Deontology, Political Morality, and the State

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Sometimes the government makes a policy choice, and, as a result, innocent persons die. How should we morally assess such deaths? For instance, is the government's choice of the reasonable doubt standard or its decision to restrict the death penalty to certain narrow categories responsible for deaths of innocents? If so, does the deontological norm against harming people dictate that the government loosen the evidentiary standard for conviction or widen the availability of capital punishment? This Essay argues that the traditional distinctions between intending and foreseeing harm and between causing harm and allowing harm to occur are insufficient to absolve the state of its responsibility for such deaths. This Essay also argues, however, that it is a mistake to conclude from this observation that the government may be morally required to loosen the evidentiary standard for conviction or to widen the availability of capital punishment. Once we fully understand the distinctive features of government as a moral agent, this Essay argues, we will see that the government has obligations both to protect its people from crimes and respond to crimes on behalf of the people and *to respect various constraints placed on its power, including desert-based limitations on punishment and standards of proof required for conviction. These obligations may conflict with one another, but that observation does not generate the conclusion that it is morally required to punish people with death or convict people with reduced standards of proof.*

I. INTRODUCTION

Consider the following cases. The Supreme Court has drawn various lines to prohibit the imposition of capital punishment for certain types of crimes or offenders.[1] For purposes of argument, assume that every time we narrow the scope of those who can receive the death penalty, we weaken its deterrence effect,

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[1] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (prohibiting the death penalty for individuals under the age of eighteen when they committed their crimes); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (prohibiting the death penalty for mentally retarded criminals); Coker v. Georgia, 433 U.S. 584, 600 (1977) (prohibiting the death penalty for rape).

meaning that there would be more crime victims.[2] We also weaken the incapacitation effect—even though those not eligible for the death penalty presumably will stay in prison—because they may commit crimes against prison officers and other inmates.[3] Assuming that some of these new crime victims are murder victims, then one might argue that the Supreme Court's decision to narrow the scope of capital punishment is equivalent to a death sentence for innocent victims, who would not have been victims had the restrictions never been put into place. In other words, one might argue that the Supreme Court's decision to limit the death penalty has resulted in deaths of innocent people.

Or, consider the Blackstone adage that it is better for ten guilty men to be acquitted than for one innocent man to be convicted.[4] Statements like this are frequently made as support for the standard of proof beyond a reasonable doubt in criminal cases.[5] Assuming, plausibly, that the clear and convincing evidence standard or the preponderance of evidence standard would have the effect of acquitting fewer guilty men and convicting more innocent men, we might further assume that our choice to employ the proof beyond a reasonable doubt standard as opposed to some other standard would lead to an increase in criminal activities—both by letting potential repeat offenders walk and by lowering the likelihood of apprehension. Assuming some of these people go out and kill others, one might argue, again, that the government's choice of the proof beyond a reasonable doubt standard is equivalent to a death sentence for innocent victims, who would not have been victims had the standard of proof been the preponderance of evidence standard instead.[6]

In these cases, the government makes a policy choice, and, as a result, innocent persons die. How should we think about the moral ins and outs of this problem? Is the government's choice of the reasonable doubt standard or its decision to restrict the death penalty to certain narrow categories responsible for deaths of innocents? If so, does the deontological norm against harming people dictate that the government loosen the evidentiary standard for conviction or widen the availability of capital punishment? In a prominent, much-discussed article, Cass Sunstein and Adrian Vermeule have argued that the answer to this question is yes, at least for the death penalty, and the authors conclude that, if the death

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[2] This is a controversial assumption. For a discussion as to how such a thing might happen, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 43 (1968).

[3] *See, e.g.*, Sharon Pian Chan & Carol M. Ostrom, *Monroe Guard Complained About Working Solo Before Inmate Killed Her*, SEATTLE TIMES, Jan. 30, 2011.

[4] 4 WILLIAM BLACKSTONE, COMMENTARIES *358 ("[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.").

[5] *See, e.g.*, *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

[6] *See* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 75 (2008).

penalty deters, then "capital punishment has a strong claim to being not merely morally permissible, but morally obligatory."[7] Even though they focus their arguments on capital punishment, it is easy to imagine a parallel argument against the requirement of proof beyond a reasonable doubt. Therefore, in the rest of this Essay, I will use the phrase the "Sunstein-Vermeule challenge" to refer to the challenge against the restrictions on conviction and punishment that focuses on potential harms to innocent people traceable to such restrictions.[8]

A possible response to the Sunstein-Vermeule challenge is to suggest that the kinds of conclusions that Sunstein and Vermeule draw can be avoided if we keep in mind various distinctions found in deontological ethics. Parts II and III review such attempts and conclude that there are reasons to doubt that deontological ethics as commonly understood has sufficient resources to address the Sunstein-Vermeule challenge. Part IV argues that once we take a full account of the ways in which the government is a moral agent with distinct features, we will see the emptiness of the Sunstein-Vermeule challenge.

II. ACT-OMISSION AND DOING-ALLOWING DISTINCTIONS

One way to respond to the Sunstein-Vermeule challenge is by relying on the following argument: When the state kills, it itself carries out the act of killing, whereas when it fails to prevent a person from killing others, it does not kill; it only fails to prevent someone from killing. Sunstein and Vermeule characterize this distinction as the "act/omission" distinction and devote the "centerpiece"[9] of their article to attacking it.[10] They argue that "unlike individuals, governments always and necessarily face a choice between or among possible policies for regulating third parties,"[11] "[t]he only interesting or even meaningful question government ever faces is not whether to act, but what action should be taken—what mix of criminal justice policies government ought to pursue,"[12] and the decision not to have capital punishment is not an "'omission' or a 'failure to act' in any meaningful sense."[13]

In other words, Sunstein and Vermeule are arguing, one cannot rely on the act-omission or action-inaction distinction to draw strong conclusions about the

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[7] Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 750 (2005).

