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LEGITIMACY IN A BASTARD KINGDOM

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“Now, gods, stand up for bastards!”

No, this is not the prayer of the New York litigator; it is the battle cry of Edmund, bastard son of the Earl of Gloucester and one of the great early modern theorists of political legitimacy. Edmund is scheming to usurp the earldom with the invention of a forged letter that frames the legitimate heir, his half-brother Edgar. Edmund’s political philosophy is laid out in his first soliloquy in *King Lear*, which I quote below in its entirety. Why I believe Edmund to be a great theorist of legitimacy will become more clear over time:

*Thou, Nature, art my goddess; to thy law
My services are bound. Wherefore should I
Stand in the plague of custom, and permit
The curiosity of nations to deprive me,
For that I am some twelve or fourteen moon-shines
Lag of a brother? Why bastard? Wherefore base?
When my dimensions are as well compact,
My mind as generous, and my shape as true,
As honest madam’s issue? Why brand they us
With base? With bastardy? Base, base?
Who, in the lusty stealth of nature, take
More composition and fierce quality
Than doth, within a dull, stale, tired bed,
Go to the creating a whole tribe of fops,
Got ‘tween asleep and wake? Well, then,
Legitimate Edgar, I must have your land:
Our father’s love is to the bastard Edmund
As to the legitimate: fine word, legitimate!
Well, my legitimate, if this letter speed,
And my invention thrive, Edmund the base
Shall top the legitimate. I grow; I prosper:
Now, gods, stand up for bastards!*¹

Edmund’s case has been partially conceded by Gloucester, who has already told us that he is quite disposed to recognize Edmund. He’s fond of the lad: “Tho this knave came something saucily to the world before he was sent for, yet was his mother fair, there was good sport in his making, and the whoreson must be acknowledg’d.”² Though Edmund lacks one kind of pedigree, Gloucester grants that the circumstances of his creation confer upon him standing of another sort. Edmund has a point.

I. FROM KOSOVO TO PALM BEACH COUNTY

We’ll return to Edmund and his theory of legitimacy in a moment, but first consider a contemporary puzzle about legitimacy that comes about when we juxtapose responses to the 1999 NATO intervention in Kosovo and responses to the 2000 U.S. presidential election. To understand the piece of the puzzle posed by Kosovo, we have to back up a bit to the fall of Srebrenica in 1995 and what I’m going to sarcastically call the Srebrenica Doctrine. Srebrenica was a United Nations “safe area” that proved insufficiently safe for the 7,000 or so Bosnian Muslim men who were led to their slaughter under the supposed protection of a Dutch peacekeeping battalion. There were a lot of negligent mistakes made around Srebrenica, and arguably there was some cold-hearted political strategy that led to the fall and the slaughter as well. But

Srebrenica happened in part because U.N. officials were in the grip of an idea, the Srebrenica Doctrine, which has three prongs: immunity, neutrality, and multilateralism. In order to respect the sovereignty of nations and the immunity from interference that supposedly follows, the humanitarian intervener must avoid two sorts of partisanship: taking sides in a conflict, and acting on one's own.

To insure neutrality and multilateralism, multiple parties held the keys needed to unfetter would-be rescuers. The Bosnian Muslims were prevented from arming and defending themselves, lest the peacekeepers be seen as taking sides among armed combatants. Once the Serbian encroachment began, the besieged U.N. peacekeepers were repeatedly instructed to give ground rather than fight back. The NATO fighter pilots who, after days of delay, eventually flew overhead and could have routed the Serbs rather easily, were hampered by rules of engagement that permitted only close air support in defense of the peacekeepers themselves, not the unarmed civilians the Dutch battalion was there to protect. To save Srebrenica from slaughter, too many people had to turn their keys, and though the military commander holding the NATO key was prepared to turn it, the diplobureaucrat holding the U.N. key was not.³ To counterattack Serb forces would violate the neutrality that the Srebrenica Doctrine maintained was a requirement of international law.

