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## The Global Ethics of Helping and Harming

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### Abstract

This article addresses two issues. First, it critiques a prominent position regarding how affluent states should balance their national interest on the one hand and duty to aid developing states on the other hand. Second, it suggests that absent a principled way to balance national interest with international aid, a state's more immediate concern is to comply with its negative duty to not harm other states. To support this position, the article constructs a conception of harm that may be applied to questions regarding a state's negative duties, focusing upon the example of the Trade-Related Aspects of Intellectual Property Rights Agreement.

### I. Introduction

Within the burgeoning field of international political philosophy, a consensus has by now been reached on a handful of fundamental questions. One of those questions is whether the scope of our moral concern extends beyond our borders.<sup>1</sup> Although there might be general agreement that

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<sup>1</sup> For instance, Kok-Chor Tan recently suggested that “few theorists today seriously urge that we have no humanitarian duties to foreigners absent some compelling national interests for helping.” KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM AND PATRIOTISM* 20 (2004). This view seems right. Rawls, Nagel, and, of course, Pogge, have all argued for a duty of humanitarian aid in varying degrees: JOHN RAWLS, *THE LAW OF PEOPLES* 105-13 (2001); Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113, 118, 131 (2005); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN*

an affluent state has some duty of humanitarian aid regarding the distant needy, the contours of theories in support of that agreement are by no means established. In one sense, this is perhaps unremarkable because the question of whether an affluent state has some duty to help—say, the victims in natural disasters like the 2004 Indian Ocean tsunami—seems irrelevant in light of its banality. It is easy to assert simply that affluent states have a duty of rescue in these sorts of emergency situations and move on to more difficult questions.<sup>2</sup> This is of course unsatisfying on a number of levels. An obvious reason is that the plight of the global poor is an urgent question that is not being addressed adequately. There is little that may be added to this uncontroversial empirical observation. However, there are more subtle reasons for not overlooking the question of an affluent state's positive duties of rescue and beneficence. One such reason is that it may result in an *ad hoc* moral framework that impacts other questions, including the extent to which an affluent state has a duty to sacrifice its national interest for the sake of other states. In a recent chapter on the role national interest plays in foreign policy, Allen Buchanan sets forth a variation of the dominant view among many theorists, diplomats and state leaders, the Permissible Exclusivity Thesis: "It is always permissible for a state's foreign policy to be determined

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RESPONSIBILITIES AND REFORMS (2d ed. 2008). As I will discuss, it is in part for this reason that Buchanan's extreme version of the Permissibility Exclusivity Thesis seems unrealistic.

<sup>2</sup> The field of international political philosophy does not typically focus on the issues of rescue and beneficence. Instead, one is more likely to find debates centered on the concept of justice, which may be understood as a debate between two diametrically opposed positions. While the cosmopolitan position suggests that the demands of justice include a duty of fairness to all human beings, regardless of state membership, the so-called "nationalist" position argues that the duty of fairness is limited to those with whom we have a unique political relationship, namely, one's fellow citizens in a state. *See* Nagel, *supra* note 1, at 119-22, for an overview of the debate. Although the literature on these two conceptions has become quite rich, there has been less philosophical work done on forging some sort of middle ground between the two conceptions. The dichotomy that often exists between the cosmopolitan and nationalist conceptions may be preventing us from focusing upon certain interconnections between the two conceptions, including the role of negative duties.

exclusively by the national interest. If a state chooses, it may subordinate all other values to the pursuit of the national interest in any case.”<sup>3</sup>

Somewhat later in the chapter, Buchanan suggests that there is nothing commonsensical about the Permissible Exclusivity Thesis, including its stance on the duty of affluent states to rescue other peoples in emergency situations:

[The Permissible Exclusivity Thesis] is also at odds with the commonsense belief that a rich and powerful state such as the US from time to time ought to act charitably toward less fortunate peoples by supplying aid in times of disaster, even if, strictly speaking, justice does not require it.<sup>4</sup>

After arguing against the Permissible Exclusivity Thesis, Buchanan concludes the chapter by suggesting that we will be able to “balance a concern for the human rights of others with a special regard for our own welfare” if we discard the notion that we may exclusively act on behalf of the national interest.<sup>5</sup> However, there are worrisome problems with the approach Buchanan ultimately endorses. These problems do not mean that an affluent state should not balance its national interest with the wellbeing of impoverished states, but, if the problems are sufficiently damaging, they do mean that we are left with an unprincipled account of how to balance the competing duties.

In light of this issue, this article will attempt to accomplish two things. First, it is argued that while the Permissible Exclusivity Thesis is wrong to the extent that it denies that states have negative duties to not violate the human rights of other peoples, Buchanan has not shown how discarding the Permissible Exclusivity Thesis will allow us to balance the relationship between a

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<sup>3</sup>Allen Buchanan, *In the National Interest*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 110, 110-11 (Gillian Brock & Harry Brighouse eds., 2005).

<sup>4</sup>*Id.* at 112.

<sup>5</sup>*Id.* at 125 .

state's national interest on the one hand, and the positive duties of international rescue and beneficence on the other hand.<sup>6</sup> In pursuing this first argument, the article will examine a familiar ethical question that is not commonly considered in the global context: the question of whether there is a non-arbitrary way to draw the line between rescue and beneficence. Failing to satisfactorily address this question leads to several options that seem untenable, including: (1) drawing a line that reflects an arbitrary limit to a state's positive duties, (2) accepting that states have essentially unlimited positive duties, or (3) denying that states have any positive duties whatsoever. Buchanan's solution attempts to overcome the obstacle presented by the first option, namely, locating a non-arbitrary limit to a state's duty of beneficence is then examined. It will be argued that Buchanan has not shown how discarding the Permissible Exclusivity Thesis will allow us to balance the relationship between a state's national interest and the positive duties of international rescue and beneficence. This leads to the second goal of this article.

