

## Collective Responsibility and the State

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ARE the citizens of a state liable for what it does in their name? It is a key principle of international law that states—as unitary legal persons—can be held responsible for their acts. When a state breaches an international obligation, it has a duty to make reparation for any injury it causes, either by making restitution, paying compensation, or providing some alternative form of satisfaction, such as an official apology.<sup>1</sup> Moreover, the International Court of Justice has consistently asserted that it may order state payment of reparations when a breach of international law has occurred. Reparations have often been levied in the aftermath of aggressive war: France was required to pay reparations in 1871; Germany was required to pay reparations after World War I; Germany's Eastern, Soviet-occupied zone paid reparations to the USSR after World War II; and today Iraq continues to pay reparations to Kuwait for the First Gulf War. In 2001 the International Law Commission produced draft articles codifying these principles of state responsibility.<sup>2</sup>

Current international law thus attributes holistic responsibility to states for their acts. On this model, the state as an organized agent is held responsible independently of its members. Of course, for the state to discharge its responsibility, liability for reparations will normally have to be distributed to members, but this distribution is performed in an independent second step. The key feature of the corporate model is that since responsibility accrues to the collective, citizens may face demands to do their part in discharging responsibility merely because they belong to the body politic.

My focus in this article is primarily on this second step, the distribution of state responsibility to citizens. When is the state as a corporate agent morally entitled to pass on responsibility to its members? When reparations are levied on the state, the tax burden eventually falls on individuals, and indeed on some who may have opposed the state's acts. Consider the case of a German in the Soviet-occupied zone after 1945, forced to contribute to reparations for Nazi

<sup>1</sup>Chorzow Factory (Ger. V. Pol.), Jurisdiction, 1927 PCIJ No. O, at 21, (July 26). See also Dinah Shelton, "Righting wrongs: reparations in the articles on state responsibility," *American Journal of International Law*, 96 (2002), 833–56.

<sup>2</sup>James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002).

aggression. If he had been a Communist or Social Democrat prior to the war, he would have opposed Hitler, and may have been subject to abuse under the Nazis. Can it be fair to make such a person pay reparations for the acts of the Nazi state?

In what follows, I argue that states meeting certain criteria of legitimacy—what I call *democratic legal states*—can morally require their citizens to do their part in discharging state responsibility. Citizens of democratic legal states properly share in liability for what their state does. The particular justification for citizen liability that I develop applies only to democratic legal states, however. In other states, there may be different grounds for distributing responsibility, including that citizens participated in or endorsed the state's acts. But in a state that is not a legal democracy, membership alone does not suffice to hold a citizen liable without further evidence of identification with their regime.

The article unfolds as follows. In Section I, I review the account of corporate responsibility offered in the literature. In Section II, I show that since the state is an involuntary association, we must revise this standard view if we are to generate an adequate account of state responsibility. In Section III, I develop a revised view—the *democratic authorization account*—and show how it allows democratic legal states to distribute responsibility to their citizens. In Section IV, I examine the implications of this view for state responsibility in connection with the 2003 invasion of Iraq.

## I. COLLECTIVES AND AGENCY

*If* a citizen is obligated to discharge a share of his state's reparations burden, then on the corporate model, his responsibility for doing so derives from the state's acts, not his personal acts. To ascribe corporate responsibility to the state requires that we treat it as a moral person.<sup>3</sup> On most theories of responsibility, an entity must meet a demanding set of conditions in order to be a moral person. Among these conditions are the following: 1) it intended the act that resulted in harm; 2) it had the capacity to grasp moral and other reasons; 3) it was in deliberative

<sup>3</sup>Alexander Wendt, "The state as person in international theory," *Review of International Studies*, 30 (2004), 289–316; Peter French, *Corporate and Collective Responsibility* (New York: Columbia University Press, 1984), p. 7. Some argue that corporate groups act only vicariously, through individuals, and that only these individuals can be held responsible. See Larry May, *The Morality of Groups* (Notre Dame: University of Notre Dame Press, 1987), pp. 41–8, 83–106 and Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart, 2002), pp. 171–9. There are two reasons for rejecting the vicarious agency approach here. First, while corporate entities can only act through individuals, this does not imply that only individuals can be held responsible for what corporations do. When an individual acts on behalf of a corporation—for instance, by signing an agreement—we can describe that act in two ways: we can say both that he acted and that the corporation did, and we can hold both entities responsible. Nor is the reference to the corporation's agency superfluous. If this individual had not signed—if he had quit his job, say—the corporation would simply have designated another person to sign instead. In Philip Pettit's terminology, the corporation "programs" for the agreement to be signed, perhaps by this individual, perhaps by that one. Philip Pettit, "Responsibility incorporated," *Ethics*, 117 (2007), 190–2. Second, as I show in the next section, there are also cases in which it is *normatively desirable* to hold corporate bodies responsible independently of their members.

control of its own actions; and 4) it acted voluntarily, without duress. For Condition (1) to be satisfied, the state must be an organized body capable of making intentional choices; occasional or unorganized groups cannot form intentions, and so cannot be held responsible. Condition (2) requires the state to grasp the obligations that apply to it—like the prohibition on aggressive war—in order to be held responsible for violating them. Condition (3) requires that the state have sufficient authority over its members to carry out its intentions. And Condition (4) holds that the state must act on its own, without coercion by an outside force.<sup>4</sup> If the state meets these conditions, then the harm can be imputed to the state's agency, and the state can be held responsible to repair it. But can any collective meet these conditions?

A number of theorists have recently argued that a particular kind of group—the *incorporated group*—does meet these conditions, and thus can be treated as a moral person and held responsible separately from its members.<sup>5</sup> To see what is meant by an incorporated group, consider three types of collectives. One is a *pure aggregate* (like “brown-eyed people,” or a crowd in the park), composed of people who do not coordinate their actions in any way. Another is the *unorganized group* (say, a mob of rioters), which acts together in a coordinated way, but lacks organized decision procedures. The third kind of group is the *incorporated group* (say, “Exxon”), which not only acts together, but also has standing decision procedures by which to grasp reasons and revise its intentions.