In the aftermath of Srebrenica comes the NATO intervention in Kosovo, a ten-week bombing campaign aimed at driving Serb-dominated Yugoslav forces out of the Yugoslav province of Kosovo in order to end the persecution of the ethnic Albanians. Whatever one thinks about the moral case for intervening in Kosovo, one is hard-pressed to make a legal case. Military intervention that takes sides in an internal struggle within a sovereign nation appears to be a straightforward violation of the U.N. Charter, and so of international law. The illegality of the intervention was recognized by the independent international commission on Kosovo chaired by Richard Goldstone, Justice of the Constitutional Court of South Africa and Chief Prosecutor of the U.N. International Tribunals for the Former Yugoslavia and Rwanda. So the commission's report uncouples the concept of legality from legitimacy: "Experience from the NATO intervention in Kosovo suggests the need to close the gap between legality and legitimacy."⁴ There is a gap. "The intervention was not legal because it contravened the Charter prohibition on the unauthorized use of force."⁵ Straightforwardly, in violating the U.N. Charter, the intervention was illegal.⁶ Nonetheless,

... the question of whether the intervention was legitimate has to be answered, especially since Kosovo may provide a precedent for further intervention in the future. The Commission's answer has been that the intervention was legitimate, but not legal, given existing international law. It was legitimate because it was unavoidable: diplomatic options had been exhausted, and two sides were bent on a conflict which threatened to wreak humanitarian catastrophe and generate instability through the Balkan peninsula.⁷

The Goldstone report drives a wedge between legitimacy and legality, and goes on to offer an argument why, though illegal, the interveners still had proper legitimate authority. Gloucester's whoreson doesn't simply take lawfulness as the standard. "Wherefore should I/stand in the plague of custom and permit/the curiosity of nations to deprive me?/... When my dimensions are as well compact,/My mind as generous, and my shape as true,/As honest madam's issue?" Edmund offers a substantive standard for the proper exercise of power whether or not it comports with the curious customs of conventional law. So too, the Kosovo Commission: in its view, a wedge can be driven between legality and legitimacy, and the Kosovo intervention, though illegal, was nonetheless legitimate.

Now consider the same wedge turned around. The example takes us to the arithmetically challenged state of Florida after the 2000 presidential election. A couple of days after the final Supreme Court decision

that gave the presidency to George W. Bush, House Minority Leader Richard Gephardt was interviewed on “Meet the Press.” After a rather lengthy exchange in which the interviewer is trying hard to get Gephardt to concede that George W. Bush is legitimate, the interviewer asks,

“So George W. Bush is the legitimate forty-third president of the United States?”

Gephardt answers: “George W. Bush is the next President of the United States.”

Question: “But is he legitimate?”

Answer: “We have to respect the presidency, we have to respect the law, and we have to work with him to try to solve the people’s problems.”⁸

“The first [distinction] is [that] between descriptive legitimacy—the social fact that people believe some person or institution has the moral right to rule—and normative legitimacy—genuinely having the moral right to rule.”

In both cases, we see commentators claiming that legitimacy and legality can come apart. The Kosovo intervention, though illegal, was legitimate, and the Bush presidency, though legal, is illegitimate. Edmund drives yet another wedge, between legitimacy and pedigree, and challenges the idea that the criteria of legitimacy are procedural, not substantive. Look at me! My dimensions are as well compact, my mind as generous, and my shape as true. What is this idea of legitimacy, that it can be used in these sorts of ways? Can legality, pedigree, and legitimacy indeed come apart?

To answer, we need to make two distinctions. The first is the distinction between *descriptive* legitimacy—the social fact that people believe some person or institution has the moral right to rule—and *normative* legitimacy—genuinely having the moral right to rule. These are two different notions, and we need to be clear about when we’re using one, when we’re using the other, and what, if anything, connects the two.

