State Legitimacy and Social Order

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Our world is one of states. Virtually all of the land mass of the globe today is the territory of a (single) state, and virtually all humans alive are subject to the laws of a state. Some countries or societies are degenerate cases of a state (e.g., Somalia, Congo), and others are relics of pre-modern Europe (e.g., Liechtenstein, San Marino, the Vatican). But even these aspire to be states or are often thought of as states. "International relations" are principally relations that obtain between states. The concept of legitimacy seems to be essential to making sense of this world of states. States always claim to be legitimate, and they are often recognized as such. Legitimacy is widely held to be very important, and the lack of it debilitating. With some frequency it is said that we face a crisis of legitimacy, and often a particular state is said to lack legitimacy. Without legitimacy, it is sometimes thought, there is not much that states, even very powerful ones, can do.

There is, however, massive confusion about legitimacy. Contemporary discussions betray a notable lack of clarity and understanding about legitimacy and associated concepts. Sometimes it seems that parties to a dispute have different conceptions in mind – possibly different concepts – and may not, in effect, be talking about the same thing. Other times it is hard to know what they are thinking of. Disorder in the world may not be unrelated to disorder in our thoughts. What follows is an opinionated overview of the topic of state legitimacy and of its connections to social order. Much that I shall offer will be analysis, with part of the needed evidence or argument left out for reasons of space. But I think that clarity alone is immensely helpful with respect to the questions at hand.

1 The Importance of States

In the conditions of modern times states are very important for the maintenance of social order and prosperity. Some people – I am thinking especially of classical liberals or libertarians, and anarchists – have expressed scepticism about this claim, and their case is often not without merit. However, states seem to play a significant role in preserving many of the conditions of social order, especially in situations of conflict and instability when that order is threatened. That is not to say that states

J. Kühnelt (ed.), *Political Legitimization without Morality?*

are the sole or even principal source of social order; the various and numerous kinds of social relations of "civil society" clearly are important. But states and their legal systems are important.

Sceptics may – again often rightly – point out that many of the major threats to social order in fact originate with the state system; for instance, the principal parties to the major conflicts of the last century were states, and the agents of the great massacres of our time have typically been states. The point is well taken, and the balance sheet will surely need to mention the Nazi and Soviet states, among others.

States are with us for now, however, and in our present conditions it is hard to see how their abolition would improve things. The rule of law, basic security of person and possessions, the often intricate rules and standards necessary for commerce, even civil society, all depend to a considerable extent on states. Even if many political societies need to be organized as states mainly because they are surrounded by hostile states, there is as of yet no feasible alternative to the state system.[1] There is much to be said against states and for alternative forms of political organization.[2] Globalization and political experiments such as the European Union may transform the state system considerably. And many of the powers associated with states have been eroded in recent decades. But states will be with us for some time, and I presume that their contribution to the maintenance of social order will not significantly decrease for some time. The question of their legitimacy is thus of some importance.

2 The Importance of Legitimacy

Legitimacy seems quite important to a state's contribution to the preservation of social order. Just as the effectiveness of governments or regimes is limited by their loss of legitimacy, so states may be hampered by failing to be legitimate. Legitimation crises once were thought to threaten the internal life of Western states. Now they are said to be especially worrisome in international affairs.[3] One of the principal reasons why legitimacy is important is simply that without it states cannot efficiently perform the tasks we assign to them. States not infrequently impose sanctions or use force to secure order. But there are limits to what they can force people to do. Without other incentives, states are ineffective.[4] The thought here is that legitimacy is needed to allow states to do what they need to do. A legitimate state is one that is

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[1] The remark about being surrounded by hostile states refers the process of "secondary state formation" whereby one state or centralized political society is formed by reaction to the threatening presence of another. See my discussions in: Morris (1998): *An Essay on the Modern State*, p. 80.

[2] And I have said some of it. Morris (1998), *An Essay on the Modern State*, esp. chs. 1–3 and 10.

[3] Robert Kagan (2004): "America's Crisis of Legitimacy", in: *Foreign Affairs* 83, 2, pp. 65–83.

[4] I think the state's dependence on force or coercion greatly exaggerated by philosophers and theorists, who invariably invoke a simplified Weberian "definition" of the state. The state is rightly seen as requiring considerable political power in order to carry out its assigned tasks, but authority is a species of power and the fixation on coercion makes us lose sight of the state's authority. I discuss these matters below. See also my "Is the State Necessarily Coercive?" (manuscript).

more likely than an illegitimate one to be supported by its subjects and assisted, or at least not hindered, by others.

A legitimate state, or one that is *believed* to be legitimate? It is not always clear; in fact, the distinction is sometimes not clearly drawn.[5] Very often the notion of legitimacy in these contexts seems to be a *de facto* one. The force of the argument itself suggests that it is the *belief* in a state's legitimacy that is crucial – a state that was legitimate but not believed to be so would be no more effective than an illegitimate one thought to be legitimate (it might even be less effective). Some social scientists and political commentators do not draw the distinction and think of legitimacy as consisting in the widespread belief in legitimacy. As stated, this is an absurd or at least circular conception of legitimacy and has often been recognized as such. (What would it then be to believe something *to be* legitimate?) A *de facto* notion of legitimacy seems to presuppose the intelligibility of a *de jure* or normative notion. The basic idea behind these kinds of conceptions is that legitimacy lies in the beliefs or other attitudes of peoples, especially those subject to the state's laws. Social stability and thus social order most certainly depend directly on people's beliefs. But it is hard to believe that legitimacy itself is a property of people's mental beliefs or mental attitudes. For the concept of legitimacy is in the first instance a normative one. Someone who believes that a particular state is legitimate believes it has a certain status. That status is important and may contribute significantly to social order. The first question is in what consists this status?