Unlike the other collectives, an incorporated group possesses an internal constitution that allows it to deliberate about its intentions and control its own acts. This gives it a certain independence from the intentions of its membership. Suppose the board of Exxon votes to acquire Texaco. Although only one person actually signs the papers, and some lower level employees may not even be aware of the decision, the intention to acquire Texaco is still ascribable to the corporation-as-a-whole, thus meeting Condition (1). This is because an incorporated group's constitution specifies binding decision procedures and allocates responsibilities to various roles, such that any act taken under these procedures qualifies as an act of the entire group. Its internal constitution allows the group to grasp reasons and examine evidence, through the agency of its role-occupants, thus satisfying Condition (2). Its ability to issue authoritative directives to its membership also lets the group execute its intentions, satisfying Condition (3). And through its decision procedures, the group can voluntarily

<sup>4</sup>A similar account of individual responsibility is developed by R. Jay Wallace in *Responsibility and the Moral Sentiments* (Cambridge, MA: Harvard University Press, 1994), pp. 154–94; these conditions are applied to collectives in Pettit, “Responsibility incorporated,” pp. 177–92 and J. Angelo Corlett, “Collective moral responsibility,” *Journal of Social Philosophy*, 32 (2001), 573–84. These authors defend the conditions at greater length than I can here.

<sup>5</sup>Most prominently: David Copp, “On the agency of certain collective entities,” *Midwest Studies in Philosophy*, 30 (2006), 194–221 at p. 216; French, *Collective and Corporate Responsibility*; and Pettit, “Responsibility incorporated.”

change its intentions, thereby fulfilling Condition (4). An incorporated group can make choices about its own collective actions, and we can hold it responsible for these choices.

But we might ask: what is the point of holding an incorporated group responsible, separately from its members? Perhaps we should just hold the members individually responsible for the acts they perform in the name of the group. Thus the particular board members who voted to acquire Texaco might be held individually responsible for the acquisition. But there is a range of cases in which it is wise to hold groups holistically responsible alongside their members. The most important are cases where a group's organizational procedures fail, as they often do in corporate accidents. Consider one such accident. On November 28, 1979, a flight operated by Air New Zealand crashed directly into the side of Mount Erebus, a 12,000 foot volcano, killing all 257 people aboard.<sup>6</sup> An inquiry determined that the primary cause of the crash was an inadequate company organization that led to the filing of a faulty computer flight plan. In this case, various employees' actions combined to create a disaster that no one employee could have reasonably foreseen. While several people did contribute to the crash, in isolation their separate actions seemed unlikely to lead to any disaster. It was only when their acts interacted with those taken by others in different parts of the organization that the crash ensued. In the end, the airline itself was held responsible for the disaster and required to pay damages.

To hold an incorporated group responsible is not to deny that individual members bear responsibility as well. But in the above case, the individuals involved had significant excuses. They undertook the actions that contributed to the disaster in accordance with corporate policy, and these actions, seen on their own, did not entail any foreseeable disastrous consequence. Perhaps this means we should instead hold liable those who designed the airline's organizational structure. But the founders might plead that conditions have changed significantly since the group's inception or that the organization's policies had evolved in an organic fashion (or perhaps they are dead and cannot be held liable).

In cases like these, we are faced with a "responsibility shortfall."<sup>7</sup> While we can attribute some liability to individuals, this does not add up to liability for the entire harm. This is because the organization of the airline created an "emergent effect" that made the total harm more than the sum of the employees' intentional contributions.<sup>8</sup> What are we to say about this shortfall? One tragic response would be to say that no one is responsible for repairing this emergent harm. But this reply seems deeply unsatisfactory. First, it refuses to treat the victims'

<sup>6</sup>This case is discussed in French, *Corporate and Collective Responsibility*, pp. 145–63. Similar cases are detailed in Charles Perrow, *Normal Accidents: Living with High-Risk Technologies* (Princeton, NJ: Princeton University Press, 1999).

<sup>7</sup>Copp, "On the agency of certain collective entities," p. 216.

<sup>8</sup>See Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), pp. 197–202.

interests seriously: there are many incorporated groups that act together intentionally and perpetrate harms in our complex world. Are we to say that nobody is responsible for these consequences? Second, this response overlooks the fact that the agents who produced the outcome are not limited to the individuals involved; there is an additional agent—the incorporated group itself—to which we can attribute responsibility.

If we attribute collective responsibility to the group-as-a-whole, we imply that the *group* should do what it can to discharge responsibility—say, the CEO should issue an apology on behalf of the company. But these purely holistic acts are unlikely to fully undo the harm. This brings up a key problem: how do we connect the holistic responsibility of the group to the responsibilities of its individual members? Suppose the victims' families sue and the group is required to pay compensation. Since (even when paid out of collective funds) the impact of compensation ultimately falls on individuals, compensation treats collective responsibility like a pie that can be carved up.<sup>9</sup> This will affect many individuals who had nothing to do with the harm, such as all the shareholders, and all those employees not involved in the accident. Why should they be affected?

In the airline's case, the employees and shareholders ought to discharge a share of responsibility because they voluntarily joined the corporation. By incorporating, they gained access to a range of benefits unavailable otherwise. But gaining these benefits also means assuming liability to repair harms for which the company is responsible. One must “own up” to the company's liabilities, even when these liabilities were not caused by one's acts, much as one shares in the company's success—due to its high profits and good reputation—even when one did not personally cause that success. Since the employees and shareholders chose to join, we can say they have accepted this bargain. We appeal, then, to a principle of “tracking” individuals' associative acts in order to distribute the corporation's responsibility to its members.<sup>10</sup>

I should emphasize here that nothing I have said entails that the employees and shareholders are blameworthy—they did nothing wrong by buying shares or working for the company. But they are members of an organization that has committed a wrong, and they bear a special responsibility to repair the harm caused. To understand why, it is useful to distinguish between task-responsibility and blame-responsibility.<sup>11</sup> Blame-responsibility involves crediting or debiting an

<sup>9</sup>I take the “pie” analogy from Deborah Tollefsen, “The rationality of collective guilt,” *Midwest Studies in Philosophy*, 30 (2006), 222–39 at p. 233.