[8] Sunstein and Vermeule themselves are interested in applying their analysis to "many questions outside of the context of capital punishment." *Id.* at 705. They in fact discuss both constitutional restrictions on the death penalty, *id.*, and the proof beyond a reasonable doubt requirement in advancing their arguments. *Id.* at 727–28.

[9] *Id.* at 709.

[10] *Id.* at 720–24.

[11] *Id.* at 721.

[12] *Id.* at 722.

[13] *Id.*

morality of government actions because the government cannot help but act. It seems to me that Sunstein and Vermeule are right to argue that there are many difficulties with applying the act-omission distinction in this context. For instance, as Sunstein and Vermeule point out, capital punishment is one of several controls the government has at its disposal, and depending on how frequently this instrument is used, it may increase or decrease the risk of people being killed by others.[14] The government's decision to prohibit the imposition of the penalty of death on mentally retarded offenders thus can be characterized as adjusting the availability of the death penalty, hence changing the risk of future crimes, and the action-inaction distinction is thus not terribly informative.

The same analysis can be applied to the reasonable doubt standard. Some might argue that convicting people on the basis of anything less than what is required by the reasonable doubt standard is a wrongful action, whereas when acquitted defendants commit additional crimes, the state has not *done* anything. But the government has no choice but to act in this scenario. It is not just that an "acquittal" itself is an action as opposed to an inaction, as Sunstein and Vermeule observe.[15] It is also that the government has to determine when considering burden of proof issues the appropriate ratio between the number of innocents wrongly convicted and the number of guilty wrongly acquitted. The Blackstone ratio is set at 1:10; the government may decide that the ratio should instead be 1:1, 1:2, 1:5, or 1:100. Assuming that some of these wrongly acquitted individuals go out and commit more crimes, the government can control the amount of risk of people being crime victims by adjusting the ratio through different levels of required proof. In other words, by insisting on the reasonable doubt standard, the government "acts" in that it picks a particular ratio between wrongly convicted and wrongly acquitted. Therefore, Sunstein and Vermeule's argument against the existence of the act-omission distinction for the government is valid, and even Carol Steiker, who has written a spirited critique of Sunstein and Vermeule's arguments, seems to agree with them that the act-omission distinction is powerless in this debate.[16]

There is only one problem.[17] The argument misidentifies the target. It is clear that the main opponents Sunstein and Vermeule have in mind when they attack the

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[14] *Id.* at 721–23.

[15] *Id.* at 727–28.

[16] Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 757 (2005).

[17] One problem with Sunstein and Vermeule's argument that I will not focus on in this Essay is that their argument proves too much. Take speed limits for example. In 1995, Congress repealed all federal speed limits, and a number of states subsequently raised their speed limits above the pre-existing federal limits. A recent study argues that the repeal of the speed limit led to a 3.2% increase in road fatalities and estimates that we could attribute 12,545 fatalities between 1995 and 2005 to the repeal. Lee S. Friedman et al., *Long-Term Effects of Repealing the National Maximum Speed Limit in the United States*, 99 AM. J. PUB. HEALTH 1626, 1626 (2009). Sunstein and Vermeule are not very clear about the scope of their arguments, but by denying the act-omission distinction and arguing that

action-inaction distinction are deontologists. They say, for instance, that "[t]he unstated assumption animating much opposition to capital punishment among intuitive deontologists is that capital punishment counts as an 'action' by the state, while the refusal to impose it counts as an 'omission.'"[18] But the action-inaction distinction is not quite the distinction that deontologists are likely to have in mind when they distinguish between state acts of killing and the state's failure to prevent killing. While the distinction goes by many names,[19] the relevant distinction here is that between doing and allowing, which is different from action and omission or action and inaction. They are of course related,[20] but the moral distinction that seems to do the work in doing-allowing scenarios does not neatly map onto the distinction between action and inaction. One may *do* something without engaging in an action and one may *allow* something to happen through action.[21] Therefore, the core intuition that there is a moral distinction between doing and allowing, which Jeff McMahan recently characterized as one of the "twin pillars[] of traditional nonconsequentialism,"[22] survives Sunstein and Vermeule's effective dismantling of the action-inaction distinction for the state.

What, then, of the core intuition underlying the doing-allowing distinction? Can we rely on *that* distinction to defend the relevant constraints against the Sunstein-Vermeule challenge? As Philippa Foot suggests, what is crucial about it

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the government is essentially "killing" innocent persons any time its policy choice leads to deaths, Sunstein and Vermeule seem to be committed to the view that the federal government "killed" those 12,545 innocent people by repealing the speed limits and that a low (or even an absurdly low) federal speed limit would have "a strong claim to being not merely morally permissible, but morally obligatory." Sunstein & Vermeule, *supra* note 7, at 750. One obvious conclusion to draw from their arguments is that deontological ethics, when applied to the government, has such absurd implications and is therefore inapplicable to government policy decisions. Perhaps this is not a conclusion that they would discourage given their evident sympathies to consequentialism. However, Sunstein and Vermeule do not acknowledge this next step in their arguments, presumably because acknowledging it would expose the disingenuousness of their repeated insistence that "the choice between consequentialist and deontological approaches to morality is not crucial here," *id.* at 706, that their claims "do not depend on accepting consequentialism," *id.* at 718, and that their "argument does not challenge deontological claims as such." *Id.* at 738.