The other distinction is between the *word* legitimacy, the *concept* or idea of legitimacy, and particular *conceptions* of legitimacy—the content of the concept. “Fine word, legitimate!” Edmund says with irony. It is a fine word, but we need to trace its changing senses over time to distinguish the word from the idea or ideas it expresses. The same word, of course, can come to refer to different concepts—a “civil right” is not a polite uppercut to the jaw—and different words—“authority” is the closest cousin here—can refer to the same concept. I have, a moment ago, offered a rough account of the concept by saying that legitimacy is the moral right to rule, but if we understand conceptual analysis as the exercise of marking off apt boundaries for fruitful argument so that we neither talk past each other nor beg the question, we may discover that this rough draft needs some editing. Finally, the concept or idea of legitimacy can be filled out in different ways. We can both agree that we are talking about the same idea, legitimacy, but disagree about its content: criteria for how you get legitimacy and what it gets you.

II. DESCRIPTIVE AND NORMATIVE LEGITIMACY

Contemporary political usage of legitimacy often is ambiguous or confused. Consider the U.S. Supreme Court opinions surrounding *Bush v. Gore*. Here is the dissent of Justice Stevens from the stay that temporarily stopped the Florida recount while its legality was being adjudicated:

It is clear, however, that a stay should not be granted unless an applicant makes a substantial showing of a likelihood of irreparable harm. In this case, applicants have failed to carry that heavy burden. Counting every legally cast vote cannot constitute irreparable harm. On the other hand, there is a danger that a stay may cause irreparable harm to the respondents—and, more importantly, the public at large—because of the risk that “the entry of the stay would be tantamount to a decision on the merits in favor of the applicants.” ... Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election.⁹

Does Stevens mean that preventing the recount will cloud our perceptions of legitimacy, so that we will hold mistaken or uncertain beliefs about who has the genuine right to rule, or does Stevens mean that thinking makes it so, and the cloud will threaten the genuine legitimacy, the genuine moral right to rule, of the purported winner?

Justice Scalia, responding to Stevens, clearly understands Stevens to be making a point about perceptions:

The issue is not, as the dissent puts it, whether “[c]ounting every legally cast vote ca[n] constitute irreparable harm.” One of the principal issues in the appeal we have accepted is precisely whether the votes that have been ordered to be counted are, under a reasonable interpretation of Florida law, “legally cast vote[s].” The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires.¹⁰

Of course counting legal votes causes no irreparable harm, but counting votes of questionable legality can, and this is so even if they are ultimately ruled to be illegal. How? By casting a cloud on Bush’s *claim* of legitimacy, not on his legitimacy itself. As I read Scalia, you either have or don’t have legitimacy regardless of what people think you have. Irreparable harm comes if a cloud is cast over the truth, and the public fails to accept Bush’s genuinely legitimate rule. Scalia recognizes the gap between descriptive and normative legitimacy. Count first and rule on legality afterwards is a recipe for perceived illegitimacy, but not for genuine illegitimacy. Though the court was divided about the effects of the recount on perceptions of legitimacy, it agreed that legitimacy and perceptions of legitimacy are separable ideas—or so it seems. But now consider Justice Breyer’s understanding of legitimacy in his dissent from the final decision that gave the presidency to Bush. Breyer is commenting on the disputed Electoral College count in the Hayes-Tilden presidential election of 1876, which was decided by an ad hoc election commission appointed by Congress made up of five Senators, five Congressmen, and five Supreme Court justices. The commission split along partisan lines, and Justice Bradley cast the deciding vote for Hayes, apparently on technical, apolitical grounds:

The relevance of this history lies in the fact that the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public the process had worked fairly guided by the law. Rather, it simply embroiled members of the Court in partisan conflict thereby undermining respect for the judicial process.¹¹

On Breyer’s telling, several Supreme Court justices who had genuine legitimacy on their bench tried but failed to lend this property to a new, ad hoc deliberative body, the election commission. Why would one

think that this lending could succeed, and why did it fail? We can't be sure, but Breyer here apparently holds that thinking does make it so, and genuine legitimacy just *is* perceived legitimacy. If