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The Idea of a Legitimate State

Imagine that a drug-smuggling cartel organizes a coup and overthrows the democratically elected government of Exemplar. It establishes a dictatorship under a new constitution with the leading members of the cartel in the key political positions. Call this the Coup Example. The cartel has created a rogue state, and we want to say that this state is not "legitimate." What would we mean by this, and why would we want to say it? At root, the idea is surely as follows. Prior to the coup, as a mere band of criminals, the members of the cartel had no right to impose their will on the people, and nothing has been added to their credentials that would give them a right to do this. Simply to overthrow the state and replace it with a state of their own design does not give them this right. Of course, they can now dress their demands in the trappings of law, but this does not add any moral authority to their actions. Hence, the members of the cartel have no right to rule the people of Exemplar, and neither does their newly constituted state. To be sure, other states will eventually come to treat the cartel as the "legitimate" government of Exemplar—they will "recognize" the cartel as the government. Our point, however, is a normative one about the relation between the rogue

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state that has been newly founded by the cartel and the people and territory of Exemplar. It is about the moral authority of the rogue state, not about the likelihood that other states will treat it a certain way.

Unfortunately, reasoning similar to our reasoning in the example might force us to conclude that virtually *no* state is legitimate, for virtually *every* state owes its existence to some combination of events that includes a share of skullduggery, or worse. Therefore, unless we agree that virtually no state is legitimate, we need to explain how a state can become morally rehabilitated, even if it began by being illegitimate. The first question that I need to address, however, is what the legitimacy of a state would consist in.

When we evaluate a state for its legitimacy, our concern is to assess its moral authority to govern. The laws of a state require or prohibit us to act in certain ways, and the state typically enforces its law by attaching punishments or penalties to failures to comply. Criminal law is only one example, and it is not a typical example, since unlike other parts of law, much of the criminal law requires actions or forbearances that would be morally required in any event. In other parts of the law, such as the traffic code, some actions that are legally required would not be morally required in the absence of the law. In all of these cases, there is the problem of explaining by what right the state imposes requirements and by what right it enforces them. Moreover, states are territorial.[1] A state may apply its law to anyone within its territory, including many who have no special attachment to it, such as illegal immigrants and their children, and temporary visitors. A state may attempt to control the use of land and resources within its territory, and states define the rules of property. Moreover, states enforce their boundaries by controlling entry into and exit from their territories. The territoriality of the state raises the problem of explaining by what right the state takes jurisdiction in these ways throughout a given territory.

The problem of legitimacy is, then, to explain how a state can have the

1. This may seem obvious, but it has not been sufficiently taken into account in discussions of legitimacy. See Lea Brilmayer, "Consent, Contract, and Territory," *Minnesota Law Review* 74, no. 1 (1989): 1–35, and "Secession and Self-Determination, A Territorial Interpretation," *Yale Journal of International Law* 16 (1991): 177–202. See also Allen Buchanan, "Toward a Theory of Secession," *Ethics* 10 (1991): 322–42, and *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colo.: Westview Press, 1991). It may seem that states are not necessarily territorial. I will address this worry in what follows.

moral authority to do the kinds of things involved in governing. In part, it is the problem of explaining how a state could be morally entitled to impose and to enforce its law throughout its territory and to enforce its borders. In A. John Simmons's words, a legitimate state would have "the right to rule."[2] The problem is to understand, first, precisely what this right amounts to, and second, under what conditions a state would have it. According to the traditional account, the legitimacy of a state is to be explained in terms of its subjects' obligation to obey the law. In Section II of this article I argue that this account is inadequate. In Section III I take an inventory of various kinds of rights, and in Section IV I propose that the legitimacy of a state would consist in its having a bundle of rights of various kinds, which I attempt to specify. In Sections V and VI I discuss familiar accounts of the circumstances under which a state would be legitimate, and I argue that none is satisfactory, given my proposal as to what the legitimacy of a state would consist in. Finally, in Section VII I propose an argument from societal needs which, I claim, supports a presumption that states are legitimate. Before we can begin exploring the idea of legitimacy, however, we need to understand the notion of the *state*. What is a state?

I. The Idea of a State

Part of the problem is terminological. Speakers of contemporary English, especially North Americans, tend to use the term "state" to refer to things that are *not* states in my sense of the word. For example, the "states" of the United States and of Australia are subordinate political units or jurisdictions of the United States and of Australia, respectively, but they are not states in my sense of the term. The United States *is* a state in my sense of the term, however, as are Australia, Mexico, and France.

States are often called "nations," as when we speak of "our nation's" flag and capital or pledge allegiance to the "nation," but I want to reserve the term "nation" for a different kind of entity altogether. An idea of the *nation* is prominent in discussions of secession, for the groups that aim to secede from a state often claim to be nations. Clearly, in this context, the term "nation" is not being used to talk about entities that

2. See A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), pp. 195–200.

are *already* states. I want to reserve the term "nation" for groups or populations of this kind, groups such as the Basques and the Québécois. As I use the terms, therefore, state and nation are two quite different animals. It is possible for a state to be created for a nation just as it is possible for the population of a state to be or even to become a nation, but the concept of a state is different from the concept of a nation.

What, then, is a state? It might be said that a state governs the people of a territory. But at most this tells us what a state does without telling us what a state is. What is it that governs the people of a territory? The government does this, of course, but a state should not be identified with those people who happen to be in government at any given time. A typical state lasts through a great many changes of government, and in principle any state could last for generations. The state shares these properties with the *institutions* of government, which suggests that we might identify the state with these institutions. What then are the institutions of government? These include the institutions that make laws, those that administer the law, and those that adjudicate disputes about law. Also included are the police, the other institutions that enforce the law, the military, and, in the contemporary world, the complex institutions operated by the civil service that administer the programs of the government. As a first approximation, then, one might propose to identify the state with the institutions of government.[3]

An institution can be conceived as a system of offices or roles. So understood, the institutions of government could be described without mentioning the people who occupy the relevant offices and roles at different times. But it will not do to think of the state in such an abstract and impersonal way, as simply a system of offices. It is much more natural to think of the people who occupy the offices and roles, and who perform the relevant duties, as part of the state, at least during the times they occupy those offices and roles. To coin a phrase, I will say that an "animated institution" is an institution or system of offices and roles together with the people who occupy these offices and roles during the times they do so. An animated institution is a flesh-and-blood thing with which we could have a disagreement or to which we could feel a sense of loyalty. Suppose we think of the state as an animated institu-

3. See the discussion in Quentin Skinner, "The State," in Robert E. Goodin and Philip Pettit, eds., *Contemporary Political Philosophy, An Anthology* (Oxford: Blackwell, 1997), pp. 3–26, especially at pp. 8, 16.

tion. So understood, the state consists in part of a system of offices and roles—president, member of the legislature, judge, secretary, manager, police officer, and so on. As time passes, new offices and roles might be added, so a state presumably consists of different offices and roles at different times. Each of these offices and roles can be paired up with the person occupying it at the relevant times. The state is, then, the relevant system of offices and roles together with the people who occupy those offices and roles at the relevant times. That is, the state consists of the "animated institutions" of government.[4]

This understanding of the state rests implicitly on the idea of a legal system, for the institutions of government are creatures of the law. They are defined legally, in the constitution and in various statutes that have been enacted under the constitution.[5] It is true that the notion of a legal system is not well understood, but we need to start somewhere, and I believe that the notion is sufficiently clear that we can at least identify legal systems and the territories in which they are "in force." We can use these notions here to illuminate the idea of a state.

I therefore propose to characterize a state in the following way. Begin by identifying a legal system and the territory in which the system is "in force" in the sense that residency in it is sufficient to put one under its jurisdiction.[6] The state is the system of animated institutions that govern the territory and its residents, and that administer and enforce the legal system and carry out the programs of government. A state corre-

4. Technically my proposal is quite complex. A state is to be modeled as a temporally ordered set of sets of n-tuples—each n-tuple represents an office or role together with the people who hold that office or role; each set of n-tuples represents the animated institution at a time; and the ordering of the sets of n-tuples represents the changing nature of the institution through time.

5. It is worrisome that it might be necessary to invoke the idea of the state in order to explain what a legal system is. Law, it might be said, is the set of rules created by government. If this is so, then our characterization of the state is circular. We define the state implicitly in terms of the idea of a legal system, but we explain what a legal system is in terms of the idea of the state. Yet it is not obvious that circularity cannot be avoided. Perhaps we could give an adequate account of a legal system without presupposing the idea of a state.

6. In what sense does residency in the territory put one under the "jurisdiction" of the legal system? I explain in the next paragraph that I am assuming a positivistic account of this notion. It is compatible with my account that, in some circumstances, states impose their law on citizens who are residing outside their territory. It is also compatible with the account that the law of a state can give diplomatic immunity to the officials of other states when they are on official business within its territory.

sponds to the legal system that is in force in a territory. It governs the people in all of the territory in which its legal system is in force. It rules, or has jurisdiction, in this territory. It is the animated institutions of government.[7]

One might think that this characterization of the state has an awkward implication. For consider the version of "natural law theory" according to which only a morally legitimate state could create genuine law. Given my account of the state, it follows from this natural law view that a legitimate state must exist, or must have existed, unless there are no genuine states at all. For on my characterization of the state, the existence of a state implies the existence of a legal system, and on the natural law view, the existence of a legal system implies the existence of a legitimate state. The legal system of an illegitimate state must have been created by a legitimate state, perhaps by the illegitimate state itself at an earlier time when it was legitimate. The point is that the combination of my characterization of the state with the natural law theory implies that if there have been any states at all, some of them must have been legitimate. To me, this result seems awkward and counterintuitive. It is a substantive moral question whether any of the states that have existed have been legitimate. It is not a question that can be settled as easily as this. I shall therefore assume that the natural law view is false. I will assume a form of "legal positivism" according to which the fact that a legal system is in force in a territory—the fact that the residents of the territory are under the system's jurisdiction—is a complex nonmoral historical and sociological fact about the territory and about the relationships among the people in the territory.[8] When we combine this positivistic view with my account of states, the resulting theory leaves it open that all states might be illegitimate.

7. There are metaphysical questions here that are better avoided in this essay. Is the territory that is governed by the institutions of a state essential to it? Is the society that is so governed essential to the state? Is the legal system essential? Regarding the latter question, I think the legal system *is* essential. Replace the French legal system with another system and you replace one French République with another. But I think that neither the society nor the territory that is governed by a state is essential to it. Fortunately, however, nothing in this essay turns on this matter. There is an entity that the society and territory governed by a state are essential to, however, as we will see. It is the "country."

