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# Justification and Legitimacy\*

*A. John Simmons*

In this article I will discuss the relationship between two of the most basic ideas in political and legal philosophy: the justification of the state and state legitimacy. I plainly cannot aspire here to a complete account of these matters, but I hope to be able to say enough to motivate a way of thinking about the relation between these notions that is, I believe, superior to the approach which seems to be dominant in contemporary political philosophy. Today, showing that a state is justified and showing that it is legitimate are typically taken to require the very same arguments. I will argue that this contemporary stance obscures the difference between two central ways in which we should (and do) morally evaluate states, and it generates confusions about other serious practical issues, such as those surrounding our moral obligations to comply with law.

I begin (in Secs. I and II) with brief discussions of the ideas of justification and legitimacy and with an attempt to capture what ought to be most central in our concerns about these ideas. I turn then (in Sec. III) to two basic ways of thinking about the relation between justification and legitimacy that I want to distinguish: what I will call the Lockean and the Kantian approaches.<sup>1</sup> Next (in Sec. IV), I argue that the minority Lock-

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1. Though it will become obvious later, I should issue here a preliminary warning that the accounts identified as Lockean and Kantian will depart from the actual positions of Locke and Kant in many ways. I seek only to identify the broad "spirit" of these accounts with those of the historical philosophies in question. There are, of course, many other prominent accounts of these matters that are not centrally discussed, or discussed at all, in this article. I take the Kantian account to be the most influential in contemporary political philosophy (though not in contemporary political science) and the Lockean account to be its clearest and most persuasive rival. For that reason I concentrate here on those two accounts. But it is not at all difficult to find in contemporary philosophical literature rival views of the ground of legitimacy claims (though it is harder to find rival accounts of the meaning of such claims). Ronald Dworkin has suggested to me that the natural competitor for the Lockean view is not the Kantian one but, rather, the (older) view that explains justification, legitimacy, and political obligation simply in terms of our having been born and raised in a particular (acceptably just) political community. I have tried to express my

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ean approach to this issue captures essential features of institutional evaluation that the majority Kantian approach does not, and I add (in Sec. V) brief mention of one further complication facing any adequate account of political evaluation.

# I

The project of “justifying the state” is one that we tend to associate with the great political treatises of the seventeenth and eighteenth centuries, and especially with those of the philosophers in the social contract tradition, such as Hobbes, Locke, or Kant. We study these historical texts in large measure because of their perceived contributions to a justificatory project that many feel confident in claiming as “the central task of social and political philosophy.”<sup>2</sup> But for all this, we are not always as careful as we might be in specifying exactly what this justificatory project amounts to or how the justifications offered differ from other kinds of institutional evaluation defended within the same works. In order to clearly distinguish what I take to be two importantly different dimensions of these philosophical enterprises, I want to begin with some very general thoughts about practical justification.

Justifying an act, a strategy, a practice, an arrangement, or an institution typically involves showing it to be prudentially rational, morally acceptable, or both (depending on the kind of justification at issue). And showing this, in standard cases, centrally involves rebutting certain kinds of possible objections to it: either *comparative* objections—that other acts or institutions (etc.) are preferable to the one in question—or *noncomparative* objections—that the act in question is unacceptable or wrong or that the institution practices or sanctions wrongdoing or vice. Justification, we might say, is in large measure a “defensive” concept, in that we ask for justifications against a background presumption of possible objection:<sup>3</sup> so we try to justify moral principles by showing them to be true or valid, to defeat the objections of the skeptic or nihilist; we justify coercion against a background general presumption in favor of liberty; we justify our actions in legal settings against concerns about apparent or *prima facie* illegality; and so on.

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skepticism about that approach in “Associative Political Obligations,” *Ethics* 106 (1996): 247–73. Another familiar rival view grounds legitimacy in a Hobbesian (rather than a Kantian) version of a hypothetical contract. And Harry Brighouse has identified a “widely shared . . . liberal” conception of legitimacy that requires *both* the satisfaction of hypothetical consent standards and the actual (free, authentic) consent of at least a majority of subjects (“Civil Education and Liberal Legitimacy,” *Ethics* 108 [1998]: 719–45, pp. 720–21).

2. James Sterba, *Contemporary Social and Political Philosophy* (Belmont, Calif.: Wadsworth, 1995), p. 1.

3. I am discussing here only practical (including political) justification, but I believe this point about the “defensive” nature of justification holds as well for, e.g., epistemic justification. Many other claims made here about justification, however, plainly do not apply (or apply in the same ways) to epistemic justification.

A moral theory that is maximizing, that requires that acts or institutions (etc.) be the best possible (in the circumstances) in order to be justified—such as maximizing forms of utilitarianism—will require for justification showing that all comparative moral objections can be met (i.e., it produces what I have called “optimality justifications”<sup>4</sup>). Non-maximizing moral theories, by contrast, may allow that all acts or institutions which avoid breaching applicable moral rules are justified, even if some are in different respects preferable to others (i.e., they produce what we can call “permissibility justifications”). Kantian and traditional natural law theories are often understood in this way, so that justification requires only a showing that all noncomparative objections can be met. If an act or institution is consistent with God’s commands, passes the “consistent willing” test of the Categorical Imperative, or avoids infringing anyone’s rights, this by itself may move it across the threshold of justifiability.<sup>5</sup>

But what is it to justify *the state*? “Justifying *the state*,” with its all-inclusive tone, might at first be thought to have to involve showing that every possible state is immune to any systematic noncomparative moral objections. Or it might be taken to involve showing that *any* possible state is preferable to (or as good as) any possible condition of statelessness. If we understand “justifying the state” in either of these senses, then justifying the state is, I think, impossible. Many states are and have been hopelessly immoral and extraordinarily dangerous places to live. Even those who find Hobbes’s arguments otherwise persuasive seldom agree with his (apparent) contention that life in any kind of state, no matter how violent or oppressive, is to be preferred to any kind of life outside the state.<sup>6</sup> On this point some variant of Locke’s (opposed) position

4. This terminology, along with some of the ideas in this section, are drawn from my “Original-Acquisition Justifications of Private Property,” *Social Philosophy & Policy* 11 (1994): 63–84.

5. Both optimality and permissibility justifications, of course, may involve acknowledging that an act or arrangement can be morally justified even if it is suboptimal or impermissible *in certain respects*. Moral justifications are typically “all things considered” justifications: to show that an act or arrangement is justified (optimal or permissible) is to show that it is best or good enough on balance. Thus, I may maximize utility, performing the only act that classical maximizing utilitarianism regards as justified, even if in doing so I must cause some disutility (e.g., I may push the drowning swimmer away from the overloaded lifeboat). Or my act may be on balance permissible (on a satisficing version of utilitarianism, a rule utilitarianism, or on some deontological moral theory), even if it involves some elements that might otherwise be impermissible, provided that its other elements are sufficiently morally positive to overbalance these negative elements (e.g., I may be justified in breaking my promise to meet you for lunch in order to help a sick friend).

6. I do not pretend to any serious Hobbes scholarship with this remark, and it may reasonably be contended that for Hobbesians “only a certain *kind* of state is justified” (Thomas Christiano, “The Incoherence of Hobbesian Justifications of the State,” *American Philosophical Quarterly* 31 [1994]: 23–38, p. 26). But Hobbes at least appears to believe that (a) the presence of true sovereignty defines the state, (b) all true sovereignty is necessarily

seems correct: life in a pure state of nature or in some nonstate cooperative arrangement, subject though it might be to all of the incommunities of insecurity, lawlessness, and vulnerability such a state could be expected to involve, is still a life to be preferred to life in a state ruled by a cruel and unchallengeable tyrant, where injustice is systematic or wildly random and irresistible.<sup>7</sup>

If 'justifying the state' is to identify any plausible enterprise in political philosophy, then it should at least be taken also to be accomplished if we can show that one or more specific kinds of state are morally defensible (comparatively or noncomparatively).<sup>8</sup> So, I suggest, we can justify the state by showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible nonstate alternatives.<sup>9</sup> In the course of such a justification we will typically argue that certain virtues that states may possess or goods they may supply—such as justice or the rule of law—make it a good thing to have such states in the world.

Such a justification, of course, will provide some comfort to those who have chosen to live in a justified state: their choice wasn't a dumb choice—the state is a good bargain—nor was it a choice to participate in an immoral arrangement. But most of us don't choose the states in which we live, and almost none of us chose to live in a *state* (as opposed to something else). It seems plain that standard justifications of the state are offered not to happy participants in states but to those moved by certain kinds of objections to states. The background objection against which such attempts to justify the state are intended to be mounted must be understood to come from the anarchist, who denies that any state can

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absolute, and (c) absolute sovereignty is always justified (i.e., preferable to all nonstate alternatives). It would seem to follow that all real states (of whatever form) are justified. If Hobbes means only that peace is preferable to (active) war, then he is surely correct. But it is obviously true neither that life in a bad state precludes active war between the sovereign and at least some of his subjects nor that life in the state of nature necessarily involves a constant or active war of all against all. If Hobbes means only that any state must be better than the (real or imagined) anarchy of the English Civil War, his claim both seems possibly false and to constitute no justification of *the* state (i.e., all states) at all. We cannot justify an institution by showing it to be at least preferable to the current situation or to the worst of the other imaginable possibilities. The best discussion of these questions, I think, remains Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton, N.J.: Princeton University Press, 1986), pt. 1.

7. John Locke, *Second Treatise of Government*, sec. 137.

8. Thus, Locke, say, would "justify the state" if he succeeded in his efforts to show that states ruled by limited governments (of the specified sort) are noncomparatively unobjectionable and preferable to even the best state of nature in which we could reasonably hope to live. Hobbes, presumably, would agree with Locke that states which in fact satisfied these standards were "justified" (though neither, of course, prominently uses this language of "justification").

9. "To justify an institution is, in general, to show that it is what it should be or does what it should do" (David Schmidtz, "Justifying the State," in *For and Against the State*, ed. John T. Sanders and Jan Narveson [Lanham, Md.: Rowman & Littlefield, 1996], p. 82).

be morally and prudentially justified.<sup>10</sup> A common anarchist view, of course, is that anything that is sufficiently coercive (hierarchical, egalitarian, etc.) to count as a state is also necessarily, and for that reason, morally indefensible and prudentially irrational. States necessarily do and sanction wrong, or are necessarily in other ways practically inferior to life without the state.<sup>11</sup> Justifying the state would involve showing that these anarchist views are false. And the justification of the state will be stronger as the kinds of states that are justified are more numerous or more like past or existing states—with the strongest possible justification of the state then being of the (unsuccessful) Hobbesian sort.