<sup>10</sup>There are some cases where employment will not be sufficiently voluntary to count as conferring responsibility. This tells in favor of limiting liability for lower-level employees, since their options may be limited. Still, there are some risks—such as that the company will go bankrupt in a class-action suit—from which even lower-level employees cannot be entirely insulated.

<sup>11</sup>I take these terms from Robert Goodin, *Utilitarianism as a Public Philosophy* (Cambridge: Cambridge University Press, 1995), pp. 100–13. Similar distinctions are drawn by David Miller, in *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), pp. 81–109, and John Parrish, “Collective responsibility and the state,” *International Theory*, 1 (2009), 119–54 at p. 4.

agent with producing an outcome in a way that exhibits a moral fault or virtue. The airline ought to be held blame-responsible, since the flaw in its procedures was a major cause of the accident, and it created and sustained these procedures. The employees and officials who played a negligent role in the crash also should be held blame-responsible for their contributions. The airline's non-contributing employees and shareholders, however, are not blame-responsible for the outcome.

But this does not mean that non-contributing members get off scot-free. They may still bear certain task-responsibilities derived from the corporate responsibility of the airline. Task-responsibility involves assigning duties to people to repair a particular situation, even when they did not cause the outcome and cannot be blamed for it. Suppose a print shop owes a large order to a customer and one of its employees fails to show up the day it is due. Then other employees may have a task-responsibility to "pick up the slack" though they cannot be blamed for their colleague's negligence, because the shop-as-a-whole has a responsibility to the customer. Similarly, the airline's non-contributing employees and shareholders ought to shoulder the burdens involved in compensating the accident victims. This task-responsibility accrues to them in virtue of their voluntary membership in the corporation, but it entails no moral blame. While some individuals in the group—its officials or those who contributed to the accident—may be worthy of blame, and the group as a whole can be blamed for its faulty organization, noncontributing members are merely task-responsible to repair the harm, not blameworthy for what the collective has done.<sup>12</sup>

## II. THE STATE AS A MORAL PERSON

Is the state an incorporated group that can similarly be held holistically responsible for its acts? Yes. When we say "state," as opposed to "government," we refer to a structure of institutions that governs a territory. These institutions define various offices—including the executive, legislative, and judicial branches; the police; and the bureaucratic administration—that make and enforce law on that territory. The institutional rules allocate responsibilities across these offices, and specify the procedures used in taking collective decisions. Like an incorporated group, then, the state is defined by its internal "constitution." This constitution allows it to form intentions by means of standing decision procedures, thereby fulfilling Condition (1). The state is also capable of grasping moral reasons, through the deliberations of its officials and role occupants; it thus fulfills Condition (2). Third, the state can coordinate its subjects to execute its

<sup>12</sup>See Kay Mathiesen, "We're all in this together: responsibility of collective agents and their members," *Midwest Studies in Philosophy*, 1 (2006), 240–55 at pp. 251–2, and Christopher Kutz, *Complicity*, pp. 200–2.

intentions by issuing authoritative directives, thereby meeting Condition (3). Finally, the state acts voluntarily as long as no outside force is coercing it; it satisfies Condition (4).

The state therefore qualifies as a moral person. Indeed, states commonly treat *themselves* as moral persons: they sign treaties that are binding on the body politic in perpetuity and contract debts that future generations will have to repay, presuming that the state can be held responsible, in a unitary way, for its commitments.<sup>13</sup> For the same reason, it also makes sense for outsiders—like the victims of an unjust war—to hold the state responsible for harms it inflicts. Attributing collective responsibility to the state makes a difference for what its agents should do on its behalf: for example, its officials ought to apologize for the harm it causes.

In most cases, though, these kinds of holistic responses will not be sufficient to fully undo the harm. More robust forms of compensation will require us to distribute the “state responsibility pie” to individuals, and we require some principled basis by which to perform the distribution. Recall that in the Air New Zealand case, we appealed to individuals’ acts of “joining” an incorporated group. But we cannot appeal to citizens’ associative acts to distribute state responsibility. The state is an organization which most of us do not choose to join (or “choose” to join only under threat of being punished if we do not obey). Exit from the state is either very costly (entailing the loss of ties to family, friends, and culture for those who can leave), or nearly impossible (citizens of less-developed countries usually have nowhere else to go). In contract law, we do not hold a person to an obligation where he was induced to enter the contract under severe duress. We therefore cannot assume that citizens have accepted a “membership bargain” that makes them liable to discharge the state’s responsibility.

The state thus occupies an odd position in our analysis. It is an *incorporated group*, and it makes sense to attribute holistic responsibility to it. Moreover, there is a point to this attribution, since there are things the state itself (*qua* institution) can do—apologies, memorials, legal reform, and so on—to discharge responsibility for its failures. But since the state is an *involuntary incorporated group*, the residual responsibility for harms that cannot be addressed by the institution is (so far) left hanging in the air. It cannot be distributed to members, since the choices of those individuals do not necessarily connect them with the institution of the state.<sup>14</sup>

From the perspective of the victims of state harms, though, we ought to be extremely dissatisfied with these conclusions. Squeamishness about implicating individuals who have not chosen to “join” the state seems rarefied when we turn our attention to the uncompensated wrongs perpetrated by states in their citizens’

<sup>13</sup>Janna Thompson, *Taking Responsibility for the Past* (Cambridge: Polity, 2002), p. 4.

<sup>14</sup>In referring to the state as an involuntary association, I do not mean to imply that most members of modern states do not choose to support their state. I simply draw attention to the fact that they have few options for *disassociating* from it.

names. There is also a danger of generating perverse incentives if we end up unable to distribute state responsibility to its members. For once they have brought into being a massive institutional power with the danger for abuse, citizens could simply dissociate themselves from any liability for what their state does. States would be “responsibility-laundering machines” that commit grave harms for which no one is liable.<sup>15</sup> Surely we ought to try to do better.

