EQUALITY AND RULE

For Jessica,
In theory, with equal,
in practice, with none

EQUALITY AND RULE

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I. INTRODUCTION: A NEGATIVE OBSERVATION AND A POSITIVE CONJECTURE

Much in our interior lives and in our social structures presupposes that we, human beings, are conscious of hierarchy, of differences in rank and status. We are "conscious" of hierarchy in both senses of the word: "aware" of and "anxious" about. This consciousness appears to be rooted in our natural history. Many social animals are likewise preoccupied with "pecking order." These animals include not only literally pecking and pecked chickens, but also our closest primate relatives (de Waal 2007). And this consciousness of hierarchy, transformed by our species' special bent for symbol and self-reflection, has driven much of our non-natural history. The main chapters of the human story might be defined by the prevailing answers to the questions of who among us, if anyone, would be above, and who, if anyone, would be below. For most of the career of *homo sapiens*, we lived in hunter-gatherer bands, and then pastoralist or settled tribes, which were vigilantly egalitarian, at least among adult men (Boehm 2001, Flannery and Marcus 2014). As civilization was born, in several places and times, this was upended, with the great many being subordinated to the very few. Modernity is in large part the tale, at times inspiring, at times cautionary, of our experiments with reconciling the hierarchy of institutions with the equality of individuals.

Suppose this is all true. What question does it raise for philosophy, as opposed to social science? First, there is the analytical question of what we mean by "hierarchy." This book answers that it consists in asymmetries of power and authority, as well as disparities of what I call "consideration."

Second, there is the normative question why, if at all, we should care. Perhaps hierarchy matters only insofar it breeds other evils: an unfair division of material goods, or heightened cortisol levels for those on the bottom rung. Nevertheless, this book asks what might follow if hierarchy should matter in its own right: if hierarchy—not in all forms, but at least when not appropriately tamed or managed—should itself be something to avoid or regret.

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This book gets to these questions eventually. But it begins with a broader question: What, in the most basic and general terms, may we ask of others? At a minimum, it would seem, we may ask that others respect the boundaries of our persons. We may ask, for example, that others not subject us to gratuitous violence. Beyond that, we may ask that, where it does not burden them too much, that they make things better for us. We may ask, for example, that others help us to secure clean drinking water.

That others respect the boundaries of our persons, and make things better for us when it does not cost them too much, already is a tall order. It is an order that perhaps no society has ever filled for each of its members, or ever will. Indeed, it is already so tall an order that one might be forgiven for stopping there, and so overlooking that we also ask for something further and distinct. However, I suspect that we can't fully understand our own moral sentiments if we overlook that we ask for something further and distinct. This is that we ask that others not make us their inferiors, or anyone else's.

It is early, I know, to resort to terms of art. But some settled labels may provide steady orientation, which we will need once we plunge into the thicket of detail. So let me restate what I have just said, with a bit of regimentation. This book begins with a "negative observation" and follows with a "positive conjecture." The negative observation is that there are several "commonplace claims"—some from high theory, some from everyday talk—that can't be explained as "claims against invasion"—that the boundaries of our person be respected—or "claims to improvement"—that things be made better for us. The positive conjecture is that these commonplace claims can instead be explained as "claims against inferiority"—that we not be put beneath another.

This project would be of little interest, of course, if these allegedly "commonplace" claims were themselves peripheral or idiosyncratic. But, on the contrary, they underlie the most central and widely shared theoretical commitments of political philosophers: for instance, that the state somehow needs to be "justified" or "legitimated." (If you doubt that this is widely shared, wait until Chapter 2.) And these claims fuel some of the most powerful and least controversial protests in ordinary public discourse: for instance, that governments should not be corrupt or undemocratic, that they should follow the rule of law and treat like cases alike. Everyone within the liberal democratic

West, and often beyond, is expected to agree on at least *these* precepts—whether or not they agree, say, that "every billionaire is a policy failure."

This project would also be of little interest if "claims to improvement" and "claims against invasion" were peripheral or idiosyncratic. Little wonder that two moral ideas chosen at hazard shouldn't account for everything. However, to say that people have "claims to improvement" is to say, more or less, that society should be organized so as to situate people to live better lives, in a way that is fair to all. John Rawls's *A Theory of Justice*, for instance, puts forward one version of this very general idea (Rawls 1971). It calls for a "basic structure" that distributes "social primary goods," understood as "all-purpose means" to advance "life plans," according to the "two principles" of "justice as fairness." And to say that people have "claims against invasion" is to say, more or less, that agents—whether individual or collective, natural or artificial—should not violate "individual rights," even to make individuals' lives better. Robert Nozick's *Anarchy, State, and Utopia* puts forward one version of this idea (Nozick 1974). It forbids a more than "minimal" state, on the grounds that it would violate individual rights. In sum, the negative observation amounts to saying that, even if we help ourselves to whatever resources we like from Rawls and Nozick, we will still find ourselves at a loss to explain the commonplace claims.

This book would, finally, be of less interest if we already had a settled understanding of the content of the positive conjecture: a settled understanding of what claims against inferiority are and what they can and can't explain. To be sure, my account of claims against inferiority owes much to the discussions of "relating as equals" by "relational egalitarians," such as Elizabeth Anderson and Samuel Scheffler; to the discussions of "non-domination" by "neo-Roman republicans," such as Phillip Pettit and Quintin Skinner; and to the discussions of "independence" by scholars of Kant's political and legal philosophy, such as Arthur Ripstein. But illuminating and suggestive though these discussions are, they still leave much unsettled. Moreover, these discussions do not fully register how many and varied the phenomena are that claims against inferiority can be, and need to be, invoked to explain.

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Here is the briefest overview of the book. Part II makes the case for the negative observation: that the commonplace claims are not claims to improvement or against invasion. Among these commonplace claims are:

- claims against the state's "coercion" of those subject to it—or, at any rate, *something* about how the state relates to those subject to it—that requires the state to clear a special bar of "justification" or "legitimacy";
- claims against interference, such as fines, in choices of certain kinds, such as religion;
- claims against abuses of office;
- claims to democratic structures of decision-making, which give each person, at some appropriate level, if not at all levels, an equal say;
- claims against discrimination on the basis, say, of gender or race;
- and claims to enjoy the same liberty, opportunity, and treatment that others in one's society enjoy.

Part III pursues the positive conjecture, suggesting that these commonplace claims, just shown not to be explained as claims to improvement or against invasion, are instead explained as claims against inferiority. These are claims against standing in a "relation of inferiority" to another individual, against being set beneath them in a social hierarchy. Such relations consist, I suggest, in asymmetries in power and authority, as well as in disparities of "consideration." I hasten to add that such asymmetries or disparities are not always and everywhere objectionable. Rather, I claim, asymmetries of power and authority, and disparities of consideration constitute objectionable relations of inferiority only where they are not tamed, limited, or contextualized by what I call "tempering factors." Some of the commonplace claims, such as claims *against* corruption and unequal treatment, are claims *to* such tempering factors. That is, the objections to corruption and unequal treatment are objections to the absence of factors which, had they been present, would have tempered asymmetries of power and authority.

Part IV contrasts the positive conjecture with similar ideas, such as those of relational egalitarians, republicans, and Kantians noted earlier, as well as attempts to reduce claims against inferiority to something else.

