of force. Moreover, the account explains why the state does not have the same sort of obligation to protect for territories and persons to which it has no special connection: there is no implied promise via claims of a monopoly on the legitimate use of force, partly satisfying a main desideratum for an account of the obligation to protect. However, it only satisfies this desideratum in part, as it does not fully explain why the state has this special obligation to protect everyone in its legal territory, given that the state may only claim the monopoly in part of its territory.

## CHAPTER 5: THE LEGITIMACY OF POLITICAL CONTROL

### I. INTRODUCTION

A number of philosophers have remarked that providing protection is a necessary condition for the legitimate exercise of political control (or related state activity), with the implication that this explains why the state is required to protect.<sup>406</sup> The primary historical source for an argument of this general type is Hobbes, who considered the effective protection of the state to be a necessary condition for the rationality of submitting to the state's political control.<sup>407</sup> More recently, Waldron made a similar connection:

“If the individual challenges the legitimacy of [the demands that political regimes impose on individuals], some response on behalf of the regime must be given *to him or to her*. A government's response will normally be along these lines: ‘You are better off in certain respects (e.g., safer) as a result of the existence and activities of the regime. That is why it is reasonable that we make these demands upon you.’”<sup>408</sup>

An immediate advantage of connecting protection to the legitimate exercise of political control is that it comes close to explaining why the state obligation to protect is special for those within the state's territory: A state normally exercises political control only within its legal territory.<sup>409</sup> Thus, the explanation roughly satisfies one of the primary

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<sup>406</sup> Jeremy Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 491-94 (2006); Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 703-19 (2002); LESLIE GREEN, THE AUTHORITY OF THE STATE 71 (1988). Cf. BERNARD WILLIAMS, *Human Rights and Relativism*, in IN THE BEGINNING WAS THE DEED 62, 62-63 (2005) (“I identify the “first” political question (in the manner of Thomas Hobbes) as the securing of order, protection, safety, trust, and the conditions of co-operation. It is the “first” political question because solving it is the condition of solving, indeed posing, any other political question. It is not (unhappily) first in the sense that once solved it never has to be solved again. . . . The point, however, is not that in any country, at any moment, the basic question of recognizing an authority to secure order can reassert itself. It is obvious that in many states most of the time the question of legitimate authority can be sufficiently taken for granted for people to get on with other kinds of political agenda.”) (discussed in CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 78-80 (2009)).

<sup>407</sup> THOMAS HOBBS, LEVIATHAN ch. XXI ¶ 21 (1651).

<sup>408</sup> Jeremy Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 493 (2006).

<sup>409</sup> I use the word ‘normally’ because states do occasionally exercise political control outside of their legal territories, such as in situations of military occupation or colonialism.

desiderata for an account of the state obligation to protect. Nonetheless, this chapter will argue that the explanation by itself is philosophically inadequate as well as unable to satisfy other desiderata of an account.<sup>410</sup>

Although different theorists have viewed protection as a necessary condition for the legitimacy of a range of state characteristics, the arguments in this chapter will focus on the link between protection and the exercise of political control. It will consider whether the fact that providing protection is a necessary condition for the morally legitimate or permissible exercise of political control can explain the obligation to protect. I will roughly follow Allen Buchanan in his use of the concept of political power, although I will call it ‘political control.’<sup>411</sup> As he puts it, to exercise political power is “to exercise a monopoly, within a jurisdiction, in the making, application, and enforcement of laws . . . .”<sup>412</sup> We might expand this understanding of political control to include these activities with respect to moral or legal rights. This definition picks out the specific way in which an exercise of coercion might be understood to be political, in that it is connected to the enforcement of laws. However, two qualifications are in order. First,

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<sup>410</sup> It would be fair to say that topics like state legitimacy and legitimate authority and coercion have generated substantial disagreement as to the nature of the problems and even the terminology to be used. Most philosophers who consider these issues understand or define the central terms in different ways, rendering the debate somewhat opaque. In fact, it often appears that there is greater consensus as to the principal lines of argument (and their problems) that may be offered to establish that the state is legitimate (or has legitimate authority or may legitimately coerce) than there is concerning the terminology itself.

Frequently, but not universally, a legitimate state is equated with a state that possesses legitimate authority or that legitimately exercises coercion. However, one could follow Leslie Green in adopting the following understanding of state legitimacy: “A state is legitimate only if, all things considered, its rule is morally justified.” LESLIE GREEN, *THE AUTHORITY OF THE STATE* 5 (1988). By using such a definition, one does not foreclose any possibilities as to what might be required for a state’s rule to be morally justified. It might need to possess legitimate authority, either imposing political obligation on its subjects or merely generating moral duties with its dictates. Or it might not. It might need to wield coercion legitimately. Or it might not. Perhaps it might even have to be substantively just in the laws, policies, and commands that it issues, or at least meet some minimum standard of justice for the contents of these substantive issues.

<sup>411</sup> I call it ‘control’ and not ‘power’ to distinguish it from a moral or legal permission, which will be relevant in ch. 6.

<sup>412</sup> Allen Buchanan, *Political Legitimacy and Democracy*, 112 *ETHICS* 689, 690 (2002). Moreover, the definition is conceptually independent of any moral obligation or duty that the subjects of a state might have to obey the laws that the state makes and enforces.



Buchanan's definition overly limits the exercise of political control to those situations in which the state has a monopoly on rule making, application, and enforcement,<sup>413</sup> which would implausibly imply that medieval kings (and perhaps contemporary federal states) could not wield political control without such a monopoly.<sup>414</sup> When I speak of the exercise of political control, I will do so in Buchanan's sense, but excluding the requirement of a monopoly in order to avoid these problems. Second, since Buchanan's understanding of political control is descriptive, not normative; we must additionally specify the concept of legitimate political control. A state legitimately exercises political control if it is morally permissible for the state to exercise the political control.

Despite the substantial attention that the question of the state's authority and its justification has drawn, this chapter will *not* consider whether protection as a necessary condition for state *authority* or for legitimate state *authority*. A legitimate authority is often, but not universally, understood to be one for which those person subject to the authority have a moral obligation to obey its laws and commands. A minimal understanding of authority might hold that "A has authority over B if and only if the fact that A requires B to [phi] (i) gives B a content-independent reason to [phi] and (ii) excludes some of B's reasons for not-[phi]-ing."<sup>415</sup> The chapter will not consider whether providing protection is a necessary condition of either, because there is substantial disagreement, to the point of somewhat general skepticism, concerning two claims about authority: first, whether states, even just or morally desirable states, generally have authority over their subjects, and, second, whether legitimate states must have authority or legitimate authority over their subjects. Given the weak consensus that the

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<sup>413</sup> *Id.* at 690.

<sup>414</sup> Although Buchanan does allow that the state may delegate political control to private prisons and the like, it is not clear that such a move accurately captures the social relations that existed between kings and other feudal lords.

<sup>415</sup> LESLIE GREEN, *THE AUTHORITY OF THE STATE* 42 (1988). A stronger version of this idea, one that includes the idea of a political obligation, might require not only that state requirements create reasons but that state requirements create an obligation owed to the state itself.

answer to both questions is no, it does not make sense to argue that the state should protect because doing so is a condition of its legitimate authority.<sup>416</sup>

## II. PROTECTION AS A NECESSARY CONDITION FOR LEGITIMACY

A number of contemporary arguments that the state protection is a necessary condition for state legitimacy are intellectual heirs to Hobbes. Hobbes claimed that possessing the power to protect is a necessary condition for the legitimacy of the state, understood in terms of an individual obligation to obey the state. However, in the context of the connection between the legitimacy of the state and state protection, Hobbes advanced at least two major views that many contemporary thinkers would

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<sup>416</sup> It is not clear that we need a concept of legitimate authority in addition to legitimate political control in order to evaluate the legitimacy of political control; the morally permissible exercise of political control may not need to be paired with a duty of obedience. Raz and Edmundson have argued that a state, not even as a legitimate state, must at least claim that it is an authority, in the sense that its “authoritative directives create in [its] subjects an enforceable duty of obedience.” WILLIAM A. EDMUNDSON, *THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY* 36, 43 (1998); Joseph Raz, *Authority and Justification*, 14 *PHIL. & PUB. AFF.* 6-7 (1985); see also Philip Soper, *Legal Theory and the Claim of Authority*, 18 *PHIL. & PUB. AFF.* 209 (1989) (arguing that the state must claim law has authority). And it would seem that if it makes or must make such a claim, it would be legitimate only if it imposes at least some sort of moral obligation on its subjects with its authoritative directives. Raz makes the following argument, which Edmundson cites with approval:

“[T]ry to imagine a situation in which the political authorities of a country do not claim that the inhabitants are bound to obey them, but in which the population does acquiesce to their rule. We are to imagine courts imprisoning people without finding them guilty of any offense. Damages are ordered, but no one has a duty to pay them. The legislature never claims to impose duties of care or of contribution to common services. [I]t is unlikely that any such society ever existed . . . [and] if such a society were to exist we would not regard it as governed by authority [for] it is too unlike the political institutions we normally regard as authorities.” WILLIAM A. EDMUNDSON, *THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY* 37-38 (1998) (citing Joseph Raz, *Authority and Justification*, 14 *PHIL. & PUB. AFF.* 6-7 (1985)).

However, it is not clear that it is impossible or even difficult to imagine a state that makes no such claims. As an initial matter, a normal state does not ever seem to explicitly make the claim that its subjects owe it a moral duty of obedience; instead the claim seems to be inferred in some way from the alleged consequences for the operation of the state’s legal system. But is there no other way to understand the operation of the courts, legislature, etc. without recourse to a claimed obligation of obedience? All of the problematic features seem explicable in terms of legal duties, without adding a purely and external moral duty to obey the law. While most legal systems do not add an explicit and general legal duty of obedience to the great range of specific legal duties that different parts of the law establish, such specific legal duties would seem sufficient to make sense of the phenomena that Raz indicates. It does not follow that state actions are bare coercion if the state does not claim a moral duty of obedience. And even if this conclusion is wrong, why is there any need to connect this to an obligation owed to the state to obey? It should be sufficient for all of these arguments that there is a duty to obey.

reject. First, according to more traditional interpretations of Hobbes' work,<sup>417</sup> he accepted that individuals normally have reason to perform an action if and only if it is in their narrow self-interest to perform the action, where self-interest is primarily understood in terms of self-preservation.<sup>418</sup> Hobbes then attempted to show that individuals ought to submit to an absolute state because it is in their self-interest to do so, so long as that state protects.<sup>419</sup> On the basis of these claims, Hobbes drew the

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<sup>417</sup> The account will draw from Gauthier's interpretation of Hobbes, with supplemental ideas taken from Jean Hampton. DAVID P. GAUTHIER, *THE LOGIC OF LEVIATHAN: THE MORAL AND POLITICAL PHILOSOPHY OF THOMAS HOBBS* (1969); JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986). However, there are radically different interpretations of Hobbes, that reject the traditional assumption that he reduces morality to a system of rational self-interest. See, e.g., SHARON LLOYD, *MORALITY IN THE PHILOSOPHY OF THOMAS HOBBS: CASES IN THE LAW OF NATURE* (2009).

<sup>418</sup> Any independent moral requirements lack independent reason-giving force to guide an agent's actions. See DAVID P. GAUTHIER, *THE LOGIC OF LEVIATHAN: THE MORAL AND POLITICAL PHILOSOPHY OF THOMAS HOBBS* 48-57 (1969). This understanding of rationality creates a serious problem for rational agents who are not subject to the power of a state, that is, who are in the state of nature. Because each rational agent may act in ways that are rational from the narrow perspective of her self-preservation, she may undertake actions that are prejudicial to other agents when these actions further her self-preservation. The rationality of such prejudicial actions, and the rational fear of others' actions, leads to conflict and strife among persons in the state of nature, producing Hobbes' famous war of all against all. THOMAS HOBBS, *LEVIATHAN* ch. XIII (1651).

<sup>419</sup> Hobbes claimed that "[t]he obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them." THOMAS HOBBS, *LEVIATHAN* ch. XXI ¶ 21 (1651). The key to understanding this idea lies in Gauthier's observation about the obligations that a rational agent may not assume:

"One cannot give up one's right to do what is immediately and directly necessary for preservation—to resist threats and assaults on one's life, power, and corporal liberty . . . . There is then, an inalienable core to the right of nature." DAVID P. GAUTHIER, *THE LOGIC OF LEVIATHAN: THE MORAL AND POLITICAL PHILOSOPHY OF THOMAS HOBBS* 58 (1969). See also THOMAS HOBBS, *LEVIATHAN* ch. XIV ¶ 29 (1651).

To understand this assertion, we must note that "a covenant is valid, and obliging . . . if and only if the covenant is reasonable," DAVID P. GAUTHIER, *THE LOGIC OF LEVIATHAN: THE MORAL AND POLITICAL PHILOSOPHY OF THOMAS HOBBS* 88 (1969), considered from the perspective of prudential rationality. Thus prudential rationality imposes a condition on the possibility of a valid and obliging covenant: that covenant must be prudentially rational. However, a covenant not to take actions "immediately and directly necessary for preservation" will never be prudentially rational to fulfill, given that the measure of prudential rationality is self-preservation. It will always be prudentially rational, regardless of purported agreements, to take those actions "immediately and directly necessary for preservation . . ." *Id.* 58.

From this limitation, we can see why the obligation of subjects to the sovereign is connected to his ability to protect them. If no obligation can exclude those actions "immediately and directly necessary for preservation" (the right of self-defense is inalienable), *id.*, then the subject's obligation to obey the sovereign lasts only as long as his power to protect. *Id.* 161. When the state does not protect, it no longer furthers the core rational interest in self-preservation because it no longer alleviates the deeply problematic conditions of the state of nature. From the perspective of an individual interested in self-preservation, punishment of disobedience is important because it

general conclusion that the ability to protect may constitute a condition on the legitimacy of the state.

Although Hobbes' ideas continue to attract substantial attention and even some followers,<sup>420</sup> few currently accept that individuals normally have necessary or sufficient reason to perform an action if and only if it is in their narrow self-interest. Most accept the existence of moral reasons independent of self-interest that may require or prohibit the performance of the action. Second, Hobbes appears to accept that the narrow self-interest of individuals is dominated by the interest in self-preservation. Hobbes can then conclude that the failure of state protection, which affects the individual interest in self-preservation, shows that it is not in the narrow self-interest of individuals to obey to the state. But modern philosophers—and perhaps even Hobbes<sup>421</sup>—believe that even the narrow self-interest of a person contains important elements independent of self-preservation.

However, the core Hobbesian insight about protection—that protection is a necessary condition for the legitimacy of the state—may take other forms. First, I will consider the idea that it is impossible to justify political control if insufficient consideration is given to the individual interest in self-preservation. This argument

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discourages acts of violence, lowering the overall levels of violence he or she is likely to encounter. But more extremely, a state that does not protect interferes with the establishment of an alternative state that can further the interest in self-preservation by taking us from a (effective) state of nature and creating the necessary conditions for peace.

There is a second way to understand how the sovereign's failure to protect defeats the prudential rationality of obedience. If the sovereign lacks the power to protect, the requirements of rational prudence incumbent on a person change rather dramatically. The reason why it is rationally prudent for a person to obey a sovereign with the power to protect is that the sovereign will either stop the person from performing the act contrary to the command or punish that action afterwards. *Id.* 88-89. But if the sovereign loses (or otherwise lacks) the power to protect, the calculus for the prudentially rational agent changes. It may be prudentially rational to disobey the sovereign if it is unlikely that the sovereign will be able to protect against the action (or punish its performance).

<sup>420</sup> See, e.g., JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986); SHARON LLOYD, *MORALITY IN THE PHILOSOPHY OF THOMAS HOBBS: CASES IN THE LAW OF NATURE* (2009); GREGORY S. KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* (1986); DAVID P. GAUTHIER, *THE LOGIC OF LEVIATHAN: THE MORAL AND POLITICAL PHILOSOPHY OF THOMAS HOBBS* (1969).

<sup>421</sup> See SHARON LLOYD, *Moral Judges: Human Nature and Motivation*, in *MORALITY IN THE PHILOSOPHY OF THOMAS HOBBS: CASES IN THE LAW OF NATURE* 56 (2009).

combines Hobbes's idea that self-preservation is a core rational interest with the general principle that the legitimate exercise of political control must be justifiable to all subject to that control as rational and reasonable persons. Second, I will consider the idea that the exercise of political control without providing protection establishes a system of domination or subordination, presenting a version of ideas proposed by John Rawls in *Law of Peoples*. Third, I will consider an idea inspired by H.L.A. Hart and Leslie Green that it is impossible to justify the exercise of political control if it fails to provide assurances to individuals that they will not be 'suckers' for complying.

#### A. RATIONAL INTEREST AND LIBERAL LEGITIMACY

We may reformulate a Hobbesian idea from the modern perspective of justificatory liberalism. Rawls in his lectures on Hobbes interpreted Hobbes' argument as an attempt to show why the exercise of coercive political control should be endorsed by rational (but not reasonable citizens).<sup>422</sup> The central thought is that, considered as rational agents strongly interested in self-preservation, a citizen ought to endorse the state's exercise of political control because the alternative is a state of affairs not conducive to self-preservation.<sup>423</sup> In this sense, Rawls interpreted Hobbes as giving a proto-version of the contemporary liberal idea that the exercise of political control must be justifiable to those subject to it.<sup>424</sup> So, even though we generally reject Hobbes

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<sup>422</sup> JOHN RAWLS, LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY 30-35 (2007).

<sup>423</sup> From a modern perspective, such a justification of the exercise of political control solely in terms of self-preservation seems woefully lacking for a number of different reasons. First, we believe that citizens should be understood for the purpose of justifying the state's coercive authority as having central interests that extend beyond self-preservation in this narrow sense. Second, many think that the alternative to a state is not as bleak as Hobbes would describe it, perhaps being more like a Lockean state of nature with 'inconveniences' that do not amount to a war of all against all. Third, and perhaps most importantly, we reject the stark choice that Hobbes presents between a state and the state of nature, assuming there are multiple ways to arrange a state that exercises coercive power, and that the choice among these options requires justification as well. Thus, we do not think of Hobbes justification in terms of prudentially rational agents principally interested in self-preservation as a sufficient to legitimate the exercise of coercive political control.

<sup>424</sup> While Hobbes specifically attempted to show that it was rational for subjects to obey the state so long as it could protect, and not that the sovereign could permissibly exercise political

account of practical reason, we may accept that self-preservation has some relevance to political control.

A leading idea of contemporary liberalism is that “all aspects of the social should either be made acceptable or be capable of being made acceptable to every last individual.”<sup>425</sup> This liberal principle, which is often developed as a version of a liberal presumption in favor of liberty, perhaps most importantly requires that the exercise of coercive political control be justifiable. Rawls presents one prominent version of this idea, that the “exercise of [coercive] political [control] is . . . justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably expect to endorse in the light of principles and ideals acceptable to them as reasonable and rational.”<sup>426</sup> Rawls’ version of the liberal principle requires that it be possible to provide a justification for the exercise of political control that all against whom it is exercised would *reasonably endorse*.<sup>427</sup> Others propose that the justification must be one that no one could *reasonably reject*,<sup>428</sup> imposing a tighter constraint on the exercises of political control that could potentially be justified. Although the precise formulation of the principle varies, contemporary liberal political philosophers commonly accept that, at a minimum, political control must be justifiable in terms that those against who it is exercised either could reasonably accept or could not reasonably

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control, his focus on self-interest as self-preservation remains relevant. It is relevant not because it can be used to show that individuals have sufficient reason to obey the state but because justified political control must serve to some extent the rational interests of individuals.

<sup>425</sup> Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 128 (1987). *See also id.* at 135 (“[T]he liberal insists that intelligible justifications in social and political life must be available in principle for everyone, for society is to be understood by the individual mind, not by the tradition or sense of a community.”); *id.* at 140 (“The thesis that I want to say is *fundamentally* liberal is this: a social and political order is illegitimate unless it is rooted in the consent of all those who have to live under it; the consent or agreement of these people is a condition of its being morally permissible to enforce that order against them.”).

<sup>426</sup> JOHN RAWLS, POLITICAL LIBERALISM 217 (1996).

<sup>427</sup> *See id.*

<sup>428</sup> Thomas Nagel indicates a principle of this sort, that “[t]he task of discovering the conditions of legitimacy is traditionally conceived as that of finding a way to justify a political system to everyone who is required to live under it. If the justification is successful, no one will have grounds for moral complaint about the way it takes into account and weighs his interests and point of view.” THOMAS NAGEL, EQUALITY AND PARTIALITY 33 (1991).

reject,<sup>429</sup> taken as rational and reasonable persons.

Hobbesian ideas about the self-interest and self-preservation can partly fill in what is required for justification to persons considered as rational. Justifying the exercise of political control to a person as rational requires showing that it advances his or her interests *to some extent*. The demands will depend on exactly what form the justification must take, whether it is one that a person could reasonable endorse or accept or one that no one could reasonably reject. If the justification of the exercise of political must merely be one that a person could reasonably endorse, the principle establishes a relatively weak constraint. If the justification must be one that no one could reasonably reject the exercise of political control, the principle imposes a much stronger constraint. In either case, given that the individual interest in self-preservation is normally of great importance to a person, even if we do not assume that it is always a person's overriding concern, it will be relevant to what a person can reasonably endorse or cannot reasonably reject.

For example, if the exercise of political control requires a justification that no one subject to the control could reasonably reject, it may require strong protection from the state in normal circumstances.<sup>430</sup> A primary preoccupation of a rational person is his or her self-preservation, which the state advances primarily by providing protection, whether through systematic or operational measures. A failure to protect provides

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<sup>429</sup> See, e.g., Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257, 264 (2001); Thomas Nagel, *The Problem of Global Justice*, 33 PHIL & PUB. AFF. 113, 129-30 (2005).

<sup>430</sup> Hobbes might end up with a rather undemanding conception of what is necessary to justify the exercise of political control to a person as rational. This is because the alternative to the exercise of political control in Hobbes analysis is a state of war of all against all, which means that almost any alternative can be justified as an improvement. Moreover, even a Hobbesian agent would likely rationally prefer conditional submission to a sovereign, if that would be sufficient to extricate him or her from the state of nature. But Hobbes seems to believe that this alternative is not available in the state of nature. A state that does not protect is rationally worse than, or at least no better than, the state of war of all against all. Thus, even if we reject Hobbes conclusion that it is rational to (nearly) unconditionally surrender to an absolute sovereign, we should take seriously his conclusions about the limits of rational surrender. Because of his assumptions, any conclusion if correct on his theory about the limits of rational surrender are likely to be conditions for the rationality of surrender on any theory.

grounds on which one could reasonably reject as a rational person the state's proffered justification for its exercise of political control, because the state would not be attending to a core rational interest. Moreover, not just any protection will do; it must be a particularly strong form of protection. Imagine the New York City of the late 1970s through the early 1990s, with rampant crime and excessively high homicide rates,<sup>431</sup> but where there clearly was functioning law enforcement and criminal justice. Let us suppose, contrary to fact, that the police would regularly failed respond to specific risks of violence, such as to calls for help, because insufficient state resources were dedicated to the police, albeit without good reason. A person could perhaps reasonably reject as a rational person the state's justification for the exercise of political control, since the state unreasonably failed to take important available measures to further his or her self-preservation.<sup>432</sup>

### *1. Norms of conduct and the conduct of the state*

A primary problem with the Hobbesian explanation of the obligation to protect concerns whether the exercise of political control requires justification for more than the norms established through that exercise. When a state exercises political control over a group of people, it establishes certain norms and forces people to conform to those norms *to some extent*. Let us suppose that the liberal principle of justification requires the state to ensure that the content of those norms are at least minimally just, as the very exercise of political control involves the imposition of those norms on the group. The Hobbesian point, restated, is that if these norms are to be just, and if justice requires that the norms be justifiable to persons as rational and reasonable, the norms must

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<sup>431</sup> For example, in 1991 there were 2154 total homicides in New York, with 351 committed during robberies, 123 as domestic violence, and 670 drug-related. ANDREW KARMEN, *NEW YORK MURDER MYSTERY: THE TRUE STORY BEHIND THE CRIME CRASH OF THE 1990S*, at 39, 51 (2000). See also Philip B. Heymann, *The New Policing*, 28 *FORDHAM URB. L.J.* 407, 408-10 (2000).