One can see a contemporary version of this conception of “justifying the state,” for instance, in Robert Nozick’s well-known political philosophy. For Nozick, “the fundamental question of political philosophy . . . is whether there should be any state at all. Why not have anarchy? . . . If one could show that the state would be superior even to [the] most favored situation of anarchy . . . , this would . . . justify the state.”<sup>12</sup> Of course, Nozick does not (attempt to) justify the state in an especially strong fashion, for he goes on to argue (in pt. 1 of his book) that only the minimal state is justified; any more extensive state than that, Nozick claims (in pt. 2), cannot be justified. Nozick argues only for the justification of the minimal state; but he does so precisely by trying to show that such a state could arise and function without violating anyone’s rights in the process—thus rebutting the anarchist’s objection that even the minimal state would necessarily do or sanction wrong (i.e., would violate rights) and so could not be morally justified—and by trying to show that such a state would arise naturally (guided by an “invisible hand”) from any state of nature—thus establishing, against the anarchist, that the minimal state is prudentially superior to nonstate alternatives (i.e., that it is desirable to have states).

## II

While Nozick is not as clear about any of this as we might wish, it is important to see that this justification of the state is not for him the only

10. Locke would probably not have identified his opponent as “anarchists,” though the language of “anarchy” dates from the mid-sixteenth century and had become relatively common by the mid- to late seventeenth century when Locke was writing. Many radical tracts and familiar positions of Locke’s own day—from the pre-Civil War period to the Glorious Revolution—were recognizably anarchist in tone or substance.

11. We should distinguish between versions of anarchism that in this way deny the state’s moral standing on a priori grounds—no possible state can be justified—and those that only reject the state a posteriori, on account of the contingent character of actual states—no existing state is justified. Though most anarchists in one of these ways deny the justification of the state, I have argued elsewhere that the central unifying thesis of all forms of anarchism is in fact rather an overarching denial of state legitimacy (“Philosophical Anarchism,” in Sanders and Narveson, eds., pp. 19–39).

12. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 4–5.

dimension of the evaluation of states.<sup>13</sup> Indeed, given Nozick's orientation toward historical (or "pedigree") evaluations of institutional arrangements, his justification of the state in terms of a purely hypothetical account of a minimal state's genesis might seem a complete non sequitur.<sup>14</sup> Showing that it is possible for a (certain kind of) state to arise and function without immorality and that having such a state would be a good thing—that the state is justified, on Nozick's model—is obviously not the same thing as showing that a particular actual state (even of that kind) did in fact arise and does in fact function in morally acceptable ways. Rather than having located a deep confusion in Nozick's thought, however, I think this observation points the way to a quite basic distinction between justification and legitimacy. For notice that Nozick also defends an independent account of state legitimacy. Showing that a particular state is legitimate appears to be for Nozick a function of showing that the actual history of the state's relationship to its individual subjects is morally acceptable.<sup>15</sup>

13. See Bernard Williams, "The Minimal State," in *Reading Nozick*, ed. Jeffrey Paul (Totowa, N.J.: Rowman & Littlefield, 1981), p. 33.

14. Nozick does not ever clearly explain his position on this question. So Schmidtz, e.g., understandably maintains that Nozick's attempted hypothetical, invisible-hand, "emergent" justification of the minimal state couldn't really justify the state in any meaningful sense at all (Schmidtz, pp. 93–94). But I believe that Nozick's argument, if successful, would show at least that, according to his Kantian/Lockean right-centered conception of morality, the minimal state is morally justified. If it is logically and physically possible that a state arise and operate without violating anyone's rights, and if such a state would be rationally preferable to nonstate alternatives, then the anarchist objection is rebutted and (in that sense) the state (i.e., that particular kind of state) is justified. See Alan Nelson, "Explanation and Justification in Political Philosophy," *Ethics* 97 (1986): 154–76, p. 171.

15. Legitimate states have a special, unique right to be the state that operates in the territory (Nozick, p. 134). A state can acquire such legitimacy, according to Nozick, by having its operations consented to by enough residents of its (claimed) territory that it possesses the "greatest entitlement" (in that territory) to exact punishment for wrongdoing (ibid., pp. 108–14, 132, 139–40). So showing a state to be legitimate involves showing that it actually has (or has had) certain kinds of morally unobjectionable relations with those it controls; justifying the state only involves showing, against the anarchist, that it is possible for a state to have such relations and that having states at all is advantageous (so that we would expect them to arise naturally from within a state of nature). Notice that on this model a particular state could apparently be the sort of state that might be justified—it could (in Nozick's case) be a minimal state that provides protection to all within its territories and that performs no redistributive functions—but still not itself be a legitimate state. If, for instance, a minimal state were imposed on a people entirely by force, without any (or many) consenting "clients," it would have no greater right to enforce justice than would some group of its subjects; it could not then be legitimate, even if it did offer protection to all and operate without redistributing holdings. The state's special legitimacy arises from the fact that its consenting clients give it a greater share of the collectively held "right to punish" than is held by any of its competitors (e.g., individual nonclients, cooperative associations of allied nonclients, rival protective agencies [ibid., pp. 139–40]). A minimal state imposed from without would presumably lack such legitimacy and so have only a

It is Locke's political philosophy, of course, that provides the model for this sort of distinction between political justification and legitimacy (though Locke himself never uses these terms to describe the distinction). But Locke, in my view, is in certain ways clearer about the distinction than is Nozick. For Locke, remember, "no one can be put out of [the state of nature] and subjected to the political power of another without his own consent."<sup>16</sup> Political power is morally legitimate, and those subject to it are morally obligated to obey, only where the subjects have freely consented to the exercise of such power and only where that power continues to be exercised within the terms of the consent given. The legitimacy of particular states thus turns on consent, on the actual history of that state's relations with its subjects. But Locke also offers us (especially in chap. 9 of the *Second Treatise of Government*) a different and quite general argument for the moral and prudential preferability of states ruled by limited governments to life in the state of nature. This other argument is plainly addressed to those who maintain that the state in any form is morally or prudentially inferior to life without the state. Notice that in justifying the (limited) state—by rebutting the anarchist objection—Locke says nothing about the actual consent that is required to legitimate a particular state with respect to its subjects.<sup>17</sup> That the limited state is justified—that having limited states (governments) is on balance a good thing and that we have good reason to create them—does not appear for Locke to show that any particular limited state is legiti-

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de facto monopoly on the use of force. Particular states are legitimate in virtue of the actual history of their relations with their subjects, relations that establish the state's right to rule and the subjects' obligation to comply. So we might use a different language and say that such accounts distinguish between the general justification for having political authority and the specific justification for a particular authority's being the authority. For related distinctions, see Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), pp. 6–7; David A. J. Richards, "Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law," *Georgia Law Review* 18 (1984): 771–89, p. 781; and Harry Beran, "What Is the Basis of Political Authority?" *Monist* 66 (1983): 487–99, pp. 489–90, and *The Consent Theory of Political Obligation* (London: Croom Helm, 1987), pp. 12–13. Richard Taylor also distinguishes between general justifications of certain kinds of states, by reference to their good purposes or ends, and demonstrations of the legitimacy of a particular state. But he, unlike the others considered here, proposes a purely positivist criterion for legitimacy. See *Freedom, Anarchy, and the Law* (Englewood Cliffs, N.J.: Prentice-Hall, 1973), pp. 86–105.

16. Locke, sec. 95.

17. It is important to see that, on this Lockean model, showing that *the* limited state is justifiable may give us reasons to consent to a particular limited state's rule. But this implies neither that such consent can simply be assumed nor that actual consent is not necessary for a state's legitimacy and for its subjects' obligations. In Hanna Pitkin's well-known reading of Locke ("Obligation and Consent—I," *American Political Science Review* 59 [1965]: 990–99, pp. 995–97, 999), she (mistakenly, in my view) takes (what I here call) his general justification of the state to amount to a move by Locke to replace actual consent with hypothetical consent as the relevant standard of legitimacy.



mate, that any state (government) has the right to rule over any or all persons within its (claimed) domain (i.e., the right to occupy the position of authority).<sup>18</sup>

This Lockean account utilizes one standard moral conception of state legitimacy,<sup>19</sup> and it is this conception of “legitimacy” that I will hereafter have in mind when I use that term. A state’s (or government’s) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties. Accordingly, state legitimacy is the logical correlate of various obligations, including subjects’ political obligations.<sup>20</sup> A state’s “legitimacy right” is in part a right held specifically against the subjects bound by any state-imposed duties, arising from morally significant relations—in Locke’s case, consensual relations—between state and subject. It follows that “on balance” state legitimacy may be complete or partial, depending on whether such relations hold with all or only with some of those against whom the state enforces the duties it imposes (though the state is, of course, either fully legitimate or fully illegitimate with respect to each individual under its rule).

I do not here take up at any length questions about how *state* legitimacy is related to *governmental* legitimacy; I focus principally on questions about state legitimacy. Governments can presumably be illegitimate

18. Though Locke is far from clear on this point, it seems likely that the limited state’s justification is intended by him to be a necessary condition for the legitimation (by actual consent) of any particular limited state’s rule. Consent is necessary—but not sufficient—for legitimacy and political obligation, (in part) because the justification of a type of state is necessary for consent to a token of that type to be binding. We cannot bind ourselves by consent to immoral arrangements. And to this Locke adds that “no rational creature can be supposed to change his condition with an intention to be worse” (Locke, sec. 131). Locke appears to take this latter claim to imply that binding (rational) consent can only be given to states that are demonstrably superior on prudential grounds to (or at least as good as) the state of nature (i.e., that consent given to states whose kinds are not justified in this broad sense cannot bind us). A state must be on balance morally acceptable and a “good bargain” for our consent to succeed in legitimating it. For a defense of this reading of Locke, see my *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton, N.J.: Princeton University Press, 1993), chap. 5.