3 What is Legitimacy?

The legitimacy that interests us here is a property of *states*. But we speak of legitimacy in many contexts. Moving a pawn sideways is not a legitimate move in chess; that is, it is not allowed by the rules of the game. Were a head of state or a legislature to act in ways prohibited by the state's constitution, it would be acting illegitimately. In games, as in politics, we often say "You can't do that!" in response to a player's move. The notion of legitimacy here is that of *lawfulness* or *legality*: something is legitimate insofar as it is in accordance with the rules of the game, in this case, the law.

This notion of legitimacy is extremely useful in political life. We often wish to know whether actors are conforming to the rules of the game. It can be very important to know that a government has assumed power legitimately, just as in

[5] "Legitimacy arises from the *conviction* that state action proceeds within the ambit of law, in two senses: first, that action issues from rightful authority, that is, from the political institution authorized to take it; and second, that it does not violate a legal or moral norm. Ultimately, however, legitimacy is *rooted in opinion*, and thus actions that are unlawful in either of these senses may, in principle, still be deemed legitimate. That is why it is an elusive quality. Despite these vagaries, there can be no doubt that legitimacy is a vital thing to have, and illegitimacy a condition devoutly to be avoided." Robert W. Tucker and David C. Hendrickson (2004): "The Sources of American Legitimacy", in: *Foreign Affairs* 83, 6, p. 18 (emphases added).

olden days much depended on ascertaining the legitimate heir to the throne. But this understanding of legitimacy does not always help us when we wish to know whether the constitutional order itself, the state, is legitimate.[6] Some have argued that legality exhausts the notion of legitimacy and have denied that one can speak of the legitimacy of a system of rules or constitutional order. This position seems even less plausible today than in centuries past. Few now seem genuinely to accept it.[7]

In international contexts, states are sometimes said to be legitimate to the extent that they are recognized as such by other states. We are familiar with the manner in which states may withhold recognition from other states (e.g., Israel, Taiwan). The thought here may be that if a state is recognized as legitimate by most (legitimate) states, it is legitimate. The first problem is the familiar one of determining whether recognition here is supposed to be evidential or constitutive. It seems bizarre to think that recognition could be *constitutive*. If it were, the notion would lose much of its interest or importance. Legitimacy would then be analogous to membership in a club and would amount to little more. The club in question – the set of states – does not have a distinguished history, not to mention a discerning membership committee. There may, of course, be uses for a club of this kind – "the family of nations" – but it would be best not to think of legitimacy in this way; most of us presumably wish to deny (genuine) legitimacy to many member states of the current United Nations.

Recognition at best would be an *evidential* relation. More precisely, a case could be made for understanding people's *belief in* a state's legitimacy (or their *support for* a state) as evidence for its legitimacy. When one understands the factors that often lead one state to recognize another as legitimate, it is often hard to be particularly impressed. However, if many reasonable and well-informed people believe a particular state to be legitimate, that might be reason to agree – not conclusive, of course, but grounds nevertheless. Some take widespread belief in legitimacy to be constitutive of legitimacy, but again this is implausible; at best the relation seems evidential. There are some complicated relations to be disentangled here – we often need to distinguish people's *belief* in an institution's legitimacy, their *support* for the institution, their *endorsement* of it, and their *consent* to it. Some of the distinctions will be made below.

Legitimacy is a status, and we do not seem to make much progress understanding what it is by examining people's beliefs, legality, or recognition. A more promising approach would be to try to determine the nature and terms of the status accorded a legitimate state. Not that long ago people still spoke of a child's illegitimacy; to call someone a "bastard" was then to make a quite specific accusation. An illegitimate child is one born out of wedlock, and this was once a shameful way to come

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[6] I qualify the remark ("not always"), as some legal thinkers – for instance, Lon Fuller or Ronald Dworkin – argue that genuine legality has some legitimating force.

[7] The scepticism underlying this view may be more interestingly expressed by other accounts of legitimacy – for instance, that a state is legitimate insofar as it has a legal system and satisfies the other conditions for being a genuine state.

into the world. For our purposes the noteworthy feature of this condition was the child's status, its lack of a certain kind of standing. It could not inherit and was not due other benefits, and in the social hierarchies that were once all determining, its relative place was low. Hierarchies like these are not part of our political world; the official discourse of the modern "family of nations" is egalitarian – all states, like all citizens, are equal. Not to have legitimacy is to be excluded from the family or club and to be denied the normal benefits of membership.

What are the normal benefits of the status bestowed on legitimate states? There are in the first instance a bundle of rights and powers. A legitimate state may do certain sorts of things, and others may not prevent them from so acting. A legitimate state, to start with, has a *right to exist*; its very existence is permissible. Consider, for instance, some of the hostility to Israel. It does not merely reflect a denial of particular powers to the Israeli state; rather, it expresses the conviction that Israel has no right to exist.[8] Similarly, the position of the People's Republic of China regarding Taiwan, we may suppose, is that it has no right to exist as an independent state.[9] National liberation or independence movements seek a state for their group or people, and they suppose that this state would have a right to exist. I shall think of the right to exist as the first of two major rights possessed by legitimate states. It may be interpreted as a mere liberty or Hohfeldian privilege – the absence of a duty forbidding the thing in question. But I assume that if a state is legitimate and therefore has a right to exist, other parties have a duty not to destroy it and that this duty is correlative to the right to exist. So I shall interpret this right as a claim-right and not a mere liberty.