One way to approach our problem is to ask whether we can construct alternative principles for distributing state responsibility. If we could find some alternative principle, then we could argue that everyone covered under it should discharge a share of political liability. This includes every qualifying member, not just those who individually contributed to the harm. Depending on the principle, it may even extend a share of responsibility to political dissenters. In the rest of the article, I outline one alternative principle—the *democratic authorization principle*—that serves to distribute the responsibility of *democratic legal states* to their members. This principle, I argue, suffices to show that the will of the individual citizen is implicated in the acts of her state even though she did not consent to membership and even though she may disagree with the state’s policies. But the democratic authorization principle will not work for every state: it fails to apply to autocracies, military governments, and those democracies that do not secure fundamental rights and the rule of law.

In many of these other cases, we may be able to invoke yet further principles for distributing state responsibility. This will be especially likely where—though they have not consented to membership—citizens have authorized their state in some other way, perhaps through voluntary acts or expressions. A citizen may have volunteered for an aggressive war, voted for a repressive regime, expressed support for its policies, failed to criticize its acts, or even taken pride in it.<sup>16</sup> Though I will not explore these alternative principles here, they all point out ways in which a citizen who is involuntarily subject to a non-democratic state may still voluntarily affirm his membership. While I argue below that democratic membership is a conclusive source of state authorization, I do not deny that there may be other possible sources. There may also be cases in which we are simply unable to distribute a state’s responsibility, because there exists no adequate connection between the will of most citizens and the institution of their state. This will be true for purely coercive constitutions, under tyrannical or terroristic regimes. We might then turn to *shared responsibility* among officials, soldiers, and elites as a means of allocating political liability. This would treat the harms perpetrated by the state as acts of a private band of conspirators who oppressed the people and gained control of state institutions.

<sup>15</sup>John Parrish uses this formulation in “Collective responsibility and the state.”

<sup>16</sup>Approaches to collective responsibility along these lines are developed in Larry May, *Sharing Responsibility*, pp. 36–54, 146–52, and Farid Abdel-Nour, “National responsibility,” *Political Theory*, 31 (2003), 693–719.

I will not explore these other approaches to distributing responsibility in non-legal-democratic states here. Instead, I merely lay out a *sufficient condition* for distributing the burdens of state responsibility in *democratic legal states*. The democratic authorization principle claims, in essence, that citizens of democratic legal states have good reason to affirm their membership—even when they do nothing to express that affirmation—and that this fact suffices to justify distributing the burdens of political liability to them.

### III. DISTRIBUTING STATE RESPONSIBILITY

#### A. CONSTRUCTING AN ALTERNATIVE: THE DEMOCRATIC AUTHORIZATION PRINCIPLE

To begin, I propose that we connect the conditions for distributing state responsibility to the conditions for political obligation. Like other incorporated groups, the state as an institution is produced by the collective acts of its members, including their obedience to law, payment of taxes, and voting. A legal system depends for its existence on large-scale patterns of behavior on the part of people who orient their actions to law. By paying taxes, the people also contribute to sustaining coercive enforcement institutions, and by voting, they offer their input into what these laws should be. So it is “the people’s” collective activity that makes their authoritative and coercive legal system—the state—possible. But, as we noted earlier, “the people’s” collective activity is carried out against the perpetual background threat of coercion by government agents. So we must ask: does this activity implicate the will of those involved in it? Or is it simply something they are forced into?

I believe that even though the state is a coercive institution, the wills of its members can sometimes be implicated in the state’s acts. This is so when members not only have *prudential* reasons to comply (to avoid coercion), but when they also have a specific *moral* reason to obey the law and support their state institutions. A number of philosophers (including Hobbes, Rousseau, and Kant) have argued that members have political obligations when their state is an *authorized state*: when a justification for the state’s rule could be offered to the member that he has reason to accept. These theorists also emphasize that these political obligations are not externally imposed, but *derive from the subject’s own will*. They are obligations that can ideally be understood and endorsed by subjects themselves. If this account of political obligation holds, we can say that the member’s will is implicated in his state when that state counts as “authorized,” and therefore that he has reason to “own up” to what an authorized state does. But when his state is not authorized, then the mere fact of membership is not sufficient to saddle him with responsibility for his state’s acts.<sup>17</sup>

<sup>17</sup>Something like the authorization account seems to underlie Thomas Nagel’s position in “The problem of global justice,” *Philosophy and Public Affairs*, 33 (2005), 113–47 at pp. 128–9. He speaks

To make some sense of the authorization account, it will help to go back to the classical views put forward by Hobbes and Kant. Hobbes argues that an individual has moral reason to comply with the state because she has *authored* its acts. Hobbes's account of authorization is complex, and I will not explore all its details here. But one feature of it is particularly interesting. Hobbes argues that citizens are authors of the state's acts because those acts are *an exercise of their rights*:

. . . As the Right of possession, is called Dominion; so the right of doing any Action, is called AUTHORITY [and sometimes warrant]. So that by Authority, is always understood a Right of doing any act: and *done by Authority*, done by Commission, or License from him whose right it is.<sup>18</sup>

Here, Hobbes suggests that individual citizens are the *owners* of rights the state exercises on their behalf, and that when the state acts with authority, it acts on the rights of its citizens (the authors). Because they "own" the rights their state interprets and enforces, citizens must also take responsibility for what their state does. As long as the state exercises their rights, we might say, citizens ought to accept a share of responsibility for the state's acts. The obverse of this claim is that when the state does not exercise a member's rights, he has not authorized it, and that member does not bear responsibility. Collective responsibility does not distribute to him.

The basic structure of authorization can be detached from the particular account of rights and duties (rooted in self-interest and self-preservation) that Hobbes himself endorses. Kant takes this approach: he argues that each person has an equal right to freedom (conceived as independence from others' arbitrary wills), which the state interprets and enforces on his behalf (6:237).<sup>19</sup> The authorization view is thus compatible with different views of what rights citizens have, and I will follow the Kantian approach here.