The second objective goal of this paper article is to show that absent a principled, non-arbitrary way to balance national interest with international acts of rescue and beneficence, an affluent state's most immediate concern is to comply with its negative duty to not harm other states. Buchanan opposes the distinction between positive and negative duties for a number of reasons. In this article, an attempt will be made to show the importance of the distinction that the distinction is important by focusing upon the example of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, with which all World Trade Organization (WTO) members must comply regarding the protection of intellectual property rights (IPRs; such

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<sup>6</sup> In addition to the chapter noted above, arguments in this article are based on portions of ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION* (2007), which is a fuller account of his position on the national interest, a state's positive duties to other states, and many other issues.

as patents for medicines).<sup>7</sup> TRIPS has a notorious reputation in the literature. Many have argued that TRIPS prevents the poor from accessing life-saving medicines because it yields IPRs in a way that makes those medicines cost-prohibitive.<sup>8</sup> Of course, it would be odd to say that any particular state is the sole cause of any harm that may result from TRIPS. As an international agreement overseen by the WTO, the impact of TRIPS on the poor may not be attributed to a particular state or even a particular collection of states. Many other entities are involved, including pharmaceutical companies and the WTO itself, presenting an untidy assignment of duty. However, this article will focus upon TRIPS precisely because it is a difficult case. If TRIPS falls within the parameters of what it means to say a state is causing harm, then there are strong reasons to think states violate other, less difficult cases of negative duties. Accordingly, a framework for analyzing harm will be constructed that may be applied to other questions regarding a state's negative duties. The construction of this framework relies upon many aspects of Joel Feinberg's work. While Feinberg focused on the moral limits of the criminal law, the underpinnings of his argument are appropriate here for two reasons: First, it leverages a well-established legal framework that is relatively familiar and uncontroversial, and, second, it anticipates the prohibition of certain state actions being codified as international law in the future. Ultimately then, the goal is to provide a principled framework for analyzing the extent to which we can say a state harms the peoples of another state.

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<sup>7</sup> The WTO council responsible for intellectual property extended—until 2016—the transition period during which least-developed countries (LDCs) do not have to provide patent protection for pharmaceuticals. This topic will thus become increasingly relevant in the coming years.

<sup>8</sup> See POGGE, *supra* note 1, at 26, in which Pogge argues that TRIPS in fact constitutes a harm on the global poor. My goal is different in that I will not attempt to demonstrate that TRIPS constitutes a harm on the global poor (though I do use TRIPS as an example), nor will I argue for any policies regarding TRIPS. My goal is to provide a principled analysis of harm, to which TRIPS and other questions regarding a state's negative duties may be subjected.

## II. Helping and the National Interest

The list of positive moral duties owed by states to other states may be described as analogous to the list of positive moral duties owed by individual persons to other persons in a state of nature.<sup>9</sup>

Following John Locke in this analogy, it will be assumed that individual persons—and thus states—in the state of nature are “bound by the laws of nature,” or moral duties.<sup>10</sup> The list of positive moral duties might include *rescue*, the duty to aid in emergency situations, *beneficence*, the duty to promote well-being, and *justice*, the duty to bring about a just state of affairs.<sup>11</sup> This article will focus on the first two of these potential positive duties, rescue and beneficence.

Positive moral duties may be defined as a state’s obligations to take some sort of step or action, rather than merely complying with a negative moral duty to refrain from taking some sort of step or action. This distinction is important for a number of reasons, not least because there is disagreement regarding where the line should be drawn between positive and negative duties.

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<sup>9</sup> See A. JOHN SIMMONS, *POLITICAL PHILOSOPHY* 128-34 (2008), for a general discussion of the analogy regarding the moral position of individual persons and states. There is a long history of using this analogy in political philosophy, but I will not attempt an analysis of the merits and problems of the analogy. I will note only a central problem: States do not have moral rights in the same way individuals do because, following Locke, states must be “voluntary, consensual associations in order to be internally legitimate” and hold rights. *Id.* at 133. As Simmons points out, all states are in some sense non-voluntary and unjust, but this fact does not prevent us from using the analogy to conceive of a model in political philosophy. I will proceed without further defense of the analogy, aside from noting that I follow Buchanan’s common use of the term *state*: “enduring institutional structures for the wielding of political power,” which consists of “governments . . . the collections of individuals who fill key roles in that structure.” BUCHANAN, *JUSTICE, LEGITIMACY*, *supra* note 6, at 292. By *duties* of rescue and beneficence owed to other states, I more specifically mean duties owed to the *peoples* of other states in need of rescue and beneficence.

<sup>10</sup> SIMMONS, *supra* note 9, at 129.

<sup>11</sup> While I am not assigning these positive moral duties to Locke specifically, Simmons notes that Locke “clearly defends not only the familiar rights against aggression by others, but also (contrary to his popular reputation) a right to charity.” A. JOHN SIMMONS & CHRISTOPHER HEATH WELLMAN, *IS THERE A DUTY TO OBEY THE LAW?* 152 (2005).

For example, while Buchanan finds the distinction artificial, many take the position that affluent states have moral duties of rescue and beneficence because they caused (and are causing) the plight of poor states through policies that harm those states. Determining whether states cause harm in this way will be the subject of Section III, but the question of the extent to which an affluent state can balance its national interest with international claims of need that require acts of rescue and beneficence must first be examined. To address this question, one must answer the question of whether there are non-arbitrary differences between rescue and beneficence such that a state is justified in distinguishing between the two. The extent to which rescue and beneficence are different—if they are different in a relevant way—will determine the extent to which we can draw the line between the two, and therefore the extent to which we can sensibly argue for international standards regarding one state’s duty to provide humanitarian assistance to another state. If there is no relevant difference between rescue and beneficence then a state’s positive moral duties are conceivably without limit.

Buchanan’s moral theory of international law is based upon his conception of a natural duty of justice, “according to which each of us—independently of which institutions we find ourselves in or the special commitments we have undertaken—has a limited moral obligation to help ensure that all persons have access to institutions that protect their basic rights.”<sup>12</sup> One of the goals of his project is to determine the extent of a state’s positive duties to other states. While this project would include basic humanitarian aid, like rescue and beneficence, Buchanan assumes there is a human right to subsistence resources and thus focuses on whether and to what extent international law should recognize rights of international distributive justice (social and

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<sup>12</sup> BUCHANAN, *JUSTICE, LEGITIMACY*, *supra* note 6, at 27.

economic rights, for instance).<sup>13</sup> The present focus is on how Buchanan's theory applies to the weaker positive duty regarding the extent to which a state is required to provide international humanitarian aid in the form of rescue and beneficence. This is an appropriate starting point because rescue and beneficence are arguably less demanding and less controversial duties than distributive justice.

#### A. The National Interest

In order to clear a path for a more robust conception of a state's positive duties, Buchanan critiques two justifications for the Permissible Exclusivity Thesis: (1) the Fiduciary Realist Justification, and (2) the Instrumental Justification. The Fiduciary Realist Justification is based upon the idea that state leaders—as fiduciaries—are morally required to act in ways that maximize the national interest. Buchanan points out several inconsistencies with this justification, but his central problem with the Fiduciary Realist Justification seems to be that it requires state leaders to subordinate all other moral duties to the single moral duty of conducting foreign policy for the national interest. He rightly explains the absurdity of this view with various analogies relating to the duties of individual persons: “If I agree to become your guardian or your financial counselor or your doctor, this does not relieve me of all pre-existing moral obligations, and it certainly does not extinguish those obligations that are the correlatives of human rights.” More colorfully, the fiduciary role of a parent does not relieve one's moral duty to not “kill someone else's child and take its liver to transplant into her own dying child”.<sup>14</sup> Of course, these points

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<sup>13</sup> *Id.* at 190.