[18] Sunstein & Vermeule, *supra* note 7, at 707.

[19] *See* Samuel Scheffler, *Doing and Allowing*, 114 ETHICS 215, 215 (2004).

[20] *See* Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 PHIL. REV. 287 (1989), *reprinted in* WARREN QUINN, MORALITY AND ACTION 149 (1993).

[21] *See* Philippa Foot, *Morality, Action, and Outcome*, *in* MORALITY AND OBJECTIVITY: A TRIBUTE TO J.L. MACKIE 23, 24 (Ted Honderich ed., 1985), *reprinted in* MORAL DILEMMAS AND OTHER TOPICS IN MORAL PHILOSOPHY 88, 89 (2002); Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5 (1967), *reprinted in* PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 26 (1978) [hereinafter Foot, *Problem of Abortion*]; Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, 103 ETHICS 250, 251–52 (1993).

[22] Jeff McMahan, *Intention, Permissibility, Terrorism, and War*, 23 PHIL. PERSP. 345, 352 (2009). The other is the intending-foreseeing distinction. *See id.*

seems to be whether a person "may or may not be 'the agent' of harm that befalls someone else."[23] More specifically, as she adds, "it makes all the difference whether those who are going to die if we act in a certain way will die as a result of a sequence that we originate or of one that we allow to continue, it being of course something that did not *start* by our agency."[24]

So, in the case of capital punishment, if the state's failure to deter a murderer has led to one more murder taking place, the state stands in one kind of relationship of responsibility to the killing; if the state executes a person, the state stands in quite another, different relationship of responsibility to the killing. Similarly, if the state's failure to convict a person leads to one more murder taking place, the state's relationship to that killing is different from its relationship to someone the state convicts on the basis of proof that falls below the reasonable doubt standard. One might, then, defend the restrictions on capital punishment and the reasonable doubt standard against the Sunstein-Vermeule challenge on the ground that the state is prohibited from killing a person (who does not deserve to be killed) or convicting a person (whose guilt is not beyond a reasonable doubt) through its own agency in order to prevent a different agent from harming others through his or her own agency.

How well does this argument work? It seems that there are difficulties. To see this, consider the following hypothetical, which I will call "Sophie Variation 1," as it is a variation on an incident from the novel *Sophie's Choice*.[25] There is a war. Sophie is taken to a prison camp. A sadistic prison guard decides to free her, but before he does that, he gives her a choice. If she shoots a particular prisoner, named Bruno, he will let five children (whom she has never met) go. If she refuses, Bruno will be let go, and the children will have to stay in prison, where the conditions are terrible and there is a significant chance that they will be killed by other inmates, guards, or disease sometime before the war ends. Is the deontological constraint against killing so strong that it prohibits her from killing Bruno? Perhaps.

Consider, then, Sophie Variation 2. Sophie Variation 2 is identical to Sophie Variation 1 except for the fact that the five children are her own children. By killing Bruno, she can liberate her five children to whom she owes some duty of protection. If she now refuses to kill Bruno, can we say that she has made the morally correct decision simply because she refuses to kill? What makes Sophie Variation 2 difficult is that either way she chooses, she would be in violation of some duty—either a negative duty not to kill or a positive duty to protect her children from harm, and even if it is the case that killing is worse than allowing a

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[23] Philippa Foot, *Killing and Letting Die*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 177, 178 (Jay L. Garfield & Patricia Hennessey eds., 1984), *reprinted in* PHILIPPA FOOT, MORAL DILEMMAS AND OTHER TOPICS IN MORAL PHILOSOPHY 78, 80 (2002).

[24] *Id.* at 81–82; *see also* Scheffler, *supra* note 19.

[25] WILLIAM STYRON, SOPHIE'S CHOICE (1979).

killing to occur, this may be a situation where the positive obligations owed to her five children are weighty enough to override the negative duty owed to Bruno.[26]

Of course, just because one owes a positive obligation to protect five people from harm does not mean that one may kill one person to save those five. If we think about the famous organ transplant hypothetical in which we are asked to consider whether a surgeon may kill one person in order to use his organs to save five,[27] the conclusion that the surgeon is not permitted to do so is the correct conclusion even though the five he could save are presumably his own patients (and whether the one whose organ he needs is his patient or not, similarly, seems immaterial). And the conclusion is the same even if these five are his own children. Now, in this particular variation, the fact that he is a doctor might complicate the picture since there are special duties associated with his institutional role not to harm a patient under his care in order to care for his own loved ones. In order to avoid this complication, we can imagine a father who is considering killing a person in order to take his organs to give to his five children who need the organs to survive. The doctor who is doing the transplant will not know where the organs come from and will not ask. May the father proceed? Again, the answer here is no.

So, along these lines, one might argue that the correct answer to Sophie Variation 2 is that she is neither permitted nor required to kill the designated prisoner. Consider, then, Sophie Variation 3, in which Bruno is someone who, at the beginning of the war, took advantage of the chaos of the new situation and killed someone Sophie knows (but not very well). Because of the war, the murder was never investigated, and he was never prosecuted. Sophie now has to choose between killing Bruno and freeing her five children from the prison. Is she permitted to kill him? Is she required to kill him? If the answer is that the deontological constraint against killing still controls, does the answer change if the murder victim was not an acquaintance but Sophie's husband? Does Sophie have a moral obligation to refrain from killing a man who recently killed her husband and was never punished even if her failing to kill him would mean that her children may die in prison? Or, yet another variation: What if the victim was one of her children? Does Sophie have a moral obligation to refrain from killing a man who recently killed one of her children even though her failing to kill him would mean that her other children may die in prison?