The right to exist attaches in the first instance to a *territory*. All modern states have territories, for the most part compact and contiguous, and outsiders are forbidden access to these territories without permission. Others, including states, have a duty of non-interference, and a state may defend itself against trespassers and invaders. As one may threaten a state without encroaching on its territory, blockades and sieges may also violate its right to exist.

Legitimate states not only have a right to exist, but they also possess a right to *act* or to *do* certain things. Most important of these rights is that *to rule*. States are forms of political organization, and many of the powers they claim are related to governance. A legitimate state possesses the powers necessary to govern. The law is one of the ways, if not the principal way, in which states act. The right to rule includes the right to make, adjudicate, and enforce laws. In relations to other states and to those not subject to its laws, a legitimate state would posses the right to form alliances, to enter into agreements, to make treaties. The right to rule consists first of all of these rights to make, adjudicate, and enforce law and of these powers regarding agreements with other states.

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[8] Some might say "exist *there*", in a particular place. But modern states are necessarily territorial, and a particular state would cease to be if it lost its territory.

[9] Some think that merely admitting that Taiwan is an independent state (a descriptive claim) would be for China to concede too much – evidence to my mind of the confusion about legitimacy.

The rights to exist and to rule are not exhausted by the rights and powers I have enumerated. In particular there is an associated claim to *exclusivity* that attaches itself to these rights. A state's right to exist rules out alternative arrangements of its population and territory; its right to rule excludes alien sources of law that it does not recognize. The latter claim is hard to express exactly, at least succinctly, as it raises a number of controversies about international law and the nature of legal systems. I do not wish to broach these here and shall try to indicate the kind of exclusivity I am thinking of as simply as I can. States establish the law and apply it in their territories, and they claim that only they can do so. In classical terms, states claim *sovereignty*, to be the ultimate source of political authority in a realm.[10] A state determines what is the law in the sense that, even if it does not create it, it ascertains that it is what it is. The state is the ultimate determiner of what is the law of its realm. The sole virtue, in my view, of the influential Weberian "definition" of a state as "a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory"[11] is the recognition of the claim to exclusivity. States seek to monopolize their powers to govern. This exclusivity is one of the main sources of the controversies surrounding the powers claimed by states.

A legitimate state, then, has a right to exist and a right to rule.[12] What duties or obligations are correlative with these rights, especially the second? A state's right to exist presumably would entail a number of obligations of subjects not to threaten its existence. The right to rule would also ascribe to subjects an obligation not to undermine the state in various ways and in some situations to support it actively. To violate the (genuine) laws of a state would typically be one way of undermining its powers to rule and subjects would presumably have an obligation to obey the law.

Traditionally, the obligation to obey the law – that is, the obligation to obey each and every valid law that applies to one – has been associated with legitimate states.[13]

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[10] See: Morris (1998): *An Essay on the Modern State*, ch. 8; Morris (2000): "The Very Idea of Popular Sovereignty: 'We the People' Reconsidered", in: *Social Philosophy & Policy* 17, 1, pp. 1–26; Morris (2002): "Sovereignty", in: *Encyclopedia of Democratic Thought*, edited by Paul Barry Clarke and Joe Foweraker, pp. 673–676.

[11] Weber goes on to note that "the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the 'right' to use violence." Max Weber (1946 [1919]): "Politics as a Vocation", in: H. Gerth and C. Wright Mills (tr. & eds.): *From Max Weber: Essays in Sociology*, p. 78. Weber elsewhere gives a much more complete and better one. See Weber (1947): *The Theory of Social and Economic Organization* (Part I of *Wirtschaft und Gesellschaft*), A.M. Henderson and T. Parsons (tr.), p. 156.

[12] To forestall misunderstanding: this statement is meant neither to be exhaustive of the state's legitimate powers nor as a definition of legitimacy. The 'has' does not express a biconditional.

[13] See, for instance, A. John Simmons (1979): *Moral Principles and Political Obligations*; Leslie Green (1988): *The Authority of the State*; and David Copp (1999): "The Idea of a Legitimate State", in: *Philosophy & Public Affairs* 28, 1, pp. 3–45. A good collection of contemporary articles may be found in William A. Edmundson (ed.), (1999): *The Duty to Obey the Law Selected Philosophical Readings*. See also Simmons (2001b): "Legitimacy", in: *Encyclopedia of Ethics*, Lawrence C. & Charlotte B. Becker, (eds.), 2nd ed., pp. 960–963.

In recent years scepticism about this obligation has been growing, to the point that "philosophical anarchism" – the position that existing states are illegitimate – is no longer a minority view. If legitimacy entails an obligation to obey, then a denial of the latter implies a rejection of legitimacy. The debates here are complex. I am not sure that the usual ways of formulating the questions and positions are best, and I shall frame things somewhat differently.