<sup>432</sup> If the lack of resources is for good reasons, such as spending on social services, perhaps a person as rational *and* reasonable could not reasonably reject the justification for that exercise of political control.



prohibit the commission of acts of violence, at least under most circumstances. There is limited space to doubt that the state's exercise of political control must establish norms that prohibit violence.

However, this conclusion does not resolve our question. The question here is not why the state must establish norms against violence as a condition of the legitimate exercise of political control, but why the state must take extensive measures of protection—including systematic and operative measures of protection—to ensure compliance with those norms.<sup>433</sup> The state's exercise of political control to establish norms against acts of violence among individuals does not itself entail that the state does all it can to protect. A state may partly enforce norms against violence with partly effective law enforcement and criminal justice systems but without any efforts to take operative protection measures whenever possible or appropriate.

And even if it is clear why the set of norms that the state imposes through the exercise of political control must be just, it is not clear why the state must ensure compliance with those norms. The liberal principle of justification most plausibly applies to the content of the set of norms as a whole because their coercive imposition requires special justification. But assuming that the set of norms that the state coercively applies through the exercise of political control are just, why does the liberal principle require a particular amount of effort on the part of the state to ensure compliance with the norms? If the state makes the norms that apply to individuals, it makes sense that those sets of norms would have to be justifiable, and so the state is constrained by the liberal principle in its norm promulgation. But there is an explanatory gap between the claim that the state must only coercively impose justifiable sets of norms and the claim that the state must do a good job of imposing those justifiable sets of norms.

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<sup>433</sup> See *supra* ch. 1 Part I.

One attempt to fill the gap might note that the state's exercise of political control displaces others (would-be states) from exercising control, and that alternative exercises of political control might be superior from the perspective of those subject to the political control. It might be possible to do a better job of imposing norms. But most of us do not take the fact that some other way of behaving might better promote the interests of others to constitute a sufficient moral justification for behaving that way. Although Peter Singer might believe that we ought to donate resources until the marginal benefit is less than the marginal loss,<sup>434</sup> most of us do not accept this sort of consequentialism. Instead, most would accept that some explanation is needed for why the interests are relevant to determining how one ought to behave. Thus, this consideration does not span the explanatory gap by itself. But it also does not help to add that the point about displacement of alternatives. As argued extensively in Chapter 3 for an analogous case,<sup>435</sup> it is highly speculative to suggest that a particular state displaces an alternative state that would do a better job with protection. And for the argument to fully work, the displaced alternative must not only do a better job; it must do an ideal job of providing protection, because this alternative establishes the standard for protection. But it is unlikely that the displaced alternative would protect in complete conformity with our intuitions about the state's special obligation to protect, so the resulting standard of protection would not follow our intuitions.<sup>436</sup>

A different attempt to fill the gap might try to broaden the set of norms under consideration: the demand for justification has assumed an overly narrow understanding of the set of norms that the state imposes through the exercise of political control. The liberal principle requires that the set of norms the state imposes are justifiable to all, but the relevant set of norms is assumed to include only those norms

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<sup>434</sup> See generally Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229 (1972).

<sup>435</sup> See *supra* ch. 3 Part IV.A.

<sup>436</sup> See *supra* ch. 1 Part III.

that regulate the conduct of and relations between private persons, and not those norms that regulate the conduct of the state. However, on the modern conception of the state, as a state of right or a state subject to the rule of law, the state itself is constituted and guided by norms as well. If the set of norms subject to the justification requirement includes both the norms applying to individuals *and* the norms apply to the state, then the explanatory gap might vanish. The entire set of norms might only be justifiable to all if the norms regulating state conduct require the state to protect. To put the point differently, the requirement that the exercise of political control be justifiable to all does not apply to individual norms in isolation, but to entire normative systems. The relevant normative system might include the norms regulating the behavior of the state. And one might argue that those norms are just only if they require that the state protect.

The easy response is that it is not at all obvious why we should include the norms that regulate the state in the set of norms that are subject to the demands of the liberal principle if they neither are applied to private persons nor are imposed through the same exercise of political control. The hook for the justification requirement is the fact that the normative system is coercively imposed against those to whom justification is owed, but the norms regulating the state are not coercively imposed. The relevant set of norms must be understood as composed of the norms that require justification because the special demands arising from coercion do not force the inclusion of other norms in the set.

But the more important response is that it simply does not follow that the norms that apply to the state and society as a whole are just only if the state protects. Undoubtedly each person has a core interest in a safe society, the moral of the Hobbesian thought, and the system of norms is just only if it requires what is necessary to ensure a safe society. But there are different ways to accomplish this goal. Each individual could have an obligation to protect the rest of society, following a quasi-

medieval model of security where the public at large was expected to participate in establishing public order under certain circumstances.<sup>437</sup> Or large corporations could be required to protect. Or we could have a market system of security, reflecting the emergence of private security as a major provider of protection.<sup>438</sup> An additional explanation is necessary as to why the only just system of norms assigns the primary obligation for protection to the state itself.<sup>439</sup>

*B. SYSTEM OF COOPERATION, NOT DOMINATION OR OPPRESSION*

Rawls provides an idea that might fill this gap by explaining why protection is a necessary condition of the morally acceptable exercise of political control. Rawls in his *LAW OF PEOPLES* addresses the minimum circumstances in which a liberal people should tolerate a non-liberal people (really a non-liberal state).<sup>440</sup> Although his concern is different than ours—liberal toleration not legitimate political control—it is helpful because any society in which the exercise of political control is not tolerable will probably be one in which the exercise is not legitimate.<sup>441</sup> The basic ideas that he seems to propose—although he does not put them in these terms—are the following: The exercise of political control inevitably establishes a certain social system, which may be either a system of cooperation among people or a system of domination or oppression. If the exercise of political control is to avoid establishing a system of domination or oppression—which the state is not permitted to do<sup>442</sup>—, the state will have to protect

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<sup>437</sup> David Sklansky, *The Private Police*, 46 *UCLA L. REV.* 1165, 1195-1200 (1998).

<sup>438</sup> *See, e.g., id.* at 1212-21.

<sup>439</sup> In a way, explaining why the norms ought to require that the state protect is closely connected to the central project of this dissertation.

<sup>440</sup> JOHN RAWLS, *THE LAW OF PEOPLE* 59 (1999).

<sup>441</sup> Moreover, Rawls also seems to be concerned with issues of legitimate authority within such peoples: “The second part is that a decent people’s system of law must be such as to impose *bona fide* moral duties and obligations (distinct from human rights) on all persons within the people’s territory.” *Id.* at 65-66.

<sup>442</sup> Philip Pettit might accept this idea, as he believes that a legitimate state is one that does not dominate and thereby respects an important form of freedom for its citizens. However, he uses this connection primarily to argue that citizens must have a form of control over the state in

some human rights some of the time.<sup>443</sup> Otherwise the system that the political control establishes would be one in which some individuals may dominate or oppress others.<sup>444</sup>

Instead of speaking directly about domination or oppression, Rawls asserts that, at a minimum, the exercise of political control must accord with a common good idea of justice.<sup>445</sup> He claims that a common good idea of justice will propose an end or objective for the society as a whole, but one that is pursued only subject to certain constraints arising from the rights of individuals because “takes into account what it sees as the fundamental interests of everyone in society.”<sup>446</sup> The apparent reason for the restriction is that a common good idea of justice must establish a system of social cooperation, and not a mere system of oppression or domination. While Rawls does not explicitly mention the concepts of oppression or domination, he instead contrasts a system of social cooperation with a slave society.<sup>447</sup> But the idea seems plain: no common good idea of justice can view individuals as simply something to be dominated or oppressed, because that is incompatible with taking into account their interests in some way. A slave society cannot reflect a common good idea of justice, even if it has a worthy objective or end, because it simply dominates or oppresses those subject to slavery.

Rawls goes on to claim, in effect, that the exercise of political control to establish a social system must “secure[] for all members of the people what have come to be called

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order for the state to be legitimate. See Philip Pettit, *Legitimacy and Justice in Republican Perspective*, 65 CURRENT LEGAL PROBS. 59, 74-82 (2012).

<sup>443</sup> Presumably, Philip Pettit would claim that individuals opposed to such a social system are permitted to promote not just a change of specific norms that comprise the system but the state—the regime that coercively imposes the norms—itsself. See *id.* at 62-63.

<sup>444</sup> The concept of a system of oppression or domination may seem to bear similarity to the concept of structural violence. Structural violence exists when the social structure itself decreases human physical or mental functioning. Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167, 168-70 (1969). Unlike with the concept of a system of oppression or domination as understood here, structural violence does not imply that the social system permits or encourages any particular actor to commit acts of violence. *Id.* at 170. Additionally, structural violence would not qualify as violence under the definition employed in this dissertation, which is not focused on any reduction in human functioning (harm) but instead on harm that arises from certain human actions.

<sup>445</sup> JOHN RAWLS, *THE LAW OF PEOPLE* 67 (1999) (explicitly speaking about the system of law).

<sup>446</sup> *Id.* at 67, 71.

<sup>447</sup> *Id.* at 65.

human rights. A social system that violates these rights cannot specify a decent scheme of political and social cooperation.”<sup>448</sup> I believe the use of the word ‘secure’ implies that the use of political control not only must not violate human rights but must also protect them in some fashion. But regardless of what Rawls intended to say, it does seem to follow from his ideas that some form of protection must be required. The exercise of political control establishes a certain form of social system, and that social system reflects some idea of justice. But if it is to be in accordance with a common good idea of justice, it cannot generally permit oppression or domination regardless of the source. The actions of individuals, and not of the state, might directly dominate or oppress others, as is the case with technically-illegal human trafficking. However, the exercise of political control to establish a social system in which such trafficking occurs might entail that state actions indirectly dominates or oppresses those subject to human trafficking. When the state creates the entire social system and that system systematically allows such forms of oppression or domination because the state fails to address the problem, the state may be viewed as the author of a social system that oppresses or dominates.<sup>449</sup>

### *1. Monopoly of political control*

A first problem with the Rawlsian argument (which may also apply to the Hobbesian argument) is that it conditions the exercise of political control on the state’s providing protection only when the state has a monopoly on the exercise of political control.<sup>450</sup> The reason is simple. If two different entities simultaneously exercise political control, neither the liberal principle nor Rawlsian concerns about systems of

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<sup>448</sup> *Id.*

<sup>449</sup> Rawls made a related point, that “[w]hat have come to be called human rights are recognized as necessary conditions of any system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind.” *Id.* at 68.

<sup>450</sup> *Cf. supra* ch. 4 Part III.B.2.b. I argue there that an organization need not exercise a monopoly on the use of force in order to be a state, in order to show that the state need not implicitly promise through such a practice that it will exercise such a monopoly. In contrast, the point here about the possible lack of a monopoly on political control is used to show that the state may not dominate or oppress even if the social system allows domination and oppression.

domination and oppression lead directly to a conclusion about which entity must protect. For example, the Rawlsian argument must assume that the state is the sole actor that establishes the social system in order to conclude from the system of oppression or domination that the state has done something morally impermissible through its exercise of political control.<sup>451</sup> The Rawlsian argument works by showing that if a state creates a social system that allows acts of domination and oppression, the state itself dominates and oppresses individuals *by virtue of* creating that system. But when no single actor predominantly creates the social system, then no one dominates or oppresses by virtue of its creation. One might claim that it is a condition for exercising power that one tries to eliminate its misuses, but that conclusion is not supported by the Rawlsian argument for these reasons.<sup>452</sup>

Of course, it may well be the case that *someone* protecting is a condition on the permissibility of *either* of the two entities exercising political control. The two entities, as a result, may be morally required to ensure that one of them actually provides protection in order to exercise political control. After all, the argument under consideration does not established that either of them (or anyone else for that matter) must exercise political control; it simply establishes a necessary condition for that exercise to be morally permissible. But we seek to explain why it is the state specifically that must protect, and the argument does not tie the need for protection to a particular entity.

So it seems that the argument has an explanatory gap when applied in certain modern conditions. It is possible for two or more actors to exercise political control

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<sup>451</sup> If the state does not have a monopoly on the exercise of political control in some jurisdiction, then the social system that exists in virtue of laws created, applied, and enforced in that jurisdiction cannot be solely attributed to the state. Whatever other actor that is also exercising political control in the jurisdiction is another source of the generation of the social system.

<sup>452</sup> Additionally, that claim is perilously close to what we are seeking to explain, why the state has an obligation to protect, so it is less than helpful as a premise for the arguments under consideration.

simultaneously in a territory, but where they are not even nominally part of the same state.<sup>453</sup> But even when there are multiple entities that exercise political control that are clearly separate, the legitimacy of each exercise depends on the fact that someone is providing adequate protection. For example, the *Pueblo Bello* decision of the Inter-American Court concerned a massacre by a Colombian paramilitary group that possibly exercised political control at the local level without any official connection to the Colombian state.<sup>454</sup> Or consider the fact that Colombia's FARC insurgency currently does not hold exclusive territorial control of many areas in which it operates and exercises some forms of political control over the local population.<sup>455</sup> Thus, in the case there were (possibly) two entities exercising political control but no one was offering the protection necessary to legitimate either exercise political control.<sup>456</sup> So we can at least find a moral problem with the exercise of political control by the Colombian state in the circumstances: due to the lack of protection for the people of Pueblo Bello, its exercise of political control was illegitimate.

But while the exercise of political control was illegitimate, the actions required of the state are not straightforward. To see this, consider a variation of the *Pueblo Bello*

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<sup>453</sup> In contrast, in a federal state, the federal and state governments may separately exercise political control, in that each acts to create and enforce laws. It would seem that the federal government would not need to protect to be legitimate so long as the state governments were offering sufficient protection. But in this case, both the local and federal governments are part of the state, so it is the state that must protect in the end. A subunit in a federal state might simply be considered to be part of the state, regardless of the legal structures of the state—this is in effect how international law understands federal states. *See, e.g.*, Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 4 and comments 5-6, 8-10, *in* Int'l Law Comm'n, *Report of the International Law Commission, Fifty-third Session*, U.N. Doc. A/56/10, at ¶ 77 (2001).

<sup>454</sup> *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 95 (Jan. 31, 2006).

<sup>455</sup> INT'L CRISIS GROUP, *COLOMBIA: PEACE AT LAST?* 2-16 (2012). *Cf.* Alfredo Molina, *La justicia guerrillera*, *in* EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA: ANÁLISIS SOCIO-JURÍDICO TOMO II 331 (Boaventura de Sousa Santos & Mauricio García Villegas eds., 2001); Mario Aguilera Peña, *Justicia guerrillera y población civil, 1964-1999*, *in* EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA: ANÁLISIS SOCIO-JURÍDICO TOMO II 389 (Boaventura de Sousa Santos & Mauricio García Villegas eds., 2001).

<sup>456</sup> *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 140 (Jan. 31, 2006).



case where those responsible for the massacre were not the same as the paramilitaries wielding political control in the zone. The fact that no one protected would render illegitimate the exercises of political control by both the state and the paramilitaries. But it does not follow that the state ought to have protected. The paramilitaries perfectly well could be the ones who ought to have protected. Thus, it seems that when confronted with a non-monopoly on the exercise of political control, there is no direct connection between legitimacy and a specific requirement to act.

Now, one might be tempted to dismiss these circumstances as broadly analogous to a federal state, where the state as a whole has a monopoly on the exercise of political control but is divided into different units.<sup>457</sup> But it is not appropriate to assimilate insurgents or non-state actors to the state. There is no overarching legal plan such as a constitution according to which these actors, especially insurgents, are part of a single state with divided powers and obligations. Nor does the official state apparatus deliberately or inadvertently cede the exercise of political control to insurgents, and it often does not do so for groups like militarized criminal organizations and state-aligned paramilitaries.

### C. ASSURANCES AND POLITICAL CONTROL

Finally, the exercise of political control might have to provide minimal assurances that actions of cooperation under the system of cooperation will be

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<sup>457</sup> There is support by analogy in international law for such a position. The Draft Articles on the Responsibility of States establish:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.” Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 9, *in* Int’l Law Comm’n, *Report of the International Law Commission, Fifty-third Session*, U.N. Doc. A/56/10, at ¶ 77 (2001).

In the field of human rights, the Comm. against Torture implicitly confirmed a norm of this sort. Committee against Torture, *Elmi v. Australia*, Communication No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998, ¶ 6.5 (1999). *See also* Comm. against Torture, *H.M.H.I. v. Australia*, Communication No. 177/2001, U.N. Doc. CAT/C/28/D/177/2001, ¶ 6.4 (2003) (apparently limiting the application of the principle to situations of completely state collapse).

reciprocated. While discussing political authority and its legitimacy, Leslie Green made a comment about the relationship of coercion to political authority that is of greater importance than he indicates:

“In normal circumstances many people accept the state as legitimate, others are attracted by the facilities it provides, and still others obey habitually. In none of these cases do coercion and fear of sanctions figure prominently among their motivations. At most, coercion has an indirect and secondary effect: it offers assurance to those who are law-abiding that they will not be taken for suckers and thus reinforces their primary motives for obedience.”<sup>458</sup>

In short, he claims that coercion provides certain assurances to those subject to political authority that others will similarly obey the political authority, so that they will not be taken advantage of.<sup>459</sup> Rawls makes the related point that coercion may be necessary to maintain social cooperation, given the temptation to avoid its burdens.<sup>460</sup> General coercive enforcement of the laws is an assurance in the sense that others will have adequate reason to believe that nearly everyone will comply with the law. This enforcement of the law in effect aims to prevent acts of non-compliance, either by deterring or physically stopping them, and so constitutes protection.

Before delving into why coercive assurance may be necessary to make the exercise of political control legitimate, it is worth commenting on why we need to talk about the issue of coercive assurance at all. After all, the focus is on the exercise of political control, which implies enforcement, so aren't coercive assurances implied by the

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<sup>458</sup> LESLIE GREEN, *THE AUTHORITY OF THE STATE* 71 (1988).

<sup>459</sup> Similar points are made in H.L.A. HART, *THE CONCEPT OF LAW* 198 (2d ed., 1994); Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 278 (2011). Others note that enforcement may be necessary to sustain cooperation. Cf. Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 *PHIL. & PUB. AFF.* 147, 160 (2006) (“[T]he state, with its coercive powers, is necessary to sustain a willingness to cooperate by assuring cooperators that their willingness to do their part will not be exploited by others. . . . [T]he state comes into the picture derivatively: without a third-party enforcer in the background, norm-generative cooperation cannot be sustained.”).

<sup>460</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 240 (1971) (“It is reasonable to assume that even in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation. For although men know that they share a common sense of Justice and that each wants to adhere to the existing arrangements, they may nevertheless lack full confidence in one another. They may suspect that some are not doing their part, and so they may be tempted not to do theirs. The general awareness of these temptations may eventually cause the scheme to break down.”).

concept? Of course, the exercise of political control in the sense considered here does imply that some enforcement measures will be taken. But it does not indicate anything about the character of those measures, such as whether they will be regularly applied or whether they will be uniformly implemented. The fact that political control is exercised leaves a substantial amount of room for differences in the way the laws are actually coercively enforced. Specifically, it is compatible with very low levels of enforcement and also with substantial levels of non-compliance. The argument about coercive enforcement attempts to show that low levels of enforcement are not morally permissible by themselves; enforcement must be intensive (or the exercise of political control must be abandoned). On this basis, the fact of exercising political control may lead to a moral need to provide protection.

The basic insight, inspired by Green, Rawls, and others, is that the exercise of political control is justified only if those subject to the political control are given assurances “that they will not be taken for suckers . . . .”<sup>461</sup> To understand what it is to be taken for a ‘sucker’, it is necessary to remember in what political control consists. The exercise of political control is to make, apply, and enforce laws in a jurisdiction, perhaps in monopoly form. The laws involved will define a system of social cooperation, I will assume, that will distribute benefits and burdens among those subject to the laws, in the sense that the laws are applicable to and will be enforced against them. A person who complies with the laws is subject to a burden, in part justified by the prospect of receiving benefits from the fact that others comply with the laws. But a person who complies, or is forced to comply, while others are not forced to comply is subject to the burden of compliance without receiving the benefits from the law. In this sense, he or she is a ‘sucker.’

The reason why assurances are required follows directly. If the exercise of

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<sup>461</sup> Cf. LESLIE GREEN, *THE AUTHORITY OF THE STATE* 71 (1988).

political control is legitimate only if justifiable to all, the prospect of being a sucker poses a significant problem for its legitimacy. It would be difficult to justify to a person why the burdens that the exercise of political control imposes on him or her without reference to the benefits to him or her of the exercise of political control. Of course, one might attempt to justify the exercise of political control without reference to the benefits to the individual. Certain forms of consequentialism, such as classical utilitarianism, might view this as an adequate justification strategy (if they found the idea of justification to be important), as these views will be relatively insensitive to the distribution of benefits and burdens. But many contemporary liberals would reject such a justification strategy for failing to take seriously the distinction between persons, following John Rawls.<sup>462</sup> At a minimum, justification to all requires showing that each will benefit from the exercise of political control, not only bear its burdens.

Without certain assurances in the form of enforcement of the laws against others, it will not be possible to show that everyone will benefit.<sup>463</sup> Assurances might be necessary to show that a person will receive the actual benefit indicated under the laws established by political control. Hart made the following remark:

“Sanctions’ are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is voluntary co-operation in a coercive system.”<sup>464</sup>

Putting these thoughts in the terms of our problem, assurances are required to guarantee that those forced to comply shall not be sacrificed to those who would not be

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<sup>462</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 24 (2d ed., 1999).

<sup>463</sup> One explanation, which I will not pursue further, is as follows. Assurances might be necessary so that the expected total benefits are greater than the expected total costs of the exercise of political authority, a condition that any justifiable exercise would have to meet. Assurances, in the form of coercive enforcement of the laws imposed via political control, ensures that in reality the total benefits are greater than the total costs and that this is not just the case under theoretical full compliance with the laws. This understanding of the role of assurances reduces the role of assurances to the idea that the exercise of political control must take into account the narrow self-interest of the agent, here understood in terms of costs and benefits.

<sup>464</sup> H.L.A. HART, *THE CONCEPT OF LAW* 198 (2d ed., 1994).

forced to comply.<sup>465</sup> Compliance, forced or voluntary, with laws often involves a sacrifice on the part of individual of certain means that he or she might otherwise pursue to fulfill her ends. And forcing a person to bear this cost of a set of laws cannot be justified to that person without providing adequate assurances that he or she will receive the promised benefits of the laws.<sup>466</sup>

### *1. Dependency on actual coercion*

A first problem with the assurance argument has to do with whether it requires the state to provide assurances to those persons whose behavior is generally not affected by the coercive enforcement of law.<sup>467</sup> One desideratum for an account of the state

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<sup>465</sup> The use of the word ‘sacrificed’ is perhaps hyperbole on the Hart’s part, since not every law violation is of such a great magnitude that its victim is ‘sacrificed’ or ‘goes to the wall.’

<sup>466</sup> Moreover, the exercise of political control does not merely distribute a set of benefits and burdens; it does so by establishing a set of laws. To justify the imposition of a set of laws, it may be necessary to assure each person not only the expected costs of the laws will be less than the expected benefits but that each will receive the benefits indicated by the set of laws. This requirement for assurances is more demanding. The laws themselves must be justified in terms of the indicated benefits outweighing the indicated burdens, but then assurances must be provided that the each person will actually receive the benefits under the laws imposed. Otherwise those subject to the laws risk being used as a means to provide a benefit to others, a risk that cannot be reasonably justified to them, at least when it is possible to assure them that they will receive the indicated benefits as well.