Part V fleshes out what sort of democracy, in particular, would answer claims against inferiority. On the one hand,

what is required of formal institutions may seem deflatingly weak. I present, as a case study, the difficulty of identifying objections to gerrymandering. On the other hand, what is required of informal conditions may seem impossibly demanding.

Part VI reviews the central ideas of the book by reformulating them. What drives much of our political thought and feeling is less, as it may first appear, a concern for freedom and more a concern for equality. That is, one might view the book, in retrospect, as a kind of slow-motion, anti-libertarian judo. Press hard enough on complaints of unfreedom, and you end up in a posture not so much of defense of personal liberty as opposition to social hierarchy.

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2. "Rule Over None II: Social Equality and the Justification of Democracy," *Philosophy and Public Affairs* 42:4 (2014): 287–336.
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II. NEGATIVE OBSERVATION: CLAIMS IN SEARCH OF EXPLANATION

1 ELEMENTS

In this part, Part II, I make my case for the negative observation: that many commonplace claims are neither claims to improvement, nor claims against invasion. In this first chapter of Part II, I lay the groundwork for that case, by explaining what I take claims to improvement and claims against invasion to be.

1.1 Claims

Our moral thinking, I believe, is largely, if not wholly, organized around the concept of a person's having a "claim" on an agent. I won't try to defend this belief here. But this belief will inform just about everything else that I do try to defend. So let me begin by saying what I take claims, in general, to be.

First, claims are *held by* natural, individual persons.

Second, claims are grounded in the interests of these natural, individual persons, or, as Scanlon 1998 puts it, in the reasons that those natural, individual persons "have on their own behalf." These include, but are not necessarily exhausted by, interests in living a worthwhile life, in controlling how others use their bodies, and in being treated fairly.

Third, claims are *on* other agents, whether individual or collective, natural and artificial, to act in certain ways.[1]

Fourth, when individual *X* has a claim on agent *Y* to act in a certain way, that is a *reason of a special stringency* for *Y* to act in that way.

Finally, if *Y* does not act in that way, and so does not meet X's claim, then *X* has a *complaint* against *Y* for failing to meet the claim. *Y* thereby *wronged X*. *X* has this as a ground to *resent Y*.

This view of morality, as organized around the claims that individuals have on agents, may seem so natural as not to be worth making explicit. However, it contrasts with a view of morality as organized around the impersonal goodness of states of affairs, which agents have reasons to promote. And it contrasts with a view of morality as organized around an ideal of agency—such as coherence or proper functioning—which agents have reasons to live up to.

[1] [Estlund on "plural requirement."]

1.2 Claims to Improvement

I assume that, among the claims that an individual, Indy, has on other agents are *claims to improvement*. If benefactor, Benny, *can* improve how well Indy is situated to lead a fulfilling life, and if doing so would not ask too much of Benny, then Indy has a claim on Benny *to* improve how well Indy is situated to lead a fulfilling life.

For Indy to have a claim on Benny to improve his situation, I assume, Benny need not have any special relationship to Indy, other than simply that Benny can improve Indy's situation, without excessive cost to himself. Indy might have an improvement claim on Benny, for example, even though Benny belongs to the present generation, while Indy belongs to distant posterity.

To be sure, Indy's situation can be improved by "negative" protection, from invasion by others. Benny might help Indy guard against Altra's depredations. But Indy's situation can also be improved by "positive" goods, such as nutrition or health care. Benny might help Indy guard against natural mishaps.

Suppose Indy alleges an improvement complaint against Benny: alleges that Benny failed to meet Indy's improvement claim. Benny has two main ways to refute the allegation. First, Benny may answer that, while he could have done more to improve Indy's situation, this would have asked *too much of him*, Benny.

Second, Benny may reply that *he could not have done more*, given the constraints he faced. These constraints can be not only physical, *but also moral*. In particular, improving Indy's situation might mean failing to improve Altra's situation, in a way that trades off Altra's claims at an unfairly low rate against Indy's.[2]

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[2] "Failing to improve Altra's situation" implies that had a different choice been made, Altra would still have existed. More generally, Indy's improvement complaint might also be answered by saying that had a different choice been made, "someone would have been saved from a worse fate" (Kolodny forthcoming). Since these complications are beyond our concerns in this book, I assume that any trade offs are among people who will exist no matter what we choose.

The fact that Indy's alleged improvement complaint can be refuted by citing fairness to Altra may suggest that Indy's improvement claims are *comparative*: that Indy's claims on Benny depend on what Benny does for Altra.[3] But Indy's improvement claims are *non-comparative*. Indy's alleged complaint is not that Benny didn't do *the same* for Indy that Benny *in fact did* for Altra. It is simply that Benny could have improved Indy's situation. *This says nothing about Altra.* Benny's defense against the allegation is that he could not have improved Indy's situation, given the constraints he faced. In this case, the constraint happened to be that Benny could not have done more without unfairness to Altra. But the constraint might as well have been that Benny was simply physically incapable of doing more.

This means that, insofar as claims to improvement are concerned, *inequality*, in itself, is neither here nor there. Suppose that Benny can give Indy a "weak Pareto improvement": that is, Benny can improve Indy's situation, without forgoing any opportunity to improve anyone else's situation (and without excessive cost to himself, Benny). Then Indy has an improvement claim on Benny to improve his situation. This is so even if the weak Pareto improvement increases inequality, say, by making Indy's situation better than Altra's.

[3] [Note contrasting this usage with Feinberg 1974.]

1.3 Fair Trade-Offs

In the previous section, I said that how a benefactor, Benny, trades off Indy's improvement claims against Altra's improvement claims can be "fair" or "unfair."

I will assume that what counts as a fair trade off is, to some degree, "prioritarian." That is, in evaluating whether a trade off is fair, we give greater, but not necessarily absolute, weight to improving the situation of those worse situated. Thus, if Altra is worse off than Indy overall, then it can be fair to improve her situation by a lesser increment, even if we must thereby forgo improving the better-off Indy's situation by a greater increment.

Some might suggest an alternative, or at least a supplement. What counts as a fairer—or, at any rate, better—trade off, they might say, should be sensitive to what Indy and Altra *deserve*. If Altra is more deserving, due to her character or past actions, than Indy, then, even if Altra is no worse off overall, it can be fairer—or, at any rate, better—to improve her situation by a lesser increment, even if we must thereby forgo improving Indy's situation by a greater increment.

I will assume, however, that Indy's and Altra's improvement claims do not depend on desert. This is because I don't believe in desert, at least not of the relevant kind. (This is just an explanation, not a justification.) And it is also because it won't matter to the discussion, except in a few places, which I will note.

As I have described them, considerations of "priority" play the following role. They *triage* the claims of different people, such as Indy and Altra. This order of triage affects Benny's reasons for the different actions open to him, in part by affecting whether he would wrong anyone by performing them.

However, many moral philosophers see considerations of priority (and, for that matter, considerations of desert) as playing a different role. Considerations of priority affect whether one *state of affairs* is *impersonally better* than another. If the fact that one state of affairs is impersonally better than another affects Benny's reasons for action, it is only via a further principle to the effect that one has greater reason to bring about a better state of affairs, or that it is wrong to fail to bring about the best state of affairs one can (unless,

perhaps, one is exercising a personal prerogative or running up against a deontological constraint).