19. See, e.g., R. P. Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970), pp. 3–4.

20. State legitimacy, according to this conception of it, includes an exclusive power over subjects to impose duties and enforce them coercively, which correlates with obligations on others to refrain from these tasks. It also includes a right, held against subjects, to be obeyed (i.e., to have any imposed duties discharged). This latter right is the logical correlate of subjects’ political obligations. The correlativity of political legitimacy and political obligation has been denied in a number of recent works, most notably in Kent Greenawalt, *Conflicts of Law and Morality* (New York: Oxford University Press, 1989), chap. 4. But while Greenawalt offers convincing arguments for a noncorrelativity thesis, I think his arguments in fact support only the noncorrelativity of (what I am here calling) the state’s justification with political obligation.

even where the states they govern are not. But state and governmental legitimacy seem not to be independent of one another, since an illegitimate state could not, I think, have a legitimate government. On the Lockean model this is easily explained. According to this model, states (“civil societies” or “commonwealths,” in Locke’s parlance) earn their legitimacy by virtue of the (unanimous) consent of their members, a consent that transfers to the collectivity those rights whose exercise by a central authority is necessary for a viable political society. Governments are legitimate only if they have been entrusted by the state (society) with the exercise of those same rights.<sup>21</sup> So while a legitimate state might have an illegitimate government (one that, say, acquired its power by force rather than by trust), an illegitimate state could never have a legitimate government since illegitimate states do not possess the rights, transferred to them by their subjects’ consents, that must be entrusted by a state to a government in order to legitimate that government.

There are, of course, many other conceptions of state legitimacy, quite different from the strong Lockean conception just described. Some theorists have advocated weaker moral notions of legitimacy, according to which legitimacy is a mere liberty right or “justification right”<sup>22</sup>—a right which correlates with no other parties’ obligations (e.g., with obligations to obey the law or to refrain from rival attempts to impose duties). Such notions of legitimacy, as we shall see, sharply diminish the argumentative distance between accounts of state justification and accounts of state legitimacy.

There is also a host of conceptions of state legitimacy—those used in ordinary political discourse and those advocated by various social scientists and political theorists—whose connections to either of the aforementioned moral conceptions of legitimacy are not immediately clear. For instance, we sometimes count states as legitimate if they achieve certain kinds of international recognition—if they are “accepted into the community of nations”—or if they remain stable over long periods of time, exercising effective or unchallenged control over a fixed territory. Or we might call a regime legitimate that was simply “lawful,” in the sense that it came to power and continues to govern according to the generally accepted rules of its state, or if it refrained from the persecution or deliberate impoverishment of its subjects (or of particular groups

21. For a defense of this reading of Locke, see my *On the Edge of Anarchy*, chap. 3.

22. See, e.g., Robert Ladenson, “In Defense of a Hobbesian Conception of Law,” in *Authority*, ed. J. Raz (New York: New York University Press, 1990), pp. 36–37: “The right to rule is . . . a justification right . . . [which] by itself implies nothing about either the subject’s duty of allegiance to the state or of compliance with the law”; and Christopher Wellman, “Liberalism, Samaritanism, and Political Legitimacy,” *Philosophy & Public Affairs* 25 (1996): 211–37, pp. 211–12: “An account of political legitimacy explains why this coercion [i.e., punishment of those within the state’s borders] is permissible. . . . It is crucial to notice that political legitimacy is distinct from political obligation.”

of subjects).<sup>23</sup> Or we might, with the majority of contemporary social scientists (and following Weber), call “legitimate” those regimes that are accepted or approved of by their subjects in certain distinctive ways.

The satisfaction of any of these criteria might, of course, be said to confer on a regime the kind of moral legitimacy we have been discussing. But while concerns about a state’s stability or lawfulness or about institutional racism and persecution are clearly moral concerns, they are concerns bearing more obviously on what I have been calling the state’s justification than on its legitimacy. That a state is stable and lawful and refrains from persecution shows that it is good (or, at least, not bad) in certain ways, but it does not obviously show that the state has the kind of special moral relationship with any particular subjects that gives it a right to rule them. And international recognition, considered alone, plainly tracks the moral legitimacy of states at best irregularly. What, though, of the last, Weberian conception of legitimacy? Its popularity and its apparent similarity to the Lockean, consent-based conception of legitimacy warrants a slightly more extended consideration of this proposal.

One proponent of the Weberian view, Charles Taylor, distinguishes between two senses of “legitimacy” as follows. On his preferred use, legitimacy “is meant to designate the beliefs and attitudes that members have toward the society they make up. The society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or fails.”<sup>24</sup> Worries about the possibility of a contemporary “legitimation crisis” are often understood in this way—that is, in terms of the special difficulties faced by today’s industrial democracies in maintaining or generating the attitudes of allegiance, loyalty, or identification on which their “legitimacy” (in this first sense of the word) depends.<sup>25</sup> Taylor contrasts legitimacy in this first, “attitudinal” sense with what he calls “the seventeenth century use of the term not to describe people’s *attitudes*, but as a term of objective evaluation of regimes.”<sup>26</sup>

23. Recent international law has tended to treat the persecution of racial, ethnic, or religious groups within their territories as delegitimizing states. See, e.g., Allen Buchanan, “Theories of Secession,” *Philosophy & Public Affairs* 26 (1997): 31–61, pp. 50–51.

24. Charles Taylor, “Alternative Futures: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada,” in *Communitarianism: A New Public Ethics*, ed. M. Daly (Belmont, Calif.: Wadsworth, 1994), p. 58.

25. See C. Taylor, “Legitimation Crisis?” in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985), pp. 248–88. Although Habermas is perhaps the best known of those who have discussed the possibility of a contemporary “legitimation crisis” (in terms of the “contradictions” that weaken advanced capitalism) (e.g., in his *Legitimation Crisis* [Boston: Beacon Press, 1975]), he does not seem to accept the “attitudinal” sense of legitimacy that is being discussed here. If I understand him correctly, Habermas’s notion of legitimacy corresponds to neither of Taylor’s senses.

26. C. Taylor, “Alternative Futures: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada,” p. 58.

The majority of the social scientists writing about legitimacy during the second half of this century have, like Taylor, identified legitimacy with members' positive beliefs, attitudes, perceptions, or other "favorable orientations" toward their society or its regime. In this, as I have noted, they mostly take themselves to be following Weber, who famously attempted to analyze the legitimacy of power solely in terms of people's belief in its legitimacy.<sup>27</sup>

The most familiar criticism of this analysis of legitimacy points to its quite obvious circularity. But this is not a particularly difficult problem to repair, for Weber can be easily corrected to say more carefully (as he himself sometimes does) that the extent of a regime's legitimacy is equivalent to the extent to which its subjects regard its directives as obligatory or authoritative, or regard the regime as lawful, exemplary, morally acceptable, or appropriate for the society. Legitimacy is then just understood as the "reservoir of loyalty on which leaders can draw,"<sup>28</sup> the subjects' beliefs in the regime's authority (or their feelings of allegiance, trust, or other attachment) that will typically produce compliance and support (or at least guilt feelings on occasions of noncompliance and nonsupport).<sup>29</sup>

There are, however, more serious problems facing attitudinal accounts of legitimacy. One is that such accounts make judgments of legitimacy turn out to be about the wrong thing. Just as subjectivist accounts of moral judgment implausibly understand my judgment that an act is wrong, say, as a statement that I have negative feelings about that act—so that the "moral judgment" oddly turns out to be about *me* instead of about the *act*—so attitudinal accounts of political legitimacy make judgments of legitimacy too much about subjects and too little about their states. To call a state legitimate is surely to say something about *it*, about the rights it possesses or the scope of its authority. The attitudes of a state's subjects can at best be part of what argues for its legitimacy, not that in which its legitimacy consists.

It will not do, however, in response to this problem, to simply shift

27. M. Weber, *The Theory of Social and Economic Organization* (London: William Hodge, 1947), p. 114, and *Wirtschaft und Gesellschaft*, 4th ed. (Tübingen: J. C. B. Mohr, 1956), pp. 23, 157.

28. Tom R. Tyler, *Why People Obey the Law* (New Haven, Conn.: Yale University Press, 1990), p. 26.

29. A second familiar criticism of such attitudinal accounts of legitimacy is that they preclude the possibility of evaluating regimes according to objective standards—that is, they preclude judging regimes in terms of Taylor's second sense of legitimacy. As Hanna F. Pitkin has argued, "Weber in effect made it incomprehensible that anyone might judge legitimacy and illegitimacy according to rational, objective standards" (Pitkin, *Wittgenstein and Justice* [Berkeley: University of California Press, 1972], p. 283). But this objection is hardly likely to impress theorists (like those who typically advance Weberian accounts of legitimacy) who believe that there are no "objective" standards according to which states or societies or regimes can be evaluated.

our focus onto the properties of the state that produce feelings of allegiance or support, so that legitimacy can be redefined as “the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.”<sup>30</sup> For there is a second and much deeper problem with all accounts of legitimacy that thus centrally refer to subjects’ beliefs or attitudes: no plausible theory of state legitimacy could maintain that a state has the rights in which its legitimacy consists—rights to exclusively impose and coercively enforce binding duties on its subjects—simply in virtue of its subjects’ feelings of loyalty or its own capacities to generate such feelings. Surely by now the history of human oppression has taught us how often people come to feel obligated toward and believe in the rights of those who simply wield over them irresistible power, with no more moral authority over them than such power yields. Attitudinal accounts of state legitimacy appear to disregard such lessons. On such accounts states could create or enhance their own legitimacy by indoctrination or mind control; or states might be legitimated solely by virtue of the extraordinary stupidity, immorality, imprudence, or misperceptions of their subjects. Surely none of this is what any of us has in mind when we call a state or a government “legitimate.” Of course, even on the more plausible Lockean account of legitimacy we have discussed, a subject’s morally legitimating consent may still be given unwisely; but binding consent cannot be given under conditions that make it unfree or uninformed. And it is hard to deny that free, informed consent at least looks like an act that might give one party a right or some authority to direct and coerce another.

That a state is legitimate with respect to a subject will typically, we hope, result in that subject’s actually having feelings, beliefs, or attitudes that generate allegiance, support, etc. But this will, of course, not necessarily be the case. States may actually be legitimate with respect to us without their in fact receiving from us much or any support, provided only that we are sufficiently immoral, deceived, stupid, overwhelmed (by war or disaster, say), weak-willed, or manipulated. In such cases it is correct and perfectly natural to say that a state is legitimate, but unstable or unpopular or unsupported. When people fail to uphold a state due to their own shortcomings, rather than to its lack of moral authority, this cannot plausibly be described as a diminution of its legitimacy.