This is a formulation of the Kantian thought (not Kant’s thought) that the imposition of laws must respect the rightful honor of each, in order to be justified to him or her. As Ripstein understands it,

“[r]ightful honor consists in asserting one’s worth as a human being in relation to others, a duty expressed in the saying ‘do not make yourself a mere means for others but be at the same time an end for them. . . . If you refrain from taking what is mine, without assurance that I will refrain from taking what is yours, then you are permitting me to treat what is yours, and so an aspect of your capacity to set and pursue purposes, as subject to my purposes.” ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 161-62 (2009).

<sup>467</sup> A related problem for the argument is that, insofar as it requires the state to protect as a form of assurance, the protection necessary for legitimacy will only extend to the laws actually established by the state. The fundamental demand for assurances comes from the problem of people subject to laws not being confident that they will receive what the laws indicate while being forced to bear the costs of the laws. This means that the state need only provide assurances that those subject to the laws will receive the benefits indicated by those laws. For example, if the state makes no law prohibiting homicide, then the state need not protect against homicide. Of course, there are likely few states that lack criminal provisions prohibiting homicide, so this example does not in and of itself cause problems for the argument.

But this does not mean that the limitation causes no problems for explaining the state obligation to protect against violence in these terms. Take for example domestic violence, either against women or against children (or against men). Historically, laws have offered weak or non-existent protection against such violence, which on the theory currently being considered would

obligation to protect is that it requires protection for all persons in the state's territory. But the assurance argument will not require protection for those unresponsive to coercive law enforcement, either because they systematically disobey the law or because the law simply is not a substantial consideration in their decisions. For the present purposes, 'coercive enforcement' should be understood very broadly to include even the threat of punitive measures or sanctions for failure to comply with the law; it need not be the case that the state has specifically prevented an act of or punished a person subject to coercive enforcement. Under a broad understanding of coercive enforcement, the reach of the exercise of political control will be maximized, covering even those who have never been directly subject to state force, such as police intervention.

Nonetheless it is plausible that in some regions of some states, either rural or urban, perhaps due to the weakness of state enforcement in geographical brown zones<sup>468</sup> or due to a certain hardness of character, there are people for whom the law is simply irrelevant to their behavior. In a brown zone where coercive enforcement of law is weak, in the sense that there is little chance that a particular law violation will be met either with a preventative or punitive state response, people may conduct their activities without taking into account the law. This is not to say that they necessarily violate the

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entail that no assurance need be provided against these sorts of violence. But this is a mistake. We now normally think that there are two problems with states that fail to protect against domestic violence when the legal prohibition is weak or non-existence. First, the omission of protection is itself morally wrong and a failure of the state to fulfill moral requirements incumbent upon it. By way of comparison, the current jurisprudence of the human rights courts is highly concerned with state protection against domestic violence, as can be seen in the decisions of the European Court of Human Rights as well as the views of the CEDAW committee. *See, e.g.,* Opuz v. Turkey, App. No. 33401/02, Eur. Ct. H.R. 1 (2009); Z v. United Kingdom, App. No. 29392/95, Eur. Ct. H.R. 1 (2001); Comm. on the Elimination of Discrimination against Women, A.T. v. Hungry, Communication No. 2/2003, U.N. Doc. CEDAW/C/36/D/2/2003 (Jan. 26, 2005). Second, the failure to prohibit domestic violence adequately is also a moral failing on the part of the state. Analogously, international human rights law does not generally view the absence of relevant laws as a point in favor of the state, but instead as the exact opposite: a further reason why the state has violated its obligations. *See, e.g.,* American Convention on Human Rights arts. 1-2, Nov. 22, 1969.

<sup>468</sup> *See supra* notes 84-85 and surrounding text; Guillermo O'Donnell, *On the State, Democratization, and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries*, 21 WORLD DEV. 1355, 1359-61 (1993).

law; just that if they do not, the explanation has nothing to do with the fact that the law requires their behavior or that the law is coercively enforced. Even if there is a small chance of enforcement, and even if the state says the law does apply, such people do not live their lives in ‘the shadow of the law.’<sup>469</sup> But the crucial premise of the assurance argument is that the exercise of coercive political control against a person is justifiable only if assurances are provided that the person will also benefit from the exercise. So long as the coercive political control does not reach a given person, in that his or her behavior does not take it into account, there will be no demand to provide assurances to that person because the state does not succeed in subjecting him or her to coercive enforcement of the norms. No demand for justification arises.

At the same time there are others who more actively flout the law, in that they may take into account the coercive enforcement of the law, but regularly violate the law anyway. Take for example, members of a paramilitary group who, on a very regular basis, violate various laws, including those prohibiting acts of violence, but also those concerning membership in such groups, possession of certain arms, and the like. For such people, rejection of the law becomes the normal state of affairs because the perceived benefits of doing what the law prohibits outweigh the possible costs of coercive enforcement. We might consider such people to be outlaws, not in the traditional sense that they are beyond the protection of the law,<sup>470</sup> but in the sense that they are beyond the constraints of the law.

It would seem that the state could fail to protect such people without any consequences for the legitimacy of its exercise of political control. Given that the law does not, in effect, move these categories of victims, the reasons why they would require assurances that they will receive the benefits indicated by the law are defeated. Put in

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<sup>469</sup> The phrase is from Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>470</sup> Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 287-88 (2011) (discussing outlawry in medieval Iceland).

Hart's terms, the law would in no way sacrifice them were they to fail to receive their legal benefits, because their behavior is not meaningfully constrained by the coercive enforcement of the law.<sup>471</sup> This is true even if there is a moral obligation to obey the law. Outlaws consistently violate the law, while those who do not live in its shadow do not change their behavior based on the content of the law.

## *2. Depth of required protection*

A further problem is the degree to which the need to provide assurances to secure legitimacy must involve providing strong forms of protection against violence contrary to the law. The assurance account does not satisfy the desideratum that an explanation show why the state must often take operative protection measures as well as implement adequate systematic protection measures. Consider once again a stylized version of New York City from the late 1970s until the early 1980s, where there was rampant crime and, probably contrary to fact, the police would not respond to specific requests for protection. Nonetheless, assume that there were generally functioning criminal justice and law enforcement systems in place: the police would investigate crimes and arrest perpetrators who prosecutors and courts would try, convict, and punish. These systems perhaps were less efficient than we would like, with relatively low clearance rates for criminal investigations, and perhaps there was less police patrolling than would be ideal. Thus, while the state did protect, by and large, there were substantial problems with the intensity of systematic measures of protection and there was an absence of operational protection measures.

Despite the failings, the state does seem to provide sufficient assurances that individuals will receive the indicated benefits from the laws that are imposed. The state generally responds to crimes with at least an attempt to identify the perpetrator and impose a sanction of some sort. The consistent attempt to punish provides a substantial

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<sup>471</sup> H.L.A. HART, *THE CONCEPT OF LAW* 198 (2d ed., 1994).



disincentive to commit crimes, and an incentive to comply with the law, even though a given crime will not always be punished. While the state enforcement is insufficient to eliminate crime completely or nearly so, that cannot be the standard to determine whether sufficient assurances are provided. Requiring compliance with the law is not to force a person to risk 'going to the wall' or being a 'sucker' simply because there is a possibility that someone will violate his or her rights pursuant to the law. Although the victim of a particular crime may in some sense *ex post* be a 'sucker' for having complied, because she did not receive the reciprocal benefit of compliance with the law, it does not follow that *ex ante* she was a 'sucker' for compliance when there were general mechanisms in place for enforcing compliance. The *ex post* failure of the enforcement measures is too specific to constitute a problem for the general legitimacy of the state on these grounds, even with respect to the specific victim.<sup>472</sup>

This problem is perhaps even clearer for cases in which the state fails to take operative protection measures. It is highly implausible that a one-off failure to protect defeats the legitimacy of the exercise of political control. Take for example, the case of *Z v. United Kingdom*, in which the United Kingdom was found responsible for failure to protect four children from abuse at the hands of their parents when it had good reason to suspect that that the abuse was occurring.<sup>473</sup> The failure to protect in such circumstances does appear to be a moral wrong. But it does not seem to follow that the general exercise of political authority in the United Kingdom is illegitimate or in any way unjustified as a result. In fact, the exercise of political control in the United Kingdom is probably legitimate if any exercise of political control is legitimate. And if you think it is not, imagine an analogous case in a state whose exercise of political

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<sup>472</sup> Perhaps matters would be different if the victims were part of a group subject to systematic failures to protect, or even if the specific victims were subject to systematic failures to protect.

<sup>473</sup> *Z v. United Kingdom*, App. No. 29392/95, Eur. Ct. H.R. 1, ¶¶ 74-75 (2001). *See also* *E v. United Kingdom*, App. No. 33218/96, Eur. Ct. H.R. 1, ¶¶ 100-01 (2002).

control you believe to be legitimate. This point is not intended to show that protection is completely unconnected to legitimacy. Instead, it shows that the protection required as a condition of the legitimate exercise of political control is weaker than that that required by the intuitive state obligation to protect.<sup>474</sup>

A similar criticism applies to the Rawlsian argument where protective measures are required to ensure that the social system established by the exercise of political control does not amount to a system of domination or oppression. A social system in which there are occasional acts of domination or oppression—such as the occasional murder, or even the occasional act of human trafficking or of racial hatred—is not thereby a system of domination or oppression. Would state knowledge of an impending act of dominance or oppression followed by a failure to protect be sufficient to render the social system one of domination and oppression? It would not. The issue is that an isolated failure to protect, such as that in *Z v. United Kingdom*, whatever the motive, would not entail that the state imposes a social system of domination or oppression, because an isolated failure does not establish any social system at all.<sup>475</sup> And it is the consequences for the social system that the exercise of political control imposes that

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<sup>474</sup> Analogously, it is implausible that human rights are best explained as a mere condition of the legitimate exercise of political control. This is not to say that systematic human rights violations cannot undermine legitimacy; they quite plausibly do. Instead, it is to say that the absolute prohibition on, say, torture cannot be explained as a mere condition for legitimacy because a single state act of torture probably is not sufficient to undermine the legitimate exercise of political control. For example, despite even repeated torture by the United States during the 2000s, it seems implausible to conclude that its exercise of political control on whole was illegitimate during this period. The point is that human rights obligations must have an explanation independent of the conditions for the legitimacy of political control.

<sup>475</sup> What converts occasional acts of dominance or oppression into a system of domination or oppression such that it would undermine the legitimate exercise of political control? Suppose, contrary to the facts, that, during the Jim Crow period in the southern United States, acts of violence against African-Americans (clearly acts of domination and oppression) were in no way supported by the law. Nonetheless, the prevalence of such acts at the time—lynchings and the like committed by private persons—would be sufficient to constitute a system of dominance or oppression. Contrast that with, also contrary to the facts, an imagined contemporary United States where an racially-motivated act of violence against an African American would not be part of any sort of larger trend of dominance or oppression. The normality of acts of dominance and oppression in the former case but not the later case is sufficient to render the social system one of dominance and oppression.

determine whether the failure to protect undermines the legitimacy of that exercise. Absent that connection, failure to protect and the exercise of political control are simply unrelated according to this argument.

### III. THE ADEQUACY OF LEGITIMACY-BASED EXPLANATIONS

The last section indicated the problems with several specific attempts to explain the state obligation to protect in terms of the necessary conditions of the permissible exercise of political control. In contrast, this section will present several general problems that affect any such attempt to explain the state obligation to protect, in order to establish that the state obligation to protect cannot be reduced to a mere condition for the legitimate exercise of political control. It will first show that the obligation to protect does not have the right form according to this sort of explanation. It will conclude by noting that this form of explanation cannot be readily generalized to other positive state obligations, rendering the state obligation to protect less fundamental than other positive obligations.

#### A. *THE WRONG SORT OF OBLIGATION*

A first problem general to the argument form is that it does not establish a state obligation to protect, but rather a mere condition for the legitimate exercise of political control. If the arguments explain the existence of any obligation, it is an obligation not to exercise political control without providing adequate protection. But such an obligation is not in itself an obligation to protect. While the state may fulfill the obligation by providing adequate protection, it may also fulfill it by not exercising political control. Of course, if the state ceases to exercise political control altogether, it may cease to be a state (which might be an option in some cases), but the point I want to make concerns the strange structure of the purported obligation, not the ways in which it may be satisfied.

It may not appear that there is actually a problem with this sort of indirect obligation to protect. First, one might think that the arguments give rise to a genuine state obligation to protect that is acquired under certain conditions: by exercising political authority, the state thereby acquires an obligation to protect. That is, the state obligation to protect really is separate from and independent of the obligation to exercise political control only in certain ways. Providing protection is not simply a condition for the legitimate exercise of political control. Second, one might note that the state is an ongoing concern that cannot easily give up the exercise of political control, or cannot do so without ceasing to exist. Because ceasing to exercise political control is not a real option, the obligation to exercise political control only when providing protection in effect amounts to an obligation to protect. There is no way for the state to fulfill the obligation apart from providing protection.

Both objections are vulnerable to much the same problems. On the one hand, the problem with replacing a pure obligation to protect with an obligation to exercise political control only when protecting is not limited to whether the obligation always requires state protection. The obligations also differed in how a violation is understood. The wrong done by failing to protect under the proposed arguments is not compatible with the idea that, via the exercise of political control, the state acquires an obligation to protect. Suppose the state both exercises political control and fails to protect. The wrong done is in the exercise of the political control, or perhaps in the exercise of political control without protection. But it quite clearly is not in the failure to protect by itself. For example, the problem from the Rawlsian perspective is the character of the social system that the exercise of political control imposes if not joined with protection and from the Greenian perspective the problem is the lack of assurances that the law will be fulfilled. From the Hobbesian perspective it is the failure to exercise political control in a way that takes into account the core interests of those subject to the control. But all of

these ideas locate the core aspect of the wrongdoing in the exercise of political control, in a context of a failure to protect. The failure to protect is simply an ingredient in showing that the exercise of political control was wrong.

On the other hand, both objections assume that the obligation correctly describes the priority between the exercise of political control and the provision of protection. They imply that the obligation to provide protection presupposes the exercise of political control. But such a posture is incompatible with the moral intuitions underlying the desiderata for an explanation of the state obligation to protect. For example, consider once again the conditions that face many weak or challenged states, where they may not exercise political control in all parts of their territories, such as is perhaps the case in Colombia under the pressure of BACRIM (right wing criminal groups) or the FARC (a left wing revolutionary group). Similar cases are surprisingly common. The European Court of Human considered a comparable situation in its *Ilaşcu v. Moldova and Russia* decision, concerning the detention and treatment of political prisoners in Transdniestria, a section of Moldova that attempted to secede with the support of Russia and that remains effectively independent from Moldova.<sup>476</sup> The European Court suggested that Moldova was partly excused from fulfilling its obligation to protect.<sup>477</sup> However, it also indicated that Moldova had an “obligation to re-establish control over Transdniestria” in order to fulfill its positive obligations in that part of its legal territory.<sup>478</sup> Such situations implies that the state obligation to protect is not a necessary condition for the legitimate exercise of political control but instead the exercise of political control may be required in order to fulfill the state obligation to protect.<sup>479</sup>

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<sup>476</sup> See *Ilaşcu v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R. 1, ¶¶ 382, 409, 419, 455 (2004). Since the international community generally rejected this effort, most of the world considers the Transdniestrian territory to be legally part of Moldova.

<sup>477</sup> See *id.* ¶¶ 336-37, 341.

<sup>478</sup> See *id.* ¶¶ 336-41.

<sup>479</sup> From a moral, and not purely legal perspective, this intuitively seems to be the correct understanding under the circumstances.

From these considerations, we can see that the obligation to protect is independent of the exercise of political control in several senses. First, the obligation to protect is not part of a compound obligation, but rather stands alone. We can see this from the fact that the moral wrong in not protecting is the failure to protect, not the continued exercise of political control. Second, the state may have an obligation to protect even those over whom it does not exercise political control in some circumstances, such as when they reside in part of the legal territory of the state. It does not follow from the fact that a person is part of the legal territory of the state that the state exercises political control in that territory, even if this correlation is normal in many states. Third, in some circumstances, the obligation to protect may require the state to exercise political control in a region, or perhaps simply expand state presence to that territory. This is to say that there can be an obligation to exercise political control or at least an obligation to establish state presence that arises from the obligation to protect. This in effect reverses the relationship between the exercise of political control and protection suggested by the arguments in this chapter.

#### *B. CONDITION OF LEGITIMACY AS A UNIVERSAL EXPLANATION*

Second, explanations of the state obligation to protect though the fact that providing protection is a condition for the legitimate exercise of political control cannot extend to all positive state obligations in general. While it is possible that the obligation to protect is explained in this way, differently from other positive obligations, a consequence would be that the obligation to protect is less fundamental than other positive obligations, a rejection of long-standing assumptions about the state and its obligations.

If every positive state obligation were simply a necessary condition for the legitimate exercise of political control, and nothing more, it would be difficult or impossible to provide a morally acceptable explanation of why the state exercises

political control. It could not exercise political control to further its own idiosyncratic interests (whether self- or other-directed), since a liberal state is presumed either to have no interests independent of its moral obligations or to be prohibited from pursuing them.<sup>480</sup> It could not exercise political control to fulfill an obligation to serve the interests of those in its territory, since that would assume the state has positive obligations to them prior to the exercise of political control. It could not voluntarily (distinct from its moral obligations) exercise political control to serve the interests of individuals in its territory, since the obligations of a liberal state are assumed to leave no sphere of freedom for its voluntary activity. Without some positive obligations to serve the interests of those in its territory that arise independently from conditions for the legitimacy of the exercise of political control, there is no acceptable explanation for why a liberal state would exercise political control.<sup>481</sup>

Even if some state obligations must exist to provide a morally acceptable explanation of why the state exercises political control, the obligation to protect may still be explained merely as a morally necessary condition of that exercise. But such a view is troubling. It assumes that there is some other explanation of the other positive state obligations to those in its territory, such as obligations to maintain public infrastructure or to fulfill social economic and cultural rights. For at least some of these positive obligations, the explanation cannot be that the obligation arises as a necessary condition of performing some action that the state independently has reason to perform, exactly because of the reasons set out in the last paragraph. Political morality must require the

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<sup>480</sup> For more on this point, see *supra* ch. 3 Part III.C.

<sup>481</sup> For exactly this reason, the obligatory aims and the conditions for legitimate exercise of political control must be distinct. Because permissible aims and activities of the state arise from its moral obligations, the legitimate exercise of political control must arise from a state moral obligation. Because the permissible exercise of political control is explained by positive state moral obligations, it cannot simultaneously explain those moral obligations, on pains of an explanatory circle. It does not follow from this point that the necessary conditions for the legitimate exercise of political control have a different content than the state moral obligation. It only follows that overlap of content should not be mistaken for an explanatory reduction of positive state moral obligations to mere conditions on the legitimate exercise of political control.

liberal state to perform some actions so that it may permissibly act at all. But the explanation of those moral requirements will make them primary, and not conditional or derivative obligations that are mere conditions for the permissible exercise of some further action. In that sense, those obligations would be more fundamental to the state than the conditional or derivative obligations.

However, a long philosophical tradition has considered that the state obligation to protect is as fundamental to the state as any other obligations, if not more so. From a historical perspective, the state has been defended as in some way a response to the need to eliminate the insecurity that would exist in a state of nature,<sup>482</sup> and many subsequent philosophers have accepted that the state has a central function of protecting.<sup>483</sup> So it does some violence to long-standing views of the state to interpret the state obligation to protect as an obligation derivative from other, primary moral requirements of the state. Even though recent ideas in political philosophy and related areas perhaps have expanded traditional views about the role of the state to include social goals (promoting socio-economic rights and distributive justice),<sup>484</sup> it remains generally accepted that the state is also fundamentally in the business of protecting.<sup>485</sup>

#### IV. CONCLUSION

Despite the problems with explaining the state obligation to protect as a condition for the legitimate exercise of political control, the account has a characteristic that is both an advantage and disadvantage: it deeply connects protection to the actual exercise of political control. The characteristic is an advantage in that it allows for a solid distinction between state obligations in its legal territory and in those territories

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<sup>482</sup> See, e.g., THOMAS HOBBS, *LEVIATHAN* ch. XVII (1651); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶¶ 126, 131, 134 (1689).

<sup>483</sup> See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 110-113 (1974).

<sup>484</sup> See generally JOHN RAWLS, *A THEORY OF JUSTICE* (2d ed., 1999).

<sup>485</sup> Jeremy Waldron, *Safety and Security*, 85 *NEB. L. REV.* 454, 491-94 (2006).



where it does not act, satisfying one desideratum of an adequate account. Under normal circumstances, the state would only have to protect within its legal territory. The disadvantage is that the account can only explain a state obligation to protect those persons subject to the exercise of political control. But a state would normally seem to have an obligation to protect even in those portions of its domestic territory where it does not exercise political control (and the exercise of political control is possible).<sup>486</sup> In fact, it seems especially urgent that the state protect in such areas. While protection as a condition of the exercise of political control can to some degree make a distinction between domestic and foreign territory, it does not guarantee that the state must protect in all parts of its domestic territory, failing to satisfy completely a second desideratum of an adequate account of the state obligation to protect.<sup>487</sup>

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<sup>486</sup> See *Ilașcu v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R. 1, ¶¶ 339-41 (2004) (“Moldova’s positive obligations relate both to the measures needed to re-establish its control over Transdnistrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants’ rights, including attempts to secure their release. . . . The obligation to re-establish control over Transdnistria required Moldova, firstly, to refrain from supporting the separatist regime of the “MRT”, and secondly to act by taking all the political, judicial and other measures at its disposal to re-establish its control over that territory. . . . [W]hen confronted with a regime sustained militarily, politically and economically by a power such as the Russian Federation . . . , there was little Moldova could do to re-establish its authority over Transdnistrian territory.”).

<sup>487</sup> Tan makes the following comment on a somewhat analogous point:

“[T]he skeptical argument assumes that the boundaries of justice are to be restricted by the existing boundaries of institutions. But this assumption inverts our ordinary understanding of the relationship between justice and institutions. While considerations of justice are *necessary* where there are institutional arrangements (for we want our institutions to be just), institutional arrangements are not necessary in order for considerations of justice to have great relevance. On the contrary, we have a duty of justice, what John Rawls calls a ‘natural duty of justice,’ to establish appropriate institutions where none exists. So rather than being limited by the scope of existing institutions, justice can call on us to extend the reach of these institutions, and to create new ones, where necessary.” Kok-Chor Tan, *Patriotic Obligations*, 86 *MONIST* 434, 437 (2003).

I agree with Tan that the state has an obligation to extend the reach of institutions, at least to its borders (he might say further than this), and that this is a consequence of the obligation to protect (he speaks more generally about justice).

## CHAPTER 6: FIDUCIARY OBLIGATIONS AND THE SCOPE OF THE STATE OBLIGATION TO PROTECT

### I. INTRODUCTION

John Locke, in his *Second Treatise on Government*, argued that the state has the obligation to secure “the lives, liberties and estates” of those persons who form part of civil society.<sup>488</sup> The end of the state in his view is “the peace, safety, and public good of the people.”<sup>489</sup> Although Locke was less interested in elaborating on these positive obligations than on establishing limits of permissible government, his work suggests two different moral explanations of this obligation. First, his model of state origins indicates that political obligations arise from two agreements, first an agreement among persons to form civil society and then an agreement of civil society to constitute a state. This model might be (wrongly) construed to entail that the state has an obligation to secure lives, liberties, and estates because it agreed to do so. Second, and more interestingly, Locke claimed that government holds a fiduciary power and so must act in accordance with the trust placed in it, principally to ensure the preservation of society and all of its members.<sup>490</sup> This idea explains the obligation to protect not in terms of an agreement but as a result of the state’s status as the fiduciary of the society and its members.

However, Locke’s development of the idea that the state is a fiduciary suffers from two major problems that make it less than satisfactory as an account of the state’s special obligation to protect. First, it relies on the idea that at some particular moment the society or its members actively and voluntarily entrusted the state with power. But many states do not appear to have ever experienced such a historical moment, and even if they had, the existence of such a historical moment is not necessary for a state to have

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<sup>488</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶¶123, 131 (1689) (referring specifically to the legislative branch).