8. To be sure, laws can be formulated in language that uses moral terms, and so laws can have moral content. But when a law has moral content, the fact that it does is determined by facts of the sort mentioned in the text. A classic exposition of positivism is found in H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

One might suspect that states do not necessarily line up one-to-one with territories in which legal systems are in force. Imagine a system in which several statelike entities operate within a given territory, and each enforces its own legal system on its members. Suppose, for example, that at some point in the distant future, the French are everywhere subject to the laws of France, the Germans are everywhere subject to the laws of Germany, the Japanese are everywhere subject to the laws of Japan, and so on. And suppose that boundaries have no legal significance. One is subject to the legal system of one's parents. In this case, France, Germany, Japan, and the rest plainly are not territorial in the sense I explained, and the overall global system that embraces all of them appears to consist of several legal systems. But it is not plain that France, Germany, and Japan would still qualify as states in this example. Of course, there is not a sharp line between states and near-states any more than there is between legal systems and their near cousins. Nevertheless, a system of the kind we have imagined would not be feasible without World laws that determined the jurisdiction, say, of France, in complicated cases such as cases of mixed French and non-French ancestry, and cases in which a French national treats a non-French person in a way that is lawful in French law but unlawful in the law of the other person's group. It seems to me that the total World system in this case would best be understood as a federation of former states into a new global state. That global state would be territorial, and it would have a single legal system in the sense in which federal states have a single system.[9]

On the characterization I have given, one state would be replaced by another state if the legal system or institutions of government were destroyed and replaced by another legal system or set of institutions. In the Coup Example, I stipulated that Exemplar was overthrown and replaced by the rogue state. This seems the correct way to describe a situation in which the original constitution and government were replaced abruptly and unconstitutionally by a different kind of constitution and

9. Given the existence of international law, one might wonder whether my account implies that there is already a single global state. Perhaps it is the United Nations. As I said in the text, there is not a sharp line between states and near-states any more than there is between legal systems and their near cousins. I do not think that international law qualifies as a legal system with global jurisdiction, but nothing substantive turns on the issue. I want to ignore the issue in the text in order to avoid distracting complications.

government. In more ordinary situations, changes in the law or in the institutions of government occur gradually and in accord with the constitution, and it is accordingly plausible to think that the original state continues to exist. Of course there can be borderline cases, but nothing turns on whether we can find a sharp line between situations in which one state is replaced by another state and those in which a state merely undergoes change.

On my account, a state is to be distinguished both from the territory that it governs and from the people that it governs. It is worth noticing, however, a feature of the way that we use names such as "France" and "the United States." We may ask, for instance, about the constitution of "France," the size of the population of "France," and the total land area of "France." On my analysis, these questions are about the state, the group governed by the state, and the territory governed by the state, respectively. Yet the ease with which we view all three questions as about "France" suggests how natural it is to suppose that there is a single entity called "France" that in some way essentially involves not only the state, but the land and the people as well. I will reserve the term "country" for such entities. We may view a country as a state together with the group of people it governs and its territory.[10] Legitimacy, however, is a property of *states*.

II. The Traditional Account: The Obligation to Obey

The traditional view is that the legitimacy of a state would consist in its subjects' having a moral obligation to obey its law. Corresponding to this obligation would be the state's right to the obedience of its subjects. On this view, then, the right to rule is a right against relevant persons that they obey the law.[11] There are two chief problems with this idea.

First, the idea of an *obligation* is more specialized than is necessary to capture the idea that the subjects of a legitimate state would have a moral duty to obey the law. In the sense at issue, an "obligation" is a

10. Formally, we could represent a country as an ordered triple of a state, the group it governs, and the territory over which it has jurisdiction.

11. Simmons, *Moral Principles and Political Obligations*, pp. 195–96, 29. Simmons describes the "traditional" view as the idea that the subjects of a legitimate state have a moral obligation to obey its law and "support it." He holds that every "obligation" is "correlated" with "a right" (p. 14). This traditional idea is implicit in John Locke, *Two Treatises of Government*, P. Laslett, ed. (Cambridge: Cambridge University Press, 1988 [1690]).

special kind of moral requirement. An obligation is owed *to* some agent, and it corresponds in a precise way to a *right* possessed *by* that agent. Obligations correspond to "claim-rights," as they are often called. But obligations are not the only kind of requirement. Other moral requirements, including duties, are not owed to any agent and do not correspond in this way to rights.[12] If an obligation to obey the law would be sufficient for the legitimacy of a state, then surely it would be sufficient as well if people had a duty to obey the law, even if they did not *owe* their obedience *to* the state. This is the first problem with the traditional view. It would not be an interesting problem except that, as I will explain, the traditional view seems to lead to a form of philosophical anarchism according to which it is doubtful that any actual state is legitimate. And the arguments that support this anarchistic conclusion turn on the traditional identification of the legitimacy of a state with an obligation of its subjects to obey the law. Unless, therefore, we are inclined to accept this anarchistic conclusion, which I am not, we must question the traditional identification of legitimacy with a moral requirement of this special kind.

Since obligations correspond to claim-rights, we can carry on the discussion in terms of the idea of a claim-right. In effect, the traditional view identifies legitimacy with a claim-right to obedience, for a state has a claim-right against its citizens that they obey just in case its subjects have an obligation to obey. There are two kinds of claim-rights. There are "special rights," which some agents acquire as a result of others' voluntarily assuming or otherwise acquiring the corresponding obligations, and there are "fundamental rights," which are possessed by things of a relevant kind without having been acquired. The traditional view is that a legitimate state's right to obedience would be a special right, grounded in the consent of its subjects.

The arguments to show that the traditional view leads to an anarchistic result are presented most clearly by A. John Simmons. Simmons argues that a special right against an agent must be derived either from the agent's voluntary commitment or from her voluntary acceptance of benefits.[13] As for the first possibility, Simmons argues that it is implausi-

12. Simmons discusses the distinction between obligations and duties in *Moral Principles and Political Obligations*, at pp. 11–16.

13. Ibid., p. 16. In the following, I summarize central arguments made by Simmons in this book.

ble that the subjects of states have voluntarily committed themselves to obey the law. *Actual undertakings* would be required, not merely hypothetical ones, for hypothetical commitments do not bind us. And although some naturalized citizens might have consented to obey the law in the process of becoming citizens, and some citizens might have undertaken to obey the law in some other specific context, such as in the course of swearing an oath, very few other citizens have so committed themselves. To commit oneself voluntarily to obey the law would be to do something with the intention to obligate oneself to obey, and very few subjects of any state have done any such thing.[14] The other possibility is that the state's right to obedience is grounded in an obligation of its subjects to reciprocate for benefits they have received. Simmons points out, however, that the goods provided by a state that are available to all of its residents, such as national defense, public safety, clean air, and so on, are "public goods."[15] If a state provides such goods, it provides them to everyone in a relevant territory. It is implausible that a person who receives such benefits is thereby obligated to reciprocate. She may have had no real opportunity to avoid receiving the benefit or to stop the state from producing it. It is even less plausible that she is obligated to reciprocate *by* obeying the law. For the benefits may be worth less to her than the cost of obeying. They may also be worth less to her than the cost of paying whatever taxes she is legally required to pay. In these cases, adequate reciprocation, if such were required, would involve less than obeying the law.[16] For these reasons, Simmons argues, it is implausible that any actual state has a special right to the obedience of its residents.

The alternative is that a legitimate state's right to obedience would be

14. Ibid., chapters 3 and 4. One might suppose that consent to the state would be sufficient to make the state's coercion of its subjects legitimate regardless of whether the consequence of their consent is that they have an obligation to obey the law. In this context, however, we are viewing consent as important because of its potential to ground an obligation to obey the law.

15. Technically, the notion of a public good is the notion of a good "characterized by *nonrivalry in consumption* (i.e., its use by one person does not interfere with its use by others)," and "the consumption of which is *nonexclusive* (i.e., if the good is available to one person, it will be available to all, including those who do not help to produce it . . .)." See David Schmidtz, *The Limits of Government: An Essay on the Public Goods Argument* (Boulder: Westview Press, 1991), p. 55. Consider lighthouses. Barring crowding at sea, their use is nonexclusive and nonrivalrous.

16. Simmons, *Moral Principles and Political Obligations*, chapters 5 and 7.

a fundamental right. Since it is not plausible that every state is legitimate, a viable defense of this alternative would have to identify a property that distinguishes states that are plausibly held to be legitimate from states that are not. Moreover, it would have to show that this property grounds a claim-right to obedience, a claim-right held by the state specifically against its subjects. It might seem that the property of being a just state is a candidate for this role, given the plausible idea that we have a duty to support just institutions.[17] But, first, as I will argue later in this article, it is implausible that only just states are legitimate. Moreover, if there is a duty to support just institutions, it would seem to be a duty incumbent on everyone, not specifically on those who are subject to just institutions. Finally, it is doubtful that this duty would be *owed to* those institutions.[18] What has to be grounded is not merely a duty to obey the law, but an obligation owed to the state specifically by its subjects, and it is quite unclear what property of a state might ground such a thing, given the objections to the traditional view. It therefore seems doubtful that any actual state has a fundamental right to obedience.

For these reasons, it is doubtful that any actual state has a claim-right to the obedience of its subjects. On the traditional view, it follows that it is doubtful that any actual state is legitimate. But, as we have seen, the arguments for this anarchistic result turn on the traditional identification of the legitimacy of a state with its having a claim-right to obedience, or with its subjects' having an obligation to obey. And there is no reason to accept this identification, for there is no reason to think that a state's legitimacy depends on its citizens' having an obligation as opposed to some other kind of moral requirement to obey the law. The traditional view is on the right track in insisting that the citizens of a legitimate state would be morally required to obey the law. But they could be *required* to obey even if they do not *owe* their obedience *to* the state, even if the state has no *claim-right* to their obedience.

The second problem with the traditional view is that its account of legitimacy is too slim to ground an adequate account of the territoriality

17. A legitimate state would presumably be just at least in that one respect, for it would have the right to rule. Illegitimate states rule unjustly, for they rule without having the right to rule. What I have in mind is the idea that the property of being just in *other* respects might ground the legitimacy of a state.