It is a mistake, then, to focus in an account of state legitimacy on the attitudes of subjects or on the capacity of a state to produce or sustain these attitudes. Of course, insofar as it is the positive attitudes and beliefs of subjects that reliably produce their compliance with and support for states or regimes, instead of the nature of those actual relations with the state that obligate them to support it and give it the right to rule them

30. Seymour M. Lipset, “Social Conflict, Legitimacy, and Democracy,” in *Legitimacy and the State*, ed. W. Connolly (New York: New York University Press, 1984), p. 88.

(relations that may be overlooked or misunderstood or unappreciated), it is understandable that social scientists have tended to focus on these attitudes and beliefs. For, as social scientists, we are rightly interested in what produces compliance and in distinguishing the various causes of compliance (e.g., habit, indoctrination, fear of sanctions, belief in legitimacy, etc.). But we should not confuse these perfectly reasonable concerns with the quite distinct concerns we have about the moral legitimacy of states or governments. For that reason, I will focus here instead on two rival accounts of the relation between justification and legitimacy, both of which are initially plausible and both of which appeal to unquestionably morally relevant features of the citizen-state relationship.<sup>31</sup>

### III

Why does the Lockean separate the two stages of his argument, carefully distinguishing two dimensions of the moral evaluation of the state—its justification and its legitimacy? Why doesn't the Lockean simply say: because limited states are morally acceptable (or ideal) and a good bargain, they ought to be accepted by those subject to them; so particular limited states are legitimate and enjoy the right to rule and their subjects have obligations to comply with them?<sup>32</sup> This kind of argument, of course, would tend to make far less significant any distinction between justification and legitimacy—in the sense that those arguments that demonstrated a state's justification would also demonstrate its legitimacy—and would make the universal legitimacy of all tokens follow directly from the justification of a state-type.

31. To be perfectly clear, I should emphasize at this point that nothing turns on whether we use the language of "justification" and "legitimacy" to identify the distinction with which I am concerned (or instead, say, reserve the term 'legitimacy' to identify one of the social scientific properties mentioned above). My interest is only in claiming that there is a distinction of some philosophical importance at issue here that can, I think, be happily captured by these terms and that traditional usage encourages us to express in this language.

32. Some readers of Locke (e.g., Pitkin) mistakenly conclude from his remarks on justification and legitimacy that Locke in fact embraced a hypothetical consent standard of justification and legitimacy. If we focus our attention on Locke's justification of the limited state, arguing that in his view this is a state we ought to give our consent to, we may think Locke's account can do without any reliance on actual consent. Legitimate states are just those that are good (i.e., justified—morally acceptable and a good bargain). But such a reading is forced to ignore all of Locke's explicit references to actual consent. This could only be a good interpretive move if there were no philosophical point to distinguishing one's arguments for state justification from those for state legitimacy. I try to show here that this distinction is important. So we hardly do Locke a favor by reading him (with Pitkin) as really wanting to collapse an important distinction that the text indicates he was in fact unwilling to collapse. See my *On the Edge of Anarchy*, sec. 7.2. Another very recent misreading of Locke, similar to Pitkin's, can be found in Jonathan Waskan, "De Facto Legitimacy and Popular Will," *Social Theory and Practice* 24 (1998): 25–56, p. 29, where it is claimed of Locke (as well as Hobbes and Rousseau) that for him "'legitimacy' is roughly synonymous with 'justified' or 'acceptable'."

In opposition to such a suggestion, the Lockean, I take it, wants to say the following: the general quality or virtues of a state (i.e., those features of it appealed to in its justification) are one thing; the nature of its rights over any particular subject (i.e., that in which its legitimacy with respect to that subject consists) are quite another thing. The legitimacy of a state with respect to you and the state's other moral qualities are simply independent variables, in the same way that the right of some business to provide services to you and to bill you for them is independent of that business's efficiency or generosity or usefulness. It can be on balance a good thing that such a business was created and continues to exist, and its relationship with willing clients can be morally exemplary, without the business thereby coming to have a right to have *you* as a client. The fact that a state or a business has virtues that can be appealed to in order to justify its existence cannot by itself argue for its having special rights over particular individuals. Only interacting with you—and in a way that we normally suppose gives one party a moral right to expect something of another—will seem to “legitimate” its imposition and/or enforcement of duties on you.

The Lockean recognizes, of course, that states have many functions and virtues that businesses typically lack and that there are thus vast differences between them: states have the salience and the power to solve various coordination and assurance problems, to resolve social “Prisoners’ Dilemmas,” to institutionalize and enforce rights and justice, to empower the suppression of violence, and so on. But the Lockean also argues that in one crucial respect states and businesses are the same: neither one, no matter how virtuous or how useful to its willing clients, can acquire, simply by its virtue or usefulness, the right to insist on participation in its enterprises by unwilling free persons. To deny this is simply to deny the natural freedom of persons, a basic and plausible Lockean premise. Both states and businesses may be entitled (albeit in different ways), simply by virtue of their goodness or the needs or wants of their clients, to resist active efforts to undermine them or to protect their willing clients’ consumption of their services. But mere nonparticipation by the unwilling does not constitute an effort to undermine or an attack on clients. And where mere nonparticipation by the unwilling is sufficient to render a state or a business nonviable, that by itself, for the Lockean, amounts to an argument that the state or business has no right to use coercion on the unwilling to insure its continued existence.

A state’s legitimacy on this account, then, is its exclusive right to impose new duties on subjects by initiating legally binding directives, to have those directives obeyed, and to coerce noncompliers. This right and its correlative obligations constitute a special moral relationship between that particular state and each particular (consenting) subject. As for the significance of the state’s justification, there seem to me to be two possible Lockean positions, depending on how “positive” a conception

of morality one thinks consistent with the Lockean approach. According to the first (and my preferred) Lockean position, a state's being of a kind that is justified gives us moral reasons to refrain from undermining it and will typically give us moral reason to positively support that state (or perhaps even to promote the existence of similar states). After all, justice and the happiness of others, for example, look like ends that may require positive promotion by all moral agents. But a particular state's being justified in this way cannot ground any special moral relationship between it and you. For even if you had perfectly general duties to promote justice and happiness, say, and consequently duties to support just or happiness-producing states, these duties would require of you that you support all such states, providing you with no necessary reason to show any special favoritism or unique allegiance to your own just state, and providing none of those states with any special right to impose on you additional duties.<sup>33</sup>

The mere fact that you reside (or are otherwise located) within the claimed territories of a particular just state seems inadequate to "particularize" any general duties of support and compliance to that one just state. For mere residence of that sort guarantees receipt of none of the benefits and participation in none of the cooperative schemes that make loyalty—or even simple obedience to law—appear morally compulsory. Those within the territories of a just state who have no meaningful interaction with it surely owe it nothing more (including even obedience to just law) than do nonresidents. Imagine, to take extreme cases, citizens in dangerous inner-city "war zones" or in isolated or largely ignored parts of the state's territories—both possibilities that are consistent with a state's being tolerably just on balance. In such cases, one's only duties or obligations are those of natural morality (as Locke surely ought to have stressed, rather than retreating to an inadequate account of the "tacit consent" allegedly given by all within the state's territories).<sup>34</sup> But where citizens (or visitors) do significantly benefit from (or in other ways meaningfully interact with) a just state, which is of course more typical, it is if anything this interaction, not any general duty to support or obey just states, that grounds for them a special obligation of compliance (or more) to that particular state. General duties to promote justice or happiness can bind me no more to, say, pay taxes to my own just state than they can to make contributions to some needier just state elsewhere.

A stricter Lockean line on justification would maintain that while we ought not undermine the institutional arrangements of others if they do us (and others) no harm, the mere justifiability of an arrangement need

33. See my *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979), pp. 32–34, 143–56.

34. For an account of the ways in which I think Locke should have dealt with the issue of tacit consent, see my "'Denisons' and 'Aliens': Locke's Problem of Political Consent," *Social Theory and Practice* 24 (1998): 161–82.



not give us any moral reason at all to support that arrangement. The mere fact that a business is on balance morally acceptable and a good thing to have around seems to give me no moral reason to do anything for it, unless my failure to act will in some way affect the performance of my duties to others. (Must I even support, let alone buy a policy from, some insurance company that is efficient and charitable and offers good bargains on its policies, say?)

According to this stricter Lockean line, my principal (natural) moral duties are to refrain from directly harming others and to do my share in supporting the helpless needy. These duties I am bound to discharge whether I am a member of a legitimate state, a resident of an illegitimate state, or associated with no state at all. Since these are duties that I can discharge independent of institutional arrangements, I am permitted to do so while refraining from supporting or joining myself to even morally exemplary institutional arrangements. I can pass up morally acceptable good bargains if I wish. Indeed, on either Lockean line, I am permitted to decline to join myself to even those morally acceptable arrangements that are essential to the well-being of others, provided only that my participation in those arrangements is not necessary to their success. As long as I mind my moral business, good insurance companies and just states can be created at will by those who want them; but the virtues of these arrangements give them no moral claim on my allegiance. This is what Locke has in mind when he begins his discussion of the consensual creation of legitimate civil societies by saying: "This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature" (*Second Treatise of Government*, sec. 95). If the virtues/justifiability of institutions made by others gave those institutions authority over me, they would "injure" my natural freedom and so be impermissible.

I may, of course, never be able to effectively disentangle myself from *de facto* states, for they use irresistible force to back their claims of authority over virtually all persons and all habitable land in the world. But the Lockean asks: what could be the source of states' legitimate claims over their specific territories, other than their prior claims of authority over the persons who occupy or use the land? If that authority over persons cannot first be established, states cannot reasonably use claims over the land to compel acceptance of their authority over the persons on the land. And states' claims of authority over nonconsenting persons, the Lockean insists, are insupportable. States are not entitled to demand from unwilling inhabitants anything that one person may not demand from another independent of states.

