

## **1. “Beyond the law’s reach” - general overview of the book**

**My overarching subject:** Jurisdictions dominated by “the shadow of violence” - ones where the threat and/or reality of unchecked violence is pervasive. Overarching claim: political philosophy has said far too little about such jurisdictions.

### **Three debates**

- A. First-best justice debates: presuppose a consolidated liberal democracy with unmatched coercive capacities within its jurisdiction. No wrongdoers – be they private citizens or public officials – effectively tower above the state’s coercive apparatus.

We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is a sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed... (Ronald Dworkin, *Law’s Empire*)

- B. Second-best justice debates: presuppose a clear path to a consolidated liberal democracy – the question is what price can permissibly be paid to get there. (“Transitional justice”)

In 1976, Amnesty International estimated that 60,000 people had been at one time arrested and detained in Uruguay; one out of fifty Uruguayans had been through some period of imprisonment since the coup; and many had been tortured...After the Uruguayan Congress passed the immunity law in 1986, Uruguayan citizens and human rights groups organized...to force a popular referendum on the law...54 percent of the population voted to retain the law giving the military immunity from prosecution for human rights violations...Many Uruguayans were afraid, given the posture of the military during the referendum campaign, that if the law were over overturned, it would lead to another military coup. (Kathryn Sikkink, *The Justice cascade*)

- C. My subject: (heavily under-studied) “third-best justice”: the optimism of second-best justice debates disappears, largely (progress towards a consolidated democracy in one jurisdiction only at the expense of others) or entirely – *no* clear/feasible path to removing the shadow of violence from the jurisdiction, neither from the inside nor from the outside (endemic collective action problems).

Anything, anything, to get that man out of the country and to have a safe transition... of course I would favor him facing the full force of international law and justice for what he’s done...But if he wants to leave he could leave; that could be arranged. (David Cameron on Bashar Al-Assad, 2012)

Focusing my study of “third-best” justice dilemmas on how affluent democracies ought to relate to “shadowed” jurisdictions from the outside, particularly given the draw they represent for people who live under such jurisdictions:

- A. Affluent democracies as potential migrant destinations - personal safety (*no one* who lives under the shadow can ever be truly safe)  
B. As a market (drug trade)  
C. As a safe haven for (illicit) funds – financial safety (kleptocrats’ perverse relation to the rule of law)

**The book’s applied core:** “jurisdictional dilemmas” regarding people and/or money originating in troubled jurisdictions.

**The recurrent question:** whether to “attack”/“protect” the relevant people/funds (asylum v. arrest and prosecution; legalizing the money v. freezing and confiscating).

Three components of an “everyday ideal” of the rule of law:

1. *Location*: all victims and perpetrators of serious crimes are either present in the jurisdiction, or can be brought into the jurisdiction with relative ease (straightforward extradition)
2. *Effective submission of perpetrators* to the state (each crime reduces rather than increases the probability of the next)
3. *Victim access* – protection by the law, compensation

All of the book’s applied dilemmas revolve around the absence of one or more of these components.

## **2. Chapter 1: Conceptualizing the law’s reach**

The assumptions regarding the location of the law’s subjects, perpetrator subjection, and victim access jointly comprise a particular everyday ideal - I refer to this ideal as the law’s *hermetic seal*: First, we expect the legal system to *seal off* individual instances of crime, preventing their recurrence (deterrence, each crime reducing the likelihood that the next will occur).

Second, when all subjects of the law are squarely within the law’s reach, the law “seals off” crime in a geographic sense: it can handle (almost) any particular crime without substantial reliance on actors based outside the jurisdiction.

### **How unique is “the shadow of violence”?**

Does it really make sense to draw such a strong distinction between affluent democracies and countries ruled by the shadow of violence rather than law?

The key claim: Threats of large-scale violence uniquely *paralyze democracy*.

### **Small-scale violence and the targeting of minorities**

Threats of large-scale violence qualitatively different from smaller-scale problems of violent crime.

- Compare Escobar to “Whitey” Bulger
- Mechanisms of protest and reform – and indeed the very *possibility* of protest and reform – remains qualitatively different within a liberal democracy as compared to jurisdictions ruled by the shadow of violence (US v. China/Russia)

### **Fragile stability and “too big to jail”**

What about non-violent threats to the rule of law? Senior politicians? Business owners? Corporations? So long as violence isn’t involved, also qualitatively different.

Compare “systemically important” banks’ (constraining democracy) to the violent capacities of the most powerful cartels can, which, at the limit, *freeze* democracy altogether.