18. A. John Simmons makes essentially this point in *Moral Principles and Political Obligations.*

of the state.[19] The territorial rights that would be possessed by a legitimate state cannot adequately be explained in terms of an obligation of its subjects to obey the law. First, a state purports to have the right to govern its territory, which includes enforcing its laws against any members of other states who live in its territory as well as controlling access across its borders. But even if the members of state A have an obligation to obey the laws of A, members of state B who live in state A might have no such obligation on the traditional view. Consider, for instance, Betty, a member of B who has entered state A illegally. She might not have explicitly consented to obey the laws of A, and she might not have lived there long enough to have benefited from living in A. Yet state A would claim the right to apply its law to her. A defender of the traditional view might argue that, in entering A, Betty must have "tacitly" consented to obey the laws of A. But in order for Betty's mere crossing of the border to have put her under an obligation to obey the law of A, Betty would have to have crossed the border with some relevant intention or understanding, such as the intention thereby to obligate herself to obey, and it is unlikely that Betty had any such intention.[20] It is especially unlikely that she intended to obligate herself to obey the very law that prohibited her act of crossing the border, since, for one thing, she presumably could be deported under that law. Indeed, state A would claim to have had the right to refuse to allow her to enter even before she actually attempted to enter. It is difficult to see how the traditional view could account for A's having any such right, since it would be quite implausible to maintain, even *before* she entered A, that she must *already* have consented to obey the laws of A, even if only "tacitly." Moreover, second, state A purports to have a right not to be interfered with by any other state in governing its territory. It is difficult to see how the traditional view could explain this, especially since, for example, Betty might have consented to B's intervention on her behalf and, again, we are assuming that she has not explicitly consented to obey the laws of A and that merely crossing A's border is not sufficient to obligate her. It is difficult, therefore, to see how a state's claims regarding its borders

19. The idea that a legitimate state would have a claim to obedience is also too weak by itself to explain the state's entitlement to *enforce* legal requirements since its subjects could be obligated to obey the law without its having any right to enforce the law.

20. Here once again I follow Simmons, *Moral Principles and Political Obligations*, chapters 3 and 4.

could be given a plausible explanation on the traditional view.[21] The situation is not improved if we turn to the idea that our obligation to obey the law is grounded in a duty to reciprocate for benefits received. For the benefits of a state's investments in public goods can spill over into territories that it has no right to rule on any plausible account. For example, state A's attempts to prevent air pollution can benefit the downwind members of state B. State A does not acquire a right to the obedience of members of state B on this basis. The traditional view therefore is inadequate to account for the territoriality of states.

This problem is deeper than it might appear to be, for the traditional view cannot adequately explain the sense in which a legitimate state would be associated with a territory. It explains legitimacy in terms of an obligation to obey the law on the part of those people who have consented to obey the law. The subjects of a legitimate state therefore would have an obligation to obey its laws regarding their property. Given this, it would be natural to add to the traditional view the idea that a state's territory consists in the aggregated property of its members.[22] But it is not necessary that the territory associated with a state in this sense should coincide with the territory that is intuitively associated with a state—i.e., the territory throughout which the state's legal system is enforced. Anyone could in principle commit herself to obeying the law of any state. It is not necessary that all the people living in the territory intuitively associated with a state, nor even that only the people living in this territory, should commit themselves to obeying its law. Suppose that Alice has spent her life on her large property, which lies within the territory intuitively associated with A. But suppose she has freely committed herself to obey the law of B rather than to obey the law of A. The traditional view must see her as a citizen of state B, and, on the proposed account of territory, her property is part of the territory of B rather than the territory of A. Unless we are given some other account of legitimate territory, it cannot be argued that Alice must have tacitly consented to obey the law of A since she resides in the territory of A, for the proposed account of territory implies to the contrary that she resides in B. Yet, of course, B will view her as a subject of state A, and A will treat her the way it treats all of its subjects. It will enforce its laws

21. For similar arguments, see Brilmayer, "Consent, Contract, and Territory."

22. Nothing in the traditional view guarantees that the subjects of a legitimate state have any property, but I shall ignore this worry.

against her, and purport to have the right to do so. It seems, then, that the traditional view does not give us an intuitively plausible account of the territoriality of the state.

Of course, I do not take myself to have refuted the traditional view in this brief discussion. A defender of the traditional view could reply that the most I have shown is that states have neither the rights nor the territories that we intuitively take them to have. I think, however, that my discussion of the difficulties facing the traditional view suggests that we need to rethink the traditional analysis of legitimacy. For the arguments we discussed which show it is doubtful that any actual state is legitimate turn on the idea that legitimacy requires the citizens of the state to have an obligation to obey the law, rather than any other kind of duty to obey. And the argument that even a legitimate state might lack the rights over territory that we intuitively would expect turns on the fact that the traditional analysis seeks to explain legitimacy entirely in terms of moral relations derivable from the obligation to obey and the consent on which this obligation is thought to be based. A different account of legitimacy might yield a more plausible overall picture.

III. Hohfeldian Rights

We are looking for an account of what the legitimacy of a state would consist in, and I am assuming that the legitimacy of a state would consist in its having a *right to rule*. This way of putting things raises the question, What is meant by a *right* to rule? What are rights?

Wesley Newcomb Hohfeld observed that lawyers use the term "right" to refer to four different kinds of legal "advantage," which he called "claims," "privileges," "powers," and "immunities." In recent years, moral philosophers have proposed similar distinctions among moral "advantages," and they have noticed that some rights are clusters of Hohfeldian advantages.[23] I will use Hohfeld's distinctions in sorting out various possible interpretations of the purported right to rule.

A *claim* is a right of the familiar kind that corresponds to an obligation

23. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, Walter Wheeler Cook, ed., (New Haven: Yale University Press, 1919). In the following paragraphs, I follow the account given by Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), chapter 1. Thomson introduces the idea that certain rights may be clusters of Hohfeldian advantages.

owed *to* the right-bearer *by* the person against whom the right is held. Promises and contracts can give rise to claim-rights. For example, if I promise you to dance under the moon, then I have an obligation to do this; I owe this to you, and you have a claim against me that I do it. In general, a person A has a claim against B that such and such if and only if B has an obligation to A that such and such. A Hohfeldian *privilege* is simply an absence of relevant obligations and claims. Person A has a privilege (against B) to do something if and only if there is no claim against A (on the part of B) that A not do the thing. For example, if I hadn't made the promise to dance under the moon, then presumably no one would have had a right that I dance under the moon, and so I presumably would have had a privilege not to dance under the moon. Even if my promise to you means that I am obligated to you to dance, there may be no one else to whom I am obligated to dance. If so, I have a privilege with respect to everyone else that I not dance.

The third kind of Hohfeldian right is a *power*. Person A has a power if and only if A has the ability to alter the rights or duties of some person by performing some (permitted) action. For example, the right of the United States Congress to legislate in the area of interstate commerce consists of a legal power to create valid law in this area, thereby altering people's legal duties, claims, privileges, or powers. The fourth kind of Hohfeldian right, an *immunity*, is simply the absence of a relevant power in others. The constitutional right to free speech in the United States, for example, can be understood as an immunity against congressional legislation of certain kinds.[24] These are legal powers and immunities, but there are also moral powers and immunities. For instance, I have the power to put myself under an obligation to dance under the moon by promising, but I have an immunity against being put under such an obligation by anything you do. You have a power to obligate yourself, but no power to obligate me.

I must emphasize here that I do not view rights, obligations, or duties as "absolute." I have a claim to my privacy, and you have no privilege to break down my door. You are obligated to leave me and my door alone. I have the privilege not to open my door to you. Yet if you were being chased by a grizzly bear, and if your only hope of surviving were to break down my door and enter my home, you would be morally per-

24. David Lyons, "The Correlativity of Rights and Duties," *Noûs* 4 (1970): 50–51.

mitted to do so, all things considered, despite my claim and your obligation. And if you were being chased by a grizzly, I would be wrong not to open my door to you even though you have no claim against me that I open it. Rights, obligations, and duties support propositions about what agents ought to do *pro tanto*, but although *pro tanto* duties are genuine duties, they can be outweighed by other moral factors in a determination of what an agent ought to do all things considered.[25]

IV. The Right to Rule

Armed with this inventory of kinds of rights, we can now turn to the central question, What is the right to *rule*? What rights and powers do states purport to have simply in virtue of being states? What rights and powers would a state need to have in order to have the moral authority to do the kinds of things that states must do in ruling their people and their territories? There appear to be three basic aspects to this. First, a state claims to be morally entitled to impose and to enforce legal requirements on its subjects. Second, a state claims to have a jurisdictional right over its territory, including a right to enforce its borders. Third, a state claims a right not to be interfered with by other states. The idea of legitimacy involves all three of these aspects, and the right to rule is, then, a *bundle* of Hohfeldian rights. Let us begin with the first aspect, the right to impose and enforce legal requirements.

(1) The Right to Command Persons

In order to distinguish a legitimate state from a rogue state, we must suppose that the laws of a legitimate state have some significant normative status. They must be more than simply enactments since that is all that the laws of a rogue state are. The traditional view, expressed in Hohfeldian terms, is that a legitimate state would have a moral *claim* that its subjects obey the law, but this is implausible, as I argued before. The subjects of a legitimate state would have a duty to obey the laws, but this does not entail that the state would have a claim to their obedience.

It is implausible, however, that we have a duty to obey laws regardless of their content and nature. For this reason, a sensible view would pro-

25. There is obviously no algorithm that I can provide to determine when a right or an obligation or duty is outweighed. Shelly Kagan uses the term "pro tanto" with this meaning, in his *The Limits of Morality* (Oxford: Clarendon Press, 1989).

pose that whether there is a duty to obey a law depends on the law's moral quality. Consider, then, the idea that we would have a *pro tanto* duty to obey the morally *unobjectionable* laws of a legitimate state. If so, then a legitimate state would have a qualified Hohfeldian *power* to put its citizens under a duty to do something by enacting a morally unobjectionable law requiring them to do it.[26] To explain this, I need to explain the state's right to legislate, which involves a Hohfeldian *privilege*.