There is a natural objection to this Lockean account that might be raised here: this talk of a hard distinction between the virtues or the moral quality of a state and the state's relations with individual subjects, we might say, is highly artificial. For surely the state's "moral quality"

simply consists in or is largely constituted by the sum of its morally significant relations with individual subjects. Beneficial states are beneficial precisely by creating or distributing benefits to their subjects; just states are just by virtue of treating their subjects justly; and so on. But this objection proceeds too quickly. From the fact that good states provide benefits for subjects (and treat subjects well in other ways) it does not follow that those states have with any particular subject the kind of morally significant relationship that could ground a state's right to impose duties. Just states invariably treat some subjects badly; beneficial states invariably fail to benefit all. Justified states are those that are on balance good things. And even if some state perfectly exemplified all the stately virtues and actually succeeded in benefiting all (and treating all well), it is not obvious that the mere unsolicited provision of benefits (and good treatment) would ground a right to direct and coerce. After all, when some individual treats others well or provides them with unsolicited benefits, we don't generally suppose that this gives her a right to direct or coerce them. There is, then, considerable plausibility in the Lockean insistence that the considerations that justify the state cannot by themselves also serve to legitimate it.

It is not difficult, of course, to imagine still more basic objections to the Lockean account. Indeed, we need not even imagine, since we have in Kant's *Rechtslehre* a fundamentally different—but still obviously liberal—approach to these matters, an approach that seems to argue against the Lockean distinction between justification and legitimacy. Summarized very roughly and quickly, Kant's argument appears to be this: all persons possess an innate right to freedom, and many persons, even in a state of nature, possess “provisional” property rights (“Division,” secs. 15, 44).<sup>35</sup> These rights, however, cannot possibly be respected or enjoyed except in a civil society. Since rights correlate with the obligations of others to respect them, each person has an obligation to leave the state of nature and to accept membership in a civil society under coercive law (sec. 42), “under which alone everyone is able to enjoy his rights” (sec. 41) and reciprocal freedom under law is possible. Any other person living with me in the state of nature “robs me of . . . security and injures me by virtue of this very state in which he coexists with me.”<sup>36</sup>

So for Kant the justification of the state—its necessity for the realization of freedom and rights and justice—entails an obligation to enter civil society and accept the duties society imposes. This justification is apparently intended by Kant to at the same time legitimate particular states by binding each of us to obedience to the laws of our own states.

35. Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), pp. 63, 85–87, 123–24. “Division” is the title of an unnumbered section of the work.

36. Kant, *Perpetual Peace*, in *Kant: Political Writings*, ed. H. Reiss (Cambridge: Cambridge University Press, 1991), p. 98n.

No specific actual history of morally significant relations between a particular state and each of its subjects is thought by Kant to be necessary to support the transition from justifying the state to legitimating a particular state with respect to all of its subjects.

Kant's argument, as presented thus far, however, appears objectionably gappy. Kant never explains very clearly, for instance, why I have an obligation to leave the state of nature and live in civil society with others, rather than just a general obligation to respect humanity and the rights persons possess (whether in or out of civil society). Nor does he explain why, if others are already willing members of some secure civil society, my mere refusal of reciprocal membership (without any further wrongdoing) constitutes any kind of injury to those who already have the security they desire. While I may represent some kind of potential threat to members of a secure society (if, say, I do not acknowledge various of their institutional rights as morally binding), I am still nothing like the threat I would be to others in a state of nature, and surely less of a threat to them than are evil fellow members or other sovereign states. If my refusal of membership is public and if I respect the rights those members possess *qua* persons, any threat I represent will be relatively minor and easy to counter. Indeed, it is not even obvious why Kant thinks a general obligation to enter some civil society entails a special obligation to obey the specific laws of a particular state—namely, that in which I find myself.<sup>37</sup> In short, Kant never really seems to explain the crucial inference from justification to legitimacy—from the assertion that the state is necessary for securing rights and freedom to his conclusion that each state has the right to direct and coerce those within the territories over which it claims authority. We shall return to Kant's argument later to see if it can be filled out in a more satisfactory fashion.

Even those contemporary political philosophers who consider themselves Kantians do not embrace this Kantian line of argument in many of its details. But they do seem to share both with Kant, and with many who would not describe themselves as Kantians, Kant's desire to employ the very same arguments in both justifying the state and demonstrating the legitimacy of particular states. Thomas Nagel, for instance, writes that "the task of discovering the conditions of *legitimacy* is traditionally conceived as that of finding a way to *justify* a political system to everyone who is required to live under it."<sup>38</sup> John Rawls similarly says: "The basic

37. An obligation to enter (by consenting to) some civil society is presumably identical to neither an obligation to do what such obligatory consent would be consent to nor an obligation to do whatever one's particular society requires of its citizens. Thus, the "gaps" in Kant's argument may be sufficiently large to lead one to conclude that he was in fact simply uninterested in questions about legitimacy (in the Lockean sense), focusing entirely on questions of justification.

38. Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991), p. 330. My emphasis throughout.

structure and its public policies are to be *justifiable* to all citizens, as the principle of political *legitimacy* requires.”<sup>39</sup> And Ronald Dworkin begins his discussion of the “general *justification* for the exercise of coercive power of the state” by saying: “This is the classical problem of the *legitimacy* of coercive power. It rides on the back of another classical problem: that of political obligation.”<sup>40</sup> Similar claims can be found without difficulty in the writings of many other prominent contemporary political philosophers.<sup>41</sup>

It is not easy, of course, to assess the significance of these claims, in light of the fact that their authors may be using terms like ‘justification’ and ‘legitimacy’ differently than I have been using them here. One possibility is that questions about the justification of the state and questions about state legitimacy are simply being conflated, so that the distinction between justification and legitimacy is being collapsed entirely. This, I have argued, would be to rob political philosophy of a natural and important dimension of institutional evaluation. Another possibility is that the philosophers in question are simply working with a weaker notion of legitimacy than the strong Lockean right of the state to direct, be obeyed by, and coerce subjects. Perhaps legitimacy is being understood as a mere liberty (uncorrelated with any obligations of subjects or others), so that the state’s justification is being taken to imply (or to be part of the argument for) state legitimacy as only a kind of moral permission. Finally, these political philosophers might simply be asserting that there is a direct and obvious argument from the justification of a type of state to the legitimacy of all tokens of that type, where legitimacy is being understood in the stronger Lockean sense. The Lockean reply is that both of the first two moves encourage us to ignore an essential respect in which states and political (and other) institutions are and ought to be morally evaluated. The third move—Kant’s own claims are an example—is rejected by the Lockean for the reasons now under consideration.

It has been Rawls’s work, of course, that has influenced so many of

39. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 224; my emphasis.

40. Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986), pp. 190–91; my emphasis.

41. For instance: “The *justification* of authority . . . depends on one main argument. . . . The main argument for the *legitimacy* of any authority is that . . . a person is more likely to act successfully for the reasons which apply to him” (Joseph Raz, *The Morality of Freedom* [Oxford: Oxford University Press, 1986], pp. 70–71). “A state is *legitimate* only if, all things considered, its rule is morally *justified*” (Leslie Green, *The Authority of the State* [Oxford: Oxford University Press, 1990], p. 5). “A system of political authority or law can be *legitimate*, can be morally *justified*” (Jeffrey Reiman, *In Defense of Political Philosophy* [New York: Harper & Row, 1972], pp. 41–42). “To *justify* . . . coercive institutions, we need to show that the authorities within these institutions have a right to be obeyed and that their members have a corresponding duty to obey them. In other words, we need to show that these institutions have *legitimate* authority” (Sterba, p. 1). My emphases throughout.

the contemporary political philosophers, Kantian and non-, to whom I have been referring. And in Rawls's work one can plainly see, if not a simple conflation of questions about justification and legitimacy, at least a very distinct narrowing of the differences between the argumentative grounds for claims of justification and legitimacy. First, Rawls seems relatively unconcerned with justifying the state (or a kind of state) in a way designed to rebut the (real or imagined) objections of anarchists or others who favor nonstate forms of cooperation. Rawlsian justification is principally a justification of coercion offered to those who already accept the necessity of living in some kind of state. The only real justificatory question is: what kind of state? Rawlsian principles of justice are to govern "a structure of basic institutions we enter only at birth and exit only by death"; they are principles for the "political" realm, not for the "associational" ("which is voluntary in ways that the political is not").<sup>42</sup> These principles "regulate the choice of a political constitution and the main elements of the economic and social system."<sup>43</sup> What Rawlsian contractors select between is the kinds of constitutionally centered legal systems and large-scale distributive institutions that define the state. They select, in short, the best form for a state to take, not the state itself. The moral necessity of a large-scale political/economic institutional structure seems to be a background assumption of, not a demonstrated step in, the project of political justification in Rawlsian political philosophy.

This is one way in which the project of "justifying the state" seems quite different in Rawls's hands (and in the hands of those influenced by him) than in Locke's. There is also another: where for the Lockean, justification involves showing that the limited state is morally acceptable and a good bargain (simpliciter)—that it is objectively permissible and answers to basic human needs and interests—Rawlsian justification is accomplished instead by showing that the state is acceptable to the particular persons forced to live under its authority (i.e., it is consistent with their (possibly quite diverse) moral beliefs). What Rawls now calls "public justification"—the "best justification" of a conception of justice (and the institutional structure it dictates) "that we can have at any given time"<sup>44</sup>—is accomplished when the reasonable members of a political society can accept it as the best conception even in light of their own various comprehensive conceptions of the good<sup>45</sup> (i.e., when there is an "overlapping consensus" of reasonable comprehensive views). Import-

42. Rawls, *Political Liberalism*, pp. 135–36, 137.

43. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 7. Rawls repeatedly claims that the basic structure of society, for the regulation of which the principles chosen by the original position contractors are designed, has two parts, the first of which is a political constitution (*ibid.*, pp. 7, 61).

44. John Rawls, "Reply to Habermas," *Journal of Philosophy* 92 (1995): 132–80, pp. 144–45.

45. *Ibid.*, p. 143.

tantly, however, they accept it as best given their recognition of the need for some collective political/economic solution by which all will subsequently be bound.