Indeed, many moral philosophers believe that a moral theory *must* rank states of affairs as impersonally better or worse in order to guide action, at least in any sane way. But I don't see why. To be sure, a sane moral theory needs to say when, because of the properties of the outcomes of the actions open to Benny, it might be wrong for Benny to take a certain action, or Benny might wrong someone by taking a certain action. Among the relevant properties of outcomes, for example, might be that Indy's situation would be better to this or that extent. But to do this, a moral theory need not say anything about whether one outcome is better than another. Indeed, talk of better outcomes seems at best an unnecessary, and at worst a distorting, intermediate layer. Why say that producing this outcome is wrong because (i) it is wrong to produce a worse outcome, (ii) this outcome is worse, and (iii) it is worse because of its properties and the properties of alternative outcomes? Why not cut out the middleman and just say that this choice is wrong, because of the properties of the outcome it would produce and the properties of alternative outcomes?[4]

Nevertheless, it can be helpful, at times, to view a certain agent (such as the state) as aiming at a state of affairs. This is the state of affairs that is constituted by that agent's fairly meeting the improvement claims of each person of some

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[4] The reply might be that, even if a moral theory need not rank states of affairs in order to *guide action*, it might be said, nevertheless a moral theory needs to rank states of affairs for *other purposes*, such as to tell us what to hope for or to regret. Suppose that, no matter what any agent does, it will come about by natural causes either that the worse-off Altra is a little better off or that the better-off Indy is a lot better off. Shouldn't we hope that it comes about that worse-off Altra is better off? Shouldn't we regret it if it does not come about? Why should this be, unless this outcome is impersonally better?

Again, however, I don't see why reasons for hope and regret, any more than reasons for action, must be explained by the impersonal betterness of outcomes. Once more cutting out the middleman, we might directly appeal to the properties of outcomes that friends of impersonal betterness will themselves ultimately appeal to, in order to explain why certain outcomes are impersonally better than others.

relevant group (such those within the state's jurisdiction). I will use the phrase, "the public interest," just as a compact expression for this aim: that is, a situation in which no one in the relevant group has an improvement complaint against the relevant agent.

This expression, "the public interest," must be treated with caution. First, it is not that there is some collective entity, "the public," that has this interest. Instead, there are just the claims of individuals to have their situations improved, compatibly with fairness to others. Second, while it is true enough to say that the public interest is a state of affairs which the relevant agent has reason to promote, the agent does not have reason to serve the public interest, in the first instance, because it is a better state of affairs. Again, the agent has reason to promote the public interest instead because individuals have claims on that agent that their situations be improved, compatibly with fairness to others, and because meeting those claims just is what promoting the public interest comes to.

1.4 Choice Situations

I have described Indy's improvement claims as claims to being better "situated" to lead a fulfilling life. More carefully stated, Indy's improvement claims are claims to being given a better "choice situation," in which Indy's chances of leading a fulfilling life, in one or another respect, depend in certain ways on how Indy chooses.

Why say that improvement claims are claims to a better choice situation? In a sense, it is merely terminological. Whatever Indy has a claim to might be described as a "choice situation." That is, if Indy has a claim to enjoy certain goods, period, then we can describe that as a claim to a "degenerate" choice situation, in which Indy enjoys those goods *no matter how Indy chooses*. It becomes substantive if we grant, as I think we should, that Indy sometimes has claims to "proper" choice situations, in which Indy has a better or worse chance of enjoying certain goods *if Indy chooses accordingly*.

The basic question is this. What claim Indy does have on Benny to do going forward from some time, *t*? Is it that Benny take steps to ensure, going forward from *t*, that Indy has a better or worse chance of enjoying certain goods *if Indy chooses accordingly*—a "proper" choice situation? Or is Indy's claim on Benny to take steps to ensure, going forward from *t*, that Indy enjoys certain goods *no matter how Indy chooses*—a "degenerate" choice situation?

There are two kinds of reasons why Indy may have a claim to a proper, rather than degenerate, choice situation. First, even if *Indy* has more reason at *t* to want Benny going forward from *t* to give Indy a degenerate choice situation, this may ask too much of Benny, or it may be unfair to *Altra*, because it would unfairly leave her with worse choice situation going forward from *t*.

Second, *Indy* may have more reason at *t* to want Benny going forward from *t* to take steps to provide Indy with a proper, rather than degenerate, choice situation. There are several reasons why.

In many cases, there are no steps that Benny can take to give Indy a degenerate choice situation. Whatever Benny might do, Indy will enjoy the relevant goods, or better chances for them, only if Indy himself pitches in and makes a certain choice. Granted, sometimes Benny can give Indy a

degenerate choice situation. For example, Benny might supply Indy with an environment free of a pathogen, no matter what Indy chooses. But many cases are not like this.

In some of these cases, in which Benny cannot give Indy a degenerate choice situation, Benny's incapacity is *technical*. Lead Indy to water as you will, you can't make him drink.

In other of these cases, in which Benny cannot give Indy a degenerate choice situation, Benny's incapacity is *constitutive*. Some of the activities that make for a fulfilling life, for example, are "choice-dependent." They are possible or valuable only insofar as they flow from Indy's "own," "free" choices or judgments. These choice-dependent activities include expression, religious observance, association, or—as Raz (1986) understands "autonomy"—being the author of his life as a whole. Benny else can arrange a marriage for Indy, but not a love match. Similarly, Benny cannot choose a gift for Indy's wife that will convey *Indy's* judgment about what best expresses the significance of their marriage and the occasion. (This is Scanlon's 1998 example of what he calls the "representative" value of choice.)

In some cases, Benny can give Indy a degenerate choice situation, which does not rely on Indy to contribute a choice. However, that degenerate choice situation offers Indy, as it were, a worse prospect than some proper choice situation. Benny can do more for Indy, so long as Benny can rely on Indy to pitch in.

Again, the reasons might be *technical*. Perhaps Benny *can* make Indy drink. Benny can pry open Indy's lips and pour. It's just that the added expense of prying and pouring will leave Benny with only half a draught. Indy may have more reason to want the full draught set before him, for him to drink or spill himself.

Alternatively, the reasons why the goods might be better if Benny relies on Indy to pitch in might have to do with *information*. Indy's choice can be a *more reliable* indicator of what will be good for Indy than the alternatives. (This is what Scanlon 1998 calls the "predictive" value of choice.) If Indy's a diner, and Benny's the kitchen, then Indy usually will know best which item on the menu Indy will enjoy.

Yet another possibility is that, even if Indy's choice is no more reliable an indicator than the alternative, Indy's choice may still be a *cheaper* indicator than the alternative. For

example, if Benny has to do all of the work of identifying who among millions might benefit from a given program, this work of information gathering might all but exhaust his budget, with the result that Benny couldn't offer much to the recipients he succeeded in identifying. A system that asks prospective recipients to do the work of identifying themselves, by enrolling or applying, might offer them more.