The matter of greatest controversy is whether we, as subjects[14] of a particular state, have an obligation to obey the law and to support the state in various ways. The question is not entirely clear at the outset, and the nature of the obligation in question must first be made clear before we can address it. Philosophers immediately distinguish between legal and moral obligations and typically assume that the question must involve the latter. The law trivially imposes a "legal obligation"; the interesting question, most philosophers think, is whether there is a moral one. I do not like this way of proceeding for a number of reasons. For one, I am not always able to locate the boundary between the moral and the non-moral and am suspicious of the ease in which many are able to do so. I also think the grammar of predicating 'moral' and 'legal' of 'obligation' is misleading. Moral and legal obligations are not *species* of obligations. They are all obligations *simpliciter* – that is, normative demands or requirements of a certain kind. It is just that they have different sources and that this is what is indicated by the predicate. A moral obligation is simply an obligation whose source is morality or that part of morality which issues requirements of this kind (e.g., justice), and a legal obligation is one whose source is the law. Were etiquette or custom to be a source of obligation – which I think they can be – then there would be other sources of obligation. Now it may be that obligations which have their source in justice always or virtually always override those given to us by the law or by custom. American philosophers commonly assume this must be the case, and they may be right. But to formulate the matter in way which implies there are different species of obligation and that one species necessarily is the determining one is not the best way to frame these difficult questions. For it can lead us not to see what is most radical about the modern state: its claim to *supremacy*. A political authority is supreme in this sense if it has the power to regulate all other sources of authority (e.g., conscience, church, kin, corporate bodies). The state can be understood as an alternative system of social control to morality, and we do not notice this extraordinary claim if we assume that obligations of justice always override those of the law.

So I shall talk about obligation *simpliciter*. To have an obligation is to be subject to a kind of normative requirement. The state claims to impose obligations on us, and it understands these as requirements created or ratified by the law. The law says that one must respect the property of others, pay one's taxes, obey the speed limit,

[14] Someone is a *subject* of a set of laws insofar as he or she is directly obligated by them (or is liable to some change in his or her normative situation). A subject of a legal system or state is someone who falls under the latter's jurisdiction. For the most part we shall be thinking of citizens, but they are a proper subset of the class of subjects.

and obtain a license if one wishes to practice dentistry or to be a plumber. It does not say one has a *legal* or *moral* obligation to do these things.[15] The predicate does not indicate a species of obligation.

Obligations may have different *sources* without being different kinds of requirements. It is especially important to recognize this in the context of a discussion of the powers of the modern state. This particular form of political organization arose in Europe in the context of deep disputes and conflicts over faith and conscience. For some theorists and statesmen, the main purpose of the state was to offer an effective way of settling or adjudicating these disputes, or at least enabling people to live with them. The forms of political organization prevalent in pre-modern Europe proved not to be effective with these and other forms of conflict. The state proposed to make governance territorial and to establish itself as the ultimate source of authority within this territorial realm. What the state determines to be lawful is meant to *settle* the question of what to do for all persons who find themselves in its territory, no matter what their allegiances might otherwise dispose them. The state's word, so to speak, is to overrule or pre-empt that of pope or conscience. The idea is that the state can determine what people are to do and that this determination is genuinely to govern them – that is, to determine what they do. The state does not deny that individuals may have obligations of conscience or faith ("moral obligations"). It merely tells them they are to act in the ways that the law instructs them to act.

This understanding of the modern state sees it not as something that can create "moral obligations" but as a form of political organization which can create requirements for us whatever our other obligations – or our disagreements about our obligations. The state thus understood, we may say, is a "conflict resolution system" which is a substitute for or alternative to morality or justice.[16] This is not to say that states are independent of justice or that unjust states have the powers they claim. Rather, it is to recognize that the state purports to be a system of governance that can substitute for others, especially morals, when they fail to preserve social order. To assume our obligation to obey the law must be moral is to have us overlook this pretension of states.

Now we may not accept the state's claim to be independent of morality and of faith. Theists of more than one kind may plausibly reject it, and moralists may not accord the state the powers it claims. But I do not think we can pose the questions we need to ask without first recognizing the claims that states make. I think

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[15] You appear in front of a magistrate and ask, "This obligation, your Honour, is it a *moral* one or merely a *legal* obligation?"

[16] This is one way of reading Hobbes. *The Limits of Liberty* by James Buchanan (1975) may also be read this way. Edward McClennen also wants to understand political and legal norms as substitutes for morality. See McClennen (1990): "Foundational Explorations for a Normative Theory of Political Economy", in: *Constitutional Political Economy*, 1, 1, pp. 67–99; McClennen (1993): "Rationality, Constitutions, and the Ethics of Rules", in: *Constitutional Political Economy*, 4, pp. 173–210; and McClennen (2003): "Prudence and Constitutional Rights", in: *University of Pennsylvania Law Review*, 151, 3, pp. 917–961.

it will be helpful to talk simply about obligations, understood univocally, without assuming at the outset that obligations from one source always override those from another.[17]

We could even try to do without the language of obligation, as the aim of the law – the parts of law concerned with normative requirements – is principally to affect our behavior. What the state wants is to have us act in certain ways. Its capacity to impose normative requirements is supposed to be a means of affecting our behavior. Theorists of a certain disposition will see this power as residing in the state's capacity to sanction illegal behavior, and there is no doubt that sanctions, as well as force or even violence, can be effective ways of influencing people to act as one wishes. Many other theorists, myself included, will understand the law's attempt to affect our behavior as involving in the first instance an appeal to *authority*. The fact that the law requires someone to do something is meant to be a reason for him or her so to act. Hobbes clearly explains: "Law in generall, is not Counsell, but Command. . . addressed to one formerly obliged to obey him [who commands]", where command is "where a man saith, *Doe this*, or *Doe not this*, without expecting other reason than the Will of him that sayeth it."[18] The claim about law may be false – and it presumably would at best be credible in the case of a legitimate state – but again it seems necessary to recognize that this is the claim that is made. The reasons offered by authorities purport to be, in Hart's term, "content-independent".[19] It is hard to understand the law or the state without admitting this.