The state's justification for Rawls is, we might say, doubly relativized by comparison with Lockean justification. It is justification offered to those who already agree that some kind of state must be justified, and it is justification relative to the moral positions of those who will make up the society in question. Even if those moral positions should be illiberal and the state that is justified in light of them should be what Rawls calls "hierarchical," still, "hierarchical societies are well-ordered in terms of their own conceptions of justice."<sup>46</sup>

Notice the ways in which the arguments for a justified state and for the state's legitimacy are drawn together in the Rawlsian account, and the more distinct Lockean versions of these notions are left behind. Justification is now justification to a particular set of persons, not justification "simpliciter," so that "justifying" is now more like "legitimizing" the state with respect to those persons (i.e., more like explaining how a state could have rights over some individual). And legitimacy is now grounded not in what those persons actually accept or do (by consenting or by taking benefits, say), but in what it is reasonable to expect them to accept—that is, in their hypothetical endorsement. So "legitimizing" is now more like "justifying." As Rawls puts it: "The exercise of political power is legitimate only when it is exercised in fundamental cases in accordance with a constitution, the essentials of which all reasonable citizens as free and equal might reasonably be expected to endorse."<sup>47</sup> Political power is legitimate with respect to a set of persons if it would be reasonable for them to endorse it. So the Lockean notions of justification and legitimacy are both "pushed" toward a Kantian middle ground where the distinction between them virtually disappears: the Rawlsian argument that shows a type of state to be justified also shows all tokens of that type to be legitimate.<sup>48</sup> Both forms of evaluation are now grounded simply in show-

46. John Rawls, "The Law of Peoples," in *On Human Rights*, ed. S. Shute and S. Hurley (New York: Basic Books, 1993), p. 64.

47. Rawls, "Reply to Habermas," p. 148. Nagel, similarly, suggests that the unanimous acceptance of a political arrangement that its legitimacy (and justification) requires "is neither actual unanimity among persons with the motives they happen to have, nor the kind of ideal unanimity that simply follows from there being a single right answer which everyone ought to accept because it is independently right, but rather something in between: a unanimity which could be achieved among persons in many respects as they are, provided they were also reasonable and committed within reason to modifying their claims, requirements, and motives in a direction which makes a common framework of justification possible" (Nagel, pp. 33–34).

48. Rawls's only explicit discussion of the idea of legitimacy (in his "Reply to Habermas") focuses principally on the legitimacy of governments (regimes) and laws, not on state legitimacy, and on the grounds of legitimacy, not the meaning of legitimacy. Accordingly, he there associates legitimacy with "lawfulness," claiming that the legitimacy of specific rulers and laws is a function of "their pedigree," of how they came to power or came to be

ing that it would be reasonable for a particular set of persons to accept a particular form of political/economic organization.

## IV

I want now to explain why I think (what I am calling) the Kantian account leaves behind, unanswered, certain important questions and without warrant diminishes the force of certain forms of institutional evaluation. While it may sometimes appear that the Kantian's privileging of political solutions to the problem of social interaction is just a conservative view of the state, or a resigned acceptance of the inevitable, this cannot really be what's going on. Standing armies, for instance, seem about as inevitable as states, but Kantians certainly are not committed to accepting them. The Kantian argument at work here, albeit behind the scenes, must follow Kant in maintaining that the state is for each of us morally necessary. Promoting justice, respecting others' rights, or doing other duties requires that we cooperate by accepting the duties of membership in acceptable states.

But why doesn't the Kantian say, with the Lockean, that our duties are just to treat others rightly, whether as members of some civil society or not, and that it is up to each of us to choose membership or nonmembership? Being born in a state and living in a state cannot, of course, be made optional (barring unexpected concessions by existing states); but being a member of a state with a member's obligations can be. Contemporary Kantians sometimes do seem to take seriously this ideal of Lockean political voluntarism. Rawls writes that "no society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular society. . . . Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme."<sup>49</sup> Nagel also suggests that

in force ("Reply to Habermas," p. 175). But the legitimacy (lawfulness) of the pedigree depends in turn on whether or not the constitution that specifies the relevant procedures for determining adequate pedigree is just. The constitution must "be sufficiently just, even though not perfectly just, as no human institution can be that" (ibid.). It seems reasonable to conclude that *state* legitimacy turns, for Rawls, on the justice of the basic structure, as the passage cited in the text above suggests. Legitimate states are those that use their power according to the provisions of a just constitution. It thus seems to me that Rawls's accounts of justice (justification) and legitimacy are much more closely tied together than is suggested by Brighouse (p. 721). What exactly Rawls means by legitimacy—that is, what a state's legitimacy consists in—is less clear. But given his skepticism about citizens' political obligations (*A Theory of Justice*, pp. 113–14), obligations that correlate with (part of) the strong Lockean conception of legitimacy rights, it seems likely that Rawlsian legitimacy is only a liberty (or justification) right. This, of course, might explain why Rawls never makes explicit the form of his argument from justification to legitimacy. It may simply seem obvious to him that a justified state has a "justification right" to rule and use political coercion (though even this limited claim seems to me not at all obviously true, as my arguments in the text suggest).

49. Ibid., p. 13. See Rawls's similar remarks in *Political Liberalism*, pp. 135–37, 222.

“subjection to a political system cannot be made voluntary,” but that we should still think of “the search for legitimacy” as “an attempt to realize some of the values of voluntary participation.”<sup>50</sup>

The suggestion here seems to be that the ideal of a fully voluntary society should of course guide us, but the (regrettable) facts of political life force us to accept instead nonvoluntarist standards of legitimacy which appeal only to (what Nagel calls) “quasi-voluntariness.” There is, however, something disingenuous about this suggestion.<sup>51</sup> For if the ideal of the fully voluntary political society were in any way regulative for them, Rawls (et al.) would be interested in restructuring political societies so as to make the choice of membership (or nonmembership) as voluntary at least as circumstances would permit. And there are many nonutopian possibilities available for doing this, such as offering various classes of citizenship (and “resident noncitizen”) options, training and support to make emigration and resettlement a more realistic option, programs to disseminate relevant information, a more formalized choice process, and so on.<sup>52</sup> Advocating and pursuing such changes only makes sense, of course, if one has a genuine commitment to political voluntarism. Few of the most prominent contemporary political philosophers, however, have shown any interest in such matters, suggesting that any allegiance they might feel to the voluntarist ideal is at best half-hearted.

In fact it seems clear that contemporary Kantian and hypothetical contractarian political philosophies have illicitly appropriated the justificatory force of voluntarism while being (like Kant) in no real way motivated by it. Kantians think of institutional evaluation in terms of what ought to be chosen by people—that is, in terms of the moral quality of institutions, what makes those institutions good (virtuous, just, etc.)—not in terms of people’s actual choices. Appeals to hypothetical choice, acceptability, or reasonable nonrejectability have a very different moral basis and force than do appeals to actual choice (or to any other ground of special relationship between individual and institution). Even appeals

50. Nagel, p. 36.

51. Indeed, Rawls’s gestures toward voluntarism just seem inconsistent with the spirit of his project. For societies whose structures have been legitimated (in the Lockean sense) by the free, unanimous consent of their members may have quite illiberal shapes without thereby losing their legitimacy. Highly restrictive religious orders or extremely conservative agricultural communes, empowered by the free, informed consent of all members, could count as perfectly legitimate “societies” on the Lockean model.

52. Paradoxically, perhaps, such “individualist” changes might well also bring an increase in feelings of communal solidarity. Where we feel that we have genuinely chosen our place, we may be less likely to feel oppressed and alienated by aspects of the social world that are “given” and that seem immune to change. Choice is not the enemy of community (contrary to the suggestions of many communitarian thinkers). Indeed, such choice may be essential to both a community’s vitality and its virtue (since if virtues must be voluntary, communitarian and republican emphases on artificial means of character formation may be self-defeating).



to what ought to be chosen in light of the individual's own interests and values are quite different in force from appeals to that individual's actual choices.

Appeals to what ought to be chosen (simpliciter) are perfectly impersonal sorts of moral evaluations. Appeals to what ought to be chosen by me, in light of my peculiar interests and values, are more personal but still may be experienced as (possibly paternalistic) groundings for external practical constraints. Appeals to what I have actually chosen, or to other morally obligating features of my political history, by contrast, seem direct and personal. I am constrained only by how I have in fact lived and chosen. This not only makes the moral constraint seem less external and more obvious (explaining why promissory obligations have seemed to so many the least controversial sort of moral obligation, with breach of promise even seeming to some to involve a contradiction). It also makes the constraint more likely to be motivationally efficacious. And it seems appropriate to suggest that a state's authority over an individual ought to depend on some such personal transactions, given the coercive, very extensive, and often quite arbitrary sorts of direction and control that state authority involves.

In a way, of course, contemporary Kantians have demonstrated considerable sensitivity to some of these points. When Rawls rejects purely impersonal "metaphysical" justifications of the liberal state in favor of "political" justification to the state's citizens,<sup>53</sup> he intends a more personal and uncontroversial justification for the use of political power. Similarly, Nagel's insistence that political justification be understood in terms of what is necessary to satisfy the demands of the personal standpoint, as well as the impersonal, amounts to a clear demand that more personal justifications of power be taken seriously.<sup>54</sup> These accounts of justification seem to aim at a "middle ground" in three related senses. First, they aim for the middle ground between justification understood as the impersonal presentation of objectively good reasons or good arguments to a conclusion and justification understood pragmatically, where my justification fails if my audience is unconvinced by it.<sup>55</sup> The more personal form of Kantian justification—justification in terms of individuals' hypothetical endorsements—recognizes the need to take account of differing viewpoints, so that justifications can hope to convince and motivate those to whom they are addressed, but without surrendering completely to the eccentricities of individual uptake. Second, such justifications aim for the middle ground between impersonal appeals to what is objectively right and personal legitimation by actual individual consent. Justification

53. Rawls, *Political Liberalism*, pp. 137, 217.

54. Nagel, pp. 4, 17–18.

55. See, e.g., Christopher Bertram, "Political Justification, Theoretical Complexity, and Democratic Community," *Ethics* 107 (1997): 563–83, p. 568.

to others is seen as a matter of meeting those who disagree with us on common ground,<sup>56</sup> and individual consent offers no such ground. Third, more personal Kantian justifications aim for the middle ground between justifying to highly idealized persons and justifying to persons as we actually find them around us,<sup>57</sup> with all of their confusions, alienations, and irrationalities. By utilizing instead justification by appeal to reflective hypothetical endorsement, we try to take seriously the requirement that justifications be offered to persons in their own terms, while still refusing to allow justification to be held hostage by the worst features of actual persons.