Now consider Sophie Variation 4, which is just like Sophie Variation 3 except that Bruno is not a murderer for certain. Instead, Bruno is someone who *may* have

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[26] *Cf.* Foot, *Problem of Abortion*, *supra* note 21, at 29–30. This conclusion is consistent with the standard view in law that while in many cases a person commits a wrong in doing harm but does not when merely allowing harm to occur, the significance of the distinction is considerably weakened when there is a special relationship between the agent in question and the victim. *See, e.g.*, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 120–21 (2010); WAYNE R. LAFAVE, CRIMINAL LAW 331–32 (5th ed. 2010).

[27] JUDITH JARVIS THOMSON, *The Trolley Problem*, *in* RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 94, 95 (William Parent ed., 1986).

murdered Sophie's husband but was not apprehended. Sophie is not certain that it was him, and she knows that the evidence against him is not sufficient to win a criminal conviction in a tribunal that applies the reasonable doubt standard. However, she believes that Bruno did kill her husband, and it is more likely than not that he is the one. Is she permitted to kill Bruno? Is she required to kill Bruno? Keep in mind that the preponderance of evidence standard is not a trivial standard, and it is something that we have no trouble using in the civil context when deciding to impose enormous financial burdens on persons and entities.

We are considering these hypothetical scenarios in order to evaluate the various constraints the state places on the institution of punishment. The constraints are 1) narrowing the scope of capital punishment to the narrowest, most deserving group of offenders and 2) the requirement of proof beyond a reasonable doubt for convictions. The question here is whether we can defend these constraints against the objection that keeping these constraints in place amounts to a failure to prevent killings of innocent people. The defense strategy we are considering is the distinction between doing and allowing harm, and Sophie Variations 3 and 4 (and subvariations) are designed to show that the distinction is a questionable way of defending the constraints against the Sunstein-Vermeule challenge.

In these scenarios, imprisonment and potential death from imprisonment of her children are merely allowed by Sophie, whereas the killing of Bruno would be done by Sophie herself. Yet Sophie owes her children a duty of protection, and her positive duty may make it permissible or even mandatory for her to violate the negative duty owed to Bruno. We may justify the state's loosening of its restrictions on the death penalty or the burden of proof for conviction along the same lines. The doing-allowing distinction seems most significant in stranger-stranger situations and loses its force as the nature of the relationship between the actor and the victim becomes that of a protector-protectee relationship. The government may be large, impersonal, and bureaucratic, but it seems incorrect to characterize the crime victim-government relationship as that between complete strangers. In fact, it is not just that the government and its citizens are not strangers. Protecting its citizens from harm, from both internal and external sources, is considered to be one of the main tasks the government owes its citizens.

The state thus has a duty to provide physical security to its citizens, and if the state has to choose between killing a criminal—someone who is not innocent—who does not deserve such a harsh punishment and allowing killings of its citizens, it is not so obvious that the mere doing-allowing distinction can justify the state's insistence on respecting the constraint on administration of the death penalty. Similarly, the state owes a duty of physical security to its citizens, and if the state has to choose between conviction of a defendant under the preponderance of evidence standard (as opposed to the reasonable doubt standard) and allowing more killings of its citizens to occur, it is again not so obvious that the doing-

allowing distinction can justify the state's insistence on the beyond a reasonable doubt standard.[28]

III. PURPOSEFUL-NONPURPOSEFUL AND INTENDING-FORESEEING DISTINCTIONS

Another way to respond to the Sunstein-Vermeule challenge may be the argument articulated by Carol Steiker, who criticizes Sunstein and Vermeule for abandoning "the moral distinction between purposeful and nonpurposeful action."[29] She explains that "[i]n the capital punishment context, . . . the government knowingly or recklessly loses or 'takes' lives by not executing . . . , but it purposefully takes lives by executing" and argues that "the difference between purposeful and nonpurposeful harms remains crucial."[30] To support her claim, she gives the following example:

> Suppose a mother fails to protect her child from abuse by the mother's boyfriend, who intentionally murders the child. . . . Because the mother has an ongoing duty to protect her child (the way the government has a duty to protect its citizens), it is no defense for her to say that her failure to act was merely an omission for which she was not responsible.

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[28] Now, is it not the case that the state owes a duty to protect both criminals and non-criminals alike? In that case, Sophie Variations 3 and 4 may not be analogous because in the case of the state's relationship to criminals, the state owes them a duty of protection, whereas Sophie does not have that kind of obligation towards Bruno. This is a complication, and a full exploration of this issue would take us far afield, but I do not believe it makes a difference for our purposes. To see this point, consider Sophie Variation 5, which is identical to Sophie Variation 3, except that Bruno is not a stranger but is in fact one of her children. May Sophie now kill Bruno to save her other children? Or does the fact that Sophie owes all her children a positive obligation mean that Sophie cannot kill him? I do not think that this second conclusion follows. The reason she perhaps may not kill Bruno is because she may not kill any human being, but the fact that she has a duty to protect Bruno from harm does not give her an additional reason not to kill Bruno. This conclusion may sound counterintuitive, but we can think of it the following way. Say I owe you money. Instead of paying you back, I steal your money. Have I violated my obligation to pay you back? The answer is no—at least not yet. The only duty I violated is the negative duty not to steal. What if I pay you back and steal from you at the same time? I think I have fulfilled my obligation to pay you while simultaneously violating my obligation not to steal from you. In Sophie Variation 5, then, Sophie may fulfill her positive obligation to protect Bruno by doing the best job she can to free herself from the terrible dilemma the prison guard places her in by, say, attempting to help all her children, including Bruno, escape. Assuming that she has run out of such options, then we may morally evaluate her decision to kill Bruno in the same way we would had Bruno not been her child. This is not the same as arguing that there is no moral difference between a parent murdering his or her child and a person murdering a stranger. There may be morally relevant features that differentiate the two cases, such as special vulnerability of children to harm from their own parents. In other words, one could say that a violation of a duty x owes to y in a given instance is worse than a violation of the same duty x owes to z, but that is not the same as saying that the two violations involve two different obligations.