<sup>489</sup> *Id.* ¶ 131.

<sup>490</sup> *See id.* ¶¶ 134-36, 149, 164.

a special obligation to protect those in its territory. Second, Locke's view would seem to connect fiduciary obligations generally, and the obligation to protect in particular, to the overall legitimacy of the state. A state would have an obligation to protect only if it could be legitimate because it was formed in the right way. But even if a state is completely illegitimate, in that it has no right to hold political power over its territory, it seems plausible that it should protect so long as it illegitimately continues to hold that power. A tyrant who continues to rule ought to rule well, even if she is in violation of a more stringent obligation to hand over power.<sup>491</sup>

By taking core of Locke's idea and giving it a modern interpretation, it is possible to provide a fiduciary account of the state's special obligation to protect. The fiduciary principle establishes that an actor, the fiduciary, has certain obligations merely because it is in a fiduciary relationship with another, the principal.<sup>492</sup> This relationship need not be voluntary or even legitimate to generate obligations. Two main fiduciary obligations can be distinguished. The signature obligation of loyalty normally requires the fiduciary not to act in pursuit of the fiduciary's own interests or purposes within the scope of the

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<sup>491</sup> Consider A. J. Julius' example of a naked tyranny: "People do what the tyrant tells them to do so that he will not kill them. Though no one imagines there is any moral reason to obey him, it is hard to agree that the society is not unjust if people are going hungry as they build his pleasure palaces." A. J. Julius, *Nagel's Atlas*, 34 PHIL. & PUB. AFF. 176 (2006). If we add to the example that the people in the territory of the naked tyranny regularly suffer from acts of violence against which the tyrant makes no effort to protect, it illustrates why an account of the obligation to protect would ideally be independent of legitimacy. The naked tyranny is clearly illegitimate but nonetheless ought to protect, at least so long as it continues to hold power (which it should probably renounce).

<sup>492</sup> Peter Birks, *The Content of the Fiduciary Obligation*, 34 ISR. L. REV. 3, 9 (2000) (citing *In re Speight*, (1883) 22 Ch.D. 727, 739 (C.A.) (U.K.); *In re Speight*, (1883) 9 App. Cas. 1, 19 (H.L.) (appeal taken from Eng.) (U.K.) (Lord Blackburn); Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 105 (2008). Some have argued that fiduciary obligations vary substantially depending on the character of the fiduciary relationship. Robert Flannigan, *The Fiduciary Obligation*, 9 OX. J. L. STUD. 285, 319 (1989) ("The content of the obligation imposed in a particular case then depends on the factual structure of the relationship between the fiduciary and the trusting party. . . . The core content of the fiduciary obligation remains the same; it is just not applicable in full to every relationship. The content of the obligation in each case is calculated to ensure that the integrity of the trusting relationship is fully maintained.").

fiduciary relationship.<sup>493</sup> The obligation of care normally requires the fiduciary to actively pursue the fiduciary's purposes with care, again within the scope of the fiduciary relationship. Applying these ideas to the state provides an explanation of the state's special obligation to protect. The state has a special obligation to protect, according to the argument of this chapter, because it assumes political power over certain persons, meaning that it treats them as subject to its formulation, application, and enforcement of law and rights. For this reason, the state is in a fiduciary relationship with those individuals and has an obligation to pursue with that assumed political power the purposes of the individuals, including their purpose of obtaining security.

A fiduciary approach shows promise in the face of the deep problems identified in the previous chapters with alternative explanations of the state's special obligation to protect. First, individual interests figure into the account of the obligation in a central way, contrary to the case with promissory explanations.<sup>494</sup> The fiduciary account gives interests, in the form of individual purposes, a primary explanatory role. The state must protect when it assumes or holds political power because it must promote the normal individual purpose of obtaining security. Second, the fiduciary approach involves a genuine state obligation, not merely a condition or limitation on the permissible performance of some other action, contrary to explanations where the obligation supposedly arises as a condition on the legitimate exercise of political control.<sup>495</sup> Because the state holds power over individuals, it has an obligation to use that power, but using that power is not merely a condition for the permissible assumption of it. The failure to

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<sup>493</sup> Peter Birks, *The Content of the Fiduciary Obligation*, 34 *ISR. L. REV.* 3, 10-11, 28-29 (2000) ("It is safest to say that the obligation of disinterestedness is an obligation to abstain from any and every gain arising from the trust and, in particular but not exclusively, to abstain from any gain which might possibly conflict with the duty to preserve and promote the interest of the beneficiaries."); Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 *BUFF. L. REV.* 99, 105 (2008).

<sup>494</sup> Compare *supra* ch. 4 Part III.A.

<sup>495</sup> Compare *supra* ch. 5 Part IV.A.

use the power to protect normally constitutes a wrong independently of whether or not it was permissible or legitimate to assume the power in the first place. Third, because the obligation arises directly from assuming certain powers, which, I will argue, occurs whenever the state claims territory, it is a constitutive obligation of the state. In this sense, the state does not voluntarily assume a new obligation to protect but instead is born with the obligation, which was not the case according to the promissory account.<sup>496</sup>

The fiduciary account also resolves more practical problems concerning the scope of the state obligation to protect. On the one hand, it can explain why the state normally has an obligation to protect all those persons in its national territory, even when it fails to exercise political control in parts of that territory. Because fiduciary obligations arise from assuming or holding political power in a state's national territory even absent the use of that political power, the state has the special obligation to protect all of those persons in its national territory. In this sense, the account fulfills a primary desideratum for an account of the state obligation to protect. On the other hand, the account can resolve the scope of the state's special obligation to protect in other circumstances, where our intuitions are less clear. It can, for example, help determine when military presence abroad is sufficient for the state to have a special obligation to protect those in the territory subject to the military presence. Specifically, the state has the special obligation to protect when the military presence abroad constitutes an assumption of political power over the persons in that territory, as it normally will during military occupations but not necessarily in other sorts of military operations. In this sense, the fiduciary account provides answers to the questions that motivated our search for a moral explanation of the special obligation to protect in the first place.

The chapter will defend the fiduciary explanation of the state's special obligation to protect and will show how the account defines the scope of the obligation. First, it will

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<sup>496</sup> Compare *supra* ch. 4 Part III.B.

explain the moral concepts of fiduciaries and fiduciary obligations and provide a moral interpretation of these concepts, drawing inspiration from Kant's political philosophy.<sup>497</sup> Second, it will argue that the state's assumption of political power in its national territory can explain why the state normally has an obligation to protect all those persons in that territory. It will also indicate why the assumption of political power gives rise to a state obligation to protect that has the intuitive characteristics of the special obligation, specifically that it requires both operational and systematic measures of protection.<sup>498</sup> Third, it will show that the fiduciary explanation of the obligation to protect clarifies in a reasonable way the scope of the state's obligation to protect. It will specifically analyze how state military presence in a foreign territory, foreign military presence in the state's national territory, and citizens located in foreign territory affect the scope of the state obligation to protect.

## II. THE MORAL THEORY OF FIDUCIARY OBLIGATIONS

This section will argue that a person who assumes power over another in some general domain normally is a fiduciary, and, as a result, normally has a moral fiduciary obligation to use those assumed powers for and only for the purposes of the other, the principal, absent additional appropriate justification for using the power otherwise.<sup>499</sup> Although fiduciary obligations may be best known from legal doctrine, it is quite

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<sup>497</sup> It also will depart in important ways from recent followers of Kant such as Arthur Ripstein and Evan Fox-Decent. ARTHUR RIPSTEIN, *FORCE AND FREEDOM* 70-77 (2009); EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* 93-105 (2011).

<sup>498</sup> See *supra* ch. 1 Part. III.B.

<sup>499</sup> Some fiduciary relationships will require a more complicated analysis. For example, in a trusteeship, a relationship involving three parties, where a settlor entrusts property to the trustee for the benefit of a beneficiary. Fundamentally, the trustee has power over the rights of others, and so must use the property for their purposes. However, some of rights might be understood to belong to the settlor and others to the beneficiary.

Other relationships where one person obtains power over another may be subject to special justifications that eliminate their fiduciary character. For example, if one person assumes power over another because that person is a threat to others—such as in a psychiatric hospital—the circumstances may justify using that power for the purposes of others. But, nonetheless, there will still be strong moral pressure to use that power for the purposes of the person subject to the power as well.

plausible that the legal obligations reflect underlying moral obligations. For instance, legal commentators have often suggested that legal fiduciary obligations are needed to prevent abuse by fiduciaries,<sup>500</sup> implying that it is independently wrongful (abusive) to engage in the conduct prohibited by legal fiduciary obligations. This wrongfulness must be moral, not legal in nature in order to explain the legal obligation. But because the invocation of fiduciary ideas is relatively rare in contemporary moral and political theory—although not completely unknown<sup>501</sup>—they likely need intuitive motivation in a way that the moral principles considered in previous chapters did not. This section will first draw on examples from legal doctrine to motivate intuitively the existence of moral fiduciary obligations and then will develop a plausible moral foundation for fiduciary obligations inspired by Kantian ideas.

#### A. CHARACTERISTICS OF FIDUCIARY OBLIGATIONS

Various areas of law contemplate fiduciary relationships and obligations, and typically agree (albeit with different characterizations) that a fiduciary relationship exists and gives rise to fiduciary obligations when one person, the fiduciary, has some form of power over another, the principal.<sup>502</sup> Classic examples are the relationships of

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<sup>500</sup> See, e.g., Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 4 (1975) (“The need to control discretion has been a justification for the imposition of the harsh rule concerning fiduciaries since the beginning. . . . The desirability of deterring the fiduciary from using his discretion except for the benefit of the principal or beneficiary is often mentioned in subsequent judgments, and this aspect is also enshrined in the prohibition against allowing a conflict of interest and duty.”).

<sup>501</sup> See generally ARTHUR RIPSTEIN, *FORCE AND FREEDOM* 70-77 (2009); EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* 90-111 (2011); David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249 (2011); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989).

<sup>502</sup> Different commentators have characterized the assumed power in different ways, and some do not explicitly identify it as power. Cf. Robert Flannigan, *The Fiduciary Obligation*, 9 OX. J. L. STUD. 285, 306 (1989) (“the presence of discretion identifies a fiduciary. This discretion exists because someone has trusted the fiduciary to exercise it.”); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 4 (1975) (“Two elements thus form the core of the fiduciary concept and these elements can also serve to delineate its frontiers. First, the fiduciary

professionals like doctors and lawyers to their clients or patients, corporate directors and officers to their corporations or shareholders, agents (such as employees) to the principal on whose behalf they act, and trustees to settlors or beneficiaries.<sup>503</sup> In all these relationships, the principal is exposed to significant risk that the fiduciary will misuse the power they hold in part because the principal is unable to direct, control, or consent to the specific uses of that power.<sup>504</sup> This part will develop an intuitive moral

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must have scope for the exercise of discretion, and, second, this discretion must be capable of affecting the legal position of the principal.”) (identifying one circumstance in which there is a fiduciary relationship); Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 262 (2011) (cited by Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 1011 (2012)) (“[A] fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary).”); Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 311 (2009) (“[Fiduciary relationships] arise from circumstances in which one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary), and the beneficiary is vulnerable to the fiduciary’s power in that she is unable, either as a matter of fact or law, to exercise the entrusted power.”).

A second current has tied the fiduciary relationship to the fiduciary’s influence over the principal. Robert Flannigan, *The Fiduciary Obligation*, 9 OX. J. L. STUD. 285, 303 (1989) (“The nature of the trust required for a special relationship is that which allows the trusted party to exert ‘influence’ over the trusting party. No domination or dominating influence need be present.”); Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 105 (2008) (“Courts have differing views with respect to when fiduciary duties arise. Some look to reliance by the principal and dominance or control by the fiduciary as evidence of a fiduciary relationship. Others look to trust and confidence on the part of the principal matched with influence or superiority by the fiduciary.”). I need not and will not address whether a relationship marked by influence also generates fiduciary obligations, because I merely seek to defend that a relationship involving power is morally sufficient to generate fiduciary obligations.

<sup>503</sup> For lawyers, see, e.g., *Flatt v. Superior Court*, 9 Cal.4th 275, 282-84 (1994); *Maritrans v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 253-55 (Pa. 1992); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F. 2d 1311, 1318-19 (7th Cir. 1978); *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1850). For doctors, see, e.g., *Brandt v. Medical Defense Associates*, 856 SW 2d 667, 670 (Mo. 1993); *Moore v. Regents of Univ. of Cal.*, 51 Cal.3d 120, 128-32 (Cal. 1990). For corporations, see, e.g., *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009); *In re Tyson Foods Consol. S’holder Lit.*, 919 A.2d 563, 592-93 (Del. Ch. 2007); *In re Caremark Int’l Inc. Derivative Litigation*, 698 A.2d 959, 970-72 (Del. Ch. 1996); *Smith v. Van Gorkom*, 488 A. 2d 858, 872 (Del. 1985). For agents, see, e.g., *Johnson v. Brewer & Pritchard, PC*, 73 SW 3d 193, 200 (Tex. 2002); *Lombardo v. Albu*, 14 P. 3d 288, 290-91 (Ariz. 1990); *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 782-83 (1971); *Burdett v. Miller*, 957 F. 2d 1375, 1381 (7th Cir. 1992) (*obiter dictum*); *Basile v. H & R Block, Inc.*, 761 A. 2d 1115, 1120 (Pa. 2000) (*obiter dictum*). For trusts, see, for example, *Conservatorship of Pelton*, 132 Cal. App. 3d 496, 501 (Cal. Ct. App. 1982); *Wood v. U.S. Bank*, 828 N.E.2d 1072, ¶ 23 (Ohio Ct. App. 2005); *In re Mark Anthony Fowler Special Needs Trust, No. 39729-3-II* (Wash. Ct. App. Feb. 8, 2011); *Baker Boyer Bank v. Garver*, 43 Wn. App. 673, 682 (Wash. Ct. App. 1986).

<sup>504</sup> TAMAR FRANKEL, *FIDUCIARY LAW* 107 (2011) (“Fiduciary duties aim at reducing entrustors’ risks in two main areas. The first area relates to the risk from the fiduciaries’ misappropriation of entrusted property or power. The second area relates to entrustors’ loss from the faulty performance of the fiduciaries’ services.”).



understanding of fiduciary relationships and the specific obligations that prohibit the misuse of power. It will draw from legal materials that reflect our intuitions about moral relationships and obligations.

### 1. *The fiduciary relationship*

Among courts, there is more agreement as to the core categories of fiduciaries and the concomitant obligations than there is with respect to the specific elements of the fiduciary relationships.<sup>505</sup> However, among legal scholars, there is some agreement, albeit not strictly universal, as to the nature of the fiduciary relationship. The picture that emerges is that of a relationship in which one person, the fiduciary, (1) holds a form of *de facto* power over another, the principal, in some general domain<sup>506</sup> (2) in circumstances where the principal is unable to effectively direct, consent to, or otherwise control the uses of the power.<sup>507</sup> For example, one can understand corporate directors as holding and exercising power over a corporation or its shareholders in a variety of domains, including in decisions regarding employment, use of corporate resources, and corporate actions.<sup>508</sup> Similarly, lawyers and doctors hold and exercise power over individuals concerning their legal relations and their physical bodies.<sup>509</sup> An agent

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<sup>505</sup> This seems to be largely because courts have often proceeded on the basis of analogical reasoning from canonical categories rather than the strict application of general legal principles. Cf. Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 240-52 (2011).

<sup>506</sup> See Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 262 (2011); TAMAR FRANKEL, FIDUCIARY LAW 6 (2011); Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 311 (2009); Robert Flannigan, *The Fiduciary Obligation*, 9 OX. J. L. STUD. 285, 306 (1989); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 4 (1975). Cf. TAMAR FRANKEL, FIDUCIARY LAW 17 (2011) (“[p]ower” means legally protected freedom to do or not to do what one wishes without the interference of other persons, including the ability to limit one’s freedom by one’s free will and actions . . .”).

<sup>507</sup> See Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 262 (2011); TAMAR FRANKEL, FIDUCIARY LAW 6 (2011); Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 311 (2009); Robert Flannigan, *The Fiduciary Obligation*, 9 OX. J. L. STUD. 285, 306 (1989); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 4 (1975).

<sup>508</sup> See, e.g., Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L. Q. 403, 423-26 (2001).

<sup>509</sup> For example, according to professional standards, a lawyer normally has the power to make routine decisions in an ongoing legal matter, see MODEL RULES OF PROF’L CONDUCT R. 1.2

receives powers to affect the legal status of the principal, such as by forming contracts.<sup>510</sup>

In its essence, a fiduciary relationship involves a lack of control or consent on the part of the principal over the particular actions of the fiduciary and a concomitant discretion on the part of the fiduciary. The core fiduciary relationships are ones in which the very point of the fiduciary holding power over the principal is to allow for the fiduciary to act quasi-independently of the fiduciary. At a minimum,

“[i]t is not possible to prescribe for fiduciaries the precise way in which they are to perform their services. The directives to fiduciaries must be general, and the precise ways in which they are to perform their services must be left to them, both if they are the experts, and if their performance is subject to a changing or unknown environment . . . .”<sup>511</sup>

For example, neither a corporation itself, as a legal entity distinct from natural persons,<sup>512</sup> nor its shareholders, as a group with limited rights to monitor and specify conduct,<sup>513</sup> can effectively direct or control the specific conduct of the corporate officers and directors, even if the shareholders may set general guidelines.<sup>514</sup> Similarly, a central role of an agent is to enter into legally binding contracts on behalf of the principal, among other functions that entail independence from the detailed directions of the principal.<sup>515</sup>

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(2013) (“A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”), and a doctor has the power to practice medicine concerning the patient, AM. MED. ASS’N, CODE OF MEDICAL ETHICS Opinion 10.015 (2001).

<sup>510</sup> Restatement (Third) of Agency § 6.01 (2006); *see, e.g.*, *Lombardo v. Albu*, 14 P.3d 288, 291 (Ariz. 1990). *Also* TAMAR FRANKEL, FIDUCIARY LAW 25 (2011).

<sup>511</sup> TAMAR FRANKEL, FIDUCIARY LAW 28 (2011).

<sup>512</sup> *See, e.g.*, DEL. CODE ANN. tit. 8, § 106 (2013).

<sup>513</sup> For changes to bylaws, voting on directors, and record inspection, *see, e.g.*, DEL. CODE ANN. tit. 8, § 109, 211, 212, 220 (2013). For mandatory shareholder proposal inclusion in corporate proxy statements, *see* 17 C.F.R. § 230.14A-8.

<sup>514</sup> *See, e.g.*, DEL. CODE ANN. tit 8, § 109, 211, 212, 220 (2014); 17 C.F.R. § 230.14A-8. *See also* TAMAR FRANKEL, FIDUCIARY LAW 11 (2011) (“[T]he entrustors’ ability to control their fiduciaries is weakened with the rise in the entrustors’ number. The entrustors may not be well organized, may have different interests and different ideas about the benefits that their fiduciaries must pursue.”).

<sup>515</sup> Restatement (Third) of Agency § 6.01 (2006); *see, e.g.*, *Lombardo v. Albu*, 14 P.3d 288, 291 (Ariz. 1990). *But see* TAMAR FRANKEL, FIDUCIARY LAW 5 (2011) (“Agency is created when a property owner or any person (principal) (1) entrusts property or power; (2) to another (agent); (3)

The establishment of a fiduciary relationship need not be voluntary or consensual on the part of the principal; a fiduciary may hold power over the principal even when the principal did not necessarily entrust power to the fiduciary. For example, parents have long been thought to have fiduciary obligations to their minor children,<sup>516</sup> but minor children do not typically consent to their parent's assumption of the power.<sup>517</sup> Similarly, the classic fiduciary relationship of a doctor to a patient does not always begin with informed consent to the doctor's assuming power over the patient's body. In certain emergencies where the patient is incapacitated, it is understood that a doctor may initiate emergency treatment without the consent of the patient.<sup>518</sup> Despite the fact that these relationships are not voluntary, the resulting fiduciary obligations are plausibly as strong or even stronger when the power is assumed without consent or entrustment than they otherwise would be.

Beyond cases where the fiduciary relationship is established without any voluntary act on the part of the principal, some fiduciary relationships are, at best, only partly voluntary. Officers and directors of a corporation are in a fiduciary relationship to

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with directions on how to use the property or power; (4) under the control of the principal.”). Although Frankel specifies that the agent is under the control of the principal, by the nature of the relationship, one where the purpose is for another to replace the principal in carrying out a task, there normally are limits to the control the principal may exert.

<sup>516</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* Ch. VI (1689); Harry Brighthouse & Adam Swift, *Parents' Rights and the Value of Family*, 117 *Ethics* 80, 95 (“The parent’s fiduciary role has been widely acknowledged since Locke.”). *Cf.* *Evans v. Eckelman*, 216 Cal. App. 3d 1609 (1990); *Varner v. Varner*, 588 So. 2d 428 (Miss. 1991); *Ohio Cas. Ins. Co. v. Mallison*, 354 P.2d 800 (Or. 1960); *Williams v. Patton*, 821 S.W.2d 141, 147 n.6 (Tex. 1991); *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996). *But cf.* *Curtis v. Freden*, 585 P.2d 993 (Kan. 1978) (asserting that the adult child is not the fiduciary of the parent but not addressing whether the parent is the fiduciary of a minor child).

<sup>517</sup> What normal action of a minor would indicate this consent? And even if there was such an action—perhaps remaining with the parents—could it be sufficiently voluntary as to be relevant to the moral status of the relationship?

<sup>518</sup> *See, e.g.*, *Canterbury v. Spence*, 464 F.2d 772, 788-89 (D.C. Cir. 1972) (citing *Dunham v. Wright*, *supra* note 13, 423 F.2d 940, 941-942 (3rd Cir. 1970); *Koury v. Follo*, 158 S.E.2d 548, 555 (N.C. 1968); *Woods v. Brumlop*, 377 P.2d 520, 525 (N.M. 1962); *Gravis v. Physicians & Surgeons Hosp.*, 415 S.W.2d 674, 677, 678 (Tex. Civ. App. 1967)) (in *obiter dicta*). *Cf.* AM. MED. ASS'N, *CODE OF MEDICAL ETHICS* Opinion 10.015 (2001).

shareholders,<sup>519</sup> but shareholders need not voluntarily enter into this relationship. The shareholders that vote against a director are nonetheless in a fiduciary relationship, and shareholders typically do not appoint chief executive officers.<sup>520</sup> Perhaps the relationship is made somewhat more voluntary by the fact that a shareholder can always sell her shares or implicitly consents to the general arrangement by purchasing shares. Similarly, indigent criminal defendants have often enjoyed no choice in the attorneys assigned to them in fulfillment of the right to counsel.<sup>521</sup> If they choose to reject the assigned counsel, they will be left with no counsel at all. Under such circumstances, the attorney-client relationship is not formed voluntarily, or, at a minimum, lacks important elements of voluntariness. Nevertheless, attorney-client relationships formed in this way seem morally permissible because it is in the interests of a typical person to have counsel in a criminal proceeding and because the defendant retains the capacity to opt-out of the relationship.

## *2. The core fiduciary obligations*

The fiduciary relationship is traditionally thought to generate two primary legal obligations, which intuitively reflect moral obligations of the fiduciary. The obligation of loyalty, the first and most characteristic obligation of fiduciaries, normally requires the fiduciary to use the assumed power to further only the purposes of the principal, not to further the fiduciary's purposes or those of third parties, absent adequate additional justification.<sup>522</sup> This duty is plausibly moral as well as legal in nature. Consider cases of

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<sup>519</sup> *Cf.* *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009); *In re Tyson Foods Consol. S'holder Lit.*, 919 A.2d 563, 592-93 (Del. Ch. 2007).

<sup>520</sup> The board of directors typically appoints them. Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L. Q. 403, 425 (2001).