### Menacing leaders

As we said...the American people will decide this election. And the United States government is perfectly capable of escorting trespassers out of the White House. (Biden campaign spokesperson Andrew Bates, November 6, 2020<sup>1</sup>)

To truly paralyze democracy, any given leader must (a) be willing to genuinely countenance the use of violence, and (b) enjoy the personal loyalty of agents who control a critical mass of the means of violence. Unless both of these conditions are satisfied, there is a firm practical limit on the extent to which the relevant leader (however repugnant) can compromise the foundations of liberal democracy.

- Boris Johnson refusing to resign
- Jan. 6 – Trump demanding “personal loyalty” from “his generals.” There was no prospect of (e.g.) the US military or the national guard writ large pledging their allegiance to Trump in a personalist, fascist manner.
  - o Is there such a prospect now? Hopefully, presumably, still no.

### **Three perspectives on political violence**

An effective way for actions to be ruled out is that they never come into thought at all, and this is often the best way. One does not feel easy with the man who in the course of a discussion of how to deal with political or business rivals says, “of course, we could have them killed, but we should lay that aside right from the beginning.” It should never have come into his hands to be laid aside...some concerns are best embodied in this way, in deliberative silence (Bernard Williams, *Ethics and the limits of philosophy*<sup>2</sup>)

#### “First-best” justice debates - a consolidated liberal democracy

- The resort to macro-level violence is *sub-rational*.
- In a consolidated democracy that is *fully* robust, macro-level unconstitutional violence is sub-rational as a matter of course for anyone who is anywhere near the pinnacle of political power.
- However, a given country can still qualify as a consolidated democracy - albeit not a fully robust one - even if some key political actors are willing to countenance large-scale violence. The country will still have a consolidated democracy so long as such violence remains sub-rational for those who are directly in control of the means of violence (Jan. 6 again).

#### “second-best” justice debates – fragile democracy

A critical mass of agents with direct control over the means of violence for whom the actual resort to macro-level violence *is* rational, but distinctly *suboptimal*

- the general risks of all-out violence; the residual hold of liberal-democratic norms; to institutional memories of past misadventures.
- large-scale violence is a genuine option, but also a distinctly inferior option.
- Calculations of violent capacities and coalitions already ominous (e.g. Bolosonaro in 2022).

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<sup>1</sup> Quoted, e.g., in Sarah Mucha, “Biden campaign on reports Trump won't concede: US can escort 'trespassers out of the White House,” *CNN*, Nov. 6, 2020, at [www.cnn.com/politics/live-news/trump-biden-election-results-11-06-20/h\\_2fbbffa95ed6350c68af1b75f623ea73](http://www.cnn.com/politics/live-news/trump-biden-election-results-11-06-20/h_2fbbffa95ed6350c68af1b75f623ea73)

<sup>2</sup> Bernard Williams, *Ethics and the limits of philosophy* (London: Routledge, 1985), 206.

## *Beyond the law's reach?*

- A democracy should be viewed as consolidated *not* when the relevant calculations favor pacific outcomes, but rather when the *very idea* of running these kinds of calculations is unthinkable – akin to the incumbent inviting a challenger to a literal duel for the presidency.

### Third-best justice circumstances

Here the actual resort to unchecked violence is not merely a rational option, but is the dominant strategy.

- The military, police and security services are loyal to de-facto rulers as individuals.
- Private criminals too – drug wars example
- A self-reinforcing shadow of violence; resistance ever harder to coordinate.

### **The persistent shadow of violence and foreign democracies**

This picture of third-best justice circumstances, foregrounding acute collective action problems, should be quite familiar to empirical scholars of dictatorship, civil wars, and cartel wars.

Why examine such circumstances from the *outside*?

Answer: foreign democracies as third-best *agents*.

- In the first-best context of a consolidated liberal democracy, often reasonable for ordinary citizens to rely on the different branches of government to set and apply law and policy.
- The people play a *backup* rather than primary role – they only need to step in to settle questions of law and policy themselves if an unusual difficulty arises
- In circumstances of second-best justice, this exception effectively becomes the rule – the people's backup function is "activated." This is either because there are no institutions to which the people can sensibly entrust the adjudication of core matters of law and policy, or because the people themselves are willing and able to demand radical institutional transformation (e.g. Uruguay).
- Given that the shadow of violence uniquely paralyzes democratic collective action, then any inquiry into third-best justice circumstances – where this shadow is persistent – must take even greater distance from the standard picture of specialized institutions that settle law and policy on the sovereign people's behalf.
- Precisely because the people's collective agency is paralyzed by violence, we cannot turn to the sovereign people as backup agents to the standard institutions of liberal democracy. Rather, we can only turn, as it were to "the backup's backup" – to foreign agents that might take certain actions in the face of a pervasive threat of violence with which the sovereign people are incapable of coping on their own.
- In other words, the very same structural dynamics which trigger third-best justice dilemmas also mean that the sovereign people are unable to organize collectively to adjudicate these dilemmas. As a result, such dilemmas must be confronted – at least in large measure - by foreign governments.