Now, it may seem that the democratic authorization principle, which holds that the state's authority is derived from the exercise of its members' rights, does not get us very far when thinking about citizen responsibility for an unjust or aggressive war. For it would seem that if a war is unjust, citizens themselves do not have the right to wage it, and so when the state undertakes such a war, it is acting *ultra vires* or outside its mandate. If citizens can only be held responsible for the state's acts when those acts are an exercise of their rights, then perhaps they can't be held responsible for such a war at all.

of "a special involvement of agency or the will that is inseparable from membership in political society" and connects this involvement of the will to citizen responsibility for state acts. In a footnote, he suggests that when our state inflicts wrongs on others, we are obliged to contribute to reparations "whether we individually played a part in the wrongs or not" (p. 129).

<sup>18</sup>Hobbes, *Leviathan*, ed. Gaskin (Oxford: Oxford University Press, 1996), p. 107. I am indebted to John Parrish's paper, "Collective responsibility and the state," which makes similar points.

<sup>19</sup>I cite Kant's writings by the standard German edition, *Kant's Gesammelte Schriften*, edited by the Academy of Sciences (Berlin: Walter deGruyter, ongoing from 1900). These numbers are noted in the margins of English translations. Translations are from Mary J. Gregor, ed., *Immanuel Kant: Practical Philosophy* (Cambridge: Cambridge University Press, 1996).

It is instructive to see why this objection fails. Both Hobbes and Kant claim that persons have one basic right that must be interpreted and enforced by the state. The reason why the state must exercise this right *for us* is that our own attempts to interpret and enforce it are self-defeating. Private judgment and enforcement of rights paradoxically renders our enjoyment of them less secure, because individuals' judgments about the extent of their rights conflict. Since the point of a system of rights, however, is to coordinate our actions and avoid mutual interference, this goal is undermined so long as individuals exercise unilateral jurisdiction. Both thinkers therefore argue that if we are reflecting rationally, we ought to realize that a condition in which we are entitled to judge and execute our own rights is very unfavorable to securing them. For this reason, we ought to accept an arbitrator's judgment, since we gain by having reference to a *unitary* public interpretation of our rights, as coordination is a necessary condition for freedom from interference by other people.

The idea is that if we want to possess rights that are actually recognized and respected by others, we need a single set of public rules defining these claims, not a variety of competing private interpretations that coercively struggle for the upper hand. On this view, if a state that credibly interprets my basic right exists, then I *necessarily authorize* it—whether I agree to join it or not—since I require its system of law to secure me against others' interference. So the ground of our obligation to the state is our one fundamental right: when reflecting rationally, we understand that we better secure this right by allowing someone else to judge and enforce it. This is why the state is an *authorized state*: it is not simply forcibly imposed on us, but an institution we can understand and endorse, in a moment of calm reflection.

Now, of course there are limits to our obligation to obey the state, on the authorization view. These limits derive from the very ground of our obligation in the first place: our one innate right. The authorization principle cannot give us reason to submit to any authority that *clearly* and *obviously* fails to interpret this right. Thus, Hobbes is quite explicit that we are under no obligation to obey a sovereign if he fails to minimally guarantee our preservation—as in cases where we face death at his hands, are forced to incriminate ourselves, kept in chains, or required to give up goods needed for subsistence.<sup>20</sup> There is some essential content, in other words, to what could count as a reasonable public interpretation of our basic right. As long as this minimal threshold is passed, we are bound to act in accordance with the authority's judgment, since by accepting such a procedure we “do better” overall in securing our rights than by substituting our private judgment for the authority's. This is true even when *in this particular case* the authority's judgment about our rights is incorrect. The overall gains to the security of our rights from coordination, unity, and peace outweigh the possible better answers as to what our rights might require in this case.

<sup>20</sup>Hobbes, *Leviathan*, p. 144.

With all this in place, we must recast the question about whether citizens can bear responsibility for an aggressive war wrongly undertaken by their state. On the authorization view, we should not ask: did the citizenry actually have the right to undertake such a war, on the best interpretation of their rights? Instead we ask: was this war undertaken in accordance with an authoritative judgment that citizens had moral reason to accept? If the authority's judgment to undertake the war passes the minimal threshold for binding its citizens, then they should take responsibility for it. Now I believe that there are cases in which citizens would in fact have a right to undertake a pre-emptive war. Where *it was a true fact* that an evil regime had acquired weapons of mass destruction and was bent on using them, I think the citizens of a threatened democracy would have a right to pre-empt this regime, in order to avert mass slaughter. If I am correct, then a pre-emptive war qualifies as a possible exercise of the citizenry's rights (if the factual judgment that grounds it is true). Now let us add in the conditions of the authorization view. The authorization view stipulates that if a state qualifies as authorized, citizens will have reason to act on *its* judgments—not their own—as to the exercise of their rights. If the state is authorized, then, when it makes a judgment that it faces such an evil regime and goes to war, its citizenry is liable for the war even if the authority's judgment about their situation was gravely wrong.

The idea here is that an authority can still function *as an authority*—it can bind its subjects even when they disagree with the substance of its decisions—even though its subordinates do not take themselves to be under an obligation to obey when it makes a *clear* mistake, the kind of mistake that shows that *what the authority is doing couldn't possibly qualify as an interpretation of their rights*. Defending this position, of course, entails holding that there is a significant difference between mistakes that show an authority is not interpreting justice at all and other kinds of possible mistakes that an authority might make. So as long as the authority's judgment meets certain clear and minimal threshold conditions, qualifying it as *a reasonable interpretation of rights*, rather than some other kind of judgment, it is binding on us even when wrong (i.e. even when it fails to be a true or accurate interpretation of what our rights in fact require).

Consider the analogous case of a child whose rights must be exercised by a guardian. The child can't legally act for himself because he lacks certain capacities, but he can still possess rights (to property, for example), and the guardian can exercise these rights on his behalf. Thus the ward can be liable to pay out of his estate for debts the guardian incurs, as long as the guardian acts within his mandate (say, by contracting debts to maintain the ward's property). The ward is liable to pay even when the guardian's judgment was a very bad one (perhaps he mistakenly ordered the house repainted when there was no need). But when the guardian clearly acts outside his mandate, (say, by contracting personal gambling debts on the ward's credit), the ward is not liable for what the guardian does, since these debts were not contracted pursuant to *any reasonable* exercise of the ward's rights.