<sup>521</sup> *United States v. Garey*, 540 F. 3d 1253, 1264-65 (11th Cir. 2008); *United States v. Ely*, 719 F. 2d 902, 904-05 (7th Cir. 1983); *United States v. Welty*, 674 F. 2d 185, 188 (3d Cir. 1982); *McKee v. Harris*, 649 F. 2d 927, 930-31 (2d Cir. 1981); *United States v. Davis*, 604 F. 2d 474, 479 (7th Cir. 1979).

<sup>522</sup> *Cf.* TAMAR FRANKEL, *FIDUCIARY LAW* 108 (2011) ("The duty of loyalty takes two aspects. One aspect is a requirement that fiduciaries act for the sole benefit of the entrustors. . . . The

conflicting interests. In *Moore v. Regents of the University of California*, the doctor for a leukemia patient used cells obtained during surgery in his ongoing medical research. The Court held that the doctor had a duty to disclose and obtain patient consent to his conflicting research and economic interest in the surgery.<sup>523</sup> The doctor as fiduciary could not simply use his power over the patient's body for purposes other than those of the patients. Similarly, in *Gantler v. Stephens*, the board of directors for a bank rejected a merger proposal when its members had important conflicting interests.<sup>524</sup> Although the legal holding is somewhat complicated,<sup>525</sup> the moral evaluation is not: the directors acted contrary to moral obligation insofar as they made the decision in order to promote their purposes and not those of the corporation or its shareholders.

The other primary fiduciary obligation, the obligation of care, normally requires that the fiduciary actively use the assumed power (reasonably and competently) to promote the purposes of the principal. Again, the duty is plausibly moral as well as legal. For example, a doctor may not simply cease to treat a patient while there is an ongoing doctor-patient relationship, at least without giving reasonable notice, when the patient continues to require medical care.<sup>526</sup> As a fiduciary, the doctor must positively use the fiduciary power in accordance with the patient's purposes. In the corporate context, corporate boards must establish information and reporting systems that are sufficient to allow informed judgments about "compliance with law and . . . business

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other aspect of the duty of loyalty is a prohibition on fiduciaries from acting in conflict of interest with the interests of the entrustors . . ."). In the case of children or psychiatric patients, for example, there may be abundant and adequate reasons to use power for the protection of others. The theory of the obligation developed below will provide more detail regarding the moral barrier that the reasons must overcome. See *infra* Part II.C.

<sup>523</sup> *Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120, 133 (Cal. 1990).

<sup>524</sup> *Gantler v. Stephens*, 965 A.2d 695, 700-03 (Del. 2009).

<sup>525</sup> Specifically, the directors lost the protection of the business judgment rule and their actions were "subject to entire fairness review" for a breach of the duty of loyalty. *Gantler v. Stephens*, 965 A.2d 695, 706-09 (Del. 2009).

<sup>526</sup> *Cf. Granek v. Tex. St. Bd. of Medical Exam.*, 172 S.W.3d 761, 766 n.2 (Tex. App. 2005) ("Patient abandonment is a form of breach of duty in a medical malpractice action. Elements of an abandonment claim are (1) the unilateral severance of the doctor-patient relationship by the doctor; (2) without reasonable notice or without providing adequate alternative medical care; (3) at a time when there is a necessity of continuing medical attention.") (*obiter dictum*).

performance.”<sup>527</sup> They must use their power over the corporation in order to promote its purposes and those of the shareholders.<sup>528</sup> Trustees, who hold property for the benefit of third parties, are often required to manage and invest that property as a prudent person would.<sup>529</sup> A trustee must not only refrain from actions prejudicial to the interests of the beneficiaries but must also take prudent actions to advance those interests.

## *B. THE RIGHT OF INDEPENDENCE IN SETTING AND PURSUING PURPOSES*

Why is it that assuming power over another would generate obligations to employ that power for and only for the other’s purposes? One way to understand fiduciary obligation is as an outgrowth of a defeasible Kantian-style right to independence of agency that individuals might be thought to possess.<sup>530</sup> Specifically, a person normally

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<sup>527</sup> *In re Caremark Int’l Inc. Derivative Litigation*, 698 A.2d 959, 970 (1996).

<sup>528</sup> *Cf. Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”).

<sup>529</sup> *Conservatorship of Pelton*, 132 Cal. App. 3d 496, 500-02 (Cal. Ct. App. 1982); *Wood v. U.S. Bank*, 828 N.E.2d 1072, ¶ 30 (Ohio Ct. App. 2005); *In re Mark Anthony Fowler Special Needs Trust*, No. 39729-3-II (Wash. Ct. App. Feb. 8, 2011); *Baker Boyer Bank v. Garver*, 43 Wn. App. 673, 678-79 (Wash. Ct. App. 1986). Also UNIF. PRUDENT INVESTOR ACT § 2 (1994), available at [http://www.uniformlaws.org/shared/docs/prudent%20investor/upia\\_final\\_94.pdf](http://www.uniformlaws.org/shared/docs/prudent%20investor/upia_final_94.pdf).

<sup>530</sup> Kant clearly accepted a right along these lines, and actually understood it as the only innate right of persons. IMMANUEL KANT, *METAPHYSICS OF MORALS* 6:237 (Mary Gregor trans., 1991) (1797) (1797); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 35-36 (2009). Rawls *might* also have been inclined accept a right of this form, as might many contemporary political philosophers who organize political philosophy around securing fair conditions for developing our separate life projects, conceptions of the good, or purposes. *See, e.g.*, JOHN RAWLS, *A THEORY OF JUSTICE* 14-15 (1971).

In Kant’s political philosophy, the right to independence gives rise to all legal and political rights, which are understood to be entirely distinct from ethics. *See* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 1-3 (2009). His political philosophy attempts to develop a scheme of equal independence for all persons from the decisions of others, ultimately requiring a neutral state to define, adjudicate and enforce the limits of this independence. *See* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 9 (2009). The current account of the right to independence differs from that of Kant in order to make the explanation of fiduciary obligations acceptable to a broader range of perspectives on political and moral theory. First, unlike in Kant’s development, IMMANUEL KANT, *METAPHYSICS OF MORALS* 6:237 (Mary Gregor trans., 1991) (1797); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 35-36 (2009), the right to independence is not necessarily a foundational right that explains or gives rise to all other rights. Although it is perhaps compatible with such an approach, this account’s right to independence may coexist with other rights. For example, the right to life need not be a consequence of the right to independence from certain decisions and actions of others that affect one’s life. Second, the right to independence does not assume Kant’s strict division of moral philosophy into a doctrine of right (or of law), which generates rights that are permissibly subject to external enforcement, and a

has a right that others not treat her exercise of agency (what she aims to do and how she does it) as subject to their decisions<sup>531</sup> unless there is a specific and adequate justification for doing so. Fundamentally, this is a right to be one's own master and that no one else be your master nor treat you as such, both in what goals and projects you pursue and how you pursue them.<sup>532</sup> Because of this right, it is normally impermissible, for example, to force another to act or not act, or otherwise control a person's actions, even if it is to further the person's pursuits, but especially if it is not. If one notices that another is, say, making an argument in an article in the wrong way, one may not force the other to change the argument nor change it surreptitiously.

Others may infringe or violate a person's right to independence in two different ways, corresponding to two different ways in which agency is exercised. Exercising agency involves both setting purposes and pursuing them. Setting purposes involves deciding what goals to pursue while pursuing purposes involves deciding how to accomplish that goal and actually doing it. Other persons may subject either or both aspects of agency to their decisions and may treat either or both aspects as subject to their decision. One person can subject the other's pursuit of purposes to his or her decisions—such as by forcing another to act for purposes that the other has—thereby limiting independence in pursuing purposes but not independence in setting them. Children, for example, are often forced to act, but for purposes that are ostensibly their

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doctrine of virtue (or of ethics), which does not generate such enforceable rights. IMMANUEL KANT, *METAPHYSICS OF MORALS* 6:218-21 (Mary Gregor trans., 1991) (1797). Nothing I argue here depends in any obvious way on whether other persons may, coercively or otherwise, demand fulfillment of the right to independence. Third, the right to independence need not be absolute, in that it might be permissibly infringed or otherwise waived under some conditions, given adequate justification, without being wrongfully violated. For example, it may be permissible to force someone to act to save the life of a third party. I am not sure that Kant would reject this idea, although it seems in some tension with his formalist account of rights as a system of independence to let considerations such as interests make permissible the infringement of a right. *Cf.* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 35-36 (2009).

<sup>531</sup> *Cf.* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 70 (2009) (claiming that one may not "force [her] to act for [a purpose] she does not share").

<sup>532</sup> IMMANUEL KANT, *METAPHYSICS OF MORALS* 6:237-38 (Mary Gregor trans., 1991) (1797); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 30-31 (2009).

own, or at least that they can share, such as when a parent forces a child to go to school.

Moreover, independence in setting purposes is distinct from independence in pursuing purposes in the sense that a justification for infringing one need not constitute a justification for infringing the other. A specific and adequate justification for infringing independence in pursuing purposes need not constitute a specific and adequate justification for infringing independence in setting purposes. Again, a parent probably is generally justified in forcing his child to act in certain ways, but is not generally justified in forcing his or her child to act for purposes that the child does not have or cannot share. Parents are justified because the immaturity of children interferes with their capacity to make decisions for their own benefit, a justification that supports forcing a child to act but principally for his or her own benefit. A corporate board of directors is probably justified in forcing the corporation to act, by making certain high level decisions, but would not be justified in forcing the corporation to act for purposes that it does not share, absent additional justification.<sup>533</sup> It is worth noting that, based on these examples, we can see that the right of independence does not generate conclusive moral obligations for others but *pro tanto* obligations—obligations that can be overridden given a sufficient justification.

Importantly, even when the right to independence in pursuing purposes is infringed or violated, the right to independence in setting purposes may still require that one person not treat another's setting of purposes as subject to her decision, absent specific justification. Consequently, the rights infringer would only be permitted to force the other person to pursue purposes that the other has.<sup>534</sup> Ripstein provides an example

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<sup>533</sup> Cf. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”). While *Dodge* has an overly narrow conception of the purposes or interests of the stockholders, its conclusion could be generalized to include a wider range of factors.

<sup>534</sup> Because of the distinction between independence in setting and pursuing purposes, a person who forces another to act without justification and forces that person to act for purposes



of an interloper—let us suppose he or she is a non-custodial parent—who takes control of a child without justification. This action violates the child’s right of independence in pursuing purposes because the interloper forces the child to act without sufficient justification. Ripstein comments, plausibly, that, “if the interloper does succeed in taking the child [without justification], the interloper has obligations to the child structured by status, even though the mother has a right against the interloper to reclaim the child.”<sup>535</sup> As distinct aspects of the right to independence, the violation of one aspect does not waive the protections of the other aspect, despite the fact the violation is neither voluntary on the part of the victim nor legitimate. A doctor who properly or improperly treats a patient without that patient’s consent would still have a moral, if not legal, obligation to perform the treatment in accordance with the patient’s purposes. Regardless of whether it is permissible to force a person to act, others—even those who may permissibly force a person to act—are subject to an additional obligation to force that person to act only for his or her own purposes, unless there is a specific justification for infringing that additional obligation.

### *C. THE INDEPENDENCE-BASED INTERPRETATION OF FIDUCIARY OBLIGATION*

Because fiduciary relationships characteristically involve the fiduciary in determining how the principal will pursue or not pursue purposes, either directly or indirectly, the right of independence requires that the fiduciary do so for purposes that the principal shares, absent special justification. For example, parents typically make decisions regarding what their children will do, including deciding on schools and

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that he or she does not share commits two wrongs, one corresponding to each aspect of the right. It is wrong to force a patient to undergo treatment without consent, and also wrong that the forced treatment is not in accordance with the patient’s purposes. For example, absent an emergency, it is wrong to force medical treatment on a person even if the medical treatment is in accordance with what the patient wants. But it is additionally wrong to force a treatment that the patient does not want, such as because of religious beliefs.

<sup>535</sup> ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 72 (2009).

activities as well as controlling their behavior more directly. A corporate board of directors and corporate officers determine how the corporation acts (indirectly determining how shareholders use their property), such as by setting the activities it will conduct and who will perform those activities. These are examples of a fiduciary directly determining the principal's pursuit of purposes. A fiduciary may also indirectly determine how the principal will be forced to act, such as by affecting his or her legal obligations. For example, agents, such as certain employees, may legally enter into contracts that will be binding on the principal. Or a parent may arrange the financial affairs of her child.

A fiduciary relationship exists when the fiduciary assumes, rightly or wrongly, the power to determine how the principal exercises agency in some general domain using some set of methods. It exists regardless of whether the fiduciary has assumed the power legitimately, such as through the principal's voluntary act or some other method. Assuming this power consists of treating the agency of the principal as subject to the fiduciary's decision in some general domain through the set of methods, a form of treatment that is *prima facie* incompatible with the right to independence in pursuing purposes.<sup>536</sup> For example, a legal agent may treat certain categories of contractual matters of the principal as subject to his or her decision, because they relate to her employment functions. Parents often treat educational and financial choices of their children as subject to their decisions. Fiduciary power concerns a general domain of activity, because the generality of the assumed power prevents the principal from subjecting the fiduciary to consent, direction or control concerning particular uses of the power. Once power is assumed, the right to independence then requires that the

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<sup>536</sup> Fox-Decent and Criddle offer useful terminology. Instrumentalization of a person involves subjecting a particular action to one's decision, and domination involves treating the person's actions in general as subject to one's decision. Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 310 (2009). In these terms, assuming power involves dominating the other, whether permissibly or impermissibly.

fiduciary use the power to determine the principal's actions only in accordance with the principal's purposes, constituting the fiduciary obligation of loyalty.

But the same right of independence also generates an obligation to use the assumed power. From the moment of assumption of fiduciary power, the fiduciary treats the principal's actions in some domain as subject to the fiduciary's decision, in that the fiduciary may determine how the principal pursues certain purposes. Whether or not this infringement of independence of pursuing purposes is justified, the right of independence in setting purposes requires that the fiduciary not treat the principal's purposes as subject to his or her decision. It does not matter whether or not the resulting fiduciary relationship is legitimate or voluntarily formed.<sup>537</sup> The obligation from the right of independence to force another to act only for the purposes of that person, absent adequate and specific justification, requires that the principal use the assumed power for the principal's purposes, if those purposes so demand. Or if the purposes are better served by not using the power, then the fiduciary must not use it.

Fiduciary obligations arise in "the category of cases in which persons find themselves in a relationship in which one party is not in a position to consent either to

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<sup>537</sup> Some alternative accounts of fiduciary obligations, such as the theory that Evan Criddle and Evan Fox-Decent jointly present, go wrong specifically by failing to make a distinction equivalent to that between the right to independence in setting and pursuing purposes. *See, e.g.,* Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 *LEGAL THEORY* 301, 315 (2009) ("These relationships can be rightful (*i.e.*, consistent with the secure and equal freedom of both parties) if, and only if, the law rather than the power-holder sets the terms of the relationship."). They attempt to explain why human rights exist in terms of the justification for the state. On their view, the state may exercise nonconsensual coercion because it is a fiduciary of those subject to state power if and only if the state fulfills its fiduciary obligation to secure human rights. Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 *LEGAL THEORY* 301, 315 (2009). More generally, fulfillment of fiduciary duties is sufficient to make it permissible to assume fiduciary power. The result is that they make no clear distinction between the moral restrictions on assuming fiduciary powers—which concern independence in pursuing purposes—and the obligations that arise from holding that power, whether rightfully or not—which concern independence in setting purposes. But assuming fiduciary power cannot be made permissible simply by fulfilling the resulting fiduciary obligations. A doctor may not treat a person for a disease whenever she fulfills her fiduciary obligations. In such cases there are two potential wrongs: treatment without justification and treatment that does not respect the purposes of the patient. The fiduciary principle is not about justifying the assumption of power but about the obligations that arises from the assumption of this power.

the existence of that relationship or to modification of its terms.”<sup>538</sup> It is exactly when the principal cannot consent, direct, or control specific uses of the assumed power where there will normally be a lack of justification for infringing the right of independence in setting purposes. When one person assumes power over another in a general domain, even with consent, consent to the specific actual, uses of that power will normally be “absent, impossible, or insufficient.”<sup>539</sup> Power in a general domain impedes consent to its usage exactly because it is general. An agent is normally employed to make contractual and other arrangements on behalf of a principal because the principal lacks the availability or capacity to oversee the arrangements personally or does not want to do so.<sup>540</sup> A client often is incapable of fully consenting to the lawyer’s specific actions in the lawyer-client relationship, either because of a lack of expertise or for lack of time. A stockholder cannot consent to or control the actions of a corporate board of directors, for lack of knowledge and because she is one of many independent stockholders. And in cases where the fiduciary power was non-consensually assumed, the capacity to consent is impaired exactly because of the formation of the fiduciary relationship. The parent-child relationship or a doctor-patient relationship under emergency circumstances or (more controversially) the state-subject relationship provide examples.

### III. FIDUCIARY OBLIGATIONS AND THE STATE OBLIGATION TO PROTECT

This section will show that a fiduciary analysis provides a plausible explanation of the main features of the state’s special obligation to protect against violence. When the state assumes political power over a person, it treats the actions of that individual with respect to other persons as potentially subject to its decision in the form of political control. The assumption of political power generates fiduciary obligations to use that

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<sup>538</sup> ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 72-73 (2009).

<sup>539</sup> *Id.* at 76.

<sup>540</sup> *See id.*

power to protect against violence. Because the state must use that power reasonably to promote the individual purpose of obtaining security, it will have to implement general systems of protect—law enforcement and the like—and take additional operational measures when those systems fail. This fiduciary obligation normally extends to all persons within a state’s national territory because the state normally assumes political power in that territory. The following parts will explain these consequences of the state’s assumption of political power in more detail.

#### *A. POLITICAL POWER AND THE OBLIGATION TO PROTECT*

The fundamental idea of the fiduciary account of the state obligation to protect is that assuming political power in a territory—whether legitimate or not—generates fiduciary obligations to those persons in the territory. Previously, I defined the exercise of political control as “the making, application, and enforcement of laws . . . .”<sup>541</sup> Of primary interest is the enforcement of laws, since both systematic and operation measures of protection are instances of enforcement. The exercise of political control—making, applying, and enforcing law—is inherently relational, about forcibly establishing certain relationships among persons among individuals.<sup>542</sup> The exercise of political control in this sense is an activity a state may conduct, not a power that a state may assume. But the systematic exercise of political control implies that the state treats those persons against whom it exercises political control as subject to the state’s decision as to how they may act with respect to other persons, and so the state assumes political power over them, whether rightly or wrongly.<sup>543</sup> This is true even in a well functioning

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<sup>541</sup> See *supra* ch. 5 Part I (citing in part Allen Buchanan, *Political Legitimacy and Democracy*, 112 *ETHICS* 689, 690 (2002)).

<sup>542</sup> It establishes relationships both among fellow subjects, such as with private law, and among subjects and non-subjects, such as with foreign policy.

<sup>543</sup> In practice, this trigger for the state obligation to protect might be close to coextensive with that proposed by Samantha Besson for the extraterritorial application of human rights treaties. See Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25

democratic state subject to oversight and control by the population as a whole because the exercise of political control remains beyond the oversight and control of the particular persons against whom it is exercised.<sup>544</sup> By assuming political power over those persons, the state has the fiduciary obligation to use that political power—to exercise political control—in accordance with the purposes that those persons have.

Several immediate clarifications about the state's assumption of political power are in order. First, assuming political power does not necessarily imply that the state revokes completely an individual's right to protect him or herself, but it does imply that the state assumes that it may intervene to determine the relationships among persons. The state revokes the individual decision as to whether or not the state will intervene in the relationships among persons, thereby generating the fiduciary obligations associated with that assumption of power. Second, assuming political power does not entail the use of the power, so it may be possible for a state to assume political power in a territory even when it does not actually exercise political control in the territory. It merely entails that the state treats the people in the territory as subject to its exercise of political control, and so it treats their actions with respect to other persons as subject to its decision. Third, assuming political power entails that the state revokes the right of individuals to decide whether the state will interfere in their decisions as to how to conduct themselves with respect to others. But the state may be permitted to assume power over individuals that individuals could not use on their own. For example, a state may well be morally permitted to punish even if private individuals may not. Fourth, the fiduciary account, in fact, does not address what powers the state may permissibly or legitimately assume, only what obligations the state has to use those powers it does assume, permissibly or not. A state might impermissibly assume political power over a

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LEIDEN J. INT'L L. 857, 864-65 (2012) (“[J]urisdiction is best understood as de facto political and legal authority; that is to say, practical political and legal authority that is not yet legitimate or justified, but claims to be or, at least, is held to be legitimate by its subjects.”).

<sup>544</sup> Cf. *supra* notes 505-510 and surrounding text.

territory, nevertheless incurring fiduciary obligations—such as in, as I will argue, an illegitimate occupation<sup>545</sup>—even though it may have an overriding obligation to renounce that power.

Given that the state must use its assumed political power to promote the purposes of individuals, the desired special obligation to protect follows directly. A normal person has an important purpose of obtaining individual security, a purpose that normally will be dominant when confronted with violence or in situations of systematic insecurity.<sup>546</sup> Individuals care a great deal about being physically harmed or killed, and in situations where such events are likely to transpire, this interest will commonly translate into a central purpose. If the state must use the political power to promote individual purposes, it will have to promote the individual purpose of obtaining security. The state as fiduciary may have a range of obligations corresponding to different individual purposes, but an obligation to protect will be one of them because of the centrality of the individual purpose of obtaining security and the fact that the use of political power may readily promote this purpose. And certainly political power is sufficiently broad so that a wide range of actions the state may take within the scope of the power will promote the purpose of obtaining security. Among these actions are the establishment of systematic measures of protection and the undertaking of operational measures of protection. Moreover, a state that uses its political power reasonably to promote the individual purpose of obtaining security will take both of these actions, explaining why the state has an obligation to provide protection in both of those forms.

A normal state assumes political power that generates the obligation to protect even if it leaves individuals free to protect themselves, with the state only providing some services. Even if the state only intends to exercise political control sporadically, it

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<sup>545</sup> See *infra* Part. IV.B.

<sup>546</sup> See *supra* ch. 5 Part III.A.

still assumes political power over the individuals against who it is prepared to exercise political control. A normal state, or perhaps any state at all, treats those persons in its territory as potentially subject to its exercise of political control. While it might be possible, albeit difficult, to deny any necessary or essential connection between the potential exercise of political control in a territory and being the state in that territory, it seems still more difficult to deny that a normal state treats those persons in its national territory as potentially subject to its exercise of political control. But if, minimally, a normal state treats persons in this way, then that state assumes political power in its territory and has a fiduciary obligation to use that political power to promote the purposes of those in the territory. It is true that a state-like organization might use something similar to political power without assuming political power. Instead of attempting to establish, apply, and enforce legal relationships among people, it might simply attempt to exclude competitors. For example, an organization that wants to control natural resources in a territory might act in this way. Such an organization would not have fiduciary obligations to protect on this account. But it is neither clear that such an organization would count as a state nor that there have existed many (or any) purported states that completely rejected political power in this sense.

This explanation of how the fiduciary obligation to promote individual purposes produces the obligation to protect is dramatically different than the one implied by Evan Fox-Decent and Evan Criddle's work. They argue that, as a fiduciary, the state has obligations "to secure conditions of non-instrumentalization and non-domination" of its subjects.<sup>547</sup> Non-instrumentalization means that a person is always treated as an end

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<sup>547</sup> Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301, 329-32 (2009).



and non-domination means that a person is not “subject to arbitrary power . . . .”<sup>548</sup> A person that is abjectly poor would be inherently dependent on others, and a subject that completely lacks education would depend on others to know his or her rights, so both are exposed to domination by others.<sup>549</sup> Such circumstances are incompatible with the state’s obligation to secure conditions of non-instrumentalization and non-domination. However, it is not clear why they think the exotic moral technology of fiduciary obligations is necessary to explain why a state would have the obligation to secure conditions for the non-instrumentalization and non-domination of its subjects. In fact, such an obligation might be more parsimoniously explained simply by observing that the failure to secure such conditions might be one way for the state itself to instrumentalize or dominate its subjects.<sup>550</sup>

Extended to protection, the Fox-Decent and Criddle account would look much like the Rawlsian and assurance accounts previously considered,<sup>551</sup> as the state must protect to the degree necessary to establish conditions of non-instrumentalization and non-domination. However, eliminating general exposure to instrumentalization or domination by others does not necessarily entail that the state does all it reasonably can to protect.<sup>552</sup> Especially if we think the state need secure conditions of non-instrumentalization and non-domination to avoid instrumentalizing or dominating itself, those conditions probably do not require the complete absence of acts of violence. Instead, such conditions may only require the absence of violence as a general tendency or pattern.<sup>553</sup> Because the account does not rely on the fact that a fiduciary must promote the purposes of its principals with respect to security, it produces a weak

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<sup>548</sup> *Id.* at 329-32.

