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## INSTITUTIONS AND INSTRUMENTALIZATION IN INTERNATIONAL LAW

Paul Gowder\*

EVAN J. CRIDDLE AND EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* (OXFORD UNIVERSITY PRESS 2016). PP. 382. HARDCOVER \$100.00.

*Fiduciaries of Humanity* is the latest fruit of a near-decade long collaboration between Evan Criddle and Evan Fox-Decent (“CFD”) elaborating their theory of the fiduciary foundations of state sovereignty and human rights. The book is a substantial achievement that should be essential reading for those concerned with the vexed question of the source and bounds of the legitimate authority of international legal institutions.

The heart of the argument is that state sovereignty, as well as other sources of public authority (like that of the United Nations) are justified in the same way that other relationships of legal authority over dependents are justified—that is, through the ideas underlying common-law fiduciary duties. Because political authority shares the features of more familiar sources of fiduciary duties like parent-child relationships, attorney-client relationships, and the like—in particular, the principal’s vulnerability to the discretionary authority of the agent—CFD argue that we ought to understand political authority to be granted under the same conditions as these other forms of authority, that is, pursuant to fiduciary duties requiring them to be executed for the benefit of those over whom the power is to be exercised.

Accordingly, CFD argue that states and international institutions are, as the title suggests, “fiduciaries of humanity.”<sup>1</sup> States have, in the first instance, an authority that is delegated from an international legal order to stand as fiduciaries to their people, with this fiduciary authority granted in order to pursue their principals’ goal of establishing regimes of equal freedom under the law. States also have secondary fiduciary duties that are shared with other states as well as international institutions toward humanity as a whole, this latter as a consequence of the idea that (as I read it) the international legal order itself stands in a fiduciary relationship with humanity. These fiduciary relationships require states and

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1. EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 95 (2016).

international organizations to, above all, refrain from both domination (understood in the neo-republican sense)<sup>2</sup> and “instrumentalization” (understood in the Kantian sense: treating the other as a mere means).<sup>3</sup>

CFD defend this position with reference to the existing body of international law, arguing that the fiduciary theory of sovereignty both explains the virtues of existing international legal institutions—including, *inter alia*, human rights law, the laws of war, the powers and practices of international courts—and generates the resources to critique them on the basis of that same justificatory force, most strikingly with respect to the deficiencies of current international law on the treatment of refugees.

Of particular merit is what CFD describe as the “distinctively legal” character of their account.<sup>4</sup> I understand the account to be “distinctively legal” in two respects. First, of course, it takes inspiration from real-world legal practices, and hence wisely borrows from our collective social wisdom about the kinds of norms that work to regulate the actions of the powerful. Second, it builds a theory of how the obligations of states, particularly their human rights obligations, are legal rather than moral—a theory that does not depend on the traditional mystifications of human rights legal scholarship, which sometimes seems to elide the distinction between moral and legal by appeal to empirically dubious custom or discredited natural law theory.<sup>5</sup>

Instead, CFD rely on one central claim: the legal authority of states (and international institutions) is authority that has been delegated from those over whom it is exercised.<sup>6</sup> Such authority must come with fiduciary duties attached for the same reasons that feature in a sound justificatory account of the ordinary common law of individual relations; because otherwise those over whom authority is exercised will be subject to exploitation (domination and instrumentalization).

This justification for translating the moral demands of human rights into fiduciary legal duties is brilliantly parasitic on much more uncontroversial legal traditions. Some of our oldest legal records attest to the obligation that those who hold custody of the interests of the vulnerable bear to be legally—not just morally—accountable for conforming their conduct to those interests.<sup>7</sup> By arguing that the relationship of the state to its citizens is analogous to the relationship of other fiduciaries to their principals, CFD aptly draw on those traditions to justify the legalization of the moral obligations of non-domination and non-instrumentalization.