[29] Steiker, *supra* note 16, at 759.

[30] *Id.* at 757.

> However, the degree of her moral culpability depends on her mens rea: if she did not know, but should have known, of the risk of death to her child, she would be guilty of negligent homicide; if she knew of and consciously disregarded a substantial risk of death to her child, she would be guilty of reckless homicide (manslaughter); if she knew to a practical certainty that her child would die, she would be guilty of second-degree murder; and if her purpose in failing to act was to bring about the death of her child, she would be guilty of first-degree murder.[31]

She then concludes, "To acknowledge that the mother had a duty to act to prevent the intentional murder of her child by another is not and should not be the same as saying that her omission constituted intentional murder."[32]

What is the objection here? It cannot just be the argument that a purposeful killing is worse than a nonpurposeful killing. If that were the argument, then it would not necessarily contradict the notion that the government should engage in one purposeful killing to prevent ten (or five or even two) purposeful killings by individuals, and this is clearly the position that Steiker is trying to avoid. Perhaps Steiker's argument is not simply that a purposeful killing is worse than a nonpurposeful killing but whether the state intentionally killing a person is more blameworthy than the state engaging in an act knowing that it will result in persons being killed.[33] Her statement that "those who purposefully transgress are more blameworthy [than those who do the same nonpurposefully] because they have affirmatively chosen their course of action and its results" renders support to this interpretation.[34]

The problem, even when stated in these terms, is that merely saying that the *state* engaging in a purposeful killing is worse than the *state* engaging in a nonpurposeful killing cannot settle the issue in Steiker's favor because the question about tradeoffs still remains. To see this point, suppose that we are in a terrible world where all but twenty Picasso paintings have been destroyed. I am in possession of two of them. One day, for fun, I set one painting on fire and pay a random man going home from New York to New Jersey on a ferry to carry the other one and deliver it to a friend of mine in New Jersey. The man, having pocketed the money and not realizing what he is carrying, throws it into the river and the painting is lost or at least irreparably damaged. What I did is worse in the first instance than in the second because at least in the second instance what I did was merely reckless or negligent.

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[31] *Id.* at 757–58.

[32] *Id.* at 758.

[33] A common label for constraints that have this form is "agent-relative." *See* SHELLY KAGAN, THE LIMITS OF MORALITY 74–75 (1989); THOMAS NAGEL, THE VIEW FROM NOWHERE 175–80 (1986).

[34] Steiker, *supra* note 16, at 759.

Now change the facts a bit. There are twenty Picasso paintings. I was in possession of all twenty. Nineteen of them have been stolen by a radical art student friend of mine who calls me and says that he plans to go on a yacht on a stormy day with all nineteen paintings in order to see "how they hold up" in extreme conditions. He tells me, however, if I destroy the painting I still have and send the remains to him by midnight, he will return all nineteen and use the destroyed painting for his "next project," which he will finish "maybe" in the next five to ten years. I have known him long enough to know that he is a man of his word, so I destroy the painting in order to eliminate the risk of nineteen paintings being lost or damaged in the water somewhere. May I destroy one painting intentionally to save the nineteen, which may or may not be destroyed without my action? Should I? Must I? The proposition that intentionally destroying a painting is worse than being negligent or reckless about the well-being of a painting does not settle this question and probably generates the wrong answer if interpreted too stringently.

Therefore, Steiker's argument that a purposeful killing is worse than a nonpurposeful killing is not an effective response to the Sunstein-Vermeule challenge. What we need instead is an argument in the form that one is prohibited from intentionally killing someone even if doing so would prevent foreseeable killings. This argument, of course, relies on the classic deontological distinction between "intending" and "foreseeing" harm.[35] When the government executes a person, it kills intentionally, whereas when the government's restriction of the death penalty leads to a killing, the killing is merely foreseeable. Similarly, if the government imprisons a person on a basis of proof that falls short of the reasonable doubt standard, then the government intentionally imprisons despite limited evidence, but if its stringent standard of proof leads to acquittals of killers who murder innocent victims, the government does not kill intentionally, even though the killings may be foreseeable. If it is the case that one may not kill even if it means foreseeable killings would be prevented, then it seems that we have an answer to the Sunstein-Vermeule challenge.[36]

Putting the inquiry in this way, however, highlights a number of difficulties. First, there is the question whether we can coherently maintain that the state has "intentions" in a way that is at least analogous to the way persons have intentions.[37] Without an ability to articulate what it means for the state to have an

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[35] Legal scholars tend to use "purposeful" and "nonpurposeful," and the term "nonpurposeful" encompasses knowing, reckless, negligent, and purely faultless. Philosophers, on the other hand, tend to use "intentional" and "foreseeable." I treat these as equivalent dichotomies for the purposes of this article. *Cf.* Douglas Husak, *The Costs to Criminal Theory of Supposing That Intentions Are Irrelevant to Permissibility*, 3 CRIM. L. & PHIL. 51, 58 n.31 (2009).

[36] Even though, as we will see below, Sunstein and Vermeule focus on the act-omission distinction in their article, they also appear at times to deny the intending-foreseeing distinction. Sunstein & Vermeule, *supra* note 7, at 722–23; *see also* Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847, 849–52 (2005).