A state is not morally free to enact any law whatsoever, for people have claims that would be violated by certain laws, including laws interfering with the choice of religion and, perhaps, laws imposing the death penalty. If we have a right to choose our own religion, this right is at least a claim to noninterference, and its existence implies that a state has no privilege to interfere with our choice of religion. A state has no privilege to enact or enforce laws that violate claims. Nevertheless, the idea that a state is entitled to enforce and enact law can be understood in Hohfeldian terms as the idea that there is a *sphere* within which it has a *privilege* to legislate. And it surely must be true, if a state is *legitimate*, that there is a *sphere* within which it has a privilege to legislate—a privilege with respect all of its subjects to enact and enforce laws affecting them. If a state is legitimate, there surely must be *some* matters such that the state would not violate any of its subject's claims by enacting and enforcing laws pertaining to these matters.

Robert Nozick's argument for the "minimal state" is an argument that the sphere within which a state may legitimately act is quite small.[27] The issue here, however, is not the size of this sphere. It is whether the legitimacy of a state consists in part in its having *some* such sphere. A philosophical anarchist might claim that there is no such sphere of privilege, that a state has no privilege to enact or enforce *any* law, except perhaps with our consent, and people typically have not consented. On

26. If a legitimate state would have the power to impose a duty on us to do something, it might seem that we would in some sense "owe" the duty to do that thing "to" the state after all. The duty would at least owe its existence to the state. I have no objection to this way of using the phrase "owe to." The traditional view was that the citizens of a legitimate state would "owe" an obligation "to" the state in a sense which entailed that the state would have a claim-right to obedience. It is not part of my view that a legitimate state would have a claim-right to obedience. Christopher Morris suggested understanding legitimacy in terms of a power possessed by the state. See Christopher W. Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), chapter 4.

27. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

this anarchist view, then, states are not legitimate, except perhaps in special circumstances, for they have no sphere of permissible law. Even so, the anarchist would presumably agree that a *legitimate* state would have a sphere of privilege within which it could permissibly govern. What she denies is that any state is legitimate.

Suppose that we restrict attention to laws that are "morally innocent" in that enacting and enforcing them is within the sphere of privilege of the state and they are in no way unjust. I propose that a legitimate state would have the power to put its residents under a *pro tanto* duty to do something simply by enacting a law, provided that the law is morally innocent.[28] The fact that a legitimate state would possess such a power distinguishes it from a rogue state. The duty to comply with the morally innocent law of a legitimate state gives its laws a special normative status by comparison with the laws of a rogue state. In addition, a legitimate state would have the power to make it permissible for its officials to enforce the law simply by enacting laws that provide for the enforcement of law, provided again that these laws are morally innocent.

My view implies that a legitimate state can in principle change the moral status of actions. A legitimate state can put us under duties to perform actions that, in the absence of law, would merely have been morally *permissible*, provided that the relevant laws are morally innocent. For example, we are under a duty to pay the taxes required by a legitimate state assuming the moral innocence of the tax law. The view also implies that a legitimate state can place its officials under duties to do things that would otherwise have been *prohibited*, provided that the relevant laws are morally innocent. For example, in the absence of law, it would be wrong to harm people in the guise of "punishing" them, or to exact money from them in the guise of "taxation." But the law of a legitimate state can give officials a permission and even a duty to do such things, assuming that coercive tax laws and criminal laws can be morally innocent.

One might object that it is implausible to suppose that I violate a moral duty when I exceed the speed limit by a trivial amount on a de-

28. A state "enacts" a law in the relevant sense when it creates a law in accord with the constitution or in accord with whatever procedural rules are in force. Even in a legitimate state, controversy about whether a law has been properly enacted, or about whether a law is morally innocent, would ground controversy about whether there is a *pro tanto* duty to comply with its requirements. I am grateful to David Sobel for helpful suggestions about these issues.

serted highway. I confess that I am not certain how best to respond to this example. There can presumably be trivial moral wrongs, and the wrong in a trivial case of speeding is trivial. The underlying question is whether our intuitions rebel at the idea that we would have a duty to obey the morally innocent law of a legitimate state. Unfortunately, the issue is ideological in a way that makes it unlikely that we will agree in our intuitions. For what it is worth, however, I think the view is not unintuitive. We do feel that we need to excuse or justify ourselves for lawbreaking. At least we feel this way if we believe that our state is legitimate. Indeed those who reject the idea that there is a duty to obey the law most likely would try to defend their view by presenting arguments about the illegitimacy of current arrangements. Arguments of this kind are exactly what would be appropriate if there were a *pro tanto* duty to obey the law of a legitimate state.

The objection does, however, point to various ways in which my account could be made more subtle and complex. I want to say that a legitimate state has the power to put us under duties, but perhaps it does not *exercise* this power each and every time that it enacts a law. Many laws are not strictly enforced, and some of the less important laws are enforced merely by threatened penalties, rather than by threatened punishment. Perhaps we should say that in order to exercise its power to put us under a duty, a state must not only enact a law, it must enforce the law and do so by threatening to punish violations of it.[29] It must in effect announce in some conventionally understood way that the law is meant to put us under a duty and not merely to change our incentives by attaching a penalty to an action.

(2) The Right to Control Territory

I explained the idea of a state in terms of a legal system; a state is the set of animated governmental institutions that enforce and administer a legal system. The territory of a state is the entire territory in which its legal system is "in force" in the sense I explained before. This territory is "its" simply in the sense that it is the territory in which it has "positivistic" jurisdiction—a jurisdiction that consists in a complex nonmoral historical and sociological fact about the territory and the relationships among its residents. A legitimate state, however, would have more than

29. I am grateful to Christopher Morris for helpful discussion of the issues raised in this and the preceding paragraph.

simply a positivistic jurisdiction. It would have a moral jurisdiction or authority both over its territory and over residents of the territory. There are at least three aspects to this.

To begin with, states are territorial in the sense that they apply their law to all those who reside in their territory. A legitimate state would have to have the moral authority to do so. That is, the class of persons relative to which a legitimate state would have the moral powers and privileges that I discussed in the preceding section would include all residents of its territory. These people would be the "moral citizens" of the state, provided it were legitimate.[30]

Second, states presume that their authority over their territory includes a right to control uses of the territory. This right presumably includes the privilege to enact a regime of property law, including laws governing the transfer of property, as well as a regime of ordinary criminal law, which presumably would prohibit the use of force or fraud to seize property. States also presume that they have a privilege to restrict or control the uses to which owners put their property. The question, then, is whether this presumption is correct. What kinds of restrictions or controls on the uses of property, if any, fall within the sphere of privilege of a legitimate state?

There are a variety of views on this question. At one end of the spectrum is the position that any moral property rights that we have are derivative from the laws of legitimate states. On this view, there are no antecedent moral property rights that limit the state's sphere of privilege. At the other end of the spectrum is the idea that there are what we might call "full natural property rights"—property rights that prohibit the state from placing any limits or controls on how people use land in which they have such rights. On this view, if all the land were owned by individuals who had "full natural property rights" in their land, then the state would have no privilege to legislate land-use policy.[31] For my part,

30. Michael Walzer discusses issues about membership in the state in Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), chapter 2.

31. The idea that there are full natural property rights, or something close to them, seems to be defended by Ellen Paul. She argues that we need what she describes as "permanent exclusive rights to property" in order to survive. It seems clear, however, that restricted property rights are sufficient for our survival. Most states regulate owners' use of their property without thereby preventing their citizens from surviving and prospering. Our *survival* is not threatened simply because our property rights permit the state to impose zoning regulations and to regulate mining, actions that Paul opposes. See Ellen

I think that there are not in fact full natural property rights and that legitimate states would have the privilege to control how people use their land within certain limits. For present purposes, however, we do not need to decide whether there are full natural property rights.

It is nevertheless important to see that the idea that private property can be justified is not the same as the idea that there are *full natural* property rights. One argument for private property turns on the idea that private ownership gives people incentives to make productive use of land and other kinds of property.[32] But this argument does not show that a property owner has, or must be given, a claim against the state that precludes its restricting or regulating her use of what she owns. The argument justifies a range of legal régimes that provide for private ownership of one form or another, but many such régimes would limit an owner's right to control what happens to her property. Hence, the argument does not support the existence of full natural property rights. For all that it shows, a legitimate state would have a privilege to enact and enforce laws restricting owners' use of land, such as zoning laws, laws regulating the exploitation of mineral resources, laws restricting dangerous activities in populated areas, and so on. Indeed, John Rawls has argued that the state ought to protect its territory and its resources for future generations, and doing so plausibly requires it to regulate uses of land.[33] If we combine this argument with the preceding argument for private property the result supports the idea that there ought to be rights of private property that are restricted by the privilege of the state to oversee how its territory is cared for. It seems plausible, then, that a legitimate state would have a privilege to construct a law of property that gives owners only a restricted set of rights regarding the use of their land.

The third respect in which states are territorial is that they purport to have the right to control movement across their borders. Would legitimate states have any such right? Would the borders of a legitimate state have a moral significance of this kind? It is widely assumed that people who have no legal claim to be in the territory of a state have no moral

Frankel Paul, *Property Rights and Eminent Domain* (New Brunswick, N.J.: Transaction Books, 1987), pp. 224–39.

32. The argument is well presented in Schmidtz, *The Limits of Government*, pp. 15–32.

33. John Rawls, "The Law of Peoples," in Stephen Shute and Susan Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures, 1993*, (New York: Basic Books, 1993), p. 57.

claim either. This is almost certainly false, but it is quite unclear what rights people do have in this area. Does any interesting category of nonresident noncitizens have a claim to move into the territory of a legitimate state and establish a home there? Does a legitimate state have the privilege to control immigration and movement across its borders?

These questions raise deep issues about global economic justice. Some countries are extraordinarily wealthy while others are extraordinarily poor. Most of the people living in a poor country may be disadvantaged in their life prospects by comparison with most of the people living in a rich country. The full explanation of this inequality would be complex, but, at least to some extent, it is due to the unequal distribution of resources around the world. To the extent that we think the relative wealth of countries is a function of what, morally speaking, counts as merely good luck, we may think that countries do not deserve their wealth. And to the extent that we think this, we may think that justice requires a redistribution of wealth among the countries of the world. The philosophical literature on distributive justice has been dominated by disputes about redistribution within countries,[34] yet if justice can require redistribution within the populations of countries, it may well require redistribution within the world population. It may well be that the reasons that support redistribution within societies also support global redistribution.