The key to applying this principle is figuring out when the state's acts can reasonably be interpreted as an exercise of our rights. On the authorization view, what are the minimal threshold conditions that must be satisfied if a state's acts are to be binding, even if wrong? What features does the state have to have if its laws are to qualify as *interpretations of our rights*, rather than some other kind of judgment?

## B. CONDITIONS FOR DEMOCRATIC AUTHORIZATION

Kant offers a useful heuristic for addressing this problem: he argues that the state is not legitimate if “an entire people could not possibly agree” to its laws (8:297). Indeed, Kant glosses the basic right to freedom-as-independence as “the warrant to obey no other external laws than those to which I could have given my consent” (8:350). Admittedly, hypothetical consent is a vague standard. But in claiming legitimacy, the state claims that its laws are based on a will each member of the people can share. Interpretations of the general will vary. But we can hold that the state is an authorized state when its laws qualify as a *possible general will*, by passing a minimal threshold for taking each citizen's interests into account. Kant stipulates that any legitimate constitution must secure three such minimal interests: the freedom of each member of society as a human being, his equality with all others as a subject, and his independence as a citizen (8:290). If the constitution meets these criteria, then the state is authorized with respect to me, even if I disagree with its acts. How should we interpret these three criteria?<sup>21</sup>

First, the criterion of *freedom* requires that any legitimate state must grant a sphere of private freedom to its citizens. The principle behind civil freedom is that “each may seek his happiness in the way that seems good to him, provided he does not infringe on the freedom of others to strive for a like end . . .” (8:290). A constitution that protects freedom requires the provision of a scheme of private liberties to all citizens, which protects their interests in the formation and pursuit of a personal conception of happiness. The precise liberties necessary to guarantee civil freedom will vary over time and with the circumstances of a particular society, but it is reasonable to believe they will include claims to personal inviolability and security, as well as freedom of conscience, private property, freedom of thought and expression, freedom of association, and freedom of movement. These liberties are enshrined in all liberal constitutions, and have historically been justified on private autonomy grounds.

The criterion of *equality* requires that each person be treated as a moral equal in the eyes of the state. Minimally, this requires at least that each subject be able to claim equal treatment before the law. This rules out privileged classes of

<sup>21</sup>Of course, most well-ordered states will implement a scheme of civil rights that goes beyond these minimal conditions. But the idea is that a state must grant at least these minimal guarantees to be viewed as a legitimate authority. It is crucial to keep this distinction between ideal justice and minimal legitimacy in view.

citizens, including a hereditary aristocracy, as well as any system that would treat humans as unequal legal persons, such as slavery and serfdom. It also requires at least formal equality of opportunity: careers and official positions in the state must be open to all, and each subject must be able to attain any position her luck, effort, and talents will allow her to achieve. Finally, the ideal of equality suggests important limits on the disparities of wealth that can be tolerated within the state. It is reasonable to think that a clear minimal requirement on economic justice is the guarantee of each citizen's subsistence.<sup>22</sup> No constitution that jeopardizes a citizen's physical survival is one he has reason to accept. Thus, a state that secures constitutional equality must guarantee at least equal treatment before the law, formally equal opportunity, and basic subsistence for each subject.

Finally, the criterion of citizen independence requires that citizens be consulted in the law-making process, that they be authors of the law they are asked to obey. I interpret this to mean that, at least under favorable conditions, the state must grant citizens equal democratic rights.<sup>23</sup> It is perhaps less obvious that democracy is required to justify state authority than that civil freedom and equality are. But consider two reasons why a basic commitment to civic equality might entail democracy. First, when a political procedure privileges certain classes of people over others, it makes an invidious distinction among members of the state. This can be expected to affect the way the disenfranchised are regarded and treated in private life and civil society. No political procedure that publicly brands someone as an inferior is one he can be expected to accept.<sup>24</sup> Second, equal democratic rights are particularly important in the circumstances of controversy and disagreement that characterize modern politics. Suppose a group of citizens was subjected to the rule of benevolent legal experts, with whose views about their rights and interests these citizens often happened to disagree. Could they reasonably accept this kind of state as a credible interpreter of their rights? I believe they could not. Instead, they might plausibly believe that they are being oppressed or dominated by these experts. Where there is disagreement about the best interpretation of justice, it is difficult to see that one's interests are being equally advanced simply by looking at the *outcomes* of public decisions. Instead, when one's own view about justice is treated as being of no consequence, one can reasonably suspect that one's interests are not being taken equally seriously. So it is not sufficient that the state make a good-faith effort to its treat citizens equally, it must also be possible for these citizens to *appreciate* that they are being treated

<sup>22</sup>Kant also suggests that a rightful state must guarantee the basic needs of subjects, and that the state is entitled to tax the wealthy for the purpose of providing for their poorer fellow-citizens (6:326).

<sup>23</sup>Kant does not require that voting rights be extended to all citizens; he distinguishes between "active citizens," who can vote for their representatives, and "passive citizens," who merely enjoy civil rights. He argues that those who are economically dependent and have no property or profession fall into the latter category (8:295).

<sup>24</sup>See Charles Beitz, *Political Equality* (Princeton, NJ: Princeton University Press, 1989), pp. 36–40, 109–10 for discussion of the importance of publicly equal status.

equally.<sup>25</sup> As long as democratic procedures can be expected to guarantee civil freedom and equality, they are an important condition for state authority, because democracy is a unique way to affirm citizens' equality amid disagreement about justice.

If we accept these constitutional criteria, then we will claim that a *democratic legal state*—one that guarantees citizens' personal inviolability, basic subsistence, freedom of belief and expression, and legislates a system of private rights that treats them equally and in which they have a democratic voice and vote—is capable of conferring responsibility on citizens simply in virtue of their membership. If a state guarantees these rights, we ought to see its laws as making moral demands, not as mere forcible impositions on its citizens. Each person has a basic duty to cooperate in securing freedom for himself and others, and where his state satisfies these criteria, he will have a duty to cooperate in sustaining it, since freedom cannot be secured without a system of law. Membership in a democratic legal state is sufficient to confer responsibility even in the absence of consent, voluntary affirmation, or further evidence of identification with the regime.