[37] *See, e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT 119–46 (1999).

"intention," it appears difficult, at least at first glance, to make any moral argument that relies on the intending-foreseeing distinction. Second, there is a long-running, unresolved debate in moral philosophy about whether intention is relevant to permissibility,[38] and the strategy of relying on the intending-foreseeing distinction appears to rest on the belief that intention is relevant to permissibility. Third, even if intention is relevant to permissibility for individuals, it is unclear whether the same is the case for the state.[39] Fourth, while intention may be morally significant even if it has no relevance to permissibility,[40] the ways in which intention is morally significant may not translate well to the context of state actions.[41]

Despite the difficulties, it seems to me that there are ways to devise an account by which we can coherently maintain that the state has intentions[42] and that such intentions are either relevant to permissibility or morally significant in a way relevant to our discussion.[43] I will not attempt such an account here and will sidestep these issues, as I think that, even if these problems are overcome, there is a more serious problem, which can be seen by reexamining Sophie Variations 3 and 4 and recasting them in terms of the intending-foreseeing distinction.

So, in Sophie Variation 3, we would ask whether Sophie has a moral obligation to refrain from intentionally killing Bruno, who recently killed her husband or one of her children and was never punished, even if it is foreseeable that her failing to kill him would mean that her children may die in prison. And in Sophie Variation 4, we would ask whether Sophie has a moral obligation to refrain from intentionally killing Bruno, who may have killed her husband but was never punished, even if it is foreseeable that her failing to kill him would mean that her children may die in prison. As we saw above, what makes Sophie Variations 3 and 4 difficult is that either way she chooses, she would be in violation of some duty—either a negative duty not to kill or a positive duty to protect her children from harm, and even if it is the case that intentionally killing a person is worse than

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[38] *See, e.g.*, T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 8–88 (2008); THOMSON, *supra* note 27, at 94; McMahan, *supra* note 22, at 347–59; Victor Tadros, *Wrongdoing and Motivation*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (R.A. Duff & Stuart Green eds., forthcoming Apr. 2011); Judith Jarvis Thomson, *Physician-Assisted Suicide: Two Moral Arguments*, 109 ETHICS 497, 514–17 (1999) [hereinafter Thomson, *Physician-Assisted Suicide*]; Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 293–96 (1991).

[39] *See* David Enoch, *Intending, Foreseeing, and the State*, 13 LEGAL THEORY 69 (2007).

[40] *See* SCANLON, *supra* note 38, at 37–88; Thomson, *Physician-Assisted Suicide*, *supra* note 38, at 517.

[41] Enoch, *supra* note 39, at 84–91.

[42] *See, e.g.*, MARGARET GILBERT, *What Is It for* Us *to Intend?*, *in* SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY 14 (2000); David Copp, *On the Agency of Certain Collective Entities: An Argument from "Normative Autonomy,"* 30 MIDWEST STUD. PHIL. 194 (2006); J. Angelo Corlett, *Collective Moral Responsibility*, 32 J. SOC. PHIL. 573 (2001); Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171 (2007).

[43] *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); SCANLON, *supra* note 38, at 52–56.

failing to prevent a foreseeable killing from occurring, the positive obligations may outweigh the negative duty owed to Bruno.[44]

We may justify the state's loosening of various restrictions on its criminal justice system along the same grounds. The safety of its citizens (or the safety of people within its territory) from criminal harm is the government's business. And when the state has the choice of intentionally executing a non-innocent criminal as a way of preventing foreseeable deaths of innocent citizens under the state's protection, it seems that the state should not be able to merely cite the intending-foreseeing distinction to evade its responsibility. In short, the efficacy of the intending-foreseeing distinction as an answer to the Sunstein-Vermeule challenge may be doubted for the same reasons for doubting the doing-allowing distinction.

What is the upshot of all this? It seems that the Sunstein-Vermeule challenge cannot be easily disposed of through the doing-allowing and intending-foreseeing distinctions found within traditional deontological ethics. Now, these are complicated issues that implicate some of the most contested issues in moral philosophy, and I concede that I have not given a knock-down argument in favor of my positions in this small amount of space, especially given that intuitions may differ on some of these cases. All I seek to accomplish here is to point out some reasons to doubt that a mere reliance on these traditional deontological distinctions is sufficient to meet the Sunstein-Vermeule challenge in order to explore other ways of meeting the challenge.

IV. PUNISHMENT, THE STATE, AND POLITICAL MORALITY

If it is indeed the case, as I have suggested, that the intending-foreseeing and doing-allowing distinctions cannot answer the Sunstein-Vermeule challenge, does that mean that increasing the availability of capital punishment and lessening the burden of proof required for conviction may be "not merely morally permissible, but morally obligatory," as Sunstein and Vermeule would argue?[45]

Not so fast. The strength of the Sunstein-Vermeule challenge lies in their observation of "the distinctive features of government as a moral agent."[46] Their mistake lies in their failure to take this insight far enough. The government *is* distinctive, and once we fully understand the ways in which the government is distinctive, we will see that the various substantive and procedural safeguards guaranteed in our criminal justice system are much more resilient to the Sunstein-Vermeule challenge than they claim.

In order to understand the constraints placed on the criminal process, we must first understand the nature of criminal law and the institution of punishment. The criminal justice system has many characteristics, but we might say its three key features are that it is *coercive*, *judgmental*, and *preemptive*. First, the *coercive*

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[44] *Cf.* Foot, *Problem of Abortion*, *supra* note 21, at 29–30.