<sup>549</sup> *Id.*

<sup>550</sup> For example, the interpretation of Rawls proposed in Chapter 5, *see supra* ch. 5 Part III, imposes the same requirements but without any need for the elaborate philosophical technology of fiduciary obligations.

<sup>551</sup> *See supra* ch. 5 Part III.

<sup>552</sup> *See id.*

<sup>553</sup> *See id.*

obligation to protect. In contrast, a strong fiduciary explanation of the sort advanced here—a possibility ignored in Fox-Decent and Criddle’s work—connects the obligation to protect to the general fiduciary obligation of the state to pursue the purposes of its subjects through the exercise of political control. This obligation does not concern the character of the social order<sup>554</sup> but what the state must do for individuals because it holds political power over them.

One might object that the fiduciary account developed here is wrong because assuming political power does not entail that the state treats its subjects’ pursuit of their purposes in some domain as subject to the state’s decision. However, political power is used when the state makes, applies, and enforces laws and rights against individuals and fundamentally concerns limiting or affecting the individual pursuit of purposes.<sup>555</sup> Its use, in the form of the exercise of political control, subjects that pursuit to state decision. In contrast, the assumption of political power treats the individual pursuit of purposes as potentially subject to the state’s exercise of political control.<sup>556</sup> For

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<sup>554</sup> “[T]he fiduciary principle cannot authorize states to create a kind of order in which some are entirely dependent on the choices of others.” Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 *LEGAL THEORY* 301, 331 (2009) (note again the confusion of fiduciary obligations with the permissibility of or authorization for assuming power).

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<sup>556</sup> Locke inspires a slightly different interpretation, where the assumed political power itself ultimately belongs to individuals and so the state’s possession of that power intrinsically limits their independence. This fact places the state in a fiduciary relationship with each of the individuals subject to its assumed political power. For this reason, the state has the moral obligation to use its political powers for the purposes of the individuals to whom it ultimately belongs, at least absent explicit authorization to the contrary. Locke accepted the view that the state receives its political power derivatively and in trust from the moral powers held by each member of its society. On his view, each individual in a state of nature has a natural executive right to apply and enforce natural law and the natural right of self-government, including the right to act for the preservation of herself or others within the limits of natural law. A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* 62 (1995) (citing JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶¶ 128-130 (1689)). These rights, when assumed by the state, underwrite its political power, establishing its executive power (application and enforcement of law) and its legislative power (law creation). A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* 62 (citing JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶¶ 143-148 (1689)). Locke argues that the state acquires political rights from individuals by individual consensual alienation to the society followed by the society’s consensual entrustment of the power to the state. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶¶ 95-99, 123-31, 134, 222 (1689). But even if we reject a consensual account, a

this reason, the assumption of political power generates fiduciary obligations to exercise political control for and only for the purposes of those subject to the power, absent a special justification for exercising political control on some other basis. The assumption of political power normally generates obligations on the part of the state to act for the purposes of those in its territory.

One might also object that the assumption of political power generates fiduciary obligations only if there is no justification for exercising that power for purposes not shared by individuals. But there might well be such a justification. For example, the fact that individuals over whom the state has not assumed political power are subject to massive and systematic human rights violations may provide a justification, if not an obligation, for the state to exercise political power for other purposes. However, such justifications normally will not undermine the state's obligation to exercise political control for the purposes of those subject to its political power as well. Even if there is a genocide to which the state may or must respond through the exercise of political control, the state may simultaneously continue to exercise political control for the purposes of its subjects. The justification for not acting on those purposes only releases the state from the right of independence to the degree necessary; it is not a *carte blanche* for the state to ignore the purposes of those over whom it assumes political power. Other things being equal the state must use its assumed political power for and only for the purposes of its subjects.

Finally, one might object that there is no reason to assume the state is the fiduciary of the individuals in its territory, as opposed to civil society as a whole. If the state were the fiduciary of civil society, it would have the obligation to promote its purposes, which may require certain forms of protection for civil society as a whole but

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quasi-Lockean view holds that political power ultimately is an agglomeration of rights possessed by individuals that no state may simply prescribe. A. JOHN SIMMONS, ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY 59 (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶ 95 (1689)).

not necessarily the protection for each individual contained in the intuitive special obligation to protect. However, the fiduciary account developed here does not assume that state is exclusively the fiduciary of individuals; it is compatible with the claim that the state is *also* the fiduciary of civil society (or other entities in the state's territory). Any entity that has a right of independence in setting and pursuing purposes, even if different in some respects from that of individuals, could generate fiduciary obligations in others who assume a general power over them. For the reasons already advanced, individuals subject to state political power in its territory will be one of these entities, and the state will have fiduciary obligations, including the obligation to protect, as a result. The fact that the state could have fiduciary obligations to civil society as a whole does not undermine this conclusion, as the state can be in multiple fiduciary relationships simultaneously—all that is needed is that the state assume power over more than one entity at the same time. In fact, it is essential to the account that this be the case, because it holds that the state is normally in separate fiduciary relationships with each person located in the state's territory.

#### *B. THE CONTENT OF THE FIDUCIARY OBLIGATION TO PROTECT*

The fiduciary obligation to use political power (by exercising political control) for the purposes of each subject gives rise to the desired content of the special obligation to protect once we take into account that a normal and fundamental purpose of each individual is to obtain security from violence.<sup>557</sup> Reasonable efforts to advance this purpose will require the state to implement operational and systematic measures of protection, where we can understand 'reasonable' in terms of how a normal individual would exercise the state's political power to promote his or her security.<sup>558</sup> When a state

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<sup>557</sup> See *supra* ch. 5 Part III.A.

<sup>558</sup> This understanding follows from the fiduciary foundation of the obligation to protect because the central idea is that, even if a third party may or does subject a person to her decision,

is confronted with knowledge that a person is at high risk of suffering an act of violence, normally the only way to reasonably promote the person's purpose of obtaining security will be to take specific measures to protect against the violence.<sup>559</sup> Even if there is little violence overall in the society subject to the state's power of political control, the state may still promote the individual purpose of obtaining security when it knows of specific impending acts of violence. Moreover, given an impending act of violence, the purpose of obtaining security will normally take precedence over other purposes of the person. When there are actions available to the state to promote this fundamental purpose in the face of a known risk, a state that is reasonably promoting the purpose will normally take those actions.<sup>560</sup>

However, simply acting to stop known risks of violence is not sufficient to reasonably promote the individual purpose of obtaining security. Many substantial risks to the individual will never become known to the state in a form that allows for directed measures to protect against the risk. Common crime and domestic violence provide ample examples of risks that fall into this category. But the state is not powerless in front of these risks, as protection need not be implemented by force but can also be implemented by systematic coercion and perhaps by addressing the root causes of violence. A state can create law enforcement systems, dedicated to investigating acts of violence and transferring the perpetrators to the criminal justice system. The criminal justice system, composed of prosecutors, defense attorneys, and courts, may evaluate the guilt of a particular person and order a punishment. These systematic measures serve to

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he or she must normally exercise that power over the person in accordance with that person's purposes.

<sup>559</sup> Mere retroactive measures, such as civil remedies and criminal sanctions, are not sufficient because the effects of violence are typically not reversible. It is not possible to fully satisfy the individual interest in security by requiring compensation payments. *Compare* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 306-307 (2009).

<sup>560</sup> For related reasons, the state must take similar measures to deactivate known threats of recurring acts of violence directed against persons in the state's territory, such as those originating from violent organizations.

create a background deterrent to acts of violence, which hopefully lowers overall levels of violence.

The fiduciary explanation of the state obligation to protect also explains how limitations on state resources affect the obligation. As a fiduciary, the state must act reasonably to promote the security of individuals, again where what is reasonable depends on what a normal individual would do to promote security. Imagine a state that is completely overwhelmed by security problems such that it is simply unable to establish a decent level of security or a state where available resources are insufficient to implement all of the systematic and operational measures of protection that individuals would normally want. Short of such extreme circumstances, a reasonable state would implement systematic and operational measures of protection because a normal person would do so, for the reasons suggested in the previous paragraph. But in these extreme circumstances, it is not reasonable to fully implement systematic and operational measures of protection because it is not possible to do so. Instead, it is reasonable for the state to do what is possible in the near term to ensure individual security and to attempt to change the circumstances so that the state might better protect in the future. For example, if the problem were a lack of sufficient monetary resources, the state might consider changing state revenue policy to allow for more resources. Or, if it is impossible to protect everyone fully, it may be permissible to strategically reduce the protections for some to achieve a greater overall level of protection, so long as the reduced protections are maintained at the greatest possible level.<sup>561</sup>

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<sup>561</sup> The episode ‘Hamsterdam’ from the *Wire* is illustrative. In the episode, a local Baltimore police commander decides to stop enforcement of drug laws in a specific neighborhood—Hamsterdam—in order to reduce the overall effects from drug dealing. *The Wire: Hamsterdam* (HBO television broadcast Oct. 10, 2004). While the action had to do specifically with drug law enforcement and not with protecting against violence, in effect the police in the episode allow greater levels of drug dealing in one area to reduce the overall harmful effects of drug trafficking. If the episode concerned violence instead of drug dealing, the police actions would have been

When the conflict is not with resources, but with certain fundamental rights, a different analysis is needed to make sense of the relationship with the obligation to protect. Consider the right to freedom from torture, a right which one might think is an absolute moral constraint on state action.<sup>562</sup> It is fairly easy to imagine circumstances when the obligation to protect would collide with the right to freedom from torture, such as in a classic ticking time bomb scenario.<sup>563</sup> The fiduciary account can analyze such cases in terms of limits on state action that exist prior to the assumption of political power and the resulting fiduciary obligations. The state has an obligation to pursue individual purposes because holding political power infringes the right to independence of its subjects in pursuing purposes, but is still restricted by the right to independence in setting purposes.

But the rights of other persons, such as the right not to be subject to torture, impose constraints on what the state may permissibly do in furthering the purposes of its subjects. Even if the state is permitted to infringe the right to independence of others

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permissible so long as it was impossible to protect completely against violence and the levels of protection in Hamsterdam were as great as possible.

<sup>562</sup> Cf., e.g., American Convention on Human Rights art. 27, Nov. 22, 1969; Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention] art. 15, Nov. 4, 1950; International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966.

<sup>563</sup> See *supra* ch. 1 Part III.C. An alternative way to analyze this sort of case is from a perspective internal to the obligation to protect, where we look to what a given person would want the state to do to protect. But some people might well want the state to protect by torturing, so I think we need to make the story more complicated. We might add a fairness or impartiality constraint on the way a person would want the state to pursue his or her purposes. See Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 *LEGAL THEORY* 301, 312 (2009); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 *UCLA L. REV.* 117, 131 (2006); Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1150-58 (2004). Fundamentally the state is arranging relations among persons using political control and is accountable not to the purposes of individuals considered in isolation, but to multiple individuals at the same time. In many circumstances, this does not pose problems because there is no tradeoff between individuals in providing protection. The ticking time bomb scenario is exactly one of those circumstances in which the state is unable to pursue fully the purposes of each simultaneously. Since it is equally the fiduciary of multiple persons, it ought to maintain impartiality between their purposes. So one might think that on the basis of impartiality, the state will have to take into account the perspective of the potential victims of torture as well as the perspective of potential victims of terrorism. But this does not necessarily give us the intuitively desired result, because such a balancing might favor the perspective of terrorism victims, such as if the bomb is big enough and we are sure enough that a given person has information that can deactivate the bomb. This perspective leaves out the fact that the terrorist has a right to freedom from torture, and a particularly stringent right at that.

in pursuing purposes in many conditions—which is why the state may permissibly assume and use political power at all—it is not plausibly that it is *always* permitted to infringe the right to independence when such other rights (or interests) are at stake as well. Depending on the stringency of the rights of others at stake, the state may or may not be permitted to infringe those rights to respect with the right to independence by furthering the individual purpose of security. The right to freedom from torture is presumably extremely or absolutely stringent, in that it may never be permissibly infringed no matter the reason, while, for example, the right to property may be less stringent and infringements more easily justifiable. So the right of independence in setting purposes cannot require the state to take certain actions—such as torture (at least in most circumstances)—even when those actions are reasonably required to promote the individual purposes of obtaining security.<sup>564</sup> It could however require infringements of other rights, like the right to property, under certain circumstances, depending on the stringency of those rights. Importantly, although the obligation to protect is merely *pro tanto* for the reasons described here, the individual purpose in obtaining security is fundamental and the resulting obligation to protect is as substantial as the requirements from many human rights. Most human rights—even

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<sup>564</sup> This sort of approach to the problem of colliding rights works even if we think that the prohibition on torture is stringent but not absolute. In such a case, the prohibition on torture would not limit the state's fiduciary obligations when the state may permissibly infringe the right to freedom from torture. Two additional comments on this subject are warranted. First, it is possible that the conditions in which the state may infringe the rights of others are not identical to those conditions in which individuals may infringe the rights of others. Perhaps the state may prosecute and punish individuals even when they could not do so on their own. Whether there is a fiduciary obligation to do so depends on whether it is in fact permissible and whether doing so would reasonably promote the purposes of state subjects. Second, the analysis proposed here may be extended beyond the right to freedom from torture to other rights, possibly with different results. Depending on the stringency of a given right, there will be different circumstances in which it may be permissibly infringed, and so it will interact in different ways with the state's obligation to protect.



the right to life—give rise to requirements that are *pro tanto* even if often stringent: for example, it is morally permissible to kill in self-defense.<sup>565</sup>

Finally, what does the obligation to protect require of a state when the beneficiaries of the protection do not want to be protected? For example, must a state protect against consensual assisted suicide in order to discharge its obligation to protect for the person who wishes to die?<sup>566</sup> If we put to one side complicating factors like the state's uncertainty as to whether the suicide is genuinely consensual and desired, the fiduciary account of the special obligation to protect indicates that the state does not have an *obligation* to protect against assisted suicide. The state normally has an obligation to protect because it must respect the individual right to independence in setting purposes, even when it infringes (or violates) the right to independence in pursuing purposes by assuming political power over individuals. Because normal individuals have a central purpose of obtaining security, the right to independence in setting purposes will normally require state to promote that purpose. But a person who wishes to commit suicide does not have this purpose, at least with respect to the person from whom she wants to assistance with the suicide. So the fiduciary account indicates that the state has no *obligation* to protect, at least if it knows the person lacks this purpose, even if it might still be *permitted* to protect when there is sufficient reason to do so independently of individual preferences.<sup>567</sup> A similar analysis concerning the

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<sup>565</sup> JUDITH JARVIS THOMSON, *Self-defense and Rights*, in RIGHTS, RESTITUTION, AND RISK 33, 33-48 (1986).

<sup>566</sup> For a leading international human rights case that considers the issue of whether a state *may* protect against consensual assisted suicide, see *Pretty v. United Kingdom*, App. No. 2346/02, Eur. Ct. H.R. 1 (2002).

<sup>567</sup> Moreover, because individuals have a right to independence in setting purposes that would be infringed when the state acts against assisted suicide, there may be a *pro tanto* reason to think that the state must not interfere with assisted suicide. The reason is *pro tanto* because the infringement of the right might be justified, such as out of consideration for the fact that the state may not be able to accurately determine individual purposes in some instances and may act against assisted suicide so that vulnerable persons are not forced to commit suicide (murdered). Similarly, there might be sufficient reason to prosecute, assault even if the victim does not want

*obligation*, not the *permission*, to protect would apply to participation in violent sports, like mixed martial arts or U.S. football.<sup>568</sup> In general, individual preferences can eliminate the state obligation to protect in such circumstances, although they cannot require the state to protect in ways that violate the rights of others.<sup>569</sup>

### C. THE SCOPE OF THE FIDUCIARY OBLIGATION TO PROTECT

The state's assumption of political power, which generates a fiduciary obligation to protect, extends to its entire national territory—including geographical brown zones<sup>570</sup>—and, normally, no further. The state treats those over whom it assumes political power as subject to its decision regarding how they should relate to other persons, and so has a fiduciary obligation to use that political power for their purposes. For this reason, the state normally owes the fiduciary obligation to protect to all and only those persons in its national territory, in accordance with a key desideratum for an account of the state's special obligation to protect.<sup>571</sup> But why do borders make a difference to political power? Why does the establishment of legal borders constitute an assumption of political power inside the borders even in those brown zones where the state does not actively use the assumed political power? First, the fact that states make laws that are theoretically applicable and enforceable in the entire legal territory entails that the state assumes the power of political control in the entire territory. Moreover, states exclude other states from their territories not in general but specifically regarding

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to press charges, such as to maintain a credible deterrent against assault or to express community values about the acceptability of assault.

<sup>568</sup> The analysis here does not attempt to resolve the complicated issues concerning whether the state is permitted to protect, say, for the sake of the family of the victim or for the interest of other members in not living in a society where such consensual violence is permitted.

<sup>569</sup> See *supra* notes 564-565 and surrounding text. In this sense, individual purposes provide a floor for the protection that the state must provide, while the rights of others provide a ceiling, albeit one that requires a case-by-case analysis of stringency. If the members of a society all wanted less state protection, perhaps to expand individual liberty, the state obligation to protect would not require more state protection.

<sup>570</sup> See *supra* notes 84-85 and surrounding text; Guillermo O'Donnell, *On the State, Democratization, and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries*, 21 *WORLD DEV.* 1355, 1359-61 (1993).

<sup>571</sup> See *supra* ch. 1 Part III.D.

exercises of political control.<sup>572</sup> State officials from one state normally may enter the territory of another but normally are forbidden from exercising political control through force or coercion in that territory. Second, and more fundamentally, the act of establishing and maintaining borders is in and of itself an assumption of political power within the territory enclosed by the borders. The fact that an given organization claims certain borders implies that the organization claims to be the state within that territory, and assuming political power is a necessary condition for an organization to be the state within a territory.

There are a number of potential objections one might make to the claim that a normal state assumes political power in its entire national territory and, typically, only in its national territory—generating a fiduciary obligation to protect those persons present there. First, one might object that not all law making is confined within state borders; the Foreign Corrupt Practices Act, for example, applies to acts of bribery committed outside of the United States.<sup>573</sup> On the one hand, the state’s assuming or holding political power entails the potential subjection of individuals not only to the state’s law making but also to its law application and enforcement. And the application and enforcement of a law is typically, albeit not exclusively, carried out domestically even when violations of the law are committed abroad.<sup>574</sup> In this sense, the assumed political power does not extend beyond state borders in the normal case where the state does not apply and enforce laws to persons abroad and does not assume power to apply and enforce law outside of its territory.<sup>575</sup> On the other hand, one might argue that the

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<sup>572</sup> See *supra* ch. 3 Part III.A.1.

<sup>573</sup> 15 U.S.C. § 78dd-1 to -3 (2013).

<sup>574</sup> Insofar as law application and enforcement is carried out abroad in specific cases, the conclusions about the territorially limited nature of the obligation may need to be revised. See *infra* Part IV.

<sup>575</sup> Eric Cavallero claims that states, specifically the United States, often coerce other states to comply with an international property regime. Eric Cavallero, *Coercion, Inequality and the International Property Regime*, 18 J. POL. PHIL. 16, 22-24 (2010). Whether or not he is right, it

extraterritorial application of laws could generate fiduciary obligations to those persons subject to the laws, who will often be citizens or other persons with strong connections to the state. Although the obligations will differ depending on the nature of the power assumed over persons abroad—because the obligations concern the use of that power—it is possible that even the more limited power assumed over those abroad may generate an obligation to protect.<sup>576</sup>

Second, although previous chapters proposed certain minimum criteria for an organization to constitute the state in given territory,<sup>577</sup> one might object that these criteria need not be met for an organization to have assumed political power in a territory. According to those minimum criteria, an organization is the state in a given territory only if (1) it has a near monopoly over the use of force against it and its officials in the territory, (2) it normally responds with force (or punishment) to breaches of the monopoly, and (3) it normally acts to eliminate the capacity of rivals to use force against it and its officials. But an account of the assumed power of political control that

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seems unlikely that the majority of states are normally in a position to coerce the rest in this way on an ongoing basis.

<sup>576</sup> See *infra* Part IV.C. One might additionally argue that, since a state exercises political control at its borders when it enforces immigration law, it must assume the political power over all those outside of its national territory as well. Cf., e.g., Arash Abizadeh, *Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice*, 35 PHIL. & PUB. AFFAIRS 318 (2007); A.J. Julius, *Nagel's Atlas*, 34 PHIL. & PUB. AFFAIRS 176 (2006); Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 PHIL. & PUB. AFFAIRS 147 (2006). But this conclusion does not follow and is not true. The state assumes political power that is limited geographically to its territory, as the state normally only uses it against those foreigners who have entered the state's territory—in the form of border control. We may say that forcible border control involves physically denying entry to certain persons while coercive border control involves make threats, presumably concerning punishment for violating the borders. Neither forcible border control nor coercive border control is normally carried out in foreign territory, House of Lords (United Kingdom), *R. v. Immigration Officer at Prague Airport* [2004] UKHL 55 (appeal taken from Eng.) (U.K.) (considering a case where the U.K. conducted immigration control in the Prague airport with the agreement of the Czech government that was racially discriminatory), and neither seeks to affect behavior primarily in a foreign territory. Both the use of force and the application of sanctions are normally exercised within the national territory, and when they are exercised abroad it is generally with the consent of a foreign state. So, while current immigration law and policy may well be wrongful, see, e.g., Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEORY 37 (2008), it does not constitute an assumption of political power outside of state borders, and so does not generate *fiduciary* obligations to those in other territories.

<sup>577</sup> See ch. 4 Part III.B.2.b.

generates a state's fiduciary obligation to protect need not be based on these criteria, since assuming political power may constitute an independent criterion for statehood and not all organizations that assume political power need be states. We might say that an organization that assumes such powers is a protostate in the territory, but perhaps must fulfill other conditions to constitute a full-fledged state in a territory. For example, an insurgent group may assume state-like powers in a territory but not constitute a state, and it is not intrinsically problematic that organizations other than full-fledged states have similar powers and obligations. There can, in principle, be overlapping fiduciary obligations including the obligation to protect. What is important is that any organization that counts as a state normally will have assumed the power of political control, which generates a fiduciary obligation to protect in its territory.<sup>578</sup>

#### IV. THE SCOPE OF THE STATE'S FIDUCIARY OBLIGATION TO PROTECT

The dissertation began with questions about the scope of the state's special obligation to protect those within its national territory: In what circumstances does the state have the same sort of obligation to protect those outside the territory that it has for those within its national territory? Are there any circumstances in which the state does not have the typical special obligation to protect those in its national territory? The search for an explanation of the special state obligation to protect was partly in pursuit of a means to answer such questions.<sup>579</sup> This final section of the chapter constitutes a

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<sup>578</sup> If this were not the case, then there could be normal states that lack a fiduciary obligation to protect, undermining a core desideratum for an account of the state obligation to protect.

<sup>579</sup> See *supra* ch. 1 Part I. These particular questions, in an analogous form, have attracted substantial attention from scholars of international human rights law, who have attempted to analyze the scope of positive state human rights obligations such as the obligation to protect. For major recent works in this area, see Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 L. & ETHICS HUM. RTS. 47 (2013); KAREN DA COSTA, *THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES* (2013); Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*,

preliminary investigation into the implications of the fiduciary theory for the scope of the state obligation to protect. It will begin by examining when the state presence in a territory constitutes an assumption of political power in that territory, looking specifically at the presence and use of military force in a foreign territory. It will go on to consider whether the assumption of political power continues to generate a fiduciary obligation to protect even when a third party limits or prevents the use of that power, considering cases of foreign control of a state's national territory. It will end by evaluating whether the state may assume political power directly over individuals rather than over territory containing individuals, which determines whether the fact that a person is a citizen might generate a state obligation to protect even when that person is located abroad.