What I am proposing is that we understand the state as a form of political organization that claims for itself the power to impose requirements which are reasons for action for all those subject to its rule. A legitimate state is one that has a right to exist and to rule; that is, if a state is legitimate, then it has these rights. Its subjects have an obligation not to undermine its rule and to support it in a number of ways. We need to say a bit more, however, about the way in which obligations are meant to affect our behavior.

Deliberation normally involves weighing reasons against one another and opting for a course of action that is supported by the balance of reasons. The familiar utility-maximizing conceptions of rationality, dominant in some of the social sciences, are special cases of this more general "balance of reasons" account. Norms generally and obligations imposed by the law specifically can be reasons for action. They can, much like sanctions and similar considerations, affect the balance of reasons. The fact that a particular act is forbidden by the law may, on this understanding, be a

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[17] Note that my reluctance to understand the obligations imposed by (legitimate) states as moral does not imply that the *grounds* for the legitimacy of states must also be non-moral. The question of the nature of political or legal obligations is distinct from the nature of the justification of the institutions that create them. I discuss the grounds of legitimacy in Section 5 below.

[18] Hobbes (1991 [1651]): *Leviathan*, Richard Tuck ed., ch. xxvi, p. 183, and ch. xxv, p. 176.

[19] "A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason." Joseph Raz (1986): *The Morality of Freedom*, p. 35. See also Hart (1982): "Commands and Authoritative Legal Reasons", in: *Essays on Bentham: Jurisprudence and Political Theory*, pp. 243–268.

reason against it, one which is simply added to the other reasons against. Obligations thus understood would be no different from other kinds of reasons. This is a mistaken understanding of obligations and of norms in general; obligations are not merely a kind of especially *weighty* reasons. Reasons of this kind are meant to be *pre-emptive*, and sometimes they seem to be just that. How to understand this feature of norms is, of course, a matter of considerable controversy. I favor Raz's account of pre-emptive reasons as involving second-order exclusionary reasons requiring that one not act for certain reasons (the ones excluded), as well as the accounts of Gauthier and McClennen, which are specifically adapted to formal maximizing conceptions of practical rationality.[20]

The obligations imposed by the law, then, I shall think of as requirements which are pre-emptive. They are reasons that displace or exclude other reasons for acting differently. The laws of legitimate states are meant to be of this kind. The law is supposed to affect our behavior by affecting our reasons for action. Much of the time it does not matter whether it is successful in so doing; many acts are overdetermined, and the reasons provided by the law are merely supplementary. Most of us, for instance, refrain from killing our neighbors or kidnapping children independently of the laws forbidding such acts. But in many instances the existence of a law may be instrumental in securing social order and other goods.

The aim of the state is *practical*, to secure social order and other goods by controlling our behaviour. It does not matter whether we obey the law out of respect for it, only that our acts conform with the law, for whatever reason. So sanctions can be useful as supplementary reasons for action for those occasions when we fail to do what we have reason to do.[21] What is important is our behaviour, specifically its conformity with the law. Given the practical nature of the law and of the state generally, there is an additional reason to emphasize reasons rather than moral obligations.[22]

Let us return to the question of the obligations entailed by the rights to exist and to rule possessed by legitimate states. Minimally there would be an obligation not to undermine the state and to support it in certain ways. I am thinking of certain acts which would contribute to undermining a state's rule and even its existence – for instance, publicly showing disrespect for the authorities in certain circumstances, encouraging sedition, supporting revolution or anarchy in various ways.[23] In many instances public violations of the law would undermine a state's rule. In certain

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[20] Raz's account is first laid out in: Raz (1999 [1975]): *Practical Reason and Norms*. The most easily accessible presentation of David Gauthier's account is found in: Gauthier (1986): *Morals By Agreement*, Ch. VI. But his later essays are in many ways better; see "Commitment and Choice: An Essay on the Rationality of Plans", in: Francesco Farina, Frank Hahn, and Stefano Vannucci (eds.), (1996): *Ethics, Rationality, and Economic Behaviour*, pp. 217–243.

[21] I am thinking only of legitimate states here. Tyrannical ones presumably need to rely on these supplementary measures to a much greater extent. See my "Is the State Necessarily Coercive?"

[22] See also the remarks below about "internalism" about obligations.

[23] These examples are meant as illustrations. Lest they be misunderstood, I should note that it is not the case that all obligations should be enforced. Clearly, liberal states would want to permit

circumstances subjects of a legitimate state would also have a number of obligations to do things to support its rule – for instance, paying taxes, serving in the military. These obligations, we should note, are perfectly compatible with the absence of an obligation to obey each and every law that applies to one. The obligation to obey the law is more demanding than that not to undermine the state and to support it; it is to conform to each and every law that applies to one. Consider the examples of infractions of the law that have no adverse effects that are now standard in the literature – for instance, failure to come to a complete halt at stop signs on deserted roads in the countryside. Or think of violations of more misguided laws – for example, US laws forbidding young people from drinking alcohol before the age of 21 (even, in some states, in the company of their parents). Failure to conform with the law in such cases would not undermine the state, even if it would violate an obligation. Consider also laws which forbid people, no matter how knowledgeable, from providing certain services (e.g., providing a medicine, rewiring a house) for others without a licence. Were an unlicensed (knowledgeable, competent) physician to provide his wife with a useful drug or were someone very knowledgeable about electrical wiring to do repairs on her cousin's house for a fee, the law typically would be violated.