Understood in these terms, we should have considerable sympathy for the approach of the new Kantians. My complaint about the Kantian approach, however, is that in striking this middle ground, its dimensions of institutional evaluation become watered-down and one-sided. Rather than in this way searching for a single compromise dimension of evaluation, located somewhere between impersonal justifications and personal legitimations, the Lockean acknowledges instead the moral importance of both of these kinds of evaluation. How we have actually freely lived and chosen, confused and unwise and unreflective though we may have been, has undeniable moral significance; and our actual political histories and choices thus seem deeply relevant to the evaluation of those political institutions under which we live. I do not, of course, mean to deny that facts about the justice or goodness or moral quality of an institution—understood both in (“objective”) Lockean terms and in (the “political”) terms of the hypothetical endorsement of those subject to that institution—are centrally important to its evaluation. But I do wish to claim that we should and do also take facts about the nature of an institution’s actual relationship with particular individuals to be crucially relevant to our evaluation of its operation with respect to those individuals. If the former ground of evaluation seems undeniably relevant to questions about which states ought to be permitted to exist and which ought to be opposed, the latter ground seems just as undeniably relevant to questions about the kinds of rights over particular individuals that states can reasonably claim. The Lockean tries to emphasize the importance of both grounds of institutional evaluation. The Kantian, I think, in effect tries to make it seem that the former kind of evaluation—what I have been calling the state’s “justification”—can without further argument give us the latter—what I have been calling the state’s “legitimacy” with respect to particular persons.<sup>58</sup>

56. “Justification is argument addressed to those who disagree with us. . . . Being designed to reconcile by reason, justification proceeds from what all parties to the discussion hold in common” (Rawls, *A Theory of Justice*, p. 580).

57. Bertram, p. 574.

58. For Rawls, the “principle of legitimacy” has “the same basis as the substantive principles of justice” (*Political Liberalism*, p. 225).

To put this point in a slightly different way, we can say that *generic* evaluations in political philosophy are grounded in the general moral virtues or other positive qualities of political arrangements (such as their justice or reasonable acceptability) or their moral accomplishments for their subjects conceived as a whole (such as increases in social happiness). What we can call *transactional* evaluations<sup>59</sup> are grounded in morally significant features of the specific histories of interaction between individual persons and their polities (features such as the giving of consent or the receipt of benefits, along with the subsequent absence of rights-violations).<sup>60</sup> While states are generically evaluated with respect to either humankind as a whole (as in Locke) or the body of subjects of that state as a whole (as in Rawls), the transactional evaluation of states is with respect to individuals and may differ from one to the next. Put in this language, my claim is that the Kantian tries to make generic evaluation the sole real category of institutional evaluation (perhaps because of worries that transactional evaluations of even quite decent existing states will turn out to be negative in many respects).

Much of the Kantian's work here is done for him or her by a specific conception of the "reasonable." If the Kantian can portray a (type of) state as acceptable to reasonable persons, then we will simply seem un-

59. I use the term 'transactional' here with the intention of ignoring one of its senses: that which conveys "negotiation" or "multilateral participation." In the sense I intend here, a "transaction" has occurred even where only one of the parties involved is active (e.g., where one party benefits another without the other's knowledge or participation).

60. It may be initially unclear how my distinction between generic and transactional evaluations in political philosophy relates to others, such as the distinction drawn by Schmidtz between (what he calls) "teleological" and "emergent" justifications. According to Schmidtz, these latter are the "two kinds of justification in political theory" (p. 81). A teleological approach "seeks to justify institutions in terms of what they accomplish," while "the emergent approach takes justification to be an emergent property of the process by which institutions arise" (ibid., p. 82). I believe Schmidtz's account of the two types of justification, as stated at least, is not an exhaustive classification. His conception of a teleological justification is insufficiently broad, since, unlike what I here call generic justification, it fails to include justifications that appeal to the moral virtues of states in consequence of which those states deserve support. The state (or some kind of state) may be justified by appeal to its virtues, or by appeal to what it might reasonably be expected to accomplish, even if, through bad luck (e.g., natural disaster or war) or lack of public support, say, it actually fails to accomplish much of value. There can be good reasons to support a state that may not be translatable into "accomplishments" by the state (as when people simply fail to act on those good reasons). Similarly, Schmidtz's notion of an "emergent" justification seems to me too narrow, since it includes only justifications that concern the state's origin. Appeals to actual consent, for instance—Schmidtz's paradigm of an emergent justification—may in fact be appeals to consent given over time, not just once (and for all) in "the process by which institutions arise"; and concerns about rights-violations later in the game, rather than at the state's origin, seem to be left out of Schmidtz's classification. My alternative suggestion is that we distinguish institutional evaluations in political philosophy according to whether they appeal to the state's general moral relations with its subjects conceived as a body, or instead to its particular relations with individual subjects.

reasonable if we insist that transactional evaluations of the state are also morally crucial and possibly in conflict with this favorable generic evaluation of it. If the state's authority is acceptable to the reasonable, then how could we reasonably deny that it has the right to direct and coerce within its territory and that we are obligated to comply? Directing and coercing is, after all, what states are supposed to have authority for.

We must remember, however, what portraying a state as acceptable to the reasonable means for the Kantian. Rawls says that "persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so."<sup>61</sup> But since, as we have seen, the kind of cooperation with which Rawls seems concerned is political cooperation in establishing a just constitution for the state, the "reasonableness" of persons seems to presuppose a certain orientation toward political organization. If Rawls and his followers allow willingness to reach political agreement with others to function as a central feature of the concept of reasonableness, then what it is reasonable to reject (or to accept) will be in part determined by what it is necessary to accept in order to arrive at a collective political solution to social problems. Rawls argues that all are bound to accept reasonable terms of cooperation and hopes that it is possible to find a consensus on such terms, so that we can achieve more than a mere political *modus vivendi*. But the consensus in question is a consensus of reasonable comprehensive views, and reasonable views seem to be the views of those who are committed to finding some acceptable terms of political cooperation. But this seems to mean that views that are highly individualistic or pacifistic, say, are condemned by such an account to unreasonableness—and their proponents condemned to obligation to a coercive authority that cannot legitimate itself in their terms—by virtue of their failure to be precommitted to finding political solutions to social problems.<sup>62</sup>

But surely this conception of the "reasonable" should trouble us. It

61. Rawls, *Political Liberalism*, p. 49.

62. While I agree with little else in Michael Sandel's critique of liberal political philosophy, I think he is correct to raise the question (against Rawlsian—or what Sandel calls "minimalist"—liberalism) of "why the practical interest in securing social cooperation . . . is always so compelling as to defeat any competing moral interest." Sandel (rightly, in my view) argues that "it is not always reasonable to set aside competing values that may arise from substantive moral and religious doctrines" (*Democracy's Discontent* [Cambridge, Mass.: Harvard University Press, 1996], p. 19). Rawls at one point briefly considers the position of a Quaker pacifist ("Reply to Habermas," pp. 148–49) and argues that because Quakers support a constitutional regime and majority rule (as the best form of political association for those concerned with the rights and interests of all), their view is reasonable, and the decisions of their less pacifistic compatriots can be justified to them. But one who is an *antistate* pacifist, believing (not implausibly, I think) that modern states are by their very natures fundamentally opposed to pacifism, holds what Rawls seems to count as "unreasonable" views, so that no justification of state policy is owed to him.

is not obviously unreasonable (though it may be un- or anti- many other things) to prefer solitude and independence to cooperation. More importantly, it is surely not unreasonable to prefer more limited or less coercive, small-scale forms of cooperation to states (and all that states involve). Too much moral content, then, seems to be built (without argument) into the contemporary Kantian conception of the reasonable. So the Kantian political philosopher must, to support this understanding of the reasonable, show us why the refusal to seek and/or abide by “reasonable” or “acceptable” political terms of cooperation is objectionable.

The obvious route to take, of course, is to argue, with Kant, that each person has obligations or duties that can only be fully or effectively discharged in a state. But a traditional “justification” of the state will not do enough work here. We all know why the contractarians believed it necessary to have states. We know the “Hobbesian” reasons: the state of nature produces frequent “Prisoners’ Dilemmas” in which “anticipation” (hence conflict) is the dominant strategy, and it produces “coordination problems” (which require the salient solutions of the state). And we know the “Lockean” reasons: people are biased in their own favor, they get carried away by their passions, they don’t always know what’s right, and they lack the power and impartiality to enforce the right even where they do know it. And we know the “Kantian/Rousseauian” reasons: in the state of nature persons lack a certain kind of freedom (or autonomy), and true justice cannot be established.

The problem facing the Kantian is that none of these reasons, quite plausibly offered in support of having states, translates naturally into a reason why any particular contemporary person must become or remain a member of some state. Even if the problems Hobbes, Locke, and Kant identified can’t be solved without states (a point on which I am not fully convinced), all of these problems of life without states can be solved without unanimous participation, either at the state’s formation or later in its history.<sup>63</sup> States can be made without the participation of all in a particular territory, and they can be maintained without the participation of all in their jurisdictions. While it may be more convenient for states to simply impose political duties on all within the territories they claim, it would certainly be possible (and perhaps even optimific) for states to enforce fair rules that severely limit the political duties of unwilling subjects (as well as the political benefits they receive), while still protecting

63. Jean Hampton, e.g., justifying the state in a Hobbesian fashion, argues that “there are moral grounds for generating such a remedy [i.e., the state] because these problems [in the state of nature] have a severe negative impact on the well-being of other people. Moreover, in order to work, such a remedy must be *collective* in the sense that *all or most* people in a territory must . . . participate in it so that the warfare will end” (*Political Philosophy* [Boulder, Colo.: Westview, 1997], p. 73; second emphasis mine). But if most participating in the collective solution can solve the moral problem, then some opting out (on, say, individualist or pacifist grounds) is not necessarily wrong or “unreasonable.”

and doing justice for their willing citizens. The establishment of political justice and the enforcement of political rights for willing participants in states neither logically, morally, nor empirically requires mandatory membership (with a member's rights and duties) for the unwilling.