#### *A. NATIONAL MILITARY PRESENCE IN A FOREIGN TERRITORY*

The fiduciary explanation of the state obligation to protect claims that the obligation arises when the state assumes political power in a territory, but I have not yet extensively addressed when the state's presence in a given territory is sufficient to constitute an assumption of political power. A state assumes political power when it treats the actions of individuals with respect to others as subject to its exercise of political control, and so it has a fiduciary obligation to use that political power for the purposes of individuals. Further development of when state presence constitutes an assumption of political power is necessary to apply the theory to cases where a state is present outside of its national territory. This part will consider the theory's application to one important case of state presence abroad: when a state's military is present in the territory of another state. What form, if any of military presence in a foreign state's territory, is sufficient to generate a state obligation to protect according to the fiduciary

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25 LEIDEN J. INT'L L. 857 (2012); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY 76 (2011).

theory? How much military presence is enough? Is the sufficiency of the presence to be evaluated numerically or by some other estimator of military strength? Or must we take into account the character of the military activity?<sup>580</sup>

While these questions about the application of the fiduciary arise in many foreign military actions, they have been particularly relevant in the context of foreign military activity on the territory of Iraq, both after the 2003 U.S. invasion and in the antecedent period. First, during the U.S. invasion and occupation, the United Kingdom had a permanent military presence in Iraq following the toppling of Saddam Hussein. However, as that state pointed out in litigation when denying that it had jurisdiction in Iraq sufficient to generate human rights obligations to Iraqi civilians killed by U.K. soldiers:

“The number of Coalition Forces, including United Kingdom forces, was small: in South East Iraq, an area of 96,000 square kilometres and a population of 4.6 million, there were 14,500 Coalition troops, including 8,150 United Kingdom troops. United Kingdom troops operated in Al-Basrah and Maysan provinces, which had a population of 2.76 million for 8,119 troops.”<sup>581</sup>

Second, a large number of Turkish armed forces had previously entered northern Iraq in March 1995 to conduct a month and a half-long operation against Kurdish rebels, Operation Steel.<sup>582</sup> The state during human rights litigation emphasized that the operation was “for a limited time and for a limited purpose” and so could not produce obligations like an obligation to protect the populace.<sup>583</sup>

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<sup>580</sup> These sorts of issues have reached the European Court of Human Rights, which has claimed on multiple occasions that the “obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such [effective control of an area outside that national territory] . . . .” *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. 1, ¶¶ 138-39 (2011) (“It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State’s military presence in the area”); *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. 1, ¶ 69 (2004).

<sup>581</sup> *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. 1, ¶ 112 (2011) (concerning extra-judicial executions by state forces, not the state obligation to protect).

<sup>582</sup> See *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. 1, ¶¶ 58-59 (2004).

<sup>583</sup> *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. 1, ¶ 58 (2004).

On the fiduciary account, the special state obligation to protect does not require a state to protect whenever its troops are present in a foreign territory. Instead, it looks to whether the activity of the state military abroad constitutes an assumption of political power in a given territory, as that assumption of political power triggers the obligation to protect.<sup>584</sup> For exactly this reason, the Turkish presence in Iraq, regardless of troop levels, did not place it in a fiduciary relationship with the population and did not generate an obligation to protect. The Turkish invasion was not aimed at assuming political power in any form over Northern Iraq, and does not appear to have involved such an assumption of power. No attempt was made to control the populace on whole, much less make, apply, and enforce laws.<sup>585</sup> Instead it primarily sought to combat certain rebel forces, even though Turkey was accused of committing human rights

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<sup>584</sup> Interestingly, the European Court of Human Rights seems to have found the assumption of a sort of political power to be the precise trigger for state legal obligations:

“following the removal from power of the Ba’ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq.” *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. 1, ¶ 149 (2011).

This sort of perspective seems to reject a narrow focus on the concept of effective control that the Court has applied in the past to determine whether the state incurred obligations abroad.

In earlier cases, it undertook a qualitative analysis of troop strength and presence to make the determination:

“[N]otwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. This situation is therefore in contrast to the one which obtained in northern Cyprus . . . . [T]he Court found that the respondent Government’s armed forces totalled more than 30,000 personnel (which is, admittedly, no less than the number alleged by the applicants in the instant case . . . but with the difference that the troops in northern Cyprus were present over a very much longer period of time) and were stationed throughout the whole of the territory of northern Cyprus. Moreover, that area was constantly patrolled and had check points on all main lines of communication between the northern and southern parts of the island.” *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. 1, ¶ 75 (2004).

But such an approach to the U.K. in Iraq would produce the intuitively wrong result, that the troop strength was too limited to generate general obligations. In contrast, looking at the power the troops assumed, as suggested by the fiduciary account, produces a more plausible analysis.

<sup>585</sup> HUM. RTS. WATCH, WEAPONS TRANSFERS AND VIOLATIONS OF THE LAWS OF WAR IN TURKEY (1995), *available at* <http://www.hrw.org/reports/1995/Turkey.htm>; U.S. DEP’T OF STATE, BUREAU OF EUR. AFFAIRS, REPORT ON ALLEGATIONS OF HUMAN RIGHTS ABUSES BY THE TURKISH MILITARY (1995), *available at* <http://dosfan.lib.uic.edu/ERC/bureaus/eur/releases/950601TurkeyCyprus.html>.



violations and war crimes in its military efforts against rebels.<sup>586</sup> In contrast, the U.K. presence may have been sufficient to incur an obligation to protect exactly because the U.K. was present in Iraq to exercise political control in the territory, even if it did so intermittently and had limited efficacy.

This analysis follows directly from the moral underpinnings of state fiduciary obligations. Unless the troops present in a foreign territory are attempting to control the local population, they do not *generally* affect the right of independence of those persons present in the territory. And even when if a state constrains their independence as a side effect, a state need not treat the purposes of the individuals in the territory as subject to its decisions in a general domain and without justification. The domain in which Turkey, for example, assumed power (treated people as subject to its decisions) was not general but limited to certain morally impermissible actions of particular persons, militants. The right to independence need not be relevant for most state actions if the troops present abroad do not actually treat the people in the territory as subject to their decision, because they would not infringe *in general* the right to independence.

Now, it is certainly possible that the troops present in a foreign territory may, in individual cases, infringe or violate the right to independence or other rights. Soldiers may commit acts that violate the rights of the civilian population, such as by committing attacks against them. They may try, as in the case of Turkey, to capture or kill the alleged terrorists present in the foreign territory, which may either permissibly infringe or wrongfully violate their rights, depending on the exact circumstances. And the incursion into foreign territory may violate rights of the political community as a whole to territorial integrity. But the fact of an incursion does not entail the sort of general

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<sup>586</sup> HUM. RTS. WATCH, WEAPONS TRANSFERS AND VIOLATIONS OF THE LAWS OF WAR IN TURKEY (1995), *available at* <http://www.hrw.org/reports/1995/Turkey.htm>; U.S. DEP'T OF STATE, BUREAU OF EUR. AFFAIRS, REPORT ON ALLEGATIONS OF HUMAN RIGHTS ABUSES BY THE TURKISH MILITARY (1995), *available at* <http://dosfan.lib.uic.edu/ERC/bureaus/eur/releases/950601TurkeyCyprus.html>. Of course, it might be argued that Turkey treated the rebel forces as subject to its exercise of political control.

infringement of the right of independence that would generate a fiduciary obligation to protect.

The fiduciary account also takes issue with the following argument offered by the U.K., at least if we assume that the argument applies to moral, and not just legal, obligations:

“As an Occupying Power the United Kingdom did not have sovereignty over Iraq and was not entitled to treat the area under its occupation as its own territory or as a colony subject to its complete power and authority.”<sup>587</sup>

The U.K. in this argument used the modern aversion to colonialism to defend its actions in Iraq, by claiming it could not possibly have had moral obligations in Iraq because that would have been to displace Iraqi sovereignty. The state argues that, because it was not morally permitted to exercise political control, it could have no obligations with respect to its activities in Iraq. The fundamental problem with the argument is that the U.K. had already assumed political power, even if it was wrongful to do so, for exactly the reasons it sets out. It cannot use the apparent illegitimacy of that assumption of power to absolve it of further moral obligations because, on the fiduciary account, the obligation to protect arises from the assumption of power, whether permissibly or not. Once the U.K. assumed political power, treating the actions of those in the territory as subject to its decision, the right of independence in setting purposes constrained how the U.K. was obligated to use that power. Its decisions had to be guided by the purposes of those in the territory, not by its independent preferences.

Actual military presence in a territory is not the only way in which a state may have a form of control over a foreign territory. What would the fiduciary theory say about a case of pseudo-military non-occupation, such as when a state has limited or no

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<sup>587</sup> *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. 1, ¶ 114 (2011). *See also* *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. 1, ¶ 57 (2004). (“Iraq was an independent and sovereign State which exercised effective jurisdiction over its national territory. It was neither a member of the Council of Europe nor a signatory to the Convention. Accordingly, the acts imputed to Turkey could not fall under the Convention protection system and/or within the jurisdiction of a Contracting State.”).

military presence in a territory, ostensibly disclaims any political power over the territory, but nonetheless has complete control over entrance and exit? Would the state have a special obligation to protect within the territory or would the lack of troop presence and claims of political power relieve it of this sort of obligation? Situations of this sort, albeit with many more complicating details, might include the so-called Bantu homelands in South Africa prior to the end of apartheid or the Gaza strip following Israel's policy of disengagement. Such situations have "been likened to a large open-air prison in which the inmates control the interior while the guards control the perimeter,"<sup>588</sup> although this description might understate the state's true involvement.<sup>589</sup> But what are the moral consequences of such circumstances for the state's moral obligations to protect? Does the relationship between the state and the controlled territory generate a fiduciary obligation to protect individuals in that territory from violence?

States that implement such a policy of controlling a territory from without might plausibly be thought to violate their moral obligations not to cause harm, and have an obligation to protect as a result. The causal protection principle, considered in Chapter 3, entails that a state has an obligation to protect as a second best solution when it is impossible not to cause a given harm or perhaps when the action that causes the harm

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<sup>588</sup> Cf. Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, ¶ 10, delivered to the Human Rights Council, U.N. Doc. A/HRC/23/21 (Sept. 16, 2013) (prepared by Richard Falk). The Gaza strip was distinct from a prison in at least one potentially morally relevant sense: for the most part Israel did not place people in the Gaza strip, but instead simply isolated the people who were already there. For this reason, Israel did not subject the inhabitants of the Gaza strip to danger in exactly the same way a state does when it puts a person in a prison where she is defenseless and subject to violence.

<sup>589</sup> For example, in Gaza, Israel continued to have substantial control over basic utilities, including water and electricity, see, e.g., Legal Opinion, Avi Bell, *Israel May Stop Supplying Water and Electricity to the Gaza Strip* (July 24, 2014) (on file with author); Letter from Orna Ben-Naftali *et al*, Re: Legal Opinion Concerning Supply of Electricity and Water to the Gaza Strip, to Members of the Foreign Affairs and Defense Committee, The Knesset (July 20, 2014) (on file with author), as well as the population registry, HUM. RTS. WATCH, "FORGET ABOUT HIM, HE'S NOT HERE": ISRAEL'S CONTROL OF PALESTINIAN RESIDENCY IN THE WEST BANK AND GAZA 2-5 (2012).

is justified in general but not with respect to that harm.<sup>590</sup> The control of entrance and exit to a territory can have the result of massive economic deprivation, lack of infrastructure, and lack of access to adequate healthcare.<sup>591</sup> Such situations need not be simple matters of natural misfortune nor instances of regrettable poverty with no single dominant cause. Instead, they can be a direct consequence of a state's policy of controlling access to the territory, of admitting only a small portion of the resources needed, and of limiting potential exports to reach international markets, and the like.<sup>592</sup> For these reasons, one might conclude that the state has an obligation to protect against the harms occasioned by its policies, and more generally to change the policies that were causing such harms.<sup>593</sup>

Even if such an obligation arises from the causal protection principle, it does not arise as a fiduciary obligation according to the fiduciary account. Despite the grave moral wrongs that such a policy appeared to inflict, a failure of the fiduciary obligation to protect against violence is not one of those wrongs because the state has no fiduciary obligation to protect. The state does not hold political power within such territories because it does not treat the individuals in the territory as subject to its use of political power. While the state does control entry and exit to the territory, likely itself a morally impermissible action, this does not entail that the state generally treats those in the

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<sup>590</sup> Cf. *supra* ch. 3 Part II.

<sup>591</sup> See, e.g., Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, ¶ 8, delivered to the Human Rights Council, U.N. Doc. A/HRC/25/67 (Jan. 13, 2014) (prepared by Richard Falk) (“The present situation is dire, as massive infrastructural failures cause daily hardship for the population, who are also at risk of epidemics. At the time of writing, with insufficient quantities of fuel reaching Gaza, electricity is available only for short periods, making it impossible for hospitals to provide proper treatment for seriously ill patients suffering from cancer and kidney ailments.”).

<sup>592</sup> See, e.g., Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, ¶ 4, delivered to the Human Rights Council, U.N. Doc. A/HRC/10/20 (Feb. 11, 2009) (prepared by Richard Falk) (“By imposing a blockade, in effect since the summer of 2007, it has profoundly affected the life and well-being of every single person living in Gaza.”).

<sup>593</sup> See generally *supra* ch. 3.

territory as subject to its law-making, application, and enforcement. Insofar as the state prevents people from protecting themselves against violence, such as by limiting exit, it may generate a state obligation to protect instead, as required by the causal protection principle.<sup>594</sup> But the causal protection principle does not generate an obligation with the same structure as a fiduciary obligation. Instead of requiring the state to take all reasonable measures to protect, the causal protection principle simply requires it to take those measures necessary to eliminate its causal contribution to the harm.<sup>595</sup> None of this is to deny that a state may commit great moral wrongs when it treats a territory in such a manner; it is only to deny that the moral wrong consists in the violation of a fiduciary obligation resulting from treating individuals as subject to state *political* power.

The conclusion would not change even if the external state continued to involve itself in the territory in certain limited ways, such as through control over basic utilities, like water and electricity, the population registry—including official legal recognition of births, marriages, and deaths—, or the issuance of official documents. Control over basic services does not in itself indicate the assumption of political power over those who receive the services, as the control need not involve the making, application, and enforcement of certain relationships among private persons. Of course, control over basic services can easily be abused, even to oppress the recipients of those services, but absent the use of, or the intention to use, the basic services to exercise political control, the state does not treat those in the territory as subject to its decision. The control over the population registry and official documents is a more complex matter. It does seem to involve a form of political power because, minimally, it involves making and applying laws concerning civil status. This assumed political power might generate fiduciary

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<sup>594</sup> See *supra* ch. 3 Part IV.

<sup>595</sup> See *supra* ch. 3 Part II.

obligations for its use, insofar as it treats the population as subject to state decision in some domain.<sup>596</sup> However, the state does not assume a general political power to determine the relations among persons in general, so the power assumed does not seem to cover acts of violence. Additionally, the political power need not be general in another sense: it need not involve any aspect of coercive enforcement in the territory, in part because law concerning civil status is not the sort of law subject to, for example, sanctions,<sup>597</sup> and in part because it is perfectly possible to enforce any legal effects of the civil registry and identification documents only when people leave the territory.

#### *B. FOREIGN MILITARY PRESENCE IN THE NATIONAL TERRITORY*

According to the fiduciary account of the state obligation to protect, the state *normally* has an obligation to protect in its entire national territory. Establishing and maintaining national borders normally implies that those within the borders are potentially subject to the state's exercise of political control. But this claim does not take into account exceptional circumstances in which a third party effectively limits or prevents the state from actually using the assumed political power in its national territory. Because the generation of fiduciary obligations depends only on the assumption of political power, it is possible in principle for more than one state to assume power over the same territory and to incur fiduciary obligations in that territory simultaneously. This part will examine the specific case in which a foreign state or an insurgency excludes the state from sections of its own national territory, with the result that the state is unable to use its political power to protect in the normal manner. Does the state continue to have a special obligation to protect those within the territory? The European Court of Human Rights considered an analogous question in particularly

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<sup>596</sup> That it does seem obvious in the case of marriage registration, albeit less so in the case of birth and death registration.

<sup>597</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 27-42 (2d ed., 1994).

stark form in *Ilașcu v. Moldova and Russia*.<sup>598</sup> That case considered whether Moldova had an obligation to protect those persons in Transdniestria from the actions of the Russia-backed (or Russian puppet) government that has completely excluded the Moldovan state from part of its claimed territory since 1990.<sup>599</sup> Does Moldova continue to have a fiduciary obligation to protect individuals in Transdniestria, even if the obligation's requirements are modified or partly excused?<sup>600</sup>

Prior to the application of the fiduciary theory, the relevance of the facts in Transdniestria to the obligation to protect is unclear. On the one hand, the fact that Transdniestria is legally part of Moldova, according to Moldovan law and international law and opinion, apparently supports an obligation to protect because a state normally has an obligation to protect in its entire national territory. But our intuition that the state has an obligation to protect in its entire territory applies primarily in ordinary circumstances where the state is not forcibly excluded from a part of its national territory. On the other hand, one might think that the exclusion of Moldova from the territory, and the consequent difficulty in protecting should be decisive against the obligation to protect—the territory was forcibly and possibly wrongfully taken from Moldova—even though Moldova continues to claim the territory. But the difficulty or impossibility of protecting may instead simply entail that the Moldovan obligation to protect in the territory is modified, not that the Moldova has no obligation at all. Moldova may simply have to do what it can in the circumstances, although not necessarily what states typically have to do to protect those persons in their territories.

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<sup>598</sup> *Ilașcu v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R. 1, ¶¶ 342-43 (2004).

<sup>599</sup> *Id.* ¶¶ 29-32.

<sup>600</sup> The question is interesting because a plausible requirement of the obligation under the circumstances, if it exists at all, is for the state to reclaim the capacity to protect those in the breakaway region or otherwise ensure their security. *Cf. id.* ¶¶ 339-40 (“Moldova’s positive obligations relate both to the measures needed to re-establish its control over Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants’ rights, including attempts to secure their release.”).

The fiduciary account of the state obligation to protect helps resolve the moral significance of these facts. On a preliminary application of the account, the Moldovan state continues to assume political power over those persons in Transdniestria, so it continues to have an obligation to protect them because it remains their fiduciary. These facts are attested by its continued claims to the Transdniestria territory, attempts to reestablish control over the territory, prosecution of Transdniestrian officials, and, more generally, assertions of sovereignty over the territory.<sup>601</sup> Of course, what the obligation requires would be different than in a territory from which the Moldovan state is not excluded because the manner in which the Moldovan state may reasonably advance the individual purpose of obtaining security is different. It is neither capable of intervening directly to stop acts of violence in the territory nor of implementing systematic measures of protection. But, as the European Court observes, it is capable of endeavoring, “with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of . . . rights and freedoms . . . .”<sup>602</sup>

One might object that mere verbal claims of political power over a territory are not enough to incur fiduciary obligations to those in the territory. Without more, the assumption of political power is a mere wish that does not in fact trigger the right of independence of those in the territory. But why not? The Moldovan state is claiming and acting as if it holds political power over that population, even if it cannot exercise that political power in the normal way. These facts suggest that Moldova asserts political power over Transdniestria and so it should have an obligation to protect in that region as a result. Additionally, Moldova’s obligation to protect in the territory need not exclude such an obligation on the part of Transdniestria, as it is possible for more than

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<sup>601</sup> *Id.* ¶¶ 342-43.

<sup>602</sup> *Id.* ¶ 333.



one state (or pseudo-state) to assert political power in a territory. More important than conclusively establishing whether or not Moldova has a special obligation to protect those in Transdnistria is the fact that the fiduciary account reduces the debate to the question of whether or not Moldova's statements and actions with respect to Transdnistria are sufficient to constitute the assumption of political power. The fiduciary theory provides resources for addressing in a principled fashion whether or not a state has a special obligation to protect those inhabitants of a territory that it claims but from which it is forcibly excluded.

### *C. CITIZEN PRESENCE IN A FOREIGN TERRITORY*

The fiduciary account principally establishes that the state has a special obligation to protect on the basis of the political power it assumes over a territory and, only incidentally, over persons. But the dissertation has not so far considered whether a state might assume political power, or the equivalent, over particular individuals in such a way that it might have a fiduciary obligation to protect on that basis. This part will consider the role citizenship plays in establishing a special state obligation to protect for persons located outside their state's territory.<sup>603</sup> Why would citizenship make a person more eligible for protection than any other person not located in the state's territory? Are the state's fiduciary obligations to protect such persons different from those that it normally owes to persons in its territory?

States often act to protect their citizens even when they are located abroad when they face severe risks to their security. However, one might doubt whether citizenship by itself requires such actions:

“Taken as a value in and of itself, citizenship stands in manifest opposition to the principle of universality. When it comes to protecting an individual . . . , why

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<sup>603</sup> A similar issue not addressed here concerns corporations established under the law of the state. For a legal analysis of this issue under international law, see generally Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?*, 117 J. BUS. ETHICS 493 (2013).

should a formal tie between the individual and the state make him worthy of protection, and not his inherent human dignity? If, moreover, citizenship is not the determining consideration for the protection of individual rights when a state acts *within* its borders, why should it matter when a state acts *outside* its borders?”<sup>604</sup>

A citizen may well be located outside those territories in which a state assumes political power, so, if the state has an obligation to protect the citizen, it would have to be on a basis other than the state’s relationship to its territory. Nonetheless, the fiduciary account suggests that certain states may continue to be the fiduciary of their citizens even when those citizens are abroad, for much the same reasons that they are when the citizens are in the national territory. In both cases, many states assume power over their citizens, and perhaps over other people with strong connections to the state like residents (‘citizens’ for short in this part).

To begin, the fiduciary account of the state’s special obligation to protect is compatible with the view that “inherent human dignity” generates an obligation to protect, even if it claims that there are additional fiduciary obligations owed to citizens or others with strong connections to the state. In effect, the state’s general duty of justice considered in Chapter 2 is exactly the duty to protect that arises from inherent human dignity.<sup>605</sup> But the sort of duty to protect that arises from inherent human dignity, even if potentially quite demanding for the duty-holder, does and cannot require that a given state protect every person against every serious risk. There are too many people who need protection in the world from too many risks and too little state to go around. Instead, a state must simply provide enough protection or do its fair share, perhaps distributing those efforts in some sort of equal or efficient manner.<sup>606</sup> In contrast, if the state has a fiduciary obligation to protect on the basis of citizenship, it will have to protect a citizen whenever it is reasonable to do so. The state might be

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<sup>604</sup> MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY* 76 (2011).

<sup>605</sup> *See supra* ch. 2.

<sup>606</sup> *See generally id.*

subject to both the general duty to all persons and the special fiduciary obligation to citizens at the same time.

But this leaves the central question: why, on the fiduciary account, would citizenship make a person more worthy of protection than another person located abroad? On the fiduciary account, the state has special obligations to protect those persons (citizen or not) located in the state's national territory because the state assumes political power over them. But some states assume similar power over their citizens even when they are abroad, so, on the fiduciary account, those states would have obligations to use that power as well. For example, the United States regulates some citizen conduct outside of its territory,<sup>607</sup> including through laws on taxation<sup>608</sup> and foreign corrupt practices.<sup>609</sup> It also acts to protect the interests of citizens abroad against the actions of foreign states and persons, employing methods and resources provided by international law.<sup>610</sup> These actions entail that the United States treats the relationships between its citizens abroad and foreign states and persons as subject to its decision in a limited domain. The domain clearly is not as expansive as, and the manner of subjecting citizens to its decision is different than, when they are located in the territory of the United States itself. But, nonetheless, the United States continues assert power over its citizens abroad, and so remains their fiduciary.