<sup>14</sup> *Id.* at 113-14.



would be equally obvious to any natural duty theory that holds national interest to be the first priority of the state, in other words, any theory holding that there are basic moral requirements. Assuming there exist some sort of minimum moral duty (e.g., a negative duty not to harm others), joining some sort of association (a state, a club, a profession, etc.) does not relieve that minimum moral duty. Indeed, Buchanan's critique of Fiduciary Realism gets off the ground only because he likens it to a very strict form of so-called Hobbesian realism, which views states as being analogous to individuals in Thomas Hobbes's non-moralized state of nature.

To put it roughly, this is the view that moral principles are irrelevant because a state has no means of assurance (e.g. global structure/enforcer) that it will not be taken advantage of when engaging in non-self-interested actions. To be sure, there may be many theorists who view foreign policy in terms of Hobbes's state of nature, but of course this is not the only way to view a state's fiduciary role. As mentioned in the introduction, Locke believed that individual persons—and states—in a state of nature are bound by certain fundamental moral duties. Although Buchanan's analysis focuses on a very radical version of a state leader's fiduciary role, this is not necessary. For instance, it is not difficult to think of a version of a fiduciary theory that would be consistent with Locke's fully moralized state of nature, or any other conception that treats the fiduciary role as framed by a natural duty theory. Indeed, one could embrace a weaker version of the Permissible Exclusivity Thesis with the caveat that states are bound by certain minimal negative moral duties.<sup>15</sup> Ironically, such a version of the Permissible Exclusivity Thesis

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<sup>15</sup> If any theory grants that states are constrained by basic natural laws that entail negative moral duties, then individual persons would be required to comply with those basic moral duties even if their state failed to do so. In other words, individual persons would at a minimum be required to support institutions that complied with basic moral duties, and individual persons would arguably have a duty to promote the actual moral ends themselves (in addition to merely

may not be fundamentally different from the sort of moderate cosmopolitanism that Buchanan embraces. Buchanan shows how this could be so:

To deny that the national interest may always take precedence over human rights concerns one need not embrace the equally extreme position that the national interest counts for nothing or should always be subordinate . . . there is good reason for having a division of labor in which individual states are held primarily responsible for the welfare of their own citizens.<sup>16</sup>

It is not clear how this would be fundamentally different from a version of the Permissible Exclusivity Thesis that is restrained by basic moral duties. Of course, the devil is in the details, and Buchanan's moderate cosmopolitanism is certainly different regarding its stance on positive duties. Before turning to that issue, an examination of Buchanan's critique of the Instrumental Justification of the Permissible Exclusivity Thesis is necessary.

The Instrumental Justification accepts that states are bound by basic moral duties in their pursuit of the national interest, but asserts that "the best outcomes for everyone (or at least for most of humanity) will occur if each state aims at maximizing the national interest in foreign policy."<sup>17</sup> Buchanan takes issue with this view for a number of reasons, including because he believes that exclusively pursuing the national interest is not the best way to respect the human rights of foreigners. For example, he argues that there are a great many instances in which a state's exclusive pursuit of national interest results in harm to persons in other states. This seems undeniably true, but what Buchanan leaves unclear is whether he is referring primarily to a state's disregard of negative moral duties or a state's omission of some sort of positive act (e.g., promoting rescue, beneficence, or justice in another state). In the case of the former, a state has

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supporting morally compliant institutions). *See, e.g.*, Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 283 (1998).

<sup>16</sup> Buchanan, *In the National Interest*, *supra* note 5, at 124.

<sup>17</sup> *Id.* at 118.

clearly failed to comply with a moral duty, but, in the case of the latter, it is not clear to what extent a state has failed in its duty—at least until we define exactly the extent of a state’s positive duty to other states. Leaving this line-drawing question aside for the moment, Buchanan critiques a form of the Instrumentalist Justification suggesting that the whole of humanity will be better served if states exclusively pursue their own interest because basing foreign policy on moral values leads to moral imperialism and conflict among states.<sup>18</sup> This version of the Instrumentalist Justification is clearly cosmopolitan in nature, thus making Buchanan’s disagreement with the theory simply about the means used to achieve the good of humanity. His problem with this approach is that it fails to acknowledge the supposed “global culture of basic human rights.”<sup>19</sup> The initial implication is that these basic ethical principles have to do with prohibited behavior of states, or negative duties, which involve no necessary tension with a weaker version of the Permissible Exclusivity Thesis. However, Buchanan then refers to a “broadening global culture of basic human rights,” and elsewhere has described democratic governance as a *basic human right*.<sup>20</sup> But it is unclear to what extent democratic governance is part of a “broadening global culture of basic rights.”<sup>21</sup> Recent international conflicts and nation-building would seem to provide empirical evidence that democracy is not necessarily considered a basic human right, in addition to supporting one of the primary motivations of the Instrumental Justification mentioned above: Basing foreign policy on moral values might lead to moral imperialism and conflict

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<sup>18</sup> *Id.* at 119.

<sup>19</sup> *Id.* at 120.

<sup>20</sup> *Id.* See BUCHANAN, JUSTICE, LEGITIMACY, *supra* note 4, at 120, 147, for Buchanan’s discussion of why democratic governance should be a basic human right in international law.

<sup>21</sup> *But see* Thomas Christiano, *An Instrumental Argument for a Human Right to Democracy*, 39 PHIL. & PUB. AFF. 142 (2011), in which Christiano argues that a moral right to democracy does not impinge upon a right of collective self-determination. However, as Christiano notes, “there has been significant resistance among political theorists and philosophers to the idea that there is a moral human right to democracy.” *Id.* at 142.

among states. In any event, if foreign policy should not be about exclusively furthering national interest, and democratic governance truly is a basic human right, then an affluent state's positive duties around the globe would seem to be exceptionally demanding regarding the duty to promote—via intervention, perhaps—democratic governance.