The fiduciary model is also particularly appealing in virtue of its capacity to handle the perennial difficulties of political legitimation. Broadly speaking, we might lump theories of political legitimation into genetic and functional categories, where genetic

2. See, e.g., PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (2008).

3. CRIDDLE & FOX-DECENT, *supra* note 1, at 101–04.

4. See generally *id.* at ch. 2.

5. See, e.g., Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 *EUR. J. INT'L L.* 491, 497 (2008) (“In this particular connotation, any further qualification of peremptory human rights norms is redundant. The societal body has an intuitive representation of them which finds its basis in a widely shared moral intuition. The latter, in turn, sanctions its social authority and evocative power.”).

6. CRIDDLE & FOX-DECENT, *supra* note 1, at 18.

7. The example that leaps to mind is Demosthenes’ litigation against his guardians. See, e.g., Demosthenes, *Against Aphobus I*, in DEMOSTHENES, *SPEECHES* 27–38, at 19 (Douglas M. MacDowell trans., 2004) [Dem. 27].

theories, like consent theories of legitimation, focus on the origins of a scheme of political authority, and functional theories, like Raz's normal justification of authority, focus on the sorts of things that the scheme of political authority delivers.<sup>8</sup>

Speaking broadly, conventional objections to genetic theories tend to focus on the fact that most of the required inputs are fictional in every society,<sup>9</sup> while the conventional objections to functional theories tend to revolve around the concern that they fail to adequately take into account individual interests in autonomy and freedom from coercion.

Of course, this is a brute simplification, and there are many accounts that attempt to steer between these two rocks, but it will do to situate CFD's contribution.

CFD's fiduciary theory is a nice combination of the two approaches. At root, it is a functionalist theory, since a legitimate authority (state or international institution) is one that properly carries out its fiduciary duties toward the people for whom it is responsible, and an authority can be legitimate in virtue of its satisfying those duties even in situations where we would not want to attribute any kind of consent to some of its people.<sup>10</sup>

However, CFD can claim the clear individual autonomy benefits of a consent-based theory, because their core fiduciary duties of providing equal freedom under law while refraining from domination and instrumentalization are inconsistent with political forms that disregard the autonomy of individuals—a utilitarian dictator, for example, would clearly dominate citizens of his or her state.

#### MUST WE BE KANTIANS?

I must confess to some doubts as to the amount of work that the non-instrumentalization criterion, which is meant to capture the Kantian idea of not treating others as mere means, can do. The key problem is that the idea is extraordinarily difficult to flesh out. In particular, practical politics always requires trading off the legitimate interests of some people against one another, and without some more concrete device to elucidate what instrumentalization amounts to, it can be difficult to distinguish those trade-offs that treat others as mere means from those trade-offs that do not.

Consider CFD's discussion of just war theory. Some humanitarian interventions, we are told, are permissible even though, I take it, essentially all military actions of any size are guaranteed to cause at least some innocent civilian deaths.<sup>11</sup> So, why are such interventions not instances of instrumentalization?

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8. See Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194, 204 (1995).

9. See DAVID HUME, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 452 (1758).

10. For example, on CFD's theory, the claim of an ethnic minority that wishes to secede from a state that is satisfying its fiduciary duties toward them does not even get off the ground unless they can build an alternative state that itself is capable of satisfying their fiduciary duties; from this we can infer that there are potential empirical facts under which, to pick a timely example, Spain exercises rightful authority over Catalan separatists even if we would be uncomfortable attributing some kind of consent to the people of that region (if, for example, separatist parties win elections in the region, as appears to have just happened as I return the final edits to this review). See Sonya Dowsett & Jesús Aguado, *Spain's Crisis Reignited as Catalan Separatists Win Vote*, *REUTERS*, Dec. 22, 2017, <https://www.reuters.com/article/us-spain-politics-Catalonia/spains-crisis-re-ignited-as-catalan-separatists-win-vote-idUSKBN1EG13A>. I take no position on whether the real-world claims of the Catalan people are justified.

11. CRIDDLE & FOX-DECENT, *supra* note 1, at 196–207.

The conventional international lawyer's approach to such issues draws on the notion of proportionality. Causing, say, the deaths of ten civilians in order to achieve a major military objective in pursuit of stopping a genocide is proportional in a way that, for example, the firebombing of Dresden clearly was not.