Our suggestion, then, is that improvement claims are to better choice situations. This suggests, in turn, an answer to the question of why, intuitively, it is often the case that when Indy has made some choice—for example, to consume, invest, gamble, neglect, forgo, etc. some resource or opportunity that Benny has made available to him—Indy lacks a further claim on Benny. First, what Indy had a claim on Benny to do was to provide Indy with a certain choice situation, namely one in which Indy could make certain choices with certain results. Second, Benny has already provided Indy with that choice situation. So Benny has met the claim that Indy had on him. So Indy has no further claim on Benny. The fact that Indy makes a particular choice within the relevant choice situation doesn't *itself* have any further effect on Indy's claims on Benny or on whether Benny has met his claims. This is because Benny's providing Indy with the choice situation already settled accounts.

It is easier to see this when Benny doesn't have to "do anything" in response to Indy's choice in order to ensure that he has in fact given Indy the choice situation to which Indy has a claim: to ensure that Indy's choices have the relevant consequences. In such cases, Benny just sets up the choices for Indy, and then lets the chips lie where they fall. It is harder to see this, by contrast, when Benny does have to "do something"—to take some active, positive step, X—in response to Indy's particular choice in order to ensure that he has in fact given Indy the choice situation to which Indy has a claim: that Indy's choices have the relevant consequences. In such cases, we may be tempted to say that Indy's particular choice *creates* a claim on Benny to do X. But we see things more clearly, I think, if we instead say that by doing X, Benny sees to it that he in fact gave Indy what Indy *already* had a claim to. That was a choice situation in which, among other things, if Indy made that choice, the relevant consequence—namely, the consequence constituted or brought about by Benny's X-ing—would occur.

Note that the choice that Indy makes need not be an active, positive, conscious, etc. choice to accept the associated

results, as such. It depends on the case. Indy might only have a claim to be clearly informed that in order to avoid bad results Y, Indy must avoid behavior X. If Indy is informed of this, but then engages in X and so suffers Y, Indy's claim has been met, even if, when Indy engaged in X, he did not choose to accept Y, or even did not remember that engaging in X would bring down Y (Scanlon 1998). In other cases, however, Indy's reason to want protection from bad results Z might be so strong in comparison to the reasons others have to want not to provide that protection that Indy has a claim to avoid Z unless Indy expressly, in no uncertain terms, chooses, there and then, to accept Z.

Again, we have been proposing an answer to the question of why, intuitively, it is often the case that when Indy has made some choice, Indy lacks a further claim on Benny. The proposed answer is that Benny has already provided Indy with what he has a claim to: namely, the choice situation in which Indy made that choice. This proposed answer is perhaps best clarified by contrasting it with alternatives. So consider three different accounts of why it is often the case that when Indy has made some choice, Indy lacks a further claim on Benny.

The first answer is that what Indy really has a claim to is some "*final stuff*," realized by consummated enjoyment, such as pleasure or satisfied final desire. Indy's choice produces this final stuff, and so Indy's choice satisfies his claim to the final stuff. Suppose that Benny gives Indy and Altra each an apple. Indy chooses to eat his, whereas Altra waits to eat hers. As a result, Indy has no claim on Benny for additional apple, even though, in some sense, it's now the case that Altra has an apple whereas Indy has none. The reason, according to this answer, is that Indy's apple has been converted into the final stuff, by Indy's consuming it (Cohen 2009 18–19, 25). What matters, on this account, is not, strictly speaking, that Indy made a choice. It is instead that the final stuff was produced. Indy's choice just happens to be, in this case, was initiated the production process.

The first difficulty with this account is that Indy's claims on Benny are not only to final stuff. There are other features of choice situations, besides a tendency to produce final stuff, that Indy has reason to want.

The second difficulty with this account is that in some cases, when Indy has made a choice, Indy can lack a claim on Benny, even though the choice does not produce any final

stuff. Suppose that Benny gives everyone an apple. Altra eats her apple, but Indy makes a gamble against nature that his apple will keep another day. Or he buries the apple, betting on the start of an orchard. The apple spoils, or never takes root, and so he loses the consumption of an apple that Altra had. Indy does not, in this case, convert the apple into final stuff. But still it seems, at least if the rest of the scenario is suitably described, that he does not have a claim on Benny for more.

The second alternative account of why it is often the case that when Indy has made some choice, Indy lacks a further claim on Benny is that Indy does not *deserve* more. On this account, Indy's choice weakens the claims that he can make on others, by, as it were, making him a less compelling claimant.

Again, I set aside desert. But, in any event, even if one considers desert, the choices that leave Indy with no further claim on Benny need not be "bad" choices, of a kind to make Indy less deserving. One needn't believe that letting an apple go bad is a sin in order to believe that if Benny gives Indy an apple, and Indy lets it go bad, Indy has no claim on Benny for anything more. Or suppose that Indy makes a gamble with Altra for an extra half an apple. Each deposits half an apple with Benny. Indy loses. So, if Benny is to honor the gamble, Benny must give Indy's half to Altra. In this case, Indy hasn't done anything that Altra hasn't also done. So, if Indy doesn't deserve an apple, then neither does Altra. So, if the reason why Benny shouldn't return Indy's half to Indy is that Indy does not deserve a half, then that is equally a reason why Benny shouldn't give Indy's half to Altra. But that would mean, implausibly, that, once and for all, all bets are off.

The final alternative account of why it is often the case that when Indy makes a choice, Indy lacks a further claim on Benny is that in making the choice, Indy somehow "waives" or "forfeits" a further claim on Benny. On this account, Indy's choice about what to do with the apple matters because it is additionally the exercise of a normative power with respect to Benny: a power to waive or forfeit further claims on him.

One problem is that, in many relevant cases, there is no obvious candidate for the further claim on Benny supposedly waived by Indy's choice. When Indy chooses to let his one allotted apple spoil, for example, what *further*

claim on Benny is Indy thereby supposed to waive? It can't be a claim on Benny to give Indy the apple that Indy let spoil, since Benny already satisfied that claim. And it isn't a claim on Benny to give Indy another apple, because Indy never had a claim to a second apple.

But the deeper problem, I suspect, is that the power to waive or forfeit claims itself calls for explanation. Why should Indy's claims on Benny depend in that way on Indy's choice? I suspect that the answer will appeal to reasons that Indy has to prefer that choice situation, in which his claims on Benny can be waived by choice, over the alternatives. But then the appeal to "waived" or "forfeited" claims is not an alternative to our proposal, but a special case of it.

Our suggestion, then, is that when Indy makes a choice, he often lacks a further claim on Benny, because Benny already gave Indy what Indy had a claim to, namely the situation in which he made that choice. But one might still wonder why Indy does not have a further claim on Benny. After all, even if Indy had reason at *t* to want that Benny, going forward from *t*, take steps to give him a proper choice situation, Indy may have reason, at a later time, to prefer, retrospectively, that, going forward from *t*, Benny had instead given Indy some degenerate choice situation, which left nothing to Indy's choice. Perhaps Indy suffers a slip 'twixt cup and lip, spilling the whole draught, and now wishes that Benny had force-quenched him, even though the additional labor of force-quenching him would have left him with only half a draught. Why doesn't Indy now have a claim on Benny to give Indy what he would have had from the degenerate choice situation?

One answer is that Benny cannot give Indy what he would have gotten from the degenerate choice situation. The steps that Benny had to take going forward from *t* in order to give Indy the proper choice situation can't be undone. The draught has been spilt.