At a minimum, then, we must seek a principled way to determine the extent of a state's positive moral duty to aid other states, particularly in the context of international rescue and beneficence. In one of the passages with which this article opened, Buchanan suggested that the Permissible Exclusivity Thesis is unintuitive because it implies that an affluent state is not required to rescue less fortunate states in emergency situations "from time to time." An affluent state's positive moral duty to aid less affluent states must be spelled out more concretely than this, of course, and Buchanan believes this can be done without falling onto "a slippery slope toward the excesses of human rights."<sup>22</sup> Before turning to his solution, it would be helpful to first sketch the general problem of balancing national interest on the one hand, and international rescue and beneficence on the other.

## B. Rescue, Beneficence, and the Indeterminacy of Aid

The December 2004 Indian Ocean tsunami was one of the deadliest natural disasters in history, with an estimated death toll well over 200,000 and many more injured and displaced. Within a short time after the tsunami it became clear that the international response to the humanitarian crisis would be overwhelmingly positive. For example, by early January 2005, *Medecins Sans Frontieres* reported that it had received sufficient donations (\$54 million) to complete the first

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<sup>22</sup> Buchanan, *In the National Interest*, *supra* note 5, at 125.

stage of its tsunami relief effort, thus requesting that any additional donations be directed to its general fund (which funds on-going efforts in impoverished areas of Africa). As of the middle of January 2005, various states had donated more than \$3.5 billion. However, in the cases of many states, the source of hundreds of millions of dollars pledged was pulled from the states' regular development aid budget, causing concern regarding whether there would be additional appropriation to replenish those funds. Some officials argued that more good could be done by investing in long-term prevention and common health measures than one-time rescue efforts, with Tony Blair highlighting that there is a "man-made preventable tsunami every week in Africa."<sup>23</sup> If Blair's metaphor is even close to accurate, it is easy to see how on-going, preventable deaths in impoverished countries quickly and regularly surpass the death toll in the 2004 tsunami.

The 2004 tsunami illustrates the dramatically different responses states may have in terms of meeting the needs of those impacted by one-time catastrophic events on the one hand, and the needs of those impacted by on-going starvation and ill health on the other hand. Peter Singer famously addressed this phenomenon as it relates to the duty of individual persons to meet the on-going needs of others in his article, "Famine, Affluence, and Morality." Singer's argument is based on two principles: (1) "Suffering and death from lack of food, shelter, and medical care are bad," and (2) "If it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it."<sup>24</sup> He then

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<sup>23</sup> Declan Butler, *Agencies Fear Global Crises Will Lose out to Tsunami Donations*, NATURE 13 Jan. 2005, at 94; see also *Key Points: Blair News Conference*, BBC NEWS 6 Jan. 2005, available at [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4151081.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4151081.stm).

<sup>24</sup> Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 231 (1972). Singer provides an alternative, weaker version of the argument by removing "comparable" from the second premise.

applies these principles to a familiar rescue situation in moral philosophy: If one sees a child drowning in a shallow pond, one ought to pull the child out even if doing so means one's clothes will get muddy, which is insignificant when compared to the death of the child. After discounting the relevance of the obvious differences between the child in the pond and the distant needy (geographic distance, multiple potential rescuers, etc.), Singer argues that his two principles apply to helping the distant needy in the same way they apply to rescuing the child in the pond. Of course, the analogy to states is not completely apt because rescue situations are not "face-to-face" when states are involved; however, there is undeniable intuitive force (and widespread agreement) that affluent states should rescue other states in times of emergency, such as the 2004 tsunami. And if we accept that point, the implications of Singer's argument are perhaps relevant to states: States are morally required to give a great deal of their resources to things like on-going famine relief, rather than spending it on matters of less moral importance. It would, of course, be an understatement to say Singer's article generated a great deal of disagreement regarding one's duty to help the distant needy. Much of the disagreement may be distilled to the following concern: While most of us think we have some duty to help the distant needy, we also think there should be some practical way to limit that duty such that we are not required to reduce ourselves to a state of near poverty.

Although Singer's article dealt primarily with the duty of individual persons to aid the distant needy, it was prompted by widespread suffering in Bangladesh resulting from a catastrophic tropical cyclone, among other things, which necessitated aid from affluent states around the globe. Similarly, if an affluent state is morally required to rescue needy states in emergency situations like the 2004 tsunami, how can affluent states establish a non-arbitrary limit to their duty to provide on-going aid to states in which a great many people die from

preventable causes on a regular basis? Buchanan suggests that the moral importance of national interest is far too strong under the Permissible Exclusivity Thesis because “it entails that pursuing an additional increment of benefit for a nation that is already exceptionally rich...should have priority over...making great improvement in the well-being of the world’s worst off people.”<sup>25</sup> But it seems that the converse could be posited with equal force: If affluent states owe moral duties of rescue to other states, then pursuing an additional *increment* of benefit for the on-going needs of other states should have priority over matters of national interest that do not pertain to basic human rights of affluent states. To be sure, Buchanan does not believe states have such a demanding duty of beneficence to other states, and his argument for limiting that duty will now be addressed.

In *Justice, Legitimacy, and Self-Determination*, Buchanan attempts to determine the extent of a state’s positive duties to other states. I will focus on the problem of *deep indeterminacy*, which is a problem that is based upon the fact that protection of basic human rights involves cost.<sup>26</sup> Buchanan rightly frames this issue with the debate over the excessive demands of utilitarianism exemplified by Singer’s position, but he attempts to mitigate the concern by noting that the problem of excessive demands applies to all ethical theories that require us to address the well-being of others. A further attempt to lessen the sting of this problem is his argument that excessive demands are not limited to positive duties because negative duties also require “positive actions.” For example, the negative duties not to assault others or violate the property rights of others require funding things like police, courts, and

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<sup>25</sup> Buchanan, *In the National Interest*, *supra* note 5, at 116.

<sup>26</sup> BUCHANAN, *JUSTICE, LEGITIMACY*, *supra* note 4, at 181.

prisons.<sup>27</sup> While these examples are certainly relevant in the context of a domestic political structure—and while Buchanan may be suggesting that such examples are part of state’s duty to promote justice in other states—it is less clear how purer basic negative duties involve these sorts of costs in the international context. One can clearly distinguish, for instance, a state funding the infrastructure of another state so that it will have a just police force from a state’s negative duty not to harm the people of another state by taking aggressive steps to appropriate an oil field. On the other hand, it is certainly true that basic negative duties may involve costs. As will be discussed in Section III, a state may be required to refrain from utilizing certain lucrative multinational regulations and structures if the underlying policies violate negative duties by worsening the welfare interests of the people in another state, for example. The point is that while the distinction between negative and positive duties is not always clear, they may be distinguished clearly in many cases.