This discussion is relevant to our question about the moral significance of borders because, at least arguably, the enforcement of borders contributes to global inequality. Some might argue on this basis that all borders ought to be opened to all people. Even if this is correct, however, it does not follow that legitimate states would have no privilege to control access to their territory or to restrict immigration. A *privilege* to do something is the absence of a *claim* on the part of others that one not do that thing. It is the absence of an obligation owed to those others that one not do that thing. Perhaps, then, even though a better-off country *ought* to admit the poor, the poor have no *claim* against the better-off countries that they be admitted. If so, then a wealthy state would have the privilege to exclude the poor from less well-off countries even if it

34. But see Kai Nielsen, "World Government, Security, and Global Justice," in Steven Luper-Foy, ed., *Problems of International Justice* (Boulder, Colo.: Westview, 1988), Thomas Pogge, "Cosmopolitanism and Sovereignty," *Ethics* 103 (1992): 48–75, and Rawls, "The Law of Peoples."

ought not to exclude them all things considered. In the grizzly bear example, I have the privilege to lock my door against you even though, all things considered, I ought not to do so. In a similar way, states might have the privilege to control access to their territories even if they ought to have open borders in the interest of contributing to global equality. Moreover, there are at least two other views one might have about the impact of global economic injustice on the rights of legitimate states to enforce their borders, both of which are compatible with the idea that states have a privilege to control movement across their borders. First, perhaps global inequality underwrites a claim on the part of people who are not able to have decent lives in their own countries to move to a better-off country. Even if so, it may be that a state, even if it is wealthy, has the privilege to exclude people who *are* able to have decent lives in their own countries. It would simply be that some of the poor have a claim to live in its territory. Second, it may be that a wealthy state has the privilege to exclude the poor from less well-off states, and does no wrong in excluding them, as long as it contributes in an appropriate way to a just scheme for the global redistribution of wealth. This last view, of course, allows for an interpretation on which justice does not require global redistribution as well as an interpretation on which it does. The important point here is that each of these views is compatible with the thesis that legitimate states have a privilege to exclude a broad category of nonresident noncitizens from their territory. Hence, the idea that legitimate states would have such a right is compatible with the idea that justice requires redistribution in the interest of global equality.

In any event, the issue here is what the legitimacy of a state would consist in, and I think that a *legitimate* state *would* have a privilege to control access to its territory across its borders. For I think that our notion of a state is of a thing that governs a bounded territory and that does at least purport to have the privilege to control access to its territory.[35] But the idea of a privilege to control access to territory is puzzling. In enforcing its borders, a state restricts the movement of people who are not residents of its territory, and it is puzzling how a state could have a right to enforce laws against nonresidents who, presumably, stand in no special relation to it. If the residents of a state had all consented to

35. It does not follow that there could not be a single global state. What follows is that such a state, if it were legitimate, would have a privilege to control access to Earth on the part of any extraterrestrials.

obey the law, then, arguably, there would be no problem about the authority of the state to enforce its law against them. Yet foreigners may be imprisoned or deported if they attempt to enter a state's territory illegally, and it obviously would be a very unusual foreigner who had consented to obey the law of a state in which he does not even reside. For that matter, it is a rare citizen who has consented to obey the law, so perhaps the puzzle about the state's right to enforce borders against nonresidents is no different at bottom from the puzzle the state's right to enforce the laws against its citizens. In any event, these issues are about the grounding of a state's legitimacy, not about what the legitimacy of a state would consist in. At this point, I am only concerned with what legitimacy would consist in, and my claim is that a legitimate state would have a privilege to control movement across its borders. I have not attempted to defend a precise specification of this privilege.

(3) Sovereignty: The Right to Noninterference

The final aspect of the right to rule is the state's moral relation to other states. A legitimate state's sphere of privilege, as so far defined, is presumably a sphere within which it could govern without violating any claim of another state since *other* states have no claim to legislate with respect to *its* territory or people. Plausibly, too, a legitimate state would have a claim against other states that they not interfere with its governing within this sphere of privilege. This means that it would have a claim that it not be interfered with in governing its residents and territory. A legitimate state therefore does not merely have a privilege to govern its territory; it has a "protected privilege," a privilege that is protected from interference by the *pro tanto* obligation of other states not to interfere.

For similar reasons, it is plausible to attribute to a legitimate state an immunity to having any of its rights extinguished by any action of any other state, or, for that matter, by any person. If its rights could simply be extinguished, they would provide no moral protection. For example, if its claim to noninterference could be extinguished by another state, it would not be a significant barrier to interference. A claim against other states that they not interfere corresponds to their obligation that they not interfere, and they cannot excuse themselves at will from such an obligation. Moral agents have no power to extinguish their obligations nor therefore do they have a power to extinguish claims held against them by others. So I think that an immunity to extinction of the

cluster of Hohfeldian rights that compose the right to rule is as plausible as the other rights in the cluster.[36]

I should note, however, that there are important exceptions to the immunity of legitimate states. Other states do not have the moral power to extinguish a state's right to rule, nor do any individuals. Yet if the moral citizens of a legitimate state voted unanimously in a referendum to abolish the constitution, then, with certain provisos, I think they would thereby strip the state of its right to rule. Indeed, I think that if an overwhelming majority voted this way in a referendum, the result would be the same. With certain provisos, which I will explain below, the state would no longer be legitimate. So I do not want to say that a legitimate state is immune to losing its right to rule.

The moral sovereignty of a legitimate state is its immunity to having its right to rule extinguished by any other state plus its claim against other states that they not interfere with its governing its residents and territory. It is perhaps worth adding that a legitimate state presumably also has the moral power to modify and perhaps to extinguish certain of its own rights. For example, the members of the European Union have altered by treaty their privileges to control movements across their borders.[37]

(4) The Right to Rule—Summary

Let me bring these ideas together. I have used the varieties of Hohfeldian rights to explain the idea of a legitimate state. I call the territory in which a state has positivistic jurisdiction, "its territory," and the residents of the state's territory, "its residents." I propose that the legitimacy of a state would consist in its having roughly the following cluster of Hohfeldian "advantages": (1) a sphere within which it has a privilege to enact and enforce laws applying to the residents of its territory; (2) a power to put people residing in its territory under a *pro tanto* duty to do something simply by enacting a law that requires them to do that thing, provided that the law falls within its sphere of privilege and is otherwise

36. To say that a legitimate state would have an immunity—relative to other states and relative to individuals—against losing its right to rule is to say that no individual and no other state has the moral power to strip it of its right to rule. The drug smugglers destroyed Exemplar, and thereby put an end to the period of time in which it had the right to rule, but they had no moral power to strip Exemplar of its right to rule. To destroy a state is not to exercise a *moral* power.

37. I owe this point to Dan Haussman, in discussion.

morally innocent; (3) a privilege to control access to its territory by people who are not residents and have no moral claim to live or travel there; (4) a claim against other states that they not interfere with its governing its territory; (5) an immunity to having any of these rights extinguished by any action of any other state or person.

All of the claims and privileges of a legitimate state are defeasible; they are not absolute. And the power of a legitimate state is merely to put its subjects under *pro tanto* duties. No other state can *extinguish* these rights, but in cases of extreme injustice or violations of human rights, it is plausible to think that a state would forfeit its legitimacy. In less extreme cases of injustice, however, a state might retain its legitimacy even though, because of the injustice, its subjects have no duty to obey any but the most benign laws, such as laws against force and fraud or traffic laws. And other states might even have a duty, all things considered, to interfere with its internal affairs in order to protect human rights. The state might still be legitimate, but its legitimacy would not protect it from efforts by the international community to ensure that its people are treated justly.[38]

This, then, is my account of what the legitimacy of a state would consist in. I agree with the traditional view that a legitimate state would have a "right to rule," and I agree that the traditional view is on the right track in thinking that the subjects of a legitimate state would be morally required to obey the law. But both more and less than this is involved in legitimacy. A legitimate state has a power to put its subjects under duties, but only if it legislates within its sphere of privilege. A legitimate state has such a sphere of privilege. There are laws it can enact and enforce without violating any claims. Legitimacy includes as well privileges regarding territory and a right to noninterference. There are two parts to the traditional view, however. The first part is the traditional account of what the legitimacy of a state would consist in; the second part is the thesis that the legitimacy of a state must be grounded in its

38. John Rawls has recently argued that to be a "member in good standing" of a "just political society of peoples," a state must respect human rights, among other things. My view in effect allows that a state might be legitimate even if it is not a member in good standing in Rawls's sense. Rawls says that a state that is "legitimate" in his sense cannot rightly be interfered with or even criticized in public by a liberal state. I am developing a weaker notion of legitimacy. A state that is legitimate in my sense has a *pro tanto* claim not to be interfered with, but this claim can be overridden. See Rawls, "The Law of Peoples," pp. 71, 78.

subjects' consent. My own account of legitimacy will remain incomplete until I provide a story about the circumstances under which a state would have the cluster of Hohfeldian advantages that, as I have claimed, would constitute it as legitimate. Of course, for all that I have shown, it might be that no states are legitimate. Indeed, the problem of avoiding this anarchistic conclusion might seem more difficult on my view than on the traditional view. For on my view, a legitimate state possesses a complex family of Hohfeldian advantages, which includes powers, privileges, and immunities, rather than merely possessing the right to be obeyed. I do not believe that anarchism is the correct view, however, so I need to explain how it could be that a state is legitimate. Let me therefore turn to this problem. Under what circumstances would a state be legitimate?

V. "Liberal Legitimacy" and Consent

On the traditional view, as we saw, consent is required for legitimacy because consent is needed in order to ground an obligation to obey the law. To some thinkers, however, consent may seem to be necessary quite independently of issues about an obligation to obey the law. For suppose we think that people have claim-rights that forbid interference with their morally innocent choices unless they themselves have agreed to the interference. And suppose we think that a right-holder is the only person with the moral power to authorize infringements of what would otherwise be her moral territory. We might conclude from these ideas that the state's coercion of its subjects is not morally permissible unless the state has secured their consent. Unfortunately, as we saw, it is unlikely that any but a few citizens in special circumstances have consented to be bound by the laws enacted by their state. Some may accordingly be led to embrace the anarchist view that (virtually) no state is morally legitimate. Others, however, have been led to seek a view that gives due recognition to the idea of the person's prerogative but without requiring actual consent as a condition of legitimacy.