A legitimate state possesses a right to exist and a right to rule. But these rights can be interpreted in a number of different ways. Legitimacy may come in different forms or strengths depending on the specific obligations correlative to these rights. Too often it is simply assumed that legitimacy is a univocal notion. Given the disagreements about how to understand the concept, we should not expect it to be univocal, much less simple. I shall distinguish between two forms of legitimacy. There are undoubtedly more, and my characterization of the notion to now has been very simple. For our purposes we need to distinguish between a weaker and a stronger notion. *Weak* or *basic* legitimacy imposes an obligation on subjects not to undermine the state and to support in certain ways. And *strong* or *full* legitimacy imposes, in addition, an obligation on subjects to obey the law – that is, an obligation to obey every valid law that applies to them.

In this essay, in order not to complicate matters overly, I shall assume that if someone has an obligation in these contexts, he or she has a pre-emptive reason to act as required. This is an internalist assumption about obligations.[24] Given the practical aim of the law, the state claims that its directives are reasons for action – specifically, content-independent, pre-emptive reasons – assuming internalism here makes this claim evident. (Alternatively, we could formulate things differently, without the internalist assumption.)

To summarize, if a state is *legitimate*, it has a right to exist and a right to rule. If a state possesses *weak* or *basic* legitimacy then subjects have an obligation (and a pre-emptive reason) not to undermine the state and to support it in various ways.

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citizens to do many things (e.g., speak in favor of revolution) even if they have obligations not to do them.

[24] The internalism here, it is worth noting, is about reasons, not motives.

If it possesses *strong* or *full* legitimacy, subjects also have an obligation (and a pre-emptive reason) to obey the law. We should noted that non-subjects will in both cases have obligations not to undermine legitimate states and, in certain circumstances, to support it. Interestingly, the obligations of subjects and non-subjects toward a weakly legitimate state may be quite similar.[25]

What I have characterized as strong or full legitimacy is, I believe, the traditional conception.[26] On this (strong) conception, if it turns out that subjects lack the obligation to obey a state, it is illegitimate. Indeed, on this view, legitimacy must be denied to states where subjects *occasionally* lack the obligation to obey particular laws (e.g., traffic or drug and alcohol laws). That is, even if virtually all subject are obligated to obey virtually all laws most of the time, and have pre-emptive reasons to do so, the fact that some lack these obligations and reasons *on occasion* suffices to rob the state of legitimacy. This is seems to be a feature of the traditional conception, which is part of the reason I wish to distinguish it from another, which I have dubbed weak or basic legitimacy.

4 What is the Value of Legitimacy?

Legitimacy presumably has considerable instrumental value. A state which is legitimate and widely thought to be so may elicit more voluntary support or at least acquiescence from subjects than would otherwise be available. Legitimacy might also secure a state wider support from non-subjects. States that obtain such support will typically be better able to achieve their ends with less resistance; they will need to rely less on alternative means of achieving their ends, such as coercion or payoffs. I am supposing that legitimacy is a necessary condition of genuine authority.

States claim authority. If something is a genuine authority, its directives will be pre-emptive reasons for action. Authority is a power to get people to act in ways requested. So to the extent that a state possesses genuine authority, it will be more effective in achieving its ends.

Legitimacy confers on states a right to exist and a right to rule. A legitimate state is one which may do what it is authorized to do; that is, its lawful acts are all permissible. Certain kinds of challenges and criticisms of a state will be rebutted by establishing its legitimacy. Being able to addresses such challenges and to answer such criticisms is also valuable, instrumentally and perhaps intrinsically. There are a number of advantages to be had by the possession of legitimacy.

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[25] This means that an account of weak legitimacy will not address the "particularity problem", that of showing that the obligations to obey are particular to citizens of a state. See Simmons (1979): *Moral Principles and Political Obligations*, and Green (1988): *The Authority of the State*.

[26] Again, see the works by Simmons, Green, and Copp, cited above.

5 The Grounds of Legitimacy

What can establish or confer legitimacy? There is and has been considerable controversy as to the grounds of legitimacy. There are a number of well-known accounts, and I shall say little to resolve the debates between their partisans. Rather I wish to explore the implications of some of these accounts for the legitimacy of states.

Suppose a state to be reasonably just and efficient. It adheres to most of the normal constraints of justice regarding life, liberty, and possessions, and most of its activities it carries out with reasonable efficiency. Both assumptions may be difficult for some critics of states to accept. For instance, if we have certain kinds of rights to liberty and to property, then it will be hard to see how states could fail to violate these rights and be just. I shall not linger on this point here and simply urge sceptics to suspend belief for a moment.[27] Suppose, in addition, that this state satisfies one or more of the following conditions:

(1) it does many useful and worthy things – for instance, it provides security for its subjects, a number of important public or collective goods, relief of poverty and illness,
(2) its subjects would consent to it under certain appropriate conditions,
(3) its subjects consent to it.

Readers will recognize a number of familiar accounts of the grounds of state legitimacy. Satisfaction of the first condition would show that the state in question was beneficial to or served the interests of the governed. My formulation of this conditions does not distinguish between different members of a broadly consequentialist family of accounts, some stressing mutual advantage, others adopting non-Paretian accounts of the general or overall good; all are lumped together in one class. I trust the differences between the second and third conditions will be clear: hypothetical vs. actual consent. People may genuinely consent to something they would not consent to under certain (hypothetical) conditions. More importantly, the fact that people would consent to something – hypothetical consent – does not mean they have in fact consented to it. 'Hypothetical consent' is a misnomer, as consent normally must be an act in order to be genuine; to consent to something must involve an act of will, a dated event.