Because the power asserted over citizens abroad is different than that asserted over persons in a state's territory, its protective obligations potentially are different. As

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<sup>607</sup> See generally Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11 (1988).

<sup>608</sup> I.R.S. Publication 54 (Dec. 3, 2013).

<sup>609</sup> 15 U.S.C. §§ 78dd-1 to 78dd-3.

<sup>610</sup> For example, international law permits a state to intervene on behalf of its citizens abroad to demand that a foreign state fulfill certain minimum standards of treatment. See, e.g., Draft Articles on Diplomatic Protection, in Int'l Law Comm'n, *Report of the International Law Commission, Fifty-eighth Session*, U.N. Doc. A/61/10, at ¶ 50 (2006). A state also has the right to communicate with its citizens abroad and to receive notice from them if they have been arrested, imprisoned or otherwise detained, or face trial. Vienna Convention on Consular Relations art. 36, April 24, 1963. See also *Case Concerning Avena (Mex. v. U.S.)*, 2004 I.C.J. 12 (March 31); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

in the national context, the state will have the obligation to use the asserted power reasonably to pursue the subjective purposes of those subject to the power. Take a concrete example. Suppose a U.S. citizen abroad is at risk of an attack from an angry mob and informs the State Department.<sup>611</sup> The U.S. government may not intervene with force in such circumstances pursuant to international law (probably),<sup>612</sup> and in fact does not typically treat the relations between its citizens abroad and foreigners as subject to coercive enforcement abroad, perhaps for this reason. However, the foreign state in whose territory the citizen is located will have moral and international legal obligations to protect the citizen abroad. The U.S. can and does include in its assumed power over its citizens abroad the possibility of requesting and insisting on protection from the foreign state.<sup>613</sup> In light of these facts about how the U.S. treats its citizens abroad, the U.S. has a fiduciary obligation to request and insist on this protection, because this action reasonably promotes the citizen's purposes in accordance with the assumed power.

From this analysis under the fiduciary account, we can readily see why citizenship (and perhaps other relationships to a state) is relevant to the state's special obligation to protect abroad but not at home. In its national territory, many states do not substantially differentiate between citizens and non-citizens in their asserted political power and its use. And where there are differences, they do not undermine the fact that the state treats the actions of citizen and non-citizen alike as subject to its decision via the making, application, and enforcement of law and rights. Abroad, states

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<sup>611</sup> For broadly similar cases in the context of the Iranian revolution, see, for example, *Riahi v. Iran*, Case No. 485, Award No. 600-485-1, 37 Iran-U.S. Cl. Trib. Rep. 11 (2003); *Daley v. Iran*, Case No. 10514, Award No. 360-10514-1, 18 Iran-U.S. Cl. Trib. Rep. 232 (1988); *Yeager v. Iran*, Case No. 10199, Award No. 324-10199-1, 17 Iran-U.S. Cl. Trib. Rep. 92 (1987); *Pereira v. Iran*, Case No. 1, Award No. 116-1-3, 5 Iran-U.S. Cl. Trib. Rep. 198 (1984).

<sup>612</sup> U.N. Charter art. 2, para. 4.

<sup>613</sup> See, e.g., *Coleman v. United Mexican States*, 4 R.I.A.A. 364, 366-67 (Gen. Claims Comm'n Mex.-U.S. 1928); *Solis v. Mexico*, 4 R.I.A.A. 358, 362-63 (Gen. Claims Comm'n Mex.-U.S. 1928); *Kennedy v. Mexico*, 4 R.I.A.A. 194, ¶ 7 (Gen. Claims Comm'n Mex.-U.S. 1927); *Home Insurance Co. v. Mexico*, 4 R.I.A.A. 48, ¶ 17 (Gen. Claims Comm'n Mex.-U.S. 1926).

typically assert power only over citizens and others like residents with close relationships to the state and only in the form of making or applying of law and rights. For this reason, citizenship and other close connections to the state can be crucial for determining to whom a state owes a fiduciary obligation to protect abroad.<sup>614</sup>

## V. CONCLUSION

By taking seriously the idea that the state is a fiduciary, it is possible to construct a reasonable explanation of the state's special obligation to protect those persons in its national territory against violence. The explanation can reproduce certain central features of the intuitive special obligation, including the fact that it reaches nearly all persons in the state's territory and that it requires a demanding set of systematic and operational measures of protection. However, this explanation allows that the state may have protective obligations for other reasons. A state may well have to protect to avoid contributing to the harm from an act of violence or as part of an intrinsic duty to promote justice in the world. But these bases for obligations to protect have rather different properties, especially in that they do not typically explain the universality of the protection obligation that the state owes to those in its territory. Instead, they tend to depend on concrete facts about whom the state's actions might harm or where the state's protection efforts would be most needed or efficient. Only by complementing these explanations of state protection obligations with the fiduciary account can we fully understand the moral underpinnings of the state obligation to protect.

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<sup>614</sup> Interestingly, on this analysis, it appears that the state may also have obligations to protect foreigners against certain actions of its citizens. What this obligation requires will depend on how a person would use the state's asserted power to promote his or her purposes, which in turn will depend on what the foreign state is doing or failing to do in the regulation of the conduct of foreigners.

## CHAPTER 7: FUTURE DIRECTIONS

### I. INTRODUCTION

This dissertation has defended a fiduciary account of the state's special obligation to protect against several alternative theories. While it developed some concrete consequences of the fiduciary account at the end of Chapter 6, it did so to show that the account has the potential to resolve specific problems in applying the state's special obligation to particular circumstances—at least with respect to the obligation's scope. However, despite the attention to questions of scope, a full account of the state's special obligation to protect needs to go beyond theoretical underpinnings and test applications and say more about the detailed structure of the obligation. Practical concerns about law and policy motivated the search for the best understanding of the foundations of the state's special obligation to protect, and only an account that clarifies the obligation's central areas of ambiguity will be fully responsive to this need.

This concluding chapter of the dissertation will explain some of the principal issues that remain to be developed as part of a full fiduciary account of the state's special obligation to protect. It will not consider further questions of scope, although a more comprehensive discussion would be valuable in order to identify clearly when political power is sufficient to generate an obligation to protect and whether different elements of political power—the making, application, and enforcement of law—generate different obligations. Instead this chapter will begin by presenting several important issues regarding the content of the obligation under normal conditions, including the range of required protection measures, the role of state discretion, and the sufficiency of systematic protection measures. It will then pose new questions concerning whether and when the state is relieved of its obligation to protect due to individual actions, most importantly in cases of participation in dangerous criminal activities. Finally, it will

consider the issue of how the special state obligation to protect interacts—especially in cases of conflicting requirements—with other protection obligations that require the state to protect abroad.

## II. THE NORMAL REQUIREMENTS OF THE OBLIGATION

Perhaps the most important and difficult outstanding issue concerns the normal requirements that the obligation imposes on the state. The introduction argued that we intuitively accept that the special state obligation to protect requires both operational and systematic measures of protection, where operational measures respond to specific risks of violence known on the basis of direct evidence—threats and the like—and systematic measures seek to reduce background risks to an acceptable level. However, contemporary research on violence reduction and prevention has identified a broad, if not bewildering array of possibilities for addressing problems of violence in a society. In part, the expansion is a result of the recent shift from a pure law enforcement and criminal justice approach to a public health approach, which is open to a broader range of measures that address multiple causal factors for violence, including individual, familial, community, and social.<sup>615</sup> The new public health research has also gone a long way toward developing more comprehensive categorization schemes for possible protection measures. This newly broadened range of possibilities raises important questions about what measures a state is required to implement.

### A. *THE NEW ARRAY OF POSSIBLE PROTECTION MEASURES*

Contemporary taxonomies help indicate the extensive range of measures that a state might take to protect against private acts of violence. First, it is possible to categorize protection measures based on their relationships to concrete risks of violence. A *universal protection measure* attempts to reduce violence without responding to

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<sup>615</sup> See *infra* notes 616-628 and surrounding text.

differential risks of violence.<sup>616</sup> Traditional criminal justice could fall into this category, as it establishes a general deterrent for acts of violence that applies to all persons without regard to differing risks of committing violence. A *selected protection measure* attempts to reduce violence on the basis of particular known risks.<sup>617</sup> Beat policing aimed at emphasizing known violence hotspots would be an example because it takes into account different risks of violence in different geographical areas. Within selected protection measures, we can distinguish between those responding to *statistical* risks of violence and those responding to *specific* risks of violence.<sup>618</sup> The difference between the two is whether we have merely statistical evidence that a future act of violence may occur—high rates of violence in a neighborhood, for example—or whether we have evidence causally connected in an appropriate way with the future act of violence—a threat against the victim, for example. Finally, an *indicated protection measure* is one that responds to an ongoing sequence of acts of violence,<sup>619</sup> such as might be the case with many forms of domestic violence.

Second, an analytically independent categorization might look to the focus of the protection measure, whether on the victim, offender, or situation. *Victim-oriented protection* attempts to diminish “the vulnerability of the potential victim,”<sup>620</sup> which may, for example, involve providing police protection for a likely victim of violence. *Offender-oriented protection* seeks to reduce “propensities to offend,”<sup>621</sup> such as by deterring the would-be offender with potential sanctions or by incapacitating the offender through incarceration. Situational protection looks to strengthen “the levels of guardianship in

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<sup>616</sup> WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 15 (Etienne G. Krug *et al.* eds., 2002).

<sup>617</sup> *Id.*

<sup>618</sup> *Cf.* JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK 230-31 (1986); Judith Jarvis Thomson, *Liability and Individualized Evidence*, 49 LAW & CONTEMP. PROB. 199, 203 (1986).

<sup>619</sup> WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 15 (Etienne G. Krug *et al.* eds., 2002).

<sup>620</sup> Jan J.M. van Dijk & Jaap de Waard, *A Two-Dimensional Typology of Crime Prevention Projects; With a Bibliography*, 23 CRIM. JUST. ABSTRACTS 483, 485 (1991).

<sup>621</sup> *Id.*



the environment,”<sup>622</sup> such as by installing better lighting in a dangerous location. These categories are obviously not mutually exclusive, but serve to indicate the possible emphases of different protection measures. For example, installing lighting in a dangerous location might aim to reduce the risk of violence in that location by dissuading potential offenders.

Beyond the abstract possibilities suggested by these categorizations, contemporary research on violence prevention has gone beyond the traditional law enforcement and criminal justice paradigm to adopt a public health perspective that admits a much wider array of violence reduction measures.<sup>623</sup> Most of these measures constitute selected protection measures that respond to statistically known risks of violence, as they have a narrower focus than universal interventions like much criminal justice. Current proposals provide a range of examples illustrating the possibility for protection measures that go well beyond the traditional systematic and operational measures:

- parenting, parent-child, social support, and media programs to reduce child maltreatment and aggressive behavior in children <sup>624</sup>
- life skills programs—including preschool enrichment, school development, academic enrichment, and vocational training—to reduce susceptibility to violence among adolescents<sup>625</sup>
- measures to reduce effects of alcohol on violence, such as by increasing cost, reducing availability, providing attention to problem drinkers, and improving drinking environments<sup>626</sup>

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<sup>622</sup> *Id.*

<sup>623</sup> INTER-AM. DEV. BANK, CITIZEN SECURITY: CONCEPTUAL FRAMEWORK AND EMPIRICAL EVIDENCE 6 (2012) (citing Caroline O.N. Moser & Ailsa Winton, *Violence in the Central American Region: Towards an Integrated Framework for Violence Reduction* (Overseas Dev. Inst., Working Paper No. 171, 2002)).

<sup>624</sup> WORLD HEALTH ORG., VIOLENCE PREVENTION: THE EVIDENCE 14-20 (2010).

<sup>625</sup> *Id.* at 29-39.

- reduced access to instruments of violence—such as knives and guns<sup>627</sup>
- changes to gender norms to reduce violence against women, including through the media or educational programs at the school and community levels<sup>628</sup>

### *B. THE RANGE OF REQUIRED MEASURES OF PROTECTION*

The general question raised by this expanded view of potential protection measures is: which of these measures might the special obligation to protect require a state to implement on at least some occasions? First, is there ever an obligation to go beyond traditional measures of law enforcement and criminal justice—whether systematic or operational in character—or may a state normally discharge its special obligation to protect simply by implementing fully adequate versions of these measures? Answering this question is particularly difficult because we are accustomed to these traditional measures—and they are perhaps the most obvious ways to stop violence—, so they form a default baseline for our expectations about what a state must do to protect. However, in light of the fact that there are additional possible measures that might reasonably be thought to protect against violence, it is an open question as to which, if any, of these measures are also required in some circumstances. The question is interesting theoretically because many of the new possible measures of protection, such as measures to educate, do not connect directly to the enforcement of law and legal rights, the emphasis of the fiduciary account of the state obligation to protect.<sup>629</sup>

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<sup>626</sup> *Id.* at 47-56.

<sup>627</sup> *Id.* at 63-70.

<sup>628</sup> *Id.* at 81-90.

<sup>629</sup> In fact, some possible measures may address distal causes of violence that are only remotely connected to concrete acts of violence—for example, economic inequality. Achim Wolf *et al.*, *Violence as a Public Health Problem: An Ecological Study of 169 Countries*, 104 *SOC. SCI. & MED.* 220 (2014); James A. Mercy, *Violence and Health: The United States in a Global Perspective*, 92 *AM. J. PUB. HEALTH* 256 (2003); Pablo Fajnzylber *et al.*, *Inequality and Violent Crime*, 45 *J. L. & ECON.* 1 (2002); Pablo Fajnzylber *et al.*, *What Causes Violent Crime?*, 46 *EUR. ECON. REV.* 1323 (2002). *But see* Eric Neumayer, *Is Inequality Really a Major Cause of Violent Crime?: Evidence from a Cross-national Panel of Robbery and Violent Theft Rates*, 42 *J. PEACE RES.* 101 (2005).

Second, does the state ever have an obligation to go beyond operational protection measures that respond to specific risks of violence and systematic measures not based on any particular risk at all? The answer to this question is independent of the answer to the prior question. A state could implement non-traditional measures of protection that are merely operational or systematic in nature and it could use traditional measures of protection in ways that are neither operational nor systematic. Such non-traditional measures of protection would include a general education program on alternatives to violence as a means to resolve interpersonal problems, a systematic measure, or a therapeutic intervention for a student who threatens another, an operational measure. Policing based on hotspots, since it responds to specific statistical risks, is a traditional law enforcement measure of protection that is neither operational nor systematic. So the issue is whether, and when, the state is required to implement measures of protection based on specific statistical risks—hotspots for violence, at risk youths, and the like—even when there is no direct causal evidence that a particular act of violence will occur. The issue of whether and when such measures are required is difficult in part because the measures carry with them substantial risk of negative consequences, including abuses and stigmatization, for the very people these measures are designed to protect.

### *C. THE ROLE OF STATE DISCRETION*

Once acknowledged that there are many more possibilities for protection than is traditionally recognized, it is nearly inconceivable that the state could be required to take all possible measures simultaneously for all possible victims. There are simply too many possible measures, too many possible victims, and too many potential collisions or incompatibilities between different ways of protecting. This fact raises a question as to whether the state obligation to protect permits the state any space for the exercise of

discretion in deciding how to provide protection.<sup>630</sup> A state has discretion if no moral requirement demands a particular course of action when it is faced with a choice between two or more possible courses of action. For example, if the state could choose between two different educational interventions to reduce domestic violence and it is not morally required to choose one or the other, it has discretion. A state would not have discretion if subject to a strict moral requirement to choose, for example, the more reasonable of the two options, but would if the moral requirement were only to choose a reasonable intervention and both options were reasonable.

Given the practical circumstances in which a state protects, it could have various forms of discretion when making a choice between two or more options that are otherwise compatible with the state obligation to protect. First, the state could have discretion in its decision as to the particular mix of methods it will use to provide protection. For example, it might have discretion to take a hardline criminal justice approach to protection, or instead to take a public health approach, relying primarily on educational programs or inequality reduction, for example. Second, it could have discretion in the deployment of protection resources. For example, at least for measures that respond to statistical risks like violence hotspots or that do not respond to any differential risk at all, the state might have discretion to focus on protecting certain people or in certain areas. Third, it might have discretion regarding how to balance the competing views of different persons in the territory as to the best mix of methods and focus for the protection efforts. For example, the state might be able to decide, free from moral requirement, whether to implement the majority view or the view of those most directly affected by the measures.

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<sup>630</sup> Philip Heymann emphasizes the inevitability of discretion of a sort in the policing context. *See e.g.*, Philip B. Heymann, *The New Policing*, 28 *FORDHAM URB. L.J.* 407, 442-43 (2000). However, discretion is inevitable in his sense when the police must make difficult choices as to how to use available resources, not in my sense where the relevant norms specify in principle which choice is correct.

Finally, even if a state has discretion with respect to some choices among various options, it may lack discretion with respect to the process by which it makes its decisions. In fact, the idea that the state might have genuine moral discretion in its choice among various options is most plausible if there are moral constraints on the process that the state uses to make decisions. For example, it is more acceptable to say that the state may permissibly implement either additional policing or a neighborhood watch program in an area with unusually high crime rates if the state is required to make the decision between those options after careful consideration. In this sense, the state's special obligation to protect might constrain the state's decision-making process—perhaps by requiring officials to have certain experience or skills or to exercise a degree of care or consideration—regardless of whether it leaves discretion to the state concerning the specific actions adopted. Whether the state obligation to protect imposes such procedural requirements could have substantial consequences for the morally permissible organization and execution of state functions in this area of activity.

#### *D. SUFFICIENT LEVELS OF SYSTEMATIC PROTECTION*

A central issue, amplified once we recognize the possibility of measures beyond well-functioning law enforcement and criminal justice, concerns the required *systematic* measures of protection. Unlike operational measures of protection, which respond to specific risks of violence, systematic measures of protection attempt to reduce overall levels of violence.<sup>631</sup> In effect, these measures aim to bring about an adequate level of background security for individuals, independent of the actions the state might take when it learns of specific risks of violence. Given that a state will lack knowledge of

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<sup>631</sup> I will speak of systematic measures for simplicity, which are universal measures, but the same points apply to selected measures that target statistical risks of violence. Especially with regard to selected measures that target statistical risks, there may be important questions of distribution. Although the state's special obligation to protect is individualized, in that it is owed in the same form to each individual, selected measures of protection aimed at statistical risks are inherently not aimed at any particular individual or any particular impending act of violence.

many risks to individuals, probably even with the best knowledge gathering practices, its systematic measures are of crucial importance to individuals interested in their own security, especially in states or parts of states with high levels of violence.

It remains unclear what ultimate goal systematic protection measures ought to accomplish. Jeremy Waldron comments that:

“People don’t just want to be safe if they are merely surviving, terrified, in a sealed room. They want some assurance of safety which allows them to go about their business and deal with one another while following familiar routines.”<sup>632</sup>

However, even if systematic protection measures aim at providing security in an expansive sense—including not only safety but also assurances of safety, an absence of fear, and the ability to live normal lives—, it is unclear how much systematic protection is necessary. How much safety, what level of assurance, etc., ought systematic measures of protection ultimately seek to provide? It simply is not clear, for example, what homicide rate translates into adequate safety.

And even if we can define the ultimate objective or standard for systematic measures of protection, it may remain difficult to translate it into specific requirements on the state at a particular moment in time. Take, for example, a state such as Colombia with substantial problems of violence in various forms. There may be no way to immediately or in the short term achieve security, however understood, for many of the people in such a state’s territory. This raises important questions about what systematic measures a state must implement *now* to protect. Must the measures be sufficient to make progress toward security, either in the sense of reducing violence or of providing greater assurances? Such a requirement is not obviously reasonable given that levels of security may substantially depend on factors beyond state control. If progress is

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<sup>632</sup> Jeremy J. Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 494 (2001).

required, how much progress is required? Does the required progress depend on the other demands on state resources?

### III. PERSONS EXCLUDED FROM THE SPECIAL OBLIGATION TO PROTECT

A second set of issues concerns whether individual choices may exempt the state from having to provide protection. The dissertation already considered the case of assisted suicide, where an individual requests that another aid him or her in ending her life. Normally, the state obligation to protect requires that the state protect a person from others who attempt to kill him or her. However, I briefly argued that, on the fiduciary account of the state obligation to protect, the state is not always required to protect against assisted suicide. Nonetheless, that argument does not resolve many substantial questions concerning when the state need not protect against assisted suicide, including whether the state is required to protect a mentally ill person who seeks aid in killing himself and whether the state is required to protect a mentally ill person against herself. Given that many acts of violence are in fact self-inflicted, a better understanding of these issues is important.

But persons who wish to commit suicide are not the only ones who may or may not have waived the state's obligation to protect.<sup>633</sup> From the perspective of state policy concerning violence, perhaps the most important category are persons who do not wish to be victims of violence but who have nonetheless placed themselves in harm's way. A substantial number of violent acts occur among persons, most commonly young men, who have become involved in various illegal activities, such as the drug trade. Perhaps because such people are frequently a source of violence, both the state and society seem to express relatively little concern when they become victims of violence as well. Is this lack of concern justified in the sense that the state has no obligation to protect? Do these

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<sup>633</sup> Within this category, it may be worth considering certain categories of athletes, such as those who participate in combat sports or even in sports such as American football.

individuals waive the state protection obligation by engaging in illegal or dangerous activities? Should they be treated differently from other potential victims? Does it matter whether their role in the hazardous activity involves the use of violence? Clear moral answers to these questions would be of great relevance to state policy on violence, which normally seems to ignore this group as victims.

#### IV. THE SPECIAL OBLIGATION AND OTHER INTERNATIONAL PROTECTION OBLIGATIONS

A final set of issues concerns the relationship between a state's special obligation to protect and other obligations to protect that may require protection abroad. First, we might wonder if, when, and why a state has an obligation to protect or aid in protecting in the territory of another state that itself is either unwilling or unable to protect. The idea that foreign states may have such an obligation under some circumstances is one central element in the responsibility to protect,<sup>634</sup> an idea currently debated in international law circles. This idea reconceives sovereignty not merely as a right of the state to exclude other states but as a set of responsibilities or obligations to protect against certain serious violations of international law that affect the civilian population.<sup>635</sup> When the state fails in this responsibility, the subsidiary obligation of other states is engaged and requires them to protect.<sup>636</sup> However, the moral foundations and characteristics of that subsidiary obligation have not been extensively explored. The resources developed in the current dissertation—such as the main characteristics of the major potential bases for protection obligations—might go some way toward illuminating why sovereignty involves obligations, as well as when and why other states have a subsidiary obligation to protect.

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<sup>634</sup> See, e.g., U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 ¶ 11 (2009).

<sup>635</sup> See, e.g., *id.* ¶¶ 13-27.

<sup>636</sup> See, e.g., *id.* ¶¶ 49-66.



Second, and relatedly, we might wonder what priority should be given to the various obligations to protect when it is not possible for a state to fulfill all of the protection obligations incumbent on it. Collisions between obligations could occur for different reasons, but the most obvious would be a lack of available resources to address all of the demands at a particular time. A state, for example, may have insufficient police or soldiers available both to protect those in its territory and to protect against a cross border attack by a group based in its territory. Collisions could also result from a fundamental incompatibility between state protection measures. A state may implement a policy that protects those within its territory, in fulfillment of its special obligation to protect, but that has direct and foreseeable causal consequences for persons located abroad, apparently requiring a change of policy on the basis of the causal protection principle. Drug prohibitions might constitute concrete examples. In an increasingly interconnected world, these collisions of obligations pose a moral problem of greater and greater importance.

## V. CONCLUSION

Identifying the best moral explanation of the special state obligation to protect is only the first step in developing a full account of the obligation useful for resolving concrete practical problems and for advancing legal doctrine. Completing the account will require developing more fully the resulting details of the obligation as well as explaining how the obligation relates to other state protection obligations. Addressing the issues identified in this final chapter will go a long way towards setting out a complete account of the obligation.

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