CFD endorse imposing the requirement of proportionality on humanitarian interventions. However, proportionality is potentially in tension with non-instrumentalization. Proportionality most intuitively is a matter of degree (i.e., the relationship between the amount of harm done to people, or the number of people harmed, and the benefit created thereby).<sup>12</sup> By contrast, treating another as a mere means is most naturally interpreted as a categorical feature of an act, one that is independent of the extent of the harm done to the one(s) so treated or the extent of the good to be generated thereby. In other words, both the Dresden firebombing and our hypothetical minimal-damage humanitarian intervention treat those who are foreseeably killed in the same abstract way, sacrificing their interests for the sake of the interests of those who would benefit from the military goals to be achieved thereby. The only difference is that the Dresden firebombing treated many more people that way, and was arguably less necessary for the unquestionably justifiable military outcome to be achieved. One might imagine the claim being made that either both are instances of instrumentalization, or neither is.

CFD have a fully satisfactory response to objections to the permissibility of humanitarian intervention, but not one that goes through non-instrumentalization. Their principle of non-domination probably does the real work: they rightly demand that humanitarian interventions be approved by international institutions that are accountable to the world at large, including those who might be victims of collateral damage in such interventions.<sup>13</sup>

Similarly, consider CFD's discussion of the prohibition against torture. They distinguish torture from other cruel treatment in that torture is when "the state deliberately inflicts mental or physical suffering for the purpose of breaking a subject's will in order to conscript the subject as a means to accomplish an end the subject does not share with the state."<sup>14</sup> Moreover, they describe that prohibition as another implication of non-instrumentalization—a detainee who is beaten in order to gather intelligence is being used as a mere means for the state's goals. Importantly, they specifically reject the conventional human rights approach according to which torture is distinguished from other cruel

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12. See, e.g., Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34 (2005) (arguing that proportionality is measured by weighing the all-things-considered good of the just causes of war against the harm to be produced thereby).

13. In an e-mail discussion with Evan Fox-Decent, he has suggested to me that the key distinction between Dresden and a humanitarian intervention is that the state could plausibly be understood to be acting on behalf of even those harmed by a humanitarian intervention, while the same is obviously not true of Dresden. This does seem like a sound way of distinguishing the two cases in terms of instrumentalization, but I am skeptical that it matches conventional talk about proportionality, which seems to be more permissive. Let us suppose that I am innocent and under no moral obligation to sacrifice myself for my fellow humans, but the state can save a hundred other people by shooting me: at least on some conceptions of proportionality this seems permissible, but the state hardly acts on my behalf if it pulls the trigger. Cf. Hurka, *supra* note 12, at 48 (arguing that even remote benefits are sufficient for proportionality, for example, that a state might be permitted to go to war to "ensure that its citizens are self-determining a century from now").

14. CRIDDLE & FOX-DECENT, *supra* note 1, at 108–09.

treatment by the degree of suffering imposed.<sup>15</sup>

However, it is difficult to reconcile this account of torture with CFD's aspiration to give an account of human rights that is "metaphysically thin" and "does not . . . presuppose a comprehensive conception of the good."<sup>16</sup> Consider the case of a judge who orders a witness to disclose some information, and, when that witness refuses, orders her incarcerated for contempt of court until she complies. Unquestionably, such a judge inflicts the mental suffering of jail on the witness for the purpose of inducing her to accomplish an official end which she does not endorse. Equally unquestionably, this does not constitute torture (or instrumentalization), and indeed is often understood by judges as an act in defense of the impartial legal order rather than an offense against it.<sup>17</sup>

I take it that CFD would say that jail for contempt, unlike beating prisoners, does not break the will of those subjected to it, and it is this will-breaking that constitutes torture as instrumentalization in view of its extreme disrespect for (or perhaps even destruction of) the victim's autonomy. But in order to make that argument, CFD would require both a psychological account of what constitutes will-breaking (as distinct from merely threatening someone with sanctions until they comply) and a moral account of the distinctive wrongness of will-breaking, and it is hard to see how they could supply those without some thick account of the nature and value of human autonomy.