Another answer is that it would be unfair to Altra to give Indy what Indy would have had from the degenerate choice situation. This is because it would retroactively give Altra a worse choice situation. Benny might say: "The only way to improve your situation *now*, Indy, would be to take some of the potable from Altra to give to you. But that would retroactively deprive Altra of the choice situation that, at *t*, it was fair to give her. It would retroactively make it the case that the choice situation that I gave Altra, at *t*, was that

whatever Altra chose, Altra would get at most half a cup, whereas the choice situation that I gave you, at *t*, was better: namely, either a whole draught if there was no spill, or half a draught if there was a spill. That would have been unfair to Altra."

If, on the other hand, Benny *can* now do something additional for Indy, in a way that would not be unfair to Altra or unduly burdensome to Benny, then that just means that Benny in fact could have given (and perhaps can now still give) Indy a better choice situation: namely, one with this insurance policy, that Benny would do the something additional in this eventuality.

In recognizing that Indy may have a claim on Benny to a choice situation with such an insurance policy, our suggestion differs from the "luckist" position that Indy has no claim on others to ameliorate (absolute or comparative) bads that result from his choices: to ameliorate bad "option luck."

Return to the case in which Altra eats her apple, whereas Indy delays, and his apple spoils. That Indy does not eat his apple, it would seem, is due to his own choice. It is his own bad option luck. Had he chosen, as Altra did, to eat the apple without delay, he would have eaten it, just as Altra did. So, according to this luckist view, he has no further claim on others.

On our account, whether Indy has a claim on others depends on whether they have done what they needed to do to give him the choice situation which he had a claim on them to give. Suppose that the best choice situation that Indy and Altra each could have been given, without unfairness to the other, was one in which, even if they postponed eating their apple, they were partially indemnified if it went bad. In that case, Indy does have a claim against others. Perhaps he has a claim against Altra for eating her whole apple, thereby depleting the store of funds against which Indy's insurance claim could be filed. That deprived Indy of a better choice situation to which he was entitled. This is so even though he could have had what Altra had had he made a different choice: even though his being left without an apple is just bad option luck.

This is not say that this necessarily was the best choice situation Indy and Altra each could have been given, without unfairness to the other. Perhaps the best choice

situation is one in which postponing eating the apple is entirely at their own risk, which allows each to eat their full apple without having to hold some in reserve to cover the potential losses of others. In this case, Indy does not have a claim against others, because others would have given him the choice situation to which he was entitled: namely, the one without insurance.[5]

What then makes one choice situation better than another? It is a difficult question, and I don't have a full answer (Olsaretti 2009 on "principles of stakes" Vallentyne XXXX).

As a negative point, though, I do reject the following proposal for a full answer: that one choice situation is better than another just when it has a higher "expectation," where the "expectation" of a choice situation is something like the sum of the values of the outcomes of the specific choices open to Indy discounted by the probabilities that Indy will actually make those choices. I agree that the values of the outcomes of the specific choices, as well as the probabilities that Indy will make those choices, can bear on the value of his choice situation. But other factors also bear on its value.

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[5] The "luckist" position is one of several tenets of what has been called "luck egalitarianism." In its canonical form, luck egalitarianism holds the following (Cohen 2008 93; Temkin 1993 12). First, *states of affairs* can be fair or unfair to individuals. Second, agents have *reason to mitigate* the unfairness of states of affairs. Third, states of affairs are unfair to individuals insofar as those individuals are *worse off than* others in some respect. The relevant fairness is comparative. (I say more about these first three components in *Cosmic Fairness*.) Fourth, it is unfair to individuals that they should be worse off than others when this does *not* result from their choices, when it is bad "brute" luck. So, when they are worse off for such reasons, they have a claim on others to mitigate it. Finally, it is *not unfair* to them when it *does* result from their choices, when it is "option" luck. So when they are worse off for such reasons, they do not have a claim on others to mitigate it. This last tenet is more or less the "luckist" position described in the text. In later work, however, Cohen (2011, Ch. 6) seems to back away from this last tenet. Instead, he appears to hold that, even when inequality is due to option luck, it is *still* unfair to Indy. (The fact that Indy made a choice may affect other reasons that Benny has, but it does not affect the reason supplied by the unfairness of Indy's having less than Altra.)

In lieu of a full answer to the question of what makes a choices situation better, what I will offer instead, in due course, is a list of factors that, other things equal, tend to make a choice situation better or worse. This list of factors is partial, since it says nothing about when other things are not equal. However, this list may be enough for our purposes.

1.5 Claims against Invasion

We have been suggesting that Indy has claims to improvement: claims on others that they improve his choice situation, compatibly with fairness to others. Indy also has claims against invasion. That is, Indy has claims on others that they not dispose of his *body*, at least absent certain conditions, such as Indy's consent. Perhaps Indy has claims against invasion of "things" other than his body. Perhaps Indy has claims that other agents not invade his *external property* (at least such property as is not itself a creature of social institutions). Or perhaps Indy has claims that others not invade his *choice situation*. Claims against invasion are often what is meant by "natural rights."

If Indy's claims to improvement present themselves to Benny as *goals*, Indy's claims against invasion present themselves to Benny as *constraints*, even on the pursuit of such goals. Even if Benny could thereby improve the situation of Indy or Altra—whether by protecting them "negatively" from invasion by other agents or by providing them with "positive" goods—Benny may not invade Indy to bring about these improvements.

Our discussion of claims against invasion will focus, specifically, on the:

> *Force Constraint*: Indy has a claim on others that they not invade his body when this does not produce a greater good, or as a means to, or foreseeable side-effect of a means to, a greater good (compare Kamm 2006), barring something that "lifts" this constraint.

One might worry that this focus on the Force Constraint is too narrow. First, one might say, the Force Constraint is only a part or implication of some more extensive right over one's body. Kantians may call this more extensive right as "equal external freedom." Libertarians may call it "self-ownership." These labels typically invoke more than merely the Force Constraint. For example, self-ownership may imply that one is morally permitted to do whatever one likes with one's body; that one can permit, by consent, anything to be done to one's body (whether or not it achieves a greater good); or that one can transfer such rights over one's body to someone else. However, I doubt that these more extensive rights over one's body will help to explain the commonplace claims where the Force Constraint doesn't.

Second, as noted earlier, one might say that the focus on the Force Constraint is too narrow because there are claims against invasions of things other than one's *body*. In *Taxation*, I suggest that claims against invasion of one's *external property* do not help explain the commonplace claims where claims against invasion of one's body don't. And in *Illiberal Threats*, I suggest that claims against invasion of one's *choice situation* do not help explain the commonplace claims where claims against invasion of one's body don't.

2 JUSTIFYING THE STATE: FORCE

The previous chapter introduced claims to improvement, which one might think of as the basic building block of Rawls's theory of justice: what is pressed by the parties in the "original position." And the previous chapter introduced claims against invasion, which one might think of as the basic building block of Nozick's theory: the natural rights any agent, individual or corporate, must respect.

We can now turn to the negative observation: that even with these materials (as well as, here and there, others, such as a claim that one's policy preferences be realized), we still can't account for many commonplace claims in political discourse, either theoretical or practical. The rest of Part II will take up these commonplace claims, one by one, and explain why each in turn can't be explained as a claim to improvement or against invasion.