Thomas Nagel says, "Liberalism . . . holds that the legitimate exercise of political power must be justified on . . . grounds which belong in some sense to a common or public domain."[39] If such grounds exist, then

39. Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991), p. 158.

anyone could in principle accept the coercion of the state on the basis of this publicly available justification. The subjects *could* and presumably *would* accept the rule of law if they were reasonable and if they were also informed of the publicly available justification for it. The idea is not that the legitimacy of the state rests on a kind of consent. It is rather that a state's exercises of coercive power are legitimate only if they are acceptable under a system that, in Nagel's words, can be justified on grounds that it would be "unreasonable to reject."[40] A justification it would be unreasonable to reject belongs to a common domain because everyone is expected to be reasonable.

John Rawls has proposed a similar principle, which he calls the "liberal principle of legitimacy." According to this principle, "our exercise of political power is . . . justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[41] This Rawlsian principle is different from Nagel's in a subtle way, for there might be an arrangement that it would be unreasonable to reject, but that not everyone can reasonably be expected to endorse since reasonable people would be neutral about it. Perhaps the Australian law that requires everyone to vote is an example of such an arrangement. The Rawlsian and Nagelian principles are therefore not identical even if they are twins.[42]

These two principles are best viewed as proposals regarding the circumstances under which a state would be legitimate rather than as accounts of what the legitimacy of a state would consist in. The view is that a state is legitimate only if its constitution meets a certain test, Nagel's "unreasonable-to-reject" test, or Rawls's "reasonable-to-endorse" test. Both of these tests leave open the nature of the property of legitimacy

40. Ibid., pp. 161, 163. Nagel is here following ideas first proposed by T. M. Scanlon in "Contractualism and Utilitarianism," in Amartya Sen and Bernard Williams, eds., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), pp. 103–28.

41. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 137.

42. The difference between the "no-one could reasonably reject" test and the "everyone could reasonably endorse" test was first explained by T. M. Scanlon. See his "Contractualism and Utilitarianism," p. 111. A full exposition of these tests is beyond the scope of this paper. For present purposes, I assume an intuitive notion of the reasonable person. I take the Rawlsian test of an arrangement to be whether *any* reasonable person *would* endorse it, and I take Nagel's test to be whether *no* reasonable person *could* object to it (or to any ground that might be proposed to justify it). If reasonable people would be neutral about an arrangement, then it passes Nagel's test but it fails Rawls's test. So the tests are not equivalent.

that a state allegedly lacks unless its constitution meets the test. One could, for example, combine the unreasonable-to-reject test with my Hohfeldian account of what legitimacy would consist in.

Unfortunately, neither of these tests is successful. Neither test is sufficient to establish the legitimacy of a state, nor are both tests taken together sufficient to establish this. For even if it would be unreasonable to reject a state's constitution, and even if all reasonable citizens may be expected to endorse it, it does not follow that the state is legitimate. It does not follow, for example, that the citizens have a *pro tanto* duty to obey morally innocent laws. Moreover, a state might be legitimate even if its constitution passes neither test. The constitution of Britain presumably would pass neither test, for example, for it would not be unreasonable to reject the monarchy and the House of Lords, nor can we reasonably expect all reasonable citizens to endorse the monarchy and the House of Lords. Nevertheless, I believe that Britain is a legitimate state if any is. These tests for legitimacy are therefore quite unsuccessful.

I certainly agree with Nagel's remark that "the legitimate exercise of political power must be justified on . . . grounds which belong in some sense to a common or public domain." But this still leaves us with the task of finding the needed justification.

VI. History and Performance

We have now seen that unless we can accept the anarchical conclusion that virtually no state is legitimate, we must reject the idea that consent of the governed is necessary for the legitimacy of a state. We must also reject the idea that the legitimacy of a state is settled by the moral credentials it establishes at its origin. Virtually *every* state owes its existence to some combination of events that includes a share of force or fraud. Because of this, reasoning similar to the reasoning that led us to conclude that the rogue state in the Coup Example is illegitimate might force us to conclude that virtually no state is legitimate. Since I do not believe that this conclusion would be correct, I need to deny that the legitimacy of a state is settled by the process by which it came to exist, or by its "pedigree."[43]

43. The view that the legitimacy of a state is determined by the manner in which it came to exist is an example of a position David Schmidtz calls, "emergentism." Emergentism posits "constraints on the process by which the state comes to be," and it holds that the justification of the state depends on whether its history meets the constraints. David

There are independent reasons to deny this. For suppose that the grandchildren of the smugglers who established the rogue state in the Coup Example gradually modify the constitution to introduce democracy and civil rights for all. It is plausible that the rogue state could in this way become as legitimate as Exemplar was before the coup, especially given that Exemplar itself most likely came to exist in a way that was unsavory to some degree or other. Or consider an example in which a state that begins by being legitimate is taken over behind the scenes by a gang who, unlike the gang in the original Coup Example, retain the existing constitution but pervert it to their own ends. It would be plausible to conclude that the state in this case is no longer legitimate, despite the fact that it began by being legitimate. These two examples suggest that legitimate states can lose their legitimacy and that illegitimate states can acquire legitimacy. States can become morally rehabilitated just as they can be morally perverted.

As an alternate to the pedigree view, one might suggest a consequentialist view according to which the legitimacy of a state is determined by how well it serves the goals of its citizens by comparison with how well their goals would otherwise be served.[44] There are two variants of this view. One postulates a threshold of efficiency such that a state that surpasses the threshold is legitimate. The other, a maximizing view, holds that a state is legitimate just in case it is more efficient than any available alternative. Neither variant is plausible. Suppose that the rogue state serves the goals of its residents just as well as did the former state of Exemplar. Then on either the threshold view or the maximizing view, the rogue state would be just as legitimate as Exemplar. But our intuition is that although Exemplar was legitimate, the rogue state at least initially was not. To have the right to rule is to have a moral property importantly different from that of being efficient in ruling, which is (roughly) the property at issue in these consequentialist views. How could efficiency give the rogue state the right to rule? Many things that we are good at doing we have no right to do.

There is a fundamental problem with attempts to ground the legitimacy of states in facts about their performance. What we need to

Schmidtz, "Justifying the State," *Ethics* 101 (1990): 90–91, and Schmidtz, *The Limits of Government*, p.3.

44. Schmidtz speaks of the "teleological justification" of the state. Schmidtz, "Justifying the State," pp. 90–91. See also, Schmidtz, *The Limits of Government*, p.3.

ground is a state's possession of the complex cluster of Hohfeldian rights that would constitute its legitimacy. States that efficiently serve the goals of their citizens might *deserve* our support, or they might meet some minimal condition for deserving support, but this is a different matter from having the Hohfeldian cluster of rights that constitutes the right to rule.[45] This point seems to undermine not only arguments from efficiency as such, but also arguments that turn on the special ability of states to provide public goods.

The basic idea of "public goods" justifications of the state is found in the following famous passage from Hume's *Treatise*. Hume says:

> bridges are built; harbours open'd; ramparts raid'd; canals form'd; fleets equip'd; and armies disciplin'd; every where, by the care of government, which, tho' compos'd of men subject to all human infirmities, becomes, by one of the finest and most subtle inventions imaginable, a composition, that is, in some measure, exempted from all these infirmities.[46]

Michael Taylor says, "The most persuasive justification of the state is founded on the argument that, without it, people would not successfully cooperate in realizing their common interests and in particular would not provide themselves with certain public goods."[47] The argument is intended to justify the state, in the sense of showing that the state is permitted to tax people coercively in order to produce public goods, whether or not people have explicitly consented, on the basis that it is in people's interest to have these goods provided. As such, it is intended to support the legitimacy of states by supporting the permissibility of coercive taxation. The problem, as David Schmidtz has pointed out, is that people benefit in different ways and to different degrees from the public goods that are provided, and there are even some people who appear not to benefit at all, at least in their own opinion. Native people living in northern Canada, for example, might prefer to be left alone to

45. A. John Simmons makes essentially the same point. He argues that while a legitimate state would have the right to our support, a justified state might have no such right even if it deserved our support. Simmons, *Moral Principles and Political Obligations*, pp. 198–99. See also A. John Simmons, "Justification and Legitimacy," *Ethics* 110 (1999).

46. David Hume, *A Treatise of Human Nature*, L. Selby-Bigge, ed. (Oxford: Clarendon Press, 1978 [1739–40]), p. 539. Quoted by Schmidtz, *The Limits of Government*, p. 10.

47. Michael Taylor, *The Possibility of Cooperation* (New York: Cambridge University Press, 1987), p. 1. Quoted by Schmidtz, *The Limits of Government*, p. 2.

hunt and trap as did their ancestors. That is, the argument is not persuasive, even in its own terms, because not every member of the state benefits sufficiently from the provision of public goods.[48]

There is a deeper problem as well. For even if everyone *did* benefit from the state's provision of public goods, this fact would not underwrite a general power on the part of the state to put its members under a duty merely by passing a morally innocent law. It also would not underwrite the sovereignty of the state in the form of a prohibition on interference with its governing its people. The argument sees the state as analogous to a community garbage collector who establishes a service from which all benefit, and then comes to ask for payment. Having benefited, perhaps I ought to pay, but it seems in such a case that I have the right to refuse to pay, or at least that I have the right to eschew the benefit in the future. Perhaps it would be foolish on my part to refuse the benefit in the future if the price is right. Perhaps, if the benefit is a true public good, I will be unable to refuse it. But I don't see that I would be wrong to refuse to pay on the basis that I would have liked to refuse the benefit. It is doubtful, therefore, that the argument even underwrites a duty in fairness to do one's part in the provision of beneficial public goods. But even if it does underwrite such a duty, the legitimacy of the state involves more than simply a duty of this sort on the part of its subjects.

The most important public good provided by a state is surely the rule of law, which, ideally at least, supports our security and protects us in our basic moral rights. Protection of our basic rights is a *moral* good. In addition, if there are certain duties that our society has, such as a duty to ensure that its members are able at least to meet their basic needs, then a state that fulfills such duties on behalf of the society promotes a moral good. The good in question here is justice, broadly construed. Insofar as we have a duty to support just institutions, and to support the establishment of justice, we presumably then have a duty to support a just state. The question is whether states that were just in all respects other than being legitimate would necessarily also be legitimate.[49] The

48. See Schmidtz, *The Limits of Government*, esp. pp. 81–85.

49. As I said earlier, legitimate states presumably are just at least in that respect, for they have the right to rule. And illegitimate states are unjust in one respect since they do certain things that they have no right to do. In what follows, I ignore this point and simply speak of states that are "just" when I mean to refer to states that are just (at least) in all respects other than being legitimate. Two paragraphs ahead, when I discuss "unjust" states, I mean to refer to states that exemplify injustices other than being illegitimate.

argument from moral public goods does go some way toward supporting an affirmative answer to this question, but I want to press two objections.