Since we are not often in the business of making states, it is natural at this point in the argument to turn to reasons why remaining in a state's territories without being a member (or accepting a member's obligation) is wrong—that is, why so-called internal emigration is impermissible or unreasonable. But these reasons will mostly correspond to those offered in familiar accounts of political obligation: that residence without discharging political obligations involves breaching one's tacit consent, demonstrates ingratitude, constitutes an unfair acceptance of benefits, etc. I have argued elsewhere<sup>64</sup> that these purported reasons are in fact quite unpersuasive, and the prominent contemporary political philosophers to whom I have been referring seem mostly to have agreed in turning away from them.<sup>65</sup>

Rawls and others argue that certain natural duties bind us to (some kinds of) states within whose boundaries we may find ourselves. We must promote or advance certain goods (e.g., justice) and comply with institutions that apply to us and that advance these goods. But insisting on an obligation of compliance with our own just institutions—as opposed to a duty only to support or not to undermine them—simply begs the question now at issue.<sup>66</sup> And it is hard to see why membership in a state (with its accompanying obligations) is necessary for advancing goods like justice. One can, for instance, support just arrangements in other ways than by specially binding ourselves to one of them. We can speak out against injustice, or we can put our money where our mouths are, or we can put our bodies where our mouths are (like the American pilots who went to China and England to help resist the Japanese and German aggression). If we can act morally without accepting membership in a political community, the Kantian cannot successfully argue that the state is for each of us “morally necessary” or that unwillingness to cooperate to produce shared political solutions is “unreasonable” or morally objectionable. It is, at worst, eccentric, or perhaps “unneighborly.”

Kant and Kantians would reply, I suspect, that I have overlooked the obvious moral duties that can only be discharged by accepting membership in a state. Each of us has a duty to contribute to the most efficient provision of that security and welfare to which every person has a right. Since states are necessary for such provision, duty requires that each of us join and participate in a satisfactory political society. It is unreasonable

64. Simmons, *Moral Principles and Political Obligations*.

65. See, e.g., Rawls, *A Theory of Justice*, secs. 18, 52; and Dworkin, pp. 192–94. Nagel does not deal with these arguments in *Equality and Partiality*.

66. See my *Moral Principles and Political Obligations*, chap. 6; and Dworkin, p. 193.

and immoral to decline to do so. This, we might say, is the real intended force of Kant's argument (which we considered earlier). The rights of others cannot be respected by us individually but require of us collective efforts.

The Lockean response must be that the Kantian here simply assumes what most needs showing. First, it is hard to accept the idea that the best way to understand the rights of others is as claims on whatever action by us will best promote their security and well-being. On the Lockean view, others have rights against us only that we do our fair shares in contributing to acceptable levels of security and well-being for all. Thus understood, the rights of others can be respected by us individually. Second, even if this Lockean view of rights is mistaken, it is simply not at all obvious that the best way open to me for attempting to provide security and welfare for others is by consenting to membership in and obeying the laws of the state that claims authority over me. If I live in a stable political society, I might well do better to scrupulously avoid undermining the security of others (and the viability of my state) while privately aiding the needy than I would do to simply obey the law and pay my taxes. If I live in an unstable society, dutiful compliance with law may be vastly inferior to private action as a way of respecting others' rights. In any event, it is plainly an empirical question, and not one for which a positive answer can just be assumed, whether political membership best discharges our duties and respects others' rights, even when we understand these duties and rights in the Kantian's preferred fashion. And the question is a question about our duties and rights here and now, not Kant's question about whether persons in a world without states would do best to create them.

If the Lockean is right that opting out of any statist terms of cooperation is morally permissible (because I can do my duty without assuming a member's obligations), then Lockeans are correct in thinking that questions about the state's justification—about how good or just a state it is—require answers quite different from questions about the state's legitimacy with respect to any particular person—that is, about the state's right to direct, coerce, and be obeyed, correlating with the subject's special obligations to the state. These are distinct dimensions of the moral evaluation of states with distinct grounds, both important and possibly in conflict (as in the case of a so-called benevolent dictatorship). The distinctness of these two dimensions of institutional evaluation is lost in contemporary political philosophy's "Kantian" orientation.

For the Lockean, although the justice or goodness—the justifiability—of our state gives us a moral reason not to undermine it, and perhaps to positively support it, we only have an obligation to obey the state's directives, and the state only has an exclusive moral right to direct, be obeyed by, and coerce us if either (*a*) we have directly interacted with the state in some way that grounds a special moral relationship of that

sort, or if (b) accepting membership in a state is the only way we can fulfill one of our other moral obligations or duties. This is the rule we accept to govern our relations with every other nonpolitical institution or arrangement, where we sharply separate issues of the virtues of those arrangements from issues of our obligations to participate in them.<sup>67</sup> The Lockean position that I favor, then, is that political institutions, while vastly more important and complicated than others, and despite their alleged unique capacity to solve certain assurance and coordination problems, are still in the end only artificial human creations with no natural claims on our allegiance or compliance. And this position, I have maintained, is well motivated in a way that is not true of the Kantian view that has effectively replaced it in contemporary political philosophy.

## V

I will conclude by very briefly noting how the two dimensions of institutional evaluation that I have called “justification” and “legitimacy” naturally call for our commitment to a third dimension of evaluation, about which I’ve as yet said nothing. Legitimacy, I have suggested, is the exclusive moral right of an institution to impose on some group of persons binding duties, to be obeyed by those persons, and to enforce those duties coercively. Legitimacy is thus the logical correlate of the (defeasible) individual obligation to comply with the lawfully imposed duties that flow from the legitimate institution’s processes. The proper grounds for claims of legitimacy concern the transactional components of the specific relationship between individual and institution. Because I subscribe to political voluntarism as the correct account of these transactional grounds for legitimacy, and because I believe no actual states satisfy the requirements of this voluntarism, I also believe that no existing states are legitimate (*simpliciter*).<sup>68</sup> States become more legitimate as they more

67. Hegel and contemporary Hegelians, e.g., argue, of course, for a sharp distinction between the rules governing “civil society” and those governing the State and so will be unimpressed by the fact that the rule I mention governs our relations with all nonpolitical institutions and arrangements. The state (with the family) is said to be “special” and governed by different rules, rather than being (as the Lockean claims) on one end of a uniformly governed continuum, along with other useful social arrangements. But Hegelian explanations of what is “special” about political arrangements seem to me either to rely on very obscure and dubious metaphysics or to simply beg the questions at issue (e.g., by without argument taking the well-conditioned beliefs of many in the state’s natural authority as true and unsuspecting).

68. If all states are illegitimate, how important can questions about legitimacy be? The proper answer, I think, is that state legitimacy remains an important dimension of institutional evaluation because where states are legitimate with respect to persons, those states can justify acting (in the sense detailed below) in more restrictive fashions, and those person can justify less in the way of noncompliance and resistance than where states are illegitimate with respect to persons. A state’s justification functions similarly to increase state options and decrease subject options, so that questions of justification would also remain important even if the anarchist were right that no existing states were justified.



closely approach the ideal of voluntary association, but no existing states are legitimate with respect to even a majority of their subjects.

That all states are illegitimate in this sense, however, does not imply that all states are equally bad. States can be more or less fully illegitimate and, hence, violate rights more or less widely and severely. And while all illegitimate states do wrong in seizing a monopoly on force to which they have no right, some illegitimate states are in addition hopelessly evil, while others are decent and benevolent. Some illegitimate states may thus be justified by reference to the good that they do, which is just to say that they merit our support, and we thus have moral reason to provide it. But saying that some states merit support is not at all the same as saying that they have a right to direct and coerce us, which we are bound to honor. Thus far we have only the distinction between justification and legitimacy, as this distinction works in a philosophical anarchist's political philosophy.

But to these two dimensions of evaluation we really must add a third. For states may be justified in acting in certain ways on particular occasions, I think, even if they are neither justified nor legitimate—simply because anyone would be justified in so acting. States may be justified on balance in enforcing certain laws, say, even if they are not justified on balance in existing or are not legitimate with respect to those against whom the laws are enforced. In my view even the government of the Third Reich was justified in prohibiting rape and punishing rapists, however illegitimate that government may have been with respect to its subjects and however unjustified was its existence (i.e., however much of an improvement over its rule even the state of nature would have been). It is important to see that justifications for particular actions or policies are not in any simple way related to or derivable from justifications for existing or from possession of the right to be the one who acts or enacts policies.

Anyone may, I think, justifiably restrain would-be rapists. Anyone may, I think, justifiably push away the drowning swimmer who threatens to swamp our overloaded lifeboat, even if that actor has no special warrant or right or authority to decide such matters. Some things anyone may justifiably do; some things anyone may justifiably do in crisis situations. From this it follows that a state or government may also sometimes act with justification, even if that kind of state is not justified and even if that particular state is not legitimate. And even if the state is both justified and legitimate, that particular state plainly may act in ways or enact policies that are not morally justified.

Similarly, individuals may sometimes justifiably disobey the law or refuse otherwise to support their governments or states, even if they owe their governments general political obligations; and they may sometimes have no justification for acting contrary to their states' demands or for undermining their states, even if they owe their states no such obliga-

tions and have the right to disobey—for we are not always morally justified in exercising our rights.<sup>69</sup> The dimensions in which states may be morally evaluated, then, are more numerous and their interactions more complex and messy than my discussion above suggested.

Locke, I think, was right to stress the important difference between the grounds for the justification of the state and those for state legitimacy. My objective in this article has been to try to preserve the clarity of that distinction from the blurring of it that contemporary political philosophy seems to be bringing about—and to simply mention a third dimension of political evaluation which any complete account of the subject must accommodate.

69. Schmitz has argued that my “claim that legitimizing the state requires a deliberate act but justifying it does not” in fact amounts to a retreat on my part from my proclaimed voluntarist (“emergent”) justifications for political obligation and legitimacy to an unacknowledged “teleological” justification (p. 95). But what I discuss in the passages to which Schmitz refers is not justifying the state, or even legitimating it, but only “a justification of government *action*”: even if “a certain government does not have the right to command, its actions may nonetheless be morally justifiable” (*Moral Principles and Political Obligations*, p. 199; my emphasis). One can, I think, coherently support (as I do) voluntarist standards for legitimacy (and political obligation)—for demonstrating a general right to rule—while at the same time denying that the justification for particular actions or policies, of either states or individuals, is uniquely determined by the presence or absence of general state legitimacy (or political obligation).