Putting the distinction between negative and positive duties aside, Buchanan returns to the issue of limiting a state’s obligation to “incur costs for the sake of greater compliance with human rights.”<sup>28</sup> He concedes that the problem of deep indeterminacy cannot be definitively solved, but suggests a strategy for dealing with the problem, namely, by simply allowing certain democratic institutions and states to determine the outer limit of the demands of promoting human rights. This solution is based upon an overarching theory of what constitutes a legitimate state, which can somehow serve as a “force for moral progress.”<sup>29</sup> Roughly, the idea is that legitimate democratic states will solve the problem of indeterminacy by establishing an international standard of human rights and their obligations. States that achieve some sort of

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<sup>27</sup> *Id.* at 184.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 185-87.



minimal level of legitimacy would be afforded the right under international law to determine the demands of human rights, which could then be applied domestically.<sup>30</sup> This solution raises a number of issues. First, it should be noted that the theory sets an ideal goal for which a state should strive in terms of its duty to advance the well-being of other peoples. Second, the goal is based on *institutional moral reasoning*. In other words, Buchanan believes that the justification of moral principles regarding a state's positive duty to other states cannot occur without simultaneously considering the impact of institutionalizing those moral principles.<sup>31</sup> But it is far from clear that this is true. For example, if we believe that natural duties exist then it is not clear why we cannot theorize about the extent of those duties unless we also determine the way those duties would be institutionalized. If a moral duty exists, then it exists regardless of whether we can currently (or ever) explain how it would be fully institutionalized. Moreover, the question of a state's moral situation in the actual, non-ideal world is a pressing question that should not wait on issues of institutionalization. Despite this focus on institutional moral reasoning, Buchanan ultimately hints at his view regarding the theoretical basis for limiting a state's moral duty to aid other states in non-ideal situations of global noncompliance. That view will now be addressed.

In Chapter two of *Justice, Legitimacy, and Self-Determination*, Buchanan makes the general point that the duties of rescue and beneficence include “an implicit proviso that the cost of acting on it is not ‘excessive’...that it is a limited duty.”<sup>32</sup> He then rightly explains that individual persons are not in a position to make a large impact on human rights. This fact requires institutions to act on behalf of human rights so that the costs of aiding others may be

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<sup>30</sup> *Id.* at, 188-89.

<sup>31</sup> See *id.* at 22, for Buchanan's discussion of the relationship between abstract moral principles and the institutionalization of those moral principles.

<sup>32</sup> *Id.* at 92.

limited and distributed among groups. In a lengthy and crucial footnote, Buchanan argues that the limit of this duty should be similar to the limit proposed by Liam Murphy in *Moral Demands in Nonideal Theory*.<sup>33</sup> Murphy calls his theory the “collective principle of beneficence,” which is based upon the idea that the demands of utilitarianism are extreme only because we view them in terms of the partial compliance of others.<sup>34</sup> In other words, the reason our duty to help others seems so extreme is because the vast majority of people do not comply with their duty to help others. If everyone did their fair share in aiding the needy, then the demands on each one of us would be drastically reduced. The failure of others to comply with their duty of beneficence is the basis of Murphy’s theory, and he accounts for this failure by proposing a “compliance condition.” Roughly, the compliance condition states that one’s duty of beneficence should not exceed what the duty would be under conditions in which everyone else fully complied with their duty.<sup>35</sup> Thus, Buchanan’s position seems to be that institutional duties of rescue and beneficence are limited to a fair share of the collective responsibility. If applied to states, this position would run as follows:

- (1) States have a duty to take actions that will optimize aggregate human rights.
- (2) However, in circumstances in which each state does not comply with (1), a particular state is not required to sacrifice more than it would have to sacrifice under circumstances in which all states comply with (1).
- (3) Therefore, in circumstances in which each state does not comply with (1), a particular state has a duty to take actions—within the parameters of (2)—that will optimize

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<sup>33</sup> *Id.* at 93 n.8.

<sup>34</sup> LIAM B. MURPHY, *MORAL DEMANDS IN NONIDEAL THEORY* 5, 8 (2000).

<sup>35</sup> *Id.* at 114.

aggregate human rights.<sup>36</sup>

There are two general problems with Buchanan's endorsement of this approach. First, the collective principle of beneficence does not seem adequate unless one tacks on many rules, the most obvious involving rescue situations, such as the 2004 tsunami. Consider an affluent state that complies with (3), but subsequently a catastrophic earthquake occurs requiring significant humanitarian aid. If the state has already complied with its duty in (3), then it would be under no obligation to take additional actions to address the needs of the states impacted by the earthquake. Thus, a "rescue rule" would need to be tacked on to the principle. Buchanan seems to address this concern, but the way he does so leads to the second general problem with his reliance on the collective principle of beneficence. He argues that there are two exceptions in which more than a fair share of the collective duty is required:

[When] one's fair share in an appropriate collective scheme involves very low costs to oneself (because the total costs would be distributed among many people), and (2) [when] acting alone one could prevent a great injustice at a cost that exceeds what one's fair share would be in the collective scheme, but which is still in some intuitive sense clearly not 'excessive'—roughly does not involve a serious setback to one's more important interests.<sup>37</sup>

What are we to make of these exceptions if they are applied to a state's positive duty to aid other states? While these exceptions would account for a state's duty to rescue the people of another state in the example of the catastrophic earthquake (i.e., even though the rescuing state had already complied with its fair share of beneficence), they circumvent the central point of Murphy's theory. Buchanan's first exception to the fair share duty defeats the purpose of Murphy's compliance condition, the point of which was to mitigate the excessive demands of

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<sup>36</sup> See *id.* at 117, for a full account of Murphy's principle.