#### FROM INSTRUMENTALIZATION TO INSTITUTIONS?

Ultimately, I am tempted to say that the argument of *Fiduciaries of Humanity* would largely go through (and continue to be an exceedingly important contribution to the literature) without the principle of non-instrumentalization. In its place, I might urge more attention to what we might call the institutional consequences of human rights violations.

For example, a notorious problem with states that torture is that they are obliged to keep a supply of torturers on hand, or, more generally, to maintain personnel and institutions capable of carrying out extreme acts of cruelty against their fellow beings; such personnel and institutions are likely to undermine the capacity of the state to treat the people within its jurisdiction as humans entitled to dignity, and hence its capacity to comply with the other duties of the fiduciary theory. A state that employs people who can be induced to carry out atrocities like the United States carried out at Abu Ghraib is a state that has failed to inculcate in its agents a disposition to see human suffering as morally meaningful, and hence who are at unacceptable risk of casting aside the very idea of human security under equal law that underpins the fiduciary model.<sup>18</sup>

I offer this point as a more general friendly amendment to CFD's account. I will say that an "institution" is a persistent set of practices, dispositions, and relationships within a

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15. *Id.* at 108.

16. *Id.*

17. For example, see Judge Hogan's suggestion that failing to incarcerate journalist Judith Miller for refusing to disclose her sources would be a step "on a slippery slope to anarchy." Richard B. Schmitt, *Journalist Jailed for Not Revealing Source to Court*, L.A. TIMES (July 7, 2005), <http://articles.latimes.com/2005/jul/07/nation/na-reporters>.

18. See generally David Luban, *Liberalism, Torture and the Ticking Bomb*, 91 VA. L. REV. 1425, 1445–52 (2005) (discussing the corruptions to a state's moral culture that follow from institutionalizing torture). This point is known to the literature at least since Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 138–40 (1978).

state (or a trans-state legal entity) that can function as a high-level description of a reliable pattern of behavior from that state.<sup>19</sup> In addition to obligations that directly follow from states' fiduciary duties, their theory has the potential to ground a substantial array of secondary obligations that follow from the necessity of maintaining institutions that are capable of complying with primary obligations. It seems quite sufficient to me for CFD to say that torture is impermissible because a state that harbors torturers is unlikely, based on our knowledge of how human natures and human bureaucracies work, to be able to sustain a due regard for its fiduciary obligations to humanity—because it contributes to the destruction of a norm of respect for human beings as bearers of rights. These kinds of secondary duties are also familiar to existing fiduciary law—consider, for example, the common secondary requirement that lawyers maintain a trust account in order to facilitate their compliance with the primary fiduciary duty to preserve the funds of their clients.<sup>20</sup>

I daresay that the same point applies to international legal rules and organizations themselves. Let us say that the “institutional capacity” of an organization or group of organizations is its capacity to generate reliable patterns of behavior in accordance with its goals or the goals that justify its existence. It seems to me that the natural consequence of this line of argument is to say that the international legal order is obliged to build its institutional capacity (in the form of its power to hold recalcitrant states to its commands, or directly protect the equal freedom of humans), in order to satisfy its own fiduciary obligations and in order to have the practical capacity to legitimately delegate fiduciary responsibilities to individual states.

That argument, in turn, might license a vast expansion in the existing domain of international law and international organizations—perhaps not quite to the level of world government, but at least lots more than we have right now. In light of global menaces, such as climate change, ISIS and other international terror organizations, and the rise of right-wing nationalism, I think this is an implication to be welcomed, not feared.

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19. This is roughly equivalent to the conception of an institution that I gave in my recent book. See PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 25–26 (2016).

20. CFD hinted at this kind of obligation in several places, but did not develop it as fully as they could have. See, e.g., CRIDDLE & FOX-DECENT, *supra* note 1, at 119, 205.