First, the argument does not suffice to show that (otherwise) just states have the full panoply of Hohfeldian rights that constitute legitimacy. It does support the proposition that we have a duty to obey laws that are essential to the recognition of human rights, or that are constitutive of a state's program to establish justice, such as its scheme of redistributive taxation. But a legitimate state would have a broad power to put its citizens under a duty to obey morally innocent law, and the argument does not show that a just state would have this power. The argument does not show, for instance, that citizens of a just state have a duty to pay the sewer and garbage collection tax, or to get a proper business license before selling books on the street corner, assuming that these things are required by law. The argument also does not support the right, even of (otherwise) just states, to govern their people and territory without interference. Perhaps a neighboring state would do just as well as our state at serving justice. In that case, the argument appears to provide no reason why the neighboring state would be wrong to take over the job. The moral public goods argument provides no account of sovereignty.

Second, the moral public goods argument does not provide any support for the legitimacy of (otherwise) *unjust* states. But I think that even an unjust state might be legitimate. I agree of course that no one had any duty to obey the morally bankrupt laws of Nazi Germany, and no one had any duty to obey the fugitive slave laws that figured as law in the United States before the Civil War. These were unjust laws in unjust states. Yet I believe that people did have a duty even in these states to obey morally innocent law, such as laws against murder and rape, theft from the mails, smuggling, and so on. And these states had the right to enforce such laws. In saying this, I do not mean to restrict attention to laws which require actions that would be morally required in the absence of law, such as murder and rape. For I think that citizens have a duty to obey other kinds of laws as well, even in a state that is deeply unjust. They have a duty, for example, to obey laws requiring them to have a driver's license before driving a car, and laws requiring them to buy a ticket before riding the subway. Of course, the duty to obey morally innocent law is merely *pro tanto*. If disobedience to law can help to

support the establishment of justice, by drawing attention to injustice, for instance, or by demonstrating the serious commitment of those who believe there is injustice and want to see it corrected, then such disobedience might well be justified, all things considered. I do not mean to say that people in unjust states ought all things considered to obey the law and go about their business as if their states were perfectly just. But I do think that civil disobedience needs a serious justification because it typically involves the violation of morally innocent law, such as prohibitions on parading in the streets without a permit, and we have a duty to obey morally innocent law. The view that unjust states can be legitimate can help to explain why civil disobedience needs a serious justification even in an unjust state.[50]

I think, therefore, that arguments from efficiency or from public goods, even from moral public goods, are not fully adequate accounts of the circumstances under which a state would be legitimate. Performance-based arguments of these kinds are unsuccessful. I argued before that arguments from consent, or from historical pedigree, also are unsuccessful. I would now like to suggest a new way to think of the state and its rights.

VII. The Societal Needs Argument

I have argued elsewhere for a moral theory that I call the "society-centered theory of moral justification." According to this theory, morality is at bottom a system of norms or "standards" that are justified to the

50. It appears that David Lyons would disagree with me about this, for Lyons writes that it is a "serious moral error" to suppose that civil disobedience or political resistance "requires moral justification even in settings that are morally comparable to Jim Crow." See David Lyons, "Moral Judgment, Historical Reality, and Civil Disobedience," *Philosophy & Public Affairs* 27, no. 1 (winter 1998): 39. But Lyons is assuming that if civil disobedience required justification there would have to be a moral obligation to obey "both just and unjust laws" (p. 34). I agree with him that there is no such obligation. There is no moral duty (deriving from the legitimacy of a state) to obey unjust law. But I think that civil disobedience requires justification because there is a presumption in a legitimate state in favor of obedience to just law and because civil disobedience involves disobedience to law. If this is correct, then to justify civil disobedience to a given law of a legitimate state, we would need to show either that the law is itself unjust, or that, even though the law is not unjust, disobeying it is justified all things considered. Perhaps disobedience can be justified as a way of expressing one's dissent, or perhaps it can be justified as the only available way to promote justice. But it needs justification, assuming that the state is legitimate.

extent that their currency in society enables society to get along, and to meet its basic needs. The underlying intuition can be expressed as follows: We live in societies, and we need to live in societies. We order our lives partly on the basis of standards that we share, where the fact that we share them facilitates beneficial cooperation and coordination among us. To the extent that these standards actually function as well as can be to make things go well in society, they are justified, and corresponding moral judgments are true. This is the central idea.[51] It can helpfully be viewed as a kind of ideal moral code consequentialism. Such a view obviously raises many questions, and, equally obviously, I cannot hope to answer them here. My goal here is merely to explain how the issue of the legitimacy of the state can be handled within this framework.

To explain my approach, I need to introduce the idea of a society. In the relevant sense, the populations of states are typically societies, so there is a French society. There is also a French-speaking society in Québec. A society is a population comparable in size and in social and economic complexity to the population of a state. A society has a multigenerational history. It is characterized by a relatively self-contained network of social relationships, such as relationships of family, friendship, and commerce, and by norms of cooperation and coordination that are salient to its members. It is comprehensive of the entire population of permanent residents of a relevant territory, with the exception of recent arrivals who may not yet fit into the group's network of social relationships. It would perhaps be best to think of society-hood as a matter of degree. Perhaps the Cree living in northern Québec are rather small in number to constitute a society, and perhaps their community does not have the economic complexity of the populations of typical modern states, but it qualifies strongly on the other dimensions and therefore is a society, we could say, "to a non-trivial degree." A society is, roughly speaking, a multigenerational temporally extended population of persons embracing a relatively closed network of social relationships, and limited by the widest boundary of a distinctive system of instrumental interaction.[52]

Many societies are to some extent the product of the division of the

51. See David Copp, *Morality, Normativity, and Society* (New York: Oxford University Press, 1995).

52. For a fuller account of the concept of a society, see ibid., chapter 7.

world into states, and in virtually every case where a state governs a population, that population constitutes a society. For example, the populations of Canada and the United States each qualify as a society, but this would not have been the case if there had only been one state in the territory now occupied by Canada and the United States. The example illustrates the fact that the formation of a state can lead to the existence of social fault lines between its population and the populations of its neighbors such that its population comes to qualify as a society even if it would not otherwise have so qualified. In other cases, however, I think that social fault lines between societies do not parallel political borders. I believe, for example, that there is a French-speaking society in Québec and a Cree society in northern Québec, and these societies have a social reality that is not dependent on their having states all to themselves. This example illustrates that societies can be nested. Québécois society is nested within Canadian society.

The idea of society-centered theory is that societies need to have shared moral norms, and that a society's basic needs can better be served by the currency of some such norms than the currency of others. A society's needs can be classified as needs for "physical integrity," including the continued existence of the multigenerational population that it is, needs for "cooperative integrity," including internal social harmony, and needs for peaceful and cooperative relationships with neighboring societies.[53] The question of how best to promote societal needs clearly depends on empirical matters, and this means that the moral implications of the society-centered theory are both contingent and somewhat speculative. I think we can see nevertheless, at least in broad outlines, the kinds of considerations that would support the legitimacy of a state.

To begin, I think it is clear enough that a society that is organized into a state, or that is at least included in a state, will tend to do better at satisfying its basic needs than it otherwise could expect to do. This seems to be true at least of societies at the present time in our world. This is the basic justification of the state.[54] After all, a state is essentially

53. I explain the idea of a basic need in ibid. I discuss the basic needs of societies at pp. 192–94.

54. I need to make two qualifications. (1) Some large societies are the sums of smaller societies, which are themselves organized into states. For example, European society is the sum of the societies in France, Germany, and so on. I do not think that such societies

the administrative apparatus of a legal system. To think that societies could do better at meeting their needs in the absence of states, one would have to think that societies could do better in the absence of law. This is certainly dubious.

Moreover, a society will tend to do better than it otherwise would if the state into which it is organized legislates in morally innocent ways. Morally innocent law is just law, and it is within the state's sphere of privilege. According to the society-centered theory, injustice and moral permission are ultimately to be understood in terms of standards justified by the fact that their currency would promote a society's ability to meet its needs. Morally innocent law will tend to serve society's needs better than law that is morally noninnocent.

In order for a state to further the satisfaction of societal needs by means of law, the law must obviously be obeyed with sufficient likelihood. Moreover, in most circumstances, laws must be enforced in order to ensure a sufficient likelihood that they will be obeyed. This is the basic justification of a standard permitting the state to enforce morally innocent law. But it is a familiar point that the expense of sanctions and of enforcement could be avoided if people obeyed voluntarily, as a matter of their subscribing to a moral standard that required them to obey. The advantage of voluntary compliance with the state's arrangements to realize society's needs is the basic justification of a moral standard requiring citizens to obey the law, at least in cases where the law is morally innocent. It underwrites a Hohfeldian power, on the part of legitimate states, to put their residents under a *pro tanto* duty to do something by enacting morally innocent law.[55]

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need to be organized into states. I doubt that European society has a need for a European *state*, although it likely benefits from the organization provided by the European union. Let me say that any society that is organized into a state will do better at satisfying its needs than it otherwise would *unless* it divides into parts each of which is itself a society organized by a state. (2) It may be true, as Christopher Morris suggests, that in certain periods of history there were forms of social organization that better served the needs of societies than states would have done. If so, my justification of the state in terms of societal needs is restricted to a certain range of historical circumstances. See Morris, *An Essay on the Modern State*.

55. It might be more plausible to postulate a power to put citizens under a *pro tanto* duty by creating morally innocent law and threatening to *punish* violations of it, rather than merely to penalize violations of it. This amendment would respond to the objection I discussed before that it would be implausible to suppose I violate a moral duty when I exceed the speed limit by a trivial amount on a deserted highway.

My argument responds to many of the intuitions that drive the argument from efficiency and the public goods argument. The key to it is the society-centered theory of moral justification, which provides a bridge between facts about the performance of the state and the moral credentials of the state, thereby overcoming what I called before the "fundamental problem" facing attempts to ground the legitimacy of states in facts about their performance. The state is justified, in my view, if the society as a whole benefits from what it does. And what is thereby justified more specifically is a standard that requires our obedience to morally innocent law, as well as standards that permit the enforcement of morally innocent law and that underwrite the other moral aspects of legitimacy, as I will go on to argue.