I am leaving out much detail, of course. I do not wish to claim that the three families of accounts are jointly exhaustive. My purpose is to say something about the general implications of the main kinds of accounts of the grounds of the state's legitimacy. I shall limit myself to making two principal claims. The first is that a state's satisfaction of any of the three accounts may be sufficient to secure weak or basic legitimacy. We can see easily enough how a state's satisfying one of these

[27] In my *An Essay on the Modern State* I require that states be relatively just and efficient in order to be legitimate. See also: Morris (2005) "Natural Justice and Political Legitimacy", in: *Social Philosophy & Policy* 22, 1, pp. 314–329, which addresses the question of whether states necessarily are unjust.

conditions might plausibly give it a right to exist and to rule, with subjects having an obligation not to undermine it and to support it in various ways. Now it is likely that the satisfaction of different conditions may affect the particular obligations we have. For instance, consent might secure more demanding obligations than mutual benefit.

The second claim is that only the third condition – genuine consent – is likely to ground a state's strong or full legitimacy. This claim is more controversial, and I cannot adequately defend it here.[28] Strong legitimacy entails that subjects have an obligation to obey the law, that is, to comply with each and every law that applies to them. I have assumed that such an obligation entails a pre-emptive reason to comply. It is hard to see how anything short of (genuine) consent could secure such a conclusion. This may be the emerging consensus in the literature. To claim strong or full legitimacy is to make a very strong claim. It is very hard to see how it could be secured by either of the first or the second kind of account. The obligation to obey the law entailed by the stronger kind of legitimacy is difficult to establish for reasons that have been widely explored in the literature. The benefits typically offered by just and efficient states, as great as they may be, are not of the sort that can establish that *all* valid laws are content-independent, pre-emptive reason for *all* subjects. The nature and scope of the quantifiers are crucial elements of the argument, even if the obligation to obey here is particularized to subjects of the law. Not all persons or humans are subjects, but all subjects have obligations to obey each and every law that applies to them. Were each subject to have consented (genuinely) to a state, then it may be that they would have the obligation to obey. But, as is well-known, no state has ever been able to obtain the *genuine* consent of more than a small proportion of its subject population.

Suppose just and efficient states possess at most weak or basic legitimacy. Subjects, then, will have obligations not to undermine their state and to support it in various ways. We may suppose that the content and strength of these obligations will vary. For instance, citizens will have more obligations than mere subjects. But, as I noted earlier, everyone, independently of being a subject of a state, will have some obligations not to undermine and possibly even to support *any* state that possesses basic legitimacy. The mere existence of obligations of this kind does not distinguish subjects and outsiders. This is an interesting feature of the kind of account of (weak) legitimacy that I am offering here.

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[28] The original modern defense of consent in these contexts is, of course, John Locke's political theory. Simmons' view is "Lockean". See his books on Locke: Simmons (1992): *The Lockean Theory of Rights* and: Simmons (1993): *On the Edge of Anarchy*.

6 Legitimacy and Social Order

While we may reasonably think of most of our constitutional democracies as states with weak or basic legitimacy, it is implausible to think that any of them is strongly or fully legitimate. Should this conclusion be cause for concern or despair? For the most part, I shall argue, it is not. There is, however, something paradoxical about this conclusion, and I shall make some concluding remarks about this.

What effects might the fact that our states are not fully legitimate have on social order, assuming this fact to be common knowledge? I shall argue that the effects are not to be lamented. Consider our attitudes towards compliance with the law. There usually are many reasons why we might be moved to comply with a valid law that applies to us. We might think this law a good one, either intrinsically or because of its likely consequences. The law in question may apply a norm or principle we hold dear or are committed to, the violation of which would be shameful. We might worry about the possible consequences of non-compliance on our society, one of which might be encouraging others to take the law in question, or laws in general, less seriously. We might fear detection and the application of sanctions, as well as effects on our reputation. We may have a general policy of obeying the law unless there is some special circumstance clearly warranting disobedience. Some laws may be conventions in the special sense that the fact that others conform to them is a reason to follow suit. We may also comply with most laws ignorantly; we are not aware that we are conforming to them. This presumably is commonplace; most of us are unaware of most of the laws that apply to us and that we are not tempted to violate.

It may also be that while we disapprove of the law in question, we think that our system of government to be a good one and that we should rarely disobey a valid law. Or we may identify as nationals of our state; that is, we think of our state as the embodiment of our nation, our nation-state – a kind of *Verfassungspatriotismus*. Our motives are often multiple or mixed.

Any of these reasons may suffice to secure our conformity with the law on most occasions. And conformity is often, if not usually, overdetermined. But none of these reasons suffice to establish that *all subjects of the law of a state have a content-independent, pre-emptive reason to obey each and every law that applies to them*. The mere fact that a particular norm is a valid law of a weakly or basically legitimate state and applies to one need not be a pre-emptive reason for action. Consider the proverbial stop sign in the American desert. Traffic laws of this kind are important and worthwhile; we need to be concerned about cultivating habits of disregard for such laws. But suppose it is the middle of the day, no one is in sight, we are quite certain that the stop sign is not a trap. We slow down and drive through the stop sign without coming to a complete stop. We knowingly disobey the law. It is hard to believe that such behavior is action against a pre-emptive reason. Many laws are rules (as opposed to standards), and many apply in situations where there occasionally is little point in complying with them as long as one's non-conformity does not have bad effects. (Other examples involve stupid laws or ones which apply equally to experts and the ignorant.)