[45] Sunstein & Vermeule, *supra* note 7, at 750.

[46] *Id.* at 721.

aspect takes place most dramatically and obviously in the process of apprehension and punishment. We routinely send people to prisons in this country for five, fifteen, twenty-five years, or for life. Sometimes we even kill them. All of this is done by the government in our name and in the name of upholding the rule of law. Second, the criminal justice system is *judgmental* in the sense that when we punish, we blame, condemn, and stigmatize the offenders as recipients of blame and punishment.[47] And by stigmatizing the offenders, punishment gets "personal" and sends the message that the act being punished reflects badly on the actor.[48] Finally, the criminal justice system is *preemptive*—not in the sense of "taking place before" as in "preemptive attack" but in the sense of supersession or replacement as in "federal preemption." That is, state punishment is preemptive in that it acts as the exclusive agent licensed to respond to criminal wrongdoing through punishment, and private individuals are prohibited from doing the same. Even though the idea of retribution—that people should receive what they deserve—appears neutral on its face on the question of *who* should be the one giving wrongdoers what they deserve, the government is the only legitimate punisher, and the law prohibits private individuals from taking the law into their own hands.

Why does the criminal justice system have the peculiar shape that it does? A full answer to this question is beyond the scope of this Essay, and only a rough treatment is given here. First, criminal law plays an important role in preserving physical security through its system of prohibitions and punishments. Fulfilling this function frequently requires use of coercion and explains the criminal justice system's coercive aspect. Second, as many have argued, an important function that criminal law serves is to *displace* feelings of resentment and desires for vengeance by responding to wrongdoing through the institution of punishment.[49] As John Gardner puts it, "The blood feud, the vendetta, the duel, the revenge, the lynching: for the elimination of these modes of retaliation, more than anything else, the criminal law as we know it today came into existence."[50] A core purpose of criminal law and punishment is thus to manage punitive and retaliatory emotions of those who have been victimized by wrongdoers, and whether criminal law succeeds or fails in a society depends, not entirely of course but importantly,

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[47] Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965), *reprinted in* DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95 (1970).

[48] *See* VICTOR TADROS, CRIMINAL RESPONSIBILITY 48 (2005); John Gardner, *On the General Part of the Criminal Law*, *in* PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE 205, 236–37 (Antony Duff ed., 1998).

[49] John Gardner, *Crime: In Proportion and in Perspective*, *in* FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH 31 (Andrew Ashworth & Martin Wasik eds., 1998), *reprinted in* JOHN GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 213, 213–14 (2007).

[50] *Id.* at 213.

on how well it responds to punitive emotions of its citizens.[51] This displacement function explains the preemptive and judgmental aspects.

We cannot understand why we have the kinds of substantive and procedural safeguards we have in our criminal justice system unless we keep this big picture in mind. The government enjoys an enormous amount of power to interfere with peoples' lives with force and to stigmatize individuals with its stamp of blameworthiness, and it prohibits others from doing the same. And in order for the government to maintain its exclusive status as a legitimate holder of this power, it has to use its force in a certain specified way. That is, before the state can exercise acts of violence and attach stigma to individuals, we demand that the state be able to justify the acts it is about to take by correctly identifying wrongdoers. The proof beyond a reasonable doubt requirement is generated from this demand. We also demand that the state ensure that the force of its condemnation fairly match the level of blameworthiness of offenders. The proportionality-based limitations on the death penalty are generated from this demand.

Therefore, fundamental legal protections that are promised to individuals, such as the proof beyond a reasonable doubt requirement or the principle that people not be punished more than they deserve, are not merely requirements that flow directly from laws of morality that dictate how individuals ought to treat one another. They also spell out the proper relationship between the government and the governed, and they are among the many conditions that attach to the government's exclusive possession and use of the power to criminalize and punish. These conditions, in turn, take the form of constraints that are resistant to trade-offs in order to protect their viability as restrictions on the government's power to blame. For one thing, punitive passions, while frequently rooted in one's correct sense that a moral wrong has been done, can be excessive and driven by other less desirable, yet no less common, sentiments such as cruelty, sadism, inhumanity, and racial hatred and prejudice.[52] Such sentiments may drive punishments to go well beyond what offenders deserve. The state also faces tremendous pressures to reduce the incidence of crime, and this could lead to excessive and unwarranted uses of violence by the state. Unless we treat the constraints against convicting without sufficiently convincing proof and punishing people more than they deserve as close to inviolable, such limitations on criminalization and punishment will give too often and will not be able to provide meaningful limitations on the government's power to criminalize and punish.

The resulting picture is thus quite complex. The government's role as the exclusive agent of punishment means that it faces pressures from at least two directions. On one hand, the government has an obligation to provide physical

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[51] *Id.* at 216 ("[T]he criminal law's medicine must be strong enough to control the toxins of bitterness and resentment which course through the veins of those who are wronged, or else the urge to retaliate in kind will persist unchecked.").

[52] *Cf.* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 43–49 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 1994) (1887).

security to its citizens and respond adequately to wrongdoing on behalf of its citizens, who are prohibited from using force to defend themselves from and retaliate against those who would or do wrong them. On the other hand, the government can preserve the legitimacy of its status as the holder of the monopoly on the power to punish only by respecting various restrictions placed on its use of force, such as the proof beyond a reasonable doubt requirement and desert-based limitations on punishment. These two commitments, by design, pull the government in different directions. Providing physical security may sometimes be done more efficiently and effectively if the state can at times ignore various substantive and procedural safeguards placed on its power, but if it starts abusing its position of power like that, its status as the legitimate holder of the power to criminalize and punish will be threatened. Yet there will be times when respecting these safeguards may seem downright irresponsible—a dereliction of duty—in that they may get in the way of convicting and punishing wrongdoers.