According to the society-centered theory, any claims possessed by persons or by states must ultimately be justified on the basis of societal needs. You have a claim just in case some other person has a corresponding obligation; the other person has such an obligation only if a moral standard that requires her to act in the appropriate way in dealing with you is justified on the basis that its currency in the society would promote the society's ability to meet its needs. Now although I cannot attempt to make the argument here, I think that people do have claims of various kinds, including the civil liberties.[56] Yet if it is true that societies need to be organized into states, then any claims that exist and that constrain the privileges of the state are tailored to ensure that the state retains the ability to enact and enforce law, compliance with which will promote the society's ability to meet its needs. Hence, people do not have claims that prevent the state from serving societal needs.

Property rights are similar to the other rights people have in the respect I have just explained. That is, property rights are restricted in a way that gives the state the privilege to control the use of land within its territory, provided that by exercising such control, the state can serve the needs of the society. Given certain empirical assumptions, the argument supports institutions of private property. It is at least arguable that private ownership gives people incentives to make productive use of property just as a state's privilege to oversee people's use of their property gives it a stake in the long-term protection of its territory and resources.

56. See Copp, *Morality, Normativity, and Society*, chapter 10.

This brings us to the thesis that a legitimate state would have a (qualified) privilege to control access to its territory. The simplest argument for this thesis turns on the fact that at least some of the projects that a state undertakes in order to serve the needs of society might not be successful without some restriction on the entry of people into its territory. For example, a state-operated health care insurance scheme perhaps could not be financed successfully if anyone at all could enter the state and gain access to medical care under the scheme. Suppose that a state were faced with massive immigration on the order of fifty percent of the population per year. The state would not even be able to house the new immigrants adequately. For reasons such as this, if a state's success at serving the needs of society requires it to have programs of these kinds that are available to all its members, it might need to restrict access to its territory.

A more interesting and controversial argument turns on the idea of a "home." Michael Hardimon has suggested that there is a basic human need to "be at home" in one's "social world."[57] What is relevant here is the idea of a "home" as a familiar and comfortable social and physical environment. If our homeland became less familiar and comfortable to us as a result of massive immigration, we might feel threatened. We would feel less "at home," and we might fear loss of our "way of life." We might feel that we do not belong any more in our society, or that we are alien in our own homeland. If enough people came to feel this way, the result might be to undermine the society's internal harmony. Given that societies need to ensure their internal social harmony, it follows that a state's success in serving the needs of society might require it to restrict immigration. If so, then, leaving aside issues of redistribution, nonresident noncitizens of a state would not in general have a claim to be permitted to immigrate.

This argument needs to be assessed with care. For one thing, societies actually tend to benefit from immigration. For another thing, it is all too easy to exaggerate the impact of immigration policies on a society's internal harmony. There is disagreement about immigration in countries that annually accept relatively large numbers of migrants, but the inter-

57. Michael O. Hardimon, "The Project of Reconciliation: Hegel's Social Philosophy," *Philosophy & Public Affairs* 21, no. 2 (spring 1992): 165–95. James W. Nickel, "The Value of Cultural Belonging: Expanding Kymlicka's Theory," *Dialogue* 33 (1994). I am grateful to Klaus Nehring and Mario Pascalev for helpful discussion of related ideas.

nal harmony of these countries is not seriously threatened by the immigration. The notion of "harmony" is admittedly vague, but if people are able to work together successfully, and generally to achieve their goals, then it cannot seriously be maintained that a somewhat increasing degree of cultural diversity in a country is undermining its harmony. Perhaps it is true, however, that a society's internal harmony would be undermined by a continuing massive immigration of people who spoke many different languages and came from many cultures, and who increased a society's population by, say, fifty percent per year. This thought suggests that there is a threshold rate of immigration such that the harmony of a society would be damaged by immigration in excess of that rate. If so, a state has the privilege to restrict immigration to a level below the threshold.

In any event, given how controversial immigration policy can be, I want to stress that the issue I am addressing here is whether states have the privilege to place *any* controls on the movement of people across their borders. The argument shows that a state can have morally legitimate reasons to regulate immigration, but it does not show that borders may be hermetically sealed.

Why should we think that other states have an obligation not to interfere with a state's governing its people and its territory? As I said, each society needs to have peaceful and cooperative relationships with neighboring societies. A norm prohibiting the state from interfering with other states would tend to preserve a peaceful relationship between the corresponding society and its neighbors. Moreover, it is possible that the entire population on Earth constitutes a society. I believe that at least the bulk of the Earth's population constitutes a society. This global society's need to secure internal harmony would be well served by a norm against interference. It is each state's job, as it were, to serve the needs of the society it governs, subject to its obligation to respect the rights of its residents and others. Other states have no right to get involved except to assist a society whose government is failing in some significant way to meet its needs. For these reasons, it is plausible to attribute to a state a defeasible claim to noninterference by other states.

Finally, a legitimate state would have an immunity to having its right to rule extinguished by the action of any other state or person. The basis of the state's right to rule is that the currency of norms attributing to it the relevant power, sphere of privilege, and claim to noninterference

contributes to the ability of the society to meet its needs. If other states, or if persons, had the power to extinguish these rights, they could extinguish them without regard to the needs of the society. A norm that accorded such a power to others could not be justified on the basis that its currency serves the needs of the society.

This completes the societal needs argument. It rests on a debatable moral theory as well as on contestable empirical claims, including especially, the claim that societies need to be organized into states. What, then, should we make of it? I make two claims on its behalf. First, it illustrates how one *could* support the thesis that there are legitimate states, given my Hohfeldian account of legitimacy. It illustrates the complexity of the issues and the kinds of claims that might need to be defended to defend the legitimacy of states. Second, and more controversially, I claim that the argument supports the plausibility of a presumption that states are legitimate. Of course, I claim this because I find society-centered theory plausible.

The conclusion of the argument is that there is a presumption that states are legitimate. The argument did not depend on details that distinguish one state from another, so if it supports the legitimacy of any state, it supports the legitimacy of all states. Nevertheless, the case it makes for the legitimacy of any given state could be undermined by detailed considerations having to do with how well that state is doing at furthering the needs of the society that it governs. There must presumably be a threshold of efficiency at serving societal needs such that states falling below the threshold are not legitimate. I confess, however, that I do not know how to specify this threshold except in the following terms. An existing state is legitimate, other things being equal, unless the needs of the society it governs are so poorly served by it that either the society would do better if people viewed themselves as under no moral duty at all to obey the law, not even in cases where the law is morally innocent, or the society would do better if other states viewed themselves as under no moral duty at all not to interfere with the state's governing its territory (and so on). Matters would have to be very bad for a state not to be legitimate, it seems to me. For even if an existing state is legitimate, if things are bad enough, we might be justified overall in violating morally innocent laws, and other states might be justified overall in intervening in the affairs of our state. It is as if we were at sea in a leaky boat. Unless there is another boat available to which we could

easily move, there are strong considerations in favor of following the orders of the captain. Even so, if the captain is incompetent and unjust, we might be justified overall to mutiny, although mutiny would need a serious justification. Similarly, an extremely unjust state might be illegitimate, for it may be that the society's needs are likely to be best served if, say, citizens viewed themselves as under no duty at all to obey the law. But more typically, we are under a *pro tanto* duty to obey morally innocent law. Even if the existing state is legitimate, we might be justified overall in attempting to replace one government with another, even if by unconstitutional means.

Let me return to the Coup Example to illustrate how this account is meant to work. The rogue state clearly began by being illegitimate. I stipulate that the situation was such that, on my account, Exemplar was legitimate at the time of the coup. This means that the members of the drug-smuggling cartel had a duty to comply with the law of Exemplar. This duty was not extinguished by the coup, nor was the obligation of the rogue state not to interfere with Exemplar. Therefore, it seems, the rogue state initially had no sphere of privilege within which it could rule and impose duties on its residents. It was illegitimate, as we were intuitively inclined to say, and it continued to be illegitimate as long as Exemplar continued to exist "underground" as a viable alternative. With time, however, and perhaps in a very short time, the rogue state established *de facto* control over the territory of Exemplar, and once it had *de facto* control, and once Exemplar ceased to exist, it came to be legitimate. This is because the society that once was ruled by Exemplar came to be ruled by the rogue state, and once Exemplar ceased to exist, the society's needs had to be served by the rogue state, if by any state. Moreover, once Exemplar ceased to exist, its rights ceased to put barriers in the way of the rogue state's having a sphere of privilege. The rogue state therefore came to be legitimate.

VIII. Conclusion

In summary, I have argued that the legitimacy of a state would consist in its having a cluster of Hohfeldian rights. First, a legitimate state would have a sphere of privilege within which to enact and enforce laws applying to the residents of its territory. Second, a legitimate state would have the power to put its residents under a *pro tanto* duty to do something

simply by enacting a law that requires its residents to do that thing, provided that the law falls within its sphere of privilege and is otherwise morally innocent. Third, a legitimate state would have the privilege to control access to its territory by nonresident noncitizens who have no claim to live or travel there. Fourth, a legitimate state would have a claim against other states that they not interfere with its governing its territory. Fifth, a legitimate state would have an immunity to having any of these rights extinguished by any action of any other state or by any person. A legitimate state's right to rule has at least these components.[58]

I offered the societal needs argument to show that there is a presumption that states are legitimate. If the argument is successful, it establishes a justification for moral standards that require people to obey morally innocent laws of their state, that permit the state to control access to its territory, and the like. As I said, however, the argument turns on contestable empirical claims, such as that any society is better able to meet its needs when it is governed by a state, and when people voluntarily obey morally innocent law, than would otherwise be the case. It also turns on a debatable moral theory. So although I claim to have made a case for the presumption that existing states are legitimate, I cannot claim to have established it.

It is a sad fact that most states were founded in a way that involved wrongful exercises of force and fraud. And it is sad as well that many people, and perhaps most people in the world, live in states that they would not voluntarily consent to obey. But this does not mean that most states are *illegitimate*. It means that most states are *unjust*, or at least that they began by being unjust. Yet unjust or not, they are the ships in which we find ourselves, and we must try to make them just and to make them serve our needs.

58. It might have some other components. I suggested before, for example, that a state has the power to modify and perhaps to extinguish certain of its own rights.