The first of these commonplace claims, which will occupy this and the next two chapters, is a claim against the state, which is supposed to make "justifying the state," or "establishing its legitimacy," a problem.

2.1 The Content and Prevalence of the Concern

The state, it is said, stands in certain "relations of rule" to its subjects. It wields "authority" or "power" over its subjects. It "obligates," or "coerces," or threatens, or uses "force," or violence against them, so as to compel them to comply with its commands. It claims a "monopoly" or "exclusive right" to issue and enforce these commands. And so forth. Those who are subject to those relations of rule are thought to have a claim against those relations. To justify the state or to establish its legitimacy is then to answer this claim. To fail to is to leave the state open to a complaint.

This claim against the state is not an improvement claim. For it is supposed to persist even if we stipulate, for the sake of argument, that the state realizes the public interest: that it improves the choice situation of each person within its jurisdiction as much as it can, subject only to the constraint that it trades off among their choice situations fairly.

The standard view is that what answers the claim, if anything does, is one of two things. Either it is a "legitimating condition" that the state satisfies: for example, that those subject to the relation of rule consent to it, or that it is acceptable to them. Or is it a "limit of legitimacy" that the state respects in what it does: for example, that the state is "minimal," or that it respects the "harm principle" of John Stuart Mill (Mill 1859). The state goes only so far, but no further.

A claim of this kind is manifest in libertarian opposition to the state. A more extreme libertarian position says that, absent consent, the state, like any other agent, may enforce natural rights, but nothing more, unless the state satisfies the legitimating condition of actual consent (Simmons 1979, 2000, 2005). A more moderate libertarian position says that, absent consent, the state may enforce rights, or contributions to schemes that enforce natural rights, but nothing more. That is, the state may "enforce" its directives that people contribute to "negative" protection from invasion by others, but the state may not "enforce" directives to contribute to the improving people's situations by providing "positive" goods, such as nutrition and medical care. Absent consent, the state must be "minimal" (Nozick 1974).

Why not a more extensive state, which requires contributions to schemes that provide opportunities beyond freedom from rights violations, such as greater literacy or

protection from infectious disease? Few libertarians think that they need to deny the truism that people's lives are improved if they enjoy greater literacy or protection from infectious disease. After all, the same libertarians may support private charities, or harbor personal hopes for the victims of natural disasters or command economies, that are predicated on precisely that truism. Instead, most libertarians will first answer: "Even if the state improves people's situations, that doesn't answer the complaint against the relations of rule that the state involves. For instance, it doesn't license the state to coerce people, without their consent, to improve their situation. The ends don't justify the means."

But it's not just libertarians. Liberals also insist on limits of legitimacy. Many accept some child or cousin of the Harm Principle: roughly, that the state may "coerce" people only to prevent harm to others (Feinberg 1984). Hence, the state cannot coerce people to avoid choices that are bad for themselves alone, even if that would improve their situation.

And many liberals insist on a legitimating condition. Rawls, and the many theorists of "public reason" who have followed him, argue, very roughly, that the state's actions, or a special class of the state's actions, must meet the legitimating condition of having a "public justification," which does not rest on sectarian premises. Rawls's "liberal principle of legitimacy" says that because the state "exercises political power," it must meet the legitimating condition of being (as I will put it) "reasonably acceptable" to those subject to it: roughly, justifiable to them in terms that do not presuppose any particular religion or philosophy of life (1993, 136–37). Those subject to such "political power," it would seem, have some claim against it, which must be addressed, if not by their consenting to it, then by its being reasonably acceptable to them. The claim isn't answered simply by showing that the state meets claims to improvement. If it did, *A Theory of Justice* would not have needed a sequel.

To take another example, Dworkin agrees that there is a crucial "puzzle of legitimacy": "How can anything" supply a general "justification for coercion in ordinary politics?" (1986, 191). The legitimating condition that must be met, he argues there, is that those subject to such coercion comprise a community of a special and demanding kind—a "community of principle"—which goes beyond merely having a state that promotes the common good. And the

later Dworkin 2011 is sown with thoughts of a similar form: the government "has no moral title to coerce, unless…" (372), "coercive political organizations undermine the dignity of their members unless..." (319–20), and so on.

Even Raz, otherwise so wary of liberal pieties, holds that state coercion, at least beyond a limit of legitimacy roughly modeled on the harm principle, requires a legitimating condition of "trust" (2001).

Finally, consider the idea that "economic" justice is more urgent within borders than across them. Certain relations of rule, such as coercion, are thought to obtain distinctively within borders. And these relations are thought to provoke a complaint, which is answered only by the legitimating condition of economic justice beyond mere humanitarianism. No doubt, a minimal state improves people's situations beyond what they were in in a state of nature. But despite these improvements, the minimal state's relations of rule provoke a new demand for justification, which no one faced in the state of nature. This claim must be met by this further legitimating condition: that it become more than minimal (Blake 2001; Nagel 2005).[6] Others argue that since those outside a state's borders are exposed to its coercion, a further legitimating condition must be met with respect to them (Abizadeh 2008).

In sum, it takes searching to find a contemporary political philosopher who doesn't presuppose some such claim against the state. But we should find this more puzzling than we do. After all, it's hardly true, in general, that measures to improve people's circumstances must meet legitimating conditions, or respect limits of legitimacy. If I

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[6] To illustrate the idea, imagine a fairly benign state of nature, whose inhabitants are generally peaceful, but unwilling to provide one another with anything more than humanitarian aid. Then comes along Mr. Soft, who could, by humble persuasion, get his neighbors to satisfy a more ambitious distributive principle. Yet he is too lazy to use his persuasive powers for that end. After him comes along Mr. Firm. He establishes a minimal state. Nevertheless, like Soft, he is too lazy to use his coercive powers to induce more than humanitarian aid. The idea is that Firm is subject to a complaint that Soft is not. The complaint cannot be that Firm did not improve people's situations, since he did. Nor can it be that Firm could have done more to improve them, since the same was true of Soft.

drain a stagnant pool in my yard, protecting my neighbors from mosquito-borne disease, I don't need the legitimating condition of their consent, or a public justification, or economic justice, or a relationship of trust. Nor do I, if I urge them not to embark on some self-destructive course of action. Yet neither the drainage nor the advice respects any familiar limit of legitimacy. Neither aims solely to prevent invasions of rights. And the advice is manifestly an attempt to influence a self-regarding choice. So why, then, when the state improves people's circumstances, does it face some complaint that must be met with a legitimating condition or limit of legitimacy?

To sharpen our focus, let us idealize the state in two ways. First, the state is an "ideal enforcer": it enforces all and only violations of its directives. Its police, courts, and so on, make no mistakes.

Second, the state is "ideally directive": there is no alternative system of directives and enforcement that the state could implement that would better meet claims to improvement—although, importantly, there will usually be many alternative sets that do equally well.

Granted, this ideal state may automatically meet one of the legitimating conditions proposed earlier in this section: namely, economic justice beyond humanitarianism. But it does not, unless more is said, satisfy the other legitimating conditions, such as consent or acceptability. Nor does it respect the limits of legitimacy of the minimal state; it aims to improve choice situations beyond simply protecting rights.

2.2 Enforcement

So we begin our search for the relation of rule that is targeted by the claim against the state. As we review the usual suspects, we will perform two tests, to see whether we have identified the true target of the claim against the state.