It is necessary, however, to clarify three more points before applying this account to specific cases of state responsibility. Democratic authorization, as I conceive of it, consists of two separable elements. First, only institutions that meet certain threshold criteria count as democratically authorized: to qualify, an institution must be ruled by laws and not arbitrary decrees; allow for due process and impartial adjudication; define and enforce a scheme of private rights; and institute democratic procedures. As I mentioned above, I do not deny that there may be other sources of state authorization: for example, citizens may perform voluntary acts that express their willingness to allow a non-democratic state to rule in their name. But democratic membership is a sufficient condition for authorization even in the absence of any such acts or expressions on the citizens' part.

The second point is that a regime can qualify as democratically authorized with respect to some of its members but not others. This means that an institution can have threshold features that make it *capable* of exercising its members' rights (it does not fail to count altogether); but despite this capacity, it can still fail to *actually* exercise the rights of some members. Consider the U.S. before the Civil Rights Act of 1964 and the Voting Rights Act of 1965, when official discrimination and disenfranchisement of African-Americans was finally prohibited. Before 1965, white citizens could say that the state was interpreting their rights (and thus that they authorized it), but many black citizens could not.<sup>26</sup>

<sup>25</sup>See Thomas Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2008), pp. 75–95, for a discussion of why democracy is a uniquely valuable way of publicly treating citizens as equals amid disagreement.

<sup>26</sup>Black citizens in the North enjoyed voting rights before 1965. But literacy tests, poll taxes, and character vouchers excluded almost all blacks from voting in the South. As I explore below, where individuals can prove that their basic liberties have been violated, there is a case for excusing them from their share of the reparations burden.

Those black citizens whose basic rights were not guaranteed by the state ought not to be attributed a share of membership responsibility for the state's pre-1965 acts. These citizens are rightly seen as the state's *victims*, not the *principals* behind its agency. So even a state that reaches threshold capacity for being an authorized state can fail to realize that potential with respect to some portion of its population.

Third, it bears underscoring again that nothing in my view entails that the citizen of a democratic state is in any way blameworthy for the state's acts. The kind of responsibility I am arguing for is simply a *task-responsibility to help repair* the harm caused by the state, not moral blame. Taking this distinction seriously allows us to reject the argument made by Al Qaeda and other terrorist groups to the effect that ordinary citizens of a democracy are appropriate targets of punishment or reprisals, because they can be blamed for whatever their state does.<sup>27</sup> No liberal theory can accept this. Some officials may well be morally blameworthy—and indeed, ought to be held criminally responsible—but citizens, just in virtue of their membership, will merely be liable to help repair the harm. This is a special task-responsibility that accrues to them in virtue of their authorization of the state that committed the harmful acts.

#### IV. IMPLICATIONS

How, according to the above principle, might we distribute state responsibility in actual cases? Consider US and UK responsibility for the recent Iraq War, which has now caused over 90,000 civilian deaths from military operations, suicide bombing attacks, kidnappings, car bombings, and the like.<sup>28</sup> Since the Iraq War was not authorized by the UN Security Council and was not a war of self-defense, it was arguably an aggressive war, which is illegal under the UN Charter.<sup>29</sup>

Suppose that the International Court of Justice (ICJ) were to rule that the US or the UK was liable for waging an aggressive war in Iraq, and ordered it to pay compensation to the families of civilians killed and reparations to the state of Iraq

<sup>27</sup>These claims are made in a 2002 letter written by Osama Bin Laden, and addressed to the American people. A translation of the letter can be found in The Guardian, "Full text: bin Laden's 'letter to America,'" <<http://www.guardian.co.uk/world/2002/nov/24/theobserver>>, posted 24 November, 2002.

<sup>28</sup>See "Iraqi body Count database," <<http://www.iraqbodycount.org/database/>>, accessed September 2009.

<sup>29</sup>Article 2(4) of the UN Charter requires that states refrain from the threat or use of force against another state. See Yoram Dinstein, *War, Aggression, and Self-Defence* (Cambridge: Cambridge University Press, 2001), pp. 78–105. Along with the regime of state responsibility for civil damages, international law provides for criminal prosecutions of state officials for the crime of aggressive war before the International Criminal Court. The Rome Statute places the crime of aggressive war within the ICC's jurisdiction (though it cannot yet exercise this jurisdiction, pending an internationally agreed definition of aggression to be negotiated in 2009). See Larry May, *Aggression and Crimes against Peace* (Cambridge: Cambridge University Press, 2008). The regime of state civil responsibility and individual criminal responsibility for aggressive war coexist alongside one another.

for infrastructure destroyed by the invasion.<sup>30</sup> (This is unlikely to happen for any number of reasons, not least because cases can only be referred to the ICJ on the basis of consent between the states involved. But it is still interesting for expository purposes.)<sup>31</sup> Would there be a moral basis, according to the democratic authorization principle outlined above, for distributing political liability to citizen taxpayers of the US and the UK? I argue that there would be. Because these states credibly interpret their citizens' rights, we can attribute them a share of responsibility for harms it inflicts. Moreover, allowing liability to be distributed to citizens gives them an incentive to exercise their political participation rights to control the state, minimizing harms to outsiders. If citizens can be held task-responsible to repair the damage when the state interprets their rights incorrectly, then citizens have an incentive to ensure that the state gets it *right*, through voting, public dissent, and civil disobedience. When the public interest, as they see it, is clearly contravened, citizens can do something about it: they can contest and object to the laws, and sanction the government that imposes them.

When a democratic legal state abuses its power, however, even dissenters are liable for repairing harms their state inflicts. That is because even these dissenters require the framework of law that the state provides, if their rights are to be publicly defined and enforced. So long as state power is being exercised in a way that takes account of their fundamental constitutional interests, these dissenters, along with other citizens, authorize the institution. Like all citizens, they need a unitary interpretation of justice in order to secure them against the arbitrary interference of other people, and this is a justification of the state that the dissenters themselves, in a moment of calm reflection, can understand and endorse. The advantage that dissenters derive from the state—that is, the legally guaranteed protection of their rights—ought to be counterbalanced with an incentive for them to control their state and when necessary, to take responsibility for the harms it inflicts as a byproduct of its authorized activity.