<sup>37</sup> BUCHANAN, JUSTICE, LEGITIMACY, *supra* note 4, at 93 n.8.

beneficence. His second exception similarly blocks the force of Murphy's theory. It is always true that one may prevent a great injustice by contributing more than one's fair share. A catastrophic emergency is not necessary for this; indeed, there will always be suffering nations in which many people die from preventable causes, and additional aid will always help save those people. Buchanan does acknowledge that his position is problematic if there is no way to define an "excessive" cost other than by describing it as a cost that surpasses one's collective fair share, but he does not provide a clear way to solve the problem. He suggests that excessive demands cannot be reduced to unfair demands, but concedes that he cannot provide a principled account of "excessive" costs.<sup>38</sup>

Unfortunately, then, this position takes us precisely back to the problem exemplified by Singer's utilitarianism. In other words, Buchanan has not established a non-arbitrary way to limit a state's positive duty to aid other peoples, and it follows that he has not established a theoretical framework that would allow states to balance a duty of international rescue and beneficence with national interest. I agree with Buchanan in his endorsement of a natural duty theory—particularly as it relates to our negative duties—and I agree that we ought to be concerned about the extent of a state's positive duties to the peoples of other states. But he has not provided a principled basis for dismissing the Permissible Exclusivity Thesis out of hand. The endorsement of Murphy's collective principle of beneficence—and subsequent exceptions to that principle—seem to result

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<sup>38</sup> *Id.* Buchanan acknowledges that positive duties to other states involve an ineliminable problem of indeterminacy, and he agrees that defining excessive costs is "a serious theoretical problem and *sometimes* a practical one as well," but believes that this does not prevent us from working within the parameters of the Natural Duty of Justice. While I agree that this theoretical and practical problem does not mean we should abandon the natural duty theory—particularly as it relates to our negative duties—I am suggesting that it does mean we should refrain from downgrading the priority of a state's national interest until there is a principled, non-arbitrary way to establish a limit to a state's positive moral duties.

in a murky theoretical framework. If this is true, then perhaps a state's more immediate interest is complying with its duty to not harm the peoples of other states.

### III. Harming and Access to Medicines

This section of the article will provide an analysis of harm and the extent to which that analysis might generate demanding negative duties for states. The analysis of harm will focus on the example of TRIPS. In *Justice, Legitimacy, and Self-Determination*, Buchanan states that “only a laughably anemic conception of what it is to recognize the moral importance of persons—an absurdly attenuated view about what it is to respect persons and to be concerned about their well-being—would count my merely refraining from violating other persons’ rights as sufficient.”<sup>39</sup> An attempt will be made to show why this is not the case by providing an analysis of harm suggesting that many of the difficult questions regarding the global poor fall under the purview of a state’s duty to refrain from acting. This position builds upon the previously discussed contention that the Permissible Exclusivity Thesis could be restrained by a general natural law theory that requires compliance with negative duties, negative duties that may be far more demanding than typically considered. In taking this approach, it is fitting to begin with Pogge’s idea that the on-going problem of severe poverty is a harm that affluent states inflict on impoverished states.<sup>40</sup> In other words, in light of the current analysis of harm, we must examine Pogge’s view that “affluent states are violating this negative duty when we, in collaboration with the ruling cliques of many poor countries, coercively exclude the global poor from a proportional

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<sup>39</sup> *Id.* at 89.

<sup>40</sup> Thomas Pogge, *World Poverty and Human Rights*, 19 *ETHICS & INT’L AFF.* 1 (2005).

resource share and any equivalent substitute.”<sup>41</sup> A full account of Pogge’s vast work on this issue will not be made, but it is important to at least note his striking conception of the relationship between positive duties of rescue and beneficence and negative duties not to harm: All that has been discussed thus far regarding addressing the problem of indeterminacy, locating the limit of a state’s positive duties of rescue and beneficence, allocating fair shares of collective responsibility to states, developing legitimate institutions to make these determinations, and so on, may be put to the side in the sense that these issues are not directly related to the *harm* states inflict on other peoples. The viability of this conception remains to be seen, and it will now be subjected to an analysis of harm that utilizes the example of TRIPS.

Feinberg’s work in *Harm to Others* is particularly helpful in pursuing this task. First, it allows us to leverage a well-established legal framework that is relatively familiar and uncontroversial, and, second, it is useful to the extent that the prohibition of certain state actions might be codified as international law in the future. Drawing upon Feinberg’s work, then, the following is proposed: An action of a state *S* harms the peoples *P* of another state if<sup>42</sup>

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<sup>41</sup> *Id.* at 3-4. I will not examine specifically Pogge’s claim that much of today’s global inequality is the result of the harm affluent states inflicted on other peoples during the colonial era, but rather the more limited position that a state’s duty is to cease current actions and policies that harm other states.

<sup>42</sup> See BUCHANAN, *JUSTICE, LEGITIMACY*, *supra* note 4, at 292 for an explanation of my use of the terms *state* and *peoples*, and see Simmons, *supra* note 7, at 128-34, for my use of the analogy between a state and an individual person. Also, as noted in my introduction, it would of course be wrong to say that any particular state is the sole cause of any harm that may result from TRIPS. As I will discuss, there are a multitude of causal components and entities, each of which may have negative duties relating to the poor’s access to life-saving medicines. See, e.g., Doris Schroeder, *Does the Pharmaceutical Sector Have a Coresponsibility for the Human Right to Health?* 20 *CAMBRIDGE Q. HEALTHCARE ETHICS* 298 (2011). However, I focus on the responsibility and actions of states—strictly speaking, the citizens that form states and governments—for the reasons provided by Pogge mentioned earlier. In other words, states have taken the action of designing and utilizing rules (e.g., TRIPS) that impact the global poor, as well as encourage pharmaceutical companies to make use of “patent-protected markups.” Thomas

- (1) The action of *S* results in a welfare interest<sup>43</sup> of *P* being in a worse condition than it would have been in had *S* not acted;
- (2) The action of *S* is unjustified, including because it is outweighed by the welfare interest in (1);
- (3) The action of *S* violates *P*'s moral right to the welfare interest in (1);
- (4) *P* did not consent to the action of *S*;
- (5) The results on *P* in (1) are results included among the reasons that make *S*'s action unjustified in (2).<sup>44</sup>

Beginning with (1), how might the utilization of TRIPS by an affluent state result in a welfare interest—access to life-saving medicines, in this case—being in a worse condition than it would have been had TRIPS not been utilized by that state? In a recent symposium on bioethics, Doris Schroeder and Peter Singer described the situation in India as an example.<sup>45</sup> Prior to India's adoption of TRIPS, Indian law did not permit the patenting of products (only processes) which resulted in a "thriving generic pharmaceuticals industry that supplied cheap copies of patented medicines throughout the world's poor regions."<sup>46</sup> However, India was required to change this policy upon signing onto TRIPS. Beginning in 2005, it was required to begin patenting products, and there is evidence that this change resulted in many of the world's poor

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Pogge & Aidan Hollis, *Epilogue: New Drugs for Neglected Diseases*, 20 CAMBRIDGE Q. HEALTHCARE ETHICS 332 (2011).

<sup>43</sup> I define a welfare interest such that they include only those things necessary to maintain human life, including sustenance and life-saving medicines. Although this definition may be expanded upon with justification for other purposes, I use this narrow definition in order to provide a minimalist basis for my analysis of harm.

<sup>44</sup> I have relied primarily on JOEL FEINBERG, *HARM TO OTHERS*, Chs. 1-3, 6 (1987), in constructing this framework of harm.