Unlike some philosophers, I do not wish to deny that sometimes – perhaps quite often – a valid law is a content-independent, pre-emptive reason for action for most people. I am not sceptical or political authority *per se*; I merely think that it is less extensive than it is claimed to be. Consider three general possibilities regarding a law. A valid law is

(1) always a content-independent, pre-emptive reasons to obey,
(2) never a content-independent, pre-emptive reasons to obey,
(3) sometimes a content-independent, pre-emptive reasons to obey.

In all three cases other reasons for conformity still obtain. Were it the case that there never are any content-independent, pre-emptive reasons to obey, that would not affect the other reasons we may have to obey, for instance, because of possible effects on others or because of loyalty to our country. I assume that possibility 2 does not obtain with regard to states that are weakly legitimate. So the two possibilities to consider are 1 and 3. What are the likely effects to be of the realization that 3 and not 1 obtains? If the valid laws of weakly legitimate states are sometimes but *rarely* content-independent, pre-emptive reasons, then that will make a difference. But if they are often or even usually reasons of this kind, then the differences between 1 and 3 will be minimal, of little practical importance.

One might think that widespread recognition of the fact that the valid laws of a weakly legitimate state are not always content-independent, pre-emptive reasons would encourage non-compliance. But, I repeat, the other reasons favoring compliance would still obtain. In addition, the fact that an act of non-compliance would encourage disobedience on the part of others might in some circumstances, when significant non-compliance would be bad, itself be a supplemental reason to comply.

States will rarely, if ever, possess strong legitimacy, and I have suggested we are not worse off for this fact. This may be true, but there is still something odd or possibly paradoxical about this fact. States claim full legitimacy. The idea seems to be part of our modern conception of the state. Allen Buchanan has recently expressed puzzlement at philosophers' expectations of states. He distinguishes political legitimacy and political authority, the former consisting the moral justification for exercising political power, the latter including in addition a right to be obeyed.[29] The distinction Buchanan draws is similar to my distinction between weak and strong legitimacy.[30] He argues that

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[29] The exercise of political power for Buchanan is "the (credible) attempt to achieve supremacy in the making, application, and enforcement of laws within a jurisdiction." Allen Buchanan (2004): *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, ch. 5, p. 233. Note that this characterization will not fit political powers, e.g., in medieval Europe, which do not claim exclusive authority or ultimate power. Presumably it is mainly modern states that fit Buchanan's characterization.

[30] My current distinction is only implicit in the account offered in my *An Essay on the Modern State*. I argue in that book that even if a state is legitimate – in what I now call the weak sense – it will not possess the full set of powers it claims, including sovereignty and the power to create content-independent, presumptive reasons for all of its subjects. In recent work I have explicitly

> once we recognize how demanding the notion of political authority is, and how unconnected it appears to be with the important questions concerning the morality of political power... it is puzzling that some recent political philosophers seem to have assumed that an account of political authority must be a centerpiece of a viable political theory.[31]

There is nothing puzzling here. It is not merely "some recent philosophers" who have focused on what Buchanan calls political authority. It is the major political thinkers of modern times, starting with Hobbes.[32] We could, I think, dub what I have called strong or full legitimacy *classical* legitimacy. More importantly, this conception of legitimacy seems the natural one to start with. The state after all does not say that we may obey some laws and not others if we decide this is best (without its authorization). It reserves for itself the exclusive right to determine or ascertain what our obligations are, and it designates these as laws. Buchanan's comments suggests he does not take seriously the state's claim to (what I call) authority. He may be right, but that does not alter the presumptions of states.

It is possible, of course, to take the state's claims seriously and to deny that they are all true. To say that a state's legitimacy is merely weak or basic is to deny it the strong or full legitimacy it claims. I think that states lack strong or full legitimacy. So allowing for terminological and conceptual differences, I do not disagree with Buchanan's conclusion – states lack what he calls political authority. But I think there is something odd about the fact that states are not strongly or fully legitimate. They *could* be, of course, but it is hard to see how they ever would be. And this *is* peculiar. For what it means is that our fundamental form of political organization is one that cannot measure up to its self-image. The way in which the state presents itself is, it would seem, mistaken. It claims powers it never fully possesses. We can get by and even do well without strong or full legitimacy, and there is nothing peculiar in our realization of this fact. But states cannot get by claiming less. That fact is peculiar.

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drawn a distinction between weak and strong kinds of legitimacy in response to some comments John Simmons made in his review of my book: Simmons (2000): "Review of Morris' Essay on the Modern State", in: *The Philosophical Review* 109, 2, pp. 271–273. See also Simmons' seminal essay: Simmons (2001a) "Justification and Legitimacy", reprinted in his collection, *Justification and Legitimacy: Essays on Rights and Obligations*, pp. 122–157.

[31] Allen Buchanan (2004): *Justice, Legitimacy, and Self-Determination*: *Moral Foundations for International Law,* p. 241.

[32] For Hobbes, law is command, not counsel. "COMMAND is, where a man saith, *Doe this*, or *Doe not this*, without expecting other reason than the Will of him that sayes it." *Leviathan*, Ch. 25, para. 2.

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