The *Subtraction Test* asks whether removing the candidate target quiets the complaint. That is, if we subtract, in imagination, the relation of rule that has been proposed as the target, are we still left, intuitively, with a complaint of the kind that we are trying to make sense of? If not, then the candidate target cannot be the thing, or at least not the only thing, that provokes the complaint.

The *Spare-Justification Test* asks whether we can answer the complaint against the candidate target, at least by the lights of those who insist that there is a complaint, *even without* the legitimating conditions and limits of legitimacy that they customarily invoke. We can answer the complaint with a "sparer" justification. If so, then the relation of rule that has been proposed as the target cannot be the thing that provokes the complaint, at least not the complaint that is supposed to be answered *only with the help of* legitimating conditions or limits of legitimacy.

So what might the relation of rule be, this target of the claim against the state? Most often, perhaps, it is said to be the state's "enforcing" our compliance with its directives. Indeed, it is very often said that it is the state's use of "force" or "violence" or "threat of punishment" or "coercion" that calls for special legitimating conditions or limits of legitimacy.[7]

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[7] Simmons (2000, 137) stresses the difficulty of accounting for the state's "right to use coercion" or to "direct and enforce," absent consent. Nozick's (1974, ix) chief complaint against a more than minimal state is that it "will violate persons' rights not to be forced to do certain things," including "to aid others." Rawls, as we have seen, argues that the state's "exercise of political power" must meet a special condition because it is "coercive power," "us[ing] force in upholding its laws" (Rawls 1993, 136–37). Larmore (1999, 605–608) and Nagel (1991, ch. 14) likewise see force and coercion as raising this special condition. As we have seen, Dworkin (1986, 191) views the primary "puzzle of legitimacy" as a puzzle about the justification of "coercion," "enforcing," and "using force." See also Huemer (2013, ch.

What then is "enforcement"? It divides into three categories, which call for quite different treatment. First, to enforce a directive, *D*, may be *to threaten*: to prevent the agent's violation of *D* by telling him that he will suffer some unwelcome consequence if he violates *D*.

Second, to enforce *D* may be to defend: *to prevent the agent's violation* of *D* by more direct, physical means. Note that "defense" covers a wider range of cases than it might at first seem. Restitution "after the fact"—such as returning stolen goods—is often described as a response to a past violation. But often such responses are forward-looking defense; they aim to prevent the future violation that would take place if, say, the thief were to *remain* in control of the stolen goods.[8]

Finally, to enforce *D* may be *to impose a deterrent*: to follow through on the threat (whether or not the threat itself was permissibly issued), by visiting those unwelcome consequences on someone who violates *D*, not with the aim of preventing the violation of *D* itself (which has already occurred), but instead to sustain the potency of future threats to deter the agent or others from violating instances of the same sort of directive. I use the phrase "impose a deterrent" instead of (the admittedly less cumbersome) "punish," to stress that it does not involve condemnation, as punishment, perhaps by definition, does. The function of

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1), who is especially clear on these issues. As Edmundson, (1998 90) summarizes such positions: "The coercive nature of law not only renders the state presumptively illegitimate, it sets the bar of legitimacy at a higher level than is normally necessary for the legitimacy of individual or concerted private activity."

[8] Some forms of restitution can't be counted as forward-looking defense. If I destroy your property, there's nothing left to defend. Instead, I am required to pay you compensation. However, getting me to pay that compensation is not a fourth category: a further way of enforcing the original requirement not to destroy your property. Instead, I'm now under a new requirement: namely, to compensate you for your destroyed property. This requirement can in turn be enforced in one of the three ways distinguished in the text: by threatening me if I violate it, by directly preventing me from violating it (e.g., by garnishing my wages), or by imposing a deterrent if I defy the threat.

following through on deterrent threats is simply to induce cooperation, and that needn't involve condemnation.

For reasons that will become clearer as we proceed, I start by looking for a complaint against the permissibility of the state's imposing deterrents for violations of its directives. Suppose that some subject, Violet, has violated a state directive. May the state impose a deterrent on her? Let us assume that the deterrent, following contemporary practice, is imprisonment. Imprisoning her would deter future violations, which sustains cooperation, which in turn promotes the public interest. So what's the problem?

2.3 The Distributive Complaint

Needless to say, in order to be effective, the deterrent may need to curtail radically the opportunities that Violet enjoys, not least her freedom of movement.

But this is not enough for a complaint. For by hypothesis, the deterrent improves the situations of others. By analogy, suppose we don't save one person, Uno, from one month-long entrapment in a pit, in order to save Duo and Trio from two month-long entrapments in similar pits. We do indeed leave the freedom of movement of Uno worse than we could have left it. But this is in order to avoid leaving the freedom of movement of Duo and Trio worse to a far greater degree. If Uno has a complaint, it seems straightforwardly answered by observing that we are triaging their claims to improvement in a fair way.

It might be replied, however, that Violet's case is not like this. It isn't as though if Violet isn't imprisoned, two others will be imprisoned in similar cells for twice the time. Instead, not imprisoning Violet will affect each other person far more modestly. By hypothesis, not imprisoning Violet will weaken deterrence. But the effect of this weakened deterrence will be to leave each other person only a little more exposed to property crime, or leave each other person with only a little less in the way of public services. In sum, Violet bears great losses in order to provide others with much smaller benefits. Which is to say that imposing the deterrent on Violet does *not* promote the public interest, does not *fairly triage* improvement claims, since the trade-offs between Violet and others are unfair to Violet.

How, if at all, can this *Distributive Complaint* be answered? Violet's consent would presumably do the trick. If, when some good is distributed, Indy *consents* to a smaller share in order to provide others with greater shares, then Indy has no complaint about a lesser share. So, if Violet consented to the deterrent's being imposed on her, then she would have no complaint.

Why does consent have this effect? *Choice Situations* suggested an answer. What Indy had a claim to was not, strictly speaking, the share of the good. Instead, he had a claim to a certain *choice situation*: a certain chance to have that good, if he chose in a certain way. If he consented to a smaller share, then he hasn't been deprived of this choice

situation. He has simply made a particular choice within that situation.

In other words, claims to improvement should be understood as claims to a fair distribution of choice situations, not of, say, the consummated enjoyment of final stuff. Consequently, Violet has the Distributive Complaint only if the state provides her with a worse choice situation than it provides others, or a worse choice situation than anyone needs to have. Turn the clock back to before Violet's violation of the state's directive. At that point, the state offered her exactly the same choice situation that it offered everyone else. It was part of that choice situation that if Violet complied with a certain directive, she would not be imprisoned, and if she violated this directive, she would be. In imposing the deterrent on Violet, it might be said, the state isn't depriving her of this choice situation. What it does is consistent with her having it.

Violet might protest: "Yes, I grant that my choice situation was no worse than anyone else's, but it was worse than anyone's needed to be. The state could have provided everyone a clearly better choice situation, in which *whether or not* one complies with the directive, one does not suffer the deterrent. Surely, it is better to have a choice situation in which one does not suffer the deterrent no matter what one does than one in which one runs the risk of suffering it. This would not, for instance, foreclose any valuable 'choice-dependent' activities."