<sup>45</sup> Doris Schroeder & Peter Singer, *Access to Life-Saving Medicines and Intellectual Property Rights: An Ethical Assessment*, 20 CAMBRIDGE Q. HEALTHCARE ETHICS 285 (2011).

<sup>46</sup> *Id.*

being placed in a worse situation than they would have been had TRIPS not been implemented and utilized by affluent states. As Pogge writes, TRIPS has impacted the poor “directly by undercutting the supply of affordable medicines and indirectly by removing the generic competition that reduced the cost of brand-name medicines.”<sup>47</sup> To put things more directly, there is evidence that at least some of the millions of easily preventable deaths (resulting from lack of life-saving medicines) are harms that would not have occurred had TRIPS not been implemented and utilized by affluent states. But the story is not so simple. As Schroeder points out, TRIPS potentially helps other sectors of the poor by encouraging the pharmaceutical industry to focus upon neglected diseases that impact the poor primarily. For example, it is possible that stronger IPRs in India and other countries will prompt pharmaceutical companies to pursue neglected diseases because the purchasing power of these countries is improving significantly.<sup>48</sup> Therefore, in order to reach a conclusion about (1) of my conception of harm, one must weigh the advantages of pre-TRIPS (access to medicines at a cost that is within reach of the poor) and the advantages of TRIPS (availability of drugs for neglected diseases that impact the poor primarily).<sup>49</sup>

There is no clear path to resolve either the philosophical or the policy question here, which may ultimately boil down to a decision between a rights-based framework (the welfare interest rights of those who may be harmed now) and a utilitarian framework (the possibility that TRIPS may help many more people in the long run). However, regardless of the theoretical framework that might be adopted with respect to any changes to TRIPS, there is evidence that

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<sup>47</sup> Thomas Pogge, *Montreal Statement on the Human Right to Essential Medicines*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 99 (2007).

<sup>48</sup> Schroeder, *supra* note 42, at 304-05. .

<sup>49</sup> Schroeder & Singer, *supra* note 45, at 286.



the current utilization of TRIPS by affluent states results in a welfare interest of the peoples of other states being in a worse condition than it would have been had TRIPS not be utilized.

Points (2) and (3) in my analysis of harm may be addressed in tandem. On the one hand, the utilization of TRIPS by an affluent state must be unjustified, including because it is outweighed by a welfare interest (access to life-saving medicines) of the peoples of another state, and, on the other hand, the utilization of TRIPS by an affluent state must violate a moral right to that welfare interest. Regarding the latter point, there would not seem to be a clearer moral right—if any such rights exist—than a right to life. If TRIPS causes a lack of access to affordable generic drugs as discussed above, then TRIPS may be viewed as violating one’s moral right to life. However, the more difficult question is one step removed from this starting point; in other words, does one have a moral right to particular life-saving medicines to which other entities may claim certain rights, namely, IPRs? This brings us to point (2) and whether an affluent state is justified in denying access to life-saving medicines by utilizing TRIPS, including because utilizing TRIPS invokes a right (an IPR) that outweighs a right to a particular life-saving medicine. Resolving points (2) and (3), then, ultimately involve resolving conflicting rights. There are two primary ways one might claim that affluent states are justified in utilizing TRIPS: First, one might rely upon an argument from natural rights, i.e., “the right of any inventor to control the use of his invention.”<sup>50</sup> Second, one might rely upon an argument for the social utility of IPRs, namely, that they “incentivize intellectual innovation.”<sup>51</sup>

The goal of this article is not to defend or refute either approach, but rather to provide an account of the problems that must be addressed in determining whether the utilization of TRIPS

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<sup>50</sup> Pogge, *supra* note 47, at 99.

<sup>51</sup> *Id.*

constitutes harm. That being the case, what follows is a brief sketch of the three objections raised by Pogge to the first approach: (1) The IPRs claimed by pharmaceutical companies should not be held by those companies exclusively because much of the research into medicines is conducted by public universities and institutions with public funds; (2) it is odd to assert that IPRs are natural rights when they are protected by seemingly arbitrary time periods and other agreements dictated by TRIPS<sup>52</sup>; and (3) it is difficult to show how natural IPRs outweigh the right to life of those in need of life-saving medicines. Without wading into the merits of these objections, it should be noted that the third objection is the only one that goes to the heart of points (2) and (3) of my conception of harm. Moreover, assuming that both IPRs and life are natural rights as characterized, the natural right to life seems *prima facie* to carry the day over the natural right to one's inventions—though there is of course more that could be said about that on both sides of the issue.<sup>53</sup> Moving to the second approach, Pogge suggests that the problem with the social utility argument is that it is typically presented in an either-or fashion, namely, either we accept TRIPS or we accept a world in which there is no scientific innovation. However, a middle-ground is perhaps available: the recognition of IPRs in affluent states, but not in poor states. Pogge concludes that this middle-ground (which existed in recent history) is superior to TRIPS

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<sup>52</sup> It should be noted that the issue to which Pogge objects here seems a lot less odd if we think of the relevant natural rights as “open-textured,” with the institutional specification of their contents, while perhaps arbitrary looking, still apparently falling within the acceptable range of that openness.

<sup>53</sup> For example, if one assumes a right to life only, then it does not necessarily follow that a right to life would be violated by others' failure to supply what one needs. There are many conceptions of rights—and rights to life—on which positive supply is not strictly required. Moreover, there are many situations in which even the most stringent conception of a right to life would not be violated by non-supply (as when others' are themselves perilously close to the survival line, or where the transaction costs of supply are prohibitively high). However, rightly or wrongly, these sorts of objections perhaps slip away from the general theme of Pogge's argument, which is that an international framework has been subjected on the peoples of poor states that harms those peoples.

because TRIPS will cause a greater decline in social utility regarding the poor than increase in social utility regarding affluent states.<sup>54</sup> Here again, then, we are faced with a policy question in need of empirical evidence. But for present purposes, the point is that providing a principled account of harm will entail a philosophical justification for both IPRs and welfare rights, including the extent to which that justification is steeped in natural rights or social utility.