It bears emphasizing that nothing in my account turns on a citizen's causal effect on the state's policies. Instead, the sole relevant consideration is whether

<sup>30</sup>The U.S. military already administers a program under the Foreign Claims Act under which Iraqi civilians who are killed, injured, or suffer property damage due to wrongful actions by Coalition Forces can petition for damages. However, this program exempts any damages arising out of acts of combat. The U.S. military sometimes offers "condolence payments" of up to \$2500 for civilian deaths caused by combat operations, but this is done on an *ad hoc* basis, at the behest of the unit commander. The US has also made major investments in rebuilding infrastructure in Iraq. But since none of these payments relates to reparation for the injury caused by the war itself, they entail no admission of wrongdoing, and they are made at US discretion.

<sup>31</sup>While a decision by the ICJ is highly unlikely, it is not a mere thought-experiment: there is some basis for it in international law. First, one of the states involved—the UK—has accepted the ICJ's compulsory jurisdiction in international disputes. It is the only Security Council Member to do so. Second, while the ICJ rarely adjudicates cases involving the use of force, it did so in one high-profile case, *Nicaragua v. United States* (1986), where it ruled that the US had breached the obligation not to use force (by mining Nicaraguan harbors), and awarded reparations to Nicaragua. The judgment was never enforced, due to the US veto on the Security Council, but it has served as an important legal precedent.

the state is authorized with respect to him. If it is, then the citizen is liable even if he had no causal effect on the policy, and indeed, even if he dissented from or opposed the policy. The sense in which the state is authorized is simply that the citizen can understand and endorse the justification of having an authoritative interpreter of his rights, the state, in place, and can see that it is engaged in the activity of interpreting his rights rather than simply oppressing or dominating him. Additionally, I claim that a state that meets certain basic conditions—by implementing democracy, rule of law, and a scheme of private liberties—can be justified to the citizen in this way, even without any act of endorsement on his part.

I make this point because citizens of autocratic states are often situated similarly to democratic citizens with regard to their dissent from the state's policies and their causal efficacy on the formulation of those policies. Both categories of citizens dissent; both categories of citizens have little efficacy. But I deny that these similarities are relevant to the democratic authorization account. What is relevant is whether the state's authority can be morally justified to its citizens, and thus whether citizens have a moral reason to support the state and defer to its laws. I argue that the authority of democratic legal states conclusively meets these conditions. But I leave it open whether autocratic states and non-legal democracies are ever authorized by their citizens, and if so, under what conditions.

Attributing a share of task-responsibility to citizens in a democratic legal state is also compatible with preserving a higher standard of individual responsibility (including criminal responsibility) for the officials who planned the war, the Coalition Provisional Authority employees who governed Iraq negligently, and those soldiers or private security personnel who committed crimes. It is also consistent with conceding that there may be some US citizens who were not principals but rather victims of their democratic regime—one example may be Jose Padilla, a US citizen designated an enemy combatant and held for three and a half years without trial.<sup>32</sup> We should allow that such victims have an excuse that exculpates them from assuming political liability. The state was not credibly exercising their rights, and therefore it was not authorized with respect to them. But in the case of the US and UK, the category of citizens who were victims at the hands of their own regime is extremely small.<sup>33</sup> Therefore there is a presumption

<sup>32</sup>Padilla's case is complex. He was eventually convicted, along with two other men, of involvement in a conspiracy to provide money and recruits to Islamic terrorist organizations. But he was never convicted of the "dirty bomb" plot that was the original reason for his military confinement. Padilla's lawyers also claimed that he was tortured while confined in a Navy brig in South Carolina. So there may be some basis for the view that Padilla's rights have been violated at government hands.

<sup>33</sup>In cases where large segments of the population were victims at the hands of their regime, an institutional mechanism should be provided where the state's victims might present evidence that their rights were not guaranteed by the state. These individuals then ought to be "excused" from assuming a share of membership liability. For example, the ICJ could hear evidence from persecuted internal minorities and then issue instructions about the proper "internal distribution" of the reparations burden.

that political liability can be distributed to all citizens. Holding democratic citizens responsible recognizes that the state is wielding rights that *they own*, and it gives citizens an incentive to control the regime that acts in their name.

## V. CONCLUSION

I began this article by asking whether it is coherent and morally attractive to attribute corporate responsibility to states, in the way international law currently does. I have claimed that it makes sense to treat states as moral persons, since they are incorporated groups with an internal constitution that allows them to form collective intentions, grasp moral reasons, exercise deliberative control, and act voluntarily. But I also argued that we cannot assume that simply in virtue of membership, the will of the citizen is implicated in his state in a way that requires him to bear a share of responsibility for its acts. On the democratic authorization principle I have defended, where the state qualifies as a credible interpreter of its citizens' rights, then membership alone will suffice to implicate the citizen's will. Citizens of democratic legal states have good reason to affirm their membership, and I have claimed this is sufficient to require them to discharge a share of political liability.

In conclusion, I emphasize that this does not entail that non-democratic citizens are necessarily "off the hook" when it comes to political liability: my argument shows only that the democratic authorization principle cannot serve us in these cases. As I mentioned, there may be other distributive principles to deal with non-democratic states. Where citizens have established some voluntary connection with their state—by participating in a war, voting for the regime, or even taking pride in it—they may share in responsibility for what the state has done. Or there may be other, quite different, sources of non-democratic authorization. Though I lack the space to develop these alternative approaches here, I do not deny their plausibility. Finally, we should acknowledge that there may be cases where the state's responsibility is rightly left "hanging in the air," as in tyrannical or terroristic states. Here, citizens are the innocent victims of their regime, and they cannot be held responsible for its acts. A fully developed approach to state responsibility would thus invoke multiple principles for distributing state responsibility, according to the type of political constitution at stake.\*

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