However, Violet would be mistaken. Viewed in isolation, Violet's proposed revision might seem to make the choice situation better for each individual. But it would make the *overall* choice situation worse for each individual in *other* respects, which depend on the goods that are provided by the deterrence, the deterrence that Violet's proposed revision would undermine.

If this seems like sleight of hand, recall an example that had nothing to do with imposing deterrents. Suppose that there is some publicly provided benefit to be distributed. In order to know how to distribute it, the state asks people to apply for it. Imagine that if the state had to gather the relevant information on its own, it would be too costly to provide the benefit. Dithers chooses not to apply before the deadline, whereas others do apply. As a result, shares of the benefit are distributed to those others, but not to Dithers. Dithers protests: "Since I have just as much of a claim to the benefit

as others, it is unfair that they have more than I." The state's reply is: "What you had an equal claim to was not the benefit, but the opportunity to receive it if you applied. And your claim has been honored as fully as the claims of those who applied and received it."

Observe that this answer to the Distributive Complaint has two welcome implications. First, it puts pressure on the severity of any deterrent to be "necessary." If a less severe deterrent would have the same deterrent effect, then a better overall choice situation for each person is possible: namely, one with the less severe deterrent.

Second, it puts pressure on the severity of any deterrent to be "proportional" to the violation. If the only deterrent that will deter a given violation is very severe, whereas such violations have only small effects, then that deterrent may well make the overall choice situation worse.

2.4 The Deontological Complaint

So much for the Distributive Complaint. Another complaint against the state's imposition of deterrents, however, seems to be staring us in the face. Grant that imposing the deterrent improves individuals' choice situations in a fair way. It promotes the public interest, and so realizes a "greater good." Still, there are certain things that we may not do to a person even to produce a greater good. We may leave Uno in a pit in order to rescue Duo and Trio. But surely we may not push Uno into the pit as a means to rescuing Duo and Trio. It's not quite Thomson's (1985) paradigm of fatally pushing someone off a footbridge to stop a trolley that would otherwise kill five, since the numbers and stakes for each are lower and (arguably) since we are only "removing," not "using," the one. But it still runs up against similar "deontological" resistance. Likewise, one might protest on Violet's behalf that imposing a deterrent on her violates a claim of hers against *invasion*, a deontological constraint on what may be done to a person even to produce a greater good. More specifically, it might violate the Force Constraint introduced in *Claims against Invasion*, which said that

> a person has a claim on others that they not invade his body when this does not produce a greater good, or as a means to, or foreseeable side-effect of a means to, a greater good, barring something that "lifts" this constraint.

And, it might be said, imprisoning Violet subjects her to force as a means to, or a forseeable side-effect of a means to, a greater good. In sum, imposing the deterrent on Violet violates a claim of hers against invasion. This, then, is the "Deontological Complaint."

2.5 The Myth of the Omittites

Having now identified a candidate target for the claim against the state, we perform the first of our two tests, the Subtraction Test. We remove the candidate target and see whether the complaint remains.

One might wonder how we can remove the candidate target in this case: namely, the force used in the imposition of deterrent imprisonment. How can a state impose deterrent *imprisonment* without force (Huemer 2013, 10)? But it takes only a little imagination to remove the target. The state might build a cage around Violet, while she sleeps in a public park, using materials she does not own, without laying hands on her (directly or with the use of implements).

Now, it might be said that building a prison around Violet still "harms" her, by "actively" bringing it about that she bears the cost of confinement. And "active harming" is a close cousin to force, subject to similar deontological constraints.

So, for good measure, imagine the Omittite Empire. Their Emperor, the Guardian of the Ladder, does not put violators of his directives in prison, or build prisons around them. He doesn't need to. This is because each Omittite, to survive the elements, must descend into his naturally carved hole each night. Every morning, the Guardian drops the Ladder into each hole to enable its occupant to climb back up. His deterrent is simply to withhold the Ladder, confining the occupant there for a fixed period. Suppose an Omittite, Holton, violates some directive, and so the Guardian, as announced, does not drop the Ladder into Holton's hole for several months. This isn't a use of force or an "active harming." It's simply a failure to aid.

To be sure, there are deontological constraints on refusals to aid, even for the greater good. We may refuse to give life-saving medication to the one in order to have it to give to the five. But we may not refuse to give life-saving medication to the one in order to learn from the progress of his disease how to save the five from it (Foot 2002, 28). I take it that this is explained by something like:

> *Non-Aid Constraint*: If one is otherwise required to aid someone, it is not sufficient to release one from this requirement that by refusing to aid that person, one

> can use or affect that person as a means to a greater good.

But is the Guardian refusing aid so as to use or affect Holton as a means to the greater good? The Guardian is withholding the Ladder from Holton so that others, among them Dieter, will be deterred from violating the directive. Dieter is deterred by the combination of two beliefs. First, the *Belief in Credibility*: Dieter's belief that the Guardian won't drop the Ladder to Dieter, if Dieter violates. Second, the *Belief in Consequence*: Dieter's belief that this is something for Dieter to avoid. Now, if the Guardian were withholding the Ladder from Holton so as to be able to make a spectacle of his confinement, so as to sustain Dieter's Belief in Consequence—as if to say, "Obey, lest ye suffer as, lo, this wretch suffers"—then he would be refusing aid so as to use Holton as a means. But the Guardian doesn't need to sustain Dieter's Belief in Consequence, and indeed probably can't have much effect on it. It's obvious to Dieter that it will be a bad thing for Dieter if the Ladder isn't dropped to him. He doesn't need to be "scared straight." The Guardian needs to sustain only Dieter's Belief in Credibility. And the means to sustaining that belief is simply not dropping the Ladder into Holton's hole, as if to say to Dieter: "Look, I mean business. The same will be done in your case." Nothing that happens to Holton as a result is part of the Guardian's means to the greater good. Put another way, the Guardian's deterrent aim would not be thwarted if (contrary to fact) confinement were a benefit to Holton (if he needed and wanted more than anything quiet respite without the temptation of escape) or if refusing to drop the ladder to Holton did not confine or otherwise involve him (if he, exceptionally, could survive the elements outside, or climb out on his own). Suppose the Guardian's intelligence officers bring him two complete and fully accurate dossiers: one on how Holton would be affected by withholding the ladder, the other on how Dieter (as he believes) would. It seems the Guardian has no reason to read Holton's, but every reason to read Dieter's. If Dieter believes that confinement would benefit him, or that he would not be confined, then the Guardian's deterrent aims will be thwarted. But what will happen to Holton—the contents of his dossier—are neither here nor there.

In sum, the Deontological Complaint cannot so much as be raised in Holton's case. And yet, intuitively, the Omittites' forceless system of deterrents seems not very different in its moral character from more familiar, forcible systems.

I suppose a libertarian might reply: "Whether there is an objection to the regime all comes down to whether the Guardian owns the ladder. If he wove it from his own hair (and happened upon the design by chance inspiration and not from any scarce genetic advantage, etc.), then all's hunky-dory. He's just a private citizen going about his business. But if he wove it from plant fibers (or did so without leaving enough and as good for others, etc.), well then, he's an enslaving tyrant." However, if the libertarian's concern turns on such subtleties about the provenance of the physical instruments of deterrence, then it seems to me a long way off from any traditional or commonsense concern about relations of rule. It's doubtful that *this* could be the claim against the state that so many have in mind.