Point (4) of my harm analysis seems problematic in the case of TRIPS. States are not forced to join the WTO and comply with its regulations. Becoming a member of the WTO is voluntary, and poor states might desire membership for a variety of reasons. On the other hand, it is clear that a state—or a person—may be harmed by interests to which that state or person consents. A may very well be harmed even if A consents to B’s punching A in the face, or if A consents to B’s taking A’s last loaf of bread when A is starving. However, as Feinberg points out, there is a well-established legal principle (*Volenti non fit injuria*) that addresses this issue: “To one who has consented no wrong is done.”<sup>55</sup> Therein lays the potential problem with describing an affluent state’s utilization of TRIPS as a harm that is subjected on poorer states. By consenting to join the WTO and comply with its regulations (including TRIPS), a poor state becomes a party to the ways in which TRIPS is used by affluent states; therefore, a poor state’s complaints of harm must in some sense be directed to itself. Our inquiry into whether TRIPS constitutes a harm might end at this point were it not for equally well-established exceptions to this legal principle. In short, one must act freely and have the authority to provide the consent, meaning that the consent must not have been obtained by coercion, exploitation, fraud, or force.

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<sup>54</sup> Pogge, *Montreal Statement*, *supra* note 49, at 99.

<sup>55</sup> FEINBERG, *supra* note 44, at 115.

Otherwise, there is no actual “consent.”<sup>56</sup> Still, establishing the existence of such factors is likely a difficult burden to overcome in the case of joining the WTO and consenting to TRIPS, which requires lengthy administrative procedures that are discharged in a formal, multinational setting. Pogge suggests that the burden is not insurmountable for three reasons: (1) In the WTO negotiations leading to the agreement, representatives of poor countries were not in a position to understand what they had signed up for; (2) Many of the poor countries “lacked the bargaining power needed to resist the imposition” because they were required to purchase access to the markets of affluent states (i.e., protectionist measures), as well as agree to enforce IPRs aggressively; (3) The ruling elite of poor countries may provide consent for a variety of reasons, which in many states (such as unjust or illegitimate regimes) should not be taken as consent by the general population of those states.<sup>57</sup> I submit that the third argument seems to be the most promising. Regarding the first two, people provide uninformed consent, engage in transactions in which they have little bargaining power, and so on, all the time. However, we generally do not say that one is released from one’s consent—particularly in the legal context regarding a contractual obligation—simply because one did not have the upper hand or because one made a poor decision. Fairness is not necessarily a decisive factor here. On the other hand, if there are serious questions regarding a state’s legitimacy or justification for acting on behalf of the general population, then that state’s consent is problematic for a variety of philosophical reasons. Any principled analysis of harm, then, must provide a principled account of the extent to which states meet a minimum threshold of legitimacy for purposes of consent.

Finally, point (5) of my conception of harm relates to the requisite causal component. The

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 100-01.

harm that results from an affluent state's utilization of TRIPS must be a harm that is included among the reasons that the utilization of TRIPS is deemed to be unjustified.<sup>58</sup> In other words, one of the reasons the affluent state's action is unjustified is because the action is understood to result in the harm under consideration. Determining the extent to which a state's reliance on TRIPS is a causal component of harm to other states is particularly tricky. This is because a lack of access to life-saving medicines is a complex issue that includes many causal components. These causal components might include a lack of medical personnel, a lack of pharmacies or other means of distribution, or the poor's inability to afford even "low-cost" drugs.<sup>59</sup> So TRIPS may be one of many causal components of the poor's lack of access to life-saving medicines. However, we might still assign causal responsibility if we are able to say that the harm was an identifiable risk of an affluent state's utilization of TRIPS. Of course, the notion of an *identifiable risk* is admittedly vague, particularly in the sense that virtually all actions have a non-zero risk of harming someone. Accordingly, there must be something different about the acts in question, making them plausible candidates for arguing that their causal connection to harm makes them unjustified. While it would be a monumental—and probably impossible—task to distinguish justified and unjustified risks precisely, here is a very simple hypothetical that perhaps illustrates the rough idea: Suppose an earthquake occurs in a major US city resulting in severe damage to the downtown commercial district and the loss of merchandise in a local business; a mass of people begin looting the remaining merchandise in the store, which person *P* observes. *P* has no desire to harm the store or its owner and would prefer that the earthquake had not caused damage to the store. He nevertheless purchases a new big screen television from person *Q* on the street at

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<sup>58</sup> See *id.* at 123, for additional analysis of this point.

<sup>59</sup> Schroeder & Singer, *supra* note 45, at 279.

a fraction of the television's value. Although *P* did not observe *Q* steal the television out of the store, he knows that there is a chance that the television was stolen by *Q* during the looting. However, *P* disregards the risk because he assumes that the damage is already done and that perpetuating the looting by purchasing a stolen television poses only a remote risk of harm to the store's owner. However, *P* is a causal component of the loss of merchandise regardless of whether there are other causes (the earthquake, the many other people looting) because harm to the store *was* an identifiable risk of *P*'s action, making *P*'s action unjustified (assuming the television was in fact stolen). The requisite causal component of which my conception of harm makes use might be called a commonsense approach: If an affluent state relies upon and benefits from TRIPS, and that reliance is unjustified because one of the risks of utilizing TRIPS is harm to poor states, then the affluent state can be said to be a causal component of the harm. As with each of the other points, providing a comprehensive account of causation comes with many difficulties that need empirical evidence. However, the examples provided by Schroeder and Singer regarding India raise serious concerns that an affluent state's reliance on TRIPS involves an identifiable risk of harm to other states that makes the affluent state's action unjustified.

#### IV. Conclusion

Let us take stock of the ground that has been covered. First, it was argued that while the Permissible Exclusivity Thesis is wrong to the extent that it denies that a state has a negative duty to not violate the human rights of other peoples, Buchanan has not shown how discarding the Permissible Exclusivity Thesis will allow us to balance the relationship between a state's national interest on the one hand, and the positive duties of international rescue and beneficence

on the other hand. Second, it was suggested that absent a principled, non-arbitrary way to balance national interest with international acts of rescue and beneficence, an affluent state's more immediate concern is to comply with its negative duty to not harm other states. It was further suggested that the distinction between positive and negative duties is important, including because focusing on demanding negative duties (perhaps in situations like those involving TRIPS) may help address many of the issues we face regarding the plight of the global poor. Following Feinberg's work, the article laid out an analysis of harm that may be applied to other questions pertaining to a state's negative duties. In doing so, there was no attempt to resolve any policy matters, but rather an attempt to provide a principled framework for analyzing the extent to which a state might harm the peoples of another state. As it turns out, this sort of focus on negative duties is far from the anemic conception suggested by Buchanan. Indeed, the examples examined suggest that strict compliance with negative duties could be quite demanding for states. The larger point is this: Until there is a more principled account of how and to what extent a state must sacrifice its national interest in favor of positive duties to aid other states, compliance with negative duties is of central concern. The question of our moral duty to the global poor, then, may ultimately be more about the ways in which we are obligated to refrain from acting.