What does all this have to do with the Sunstein-Vermeule challenge? What this account shows is that the Sunstein-Vermeule challenge, the gist of which is the argument that the government's obligation to prevent crime may lead it in the direction violating these constraints, reflects a valid but banal and misleadingly incomplete truth. Yes, the government has a moral obligation to potential crime victims, and, yes, seeing that the government fulfills its obligation to protect persons from criminal activities may pull the government in the direction of violating substantive and procedural limitations on the government's power to punish. But this observation, while correct, is trivial, akin to an observation that our three branches of the government sometimes work at cross-purposes. We can in fact run the same argument backwards to argue that, "on certain empirical assumptions," non-enforcement of the criminal law "may be morally required" in order to prevent, say, accidental wrongful convictions, which may be inevitable (that is, foreseeable) byproducts of enforcing the criminal law.[53]

Moreover, the Sunstein-Vermeule challenge tells only half the story. The reason these substantive and procedural limitations exist in the first place is because the government is put in charge of criminalization and punishment, and the government has the power it does *only on condition* that it respect such limitations. To illustrate this point, imagine a parent who sends his child to a summer camp. The parent, by sending the child to the summer camp, gives the camp operators permission to exercise their discretion to care for the well-being of

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[53] Sunstein & Vermeule, *supra* note 7, at 705. Some might argue that this is unfair given that a significant portion of the Sunstein-Vermeule argument has to do with giving content to such "empirical assumptions." *Id.* Without an analogous empirical showing, one might object, this kind of reverse argument cannot get off the ground. This objection would have some traction had Sunstein and Vermeule taken a position on whether "in fact, capital punishment deters murder." Sunstein & Vermeule, *supra* note 36, at 848. But they explicitly state that they "do not mean to take a stand" on that question. *Id.* They instead describe the question they are addressing as "how the moral issues should be assessed *if* deterrence could be established." *Id.* at 849. Their main argument, in other words, is conceptual, as is my critique here.

the child in various situations that may arise while the child is at camp. The arrangement also imposes on the camp operators an obligation to take care of the child. Now imagine that the parent attaches the following condition: Before the camp operators give the child any kind of medication, they have to seek his permission except in emergency situations. Built into this arrangement is a foreseeable conflict between the camp operators' obligation to care for the child and their obligation to seek the parent's permission before giving the child medical care because there may be times when waiting for the parent's permission would interfere with what is optimal for the child from a medical perspective. A parent may recognize this downside yet for a variety of reasons still insist on the condition.

The government's obligation to protect, similarly, goes hand in hand with the existence of these limitations on the ways in which the government can exercise its power to protect. The tension between the government's obligation to protect and the requirement to act consistently with various side constraints is built into the system *by design*, and they are two sides of the same coin. The Sunstein-Vermeule challenge badly misses the mark because it fails to acknowledge the way in which the obligation to provide physical security is deeply intertwined with certain procedural and substantive restrictions on the government's use of force. The existence of the obligation to protect depends on the existence of the restrictions because without the restrictions, the government would not be put in a privileged position to provide physical security.

None of this suggests that the requirement of proof beyond a reasonable doubt or various desert-limitations on amounts of punishment cannot be revised. It is possible that these are the wrong types of limitations to have, and a renegotiation of the terms of the citizen-state relationship may be called for. But that is precisely the point. The correct way to think about this problem is in terms of devising appropriate terms of the relationship between the state and its citizens, and an abstract deontological argumentation focusing only on the number of lives lost due to one's action or inaction and on the permissibility of such action or inaction cannot help us understand the nature of the problem.

I am not denying that deontological ethics is deeply related to questions of political morality. Of course it is.[54] The point rather is that whether we are talking about criminal law, "environmental quality[,] appropriations to highway safety[,] relief of poverty,"[55] "occupational risks, terrorism, or racial discrimination,"[56] the moral significance of a government policy that imposes or fails to prevent harm cannot be assessed without having an understanding of the distinct political and institutional features of each context.

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[54] How moral and political principles actually relate is a complicated question that I cannot answer here. *Cf.* Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 126–27 (2005).

[55] Sunstein & Vermeule, *supra* note 7, at 705.

[56] *Id.* at 707.

V. CONCLUSION

When the government makes a policy choice, and, as a result, innocent persons die, how should we morally assess the deaths? I have argued in this Essay that traditional distinctions between intending and foreseeing harm and between causing harm and allowing harm to occur cannot do the work of absolving the state of its responsibility for such deaths. I have also argued that it is a mistake to conclude from this observation, as Sunstein and Vermeule do, that the government may be morally required to loosen the evidentiary standard for conviction or to widen the availability of capital punishment.

Once we fully understand the political and institutional context within which various procedural and substantive safeguards on the criminal justice system reside, I have argued, we will see that the government has a moral obligation to protect its people from crimes and to respond to crimes on behalf of its people and that it has a moral obligation to respect various constraints placed on its power, including desert-based limitations on punishment and standards of proof required for conviction. These two obligations may get in the way of each other, but concluding from this that it is morally required to discard such constraints would be to repeat the mistake that Sunstein and Vermeule themselves warn against—to fail to appreciate sufficiently "the distinctive features of government as a moral agent."[57] In other words, as John Rawls has famously remarked, "the correct regulative principle for anything depends on the nature of that thing."[58]

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[57] *Id.* at 721.

[58] JOHN RAWLS, A THEORY OF JUSTICE 25 (rev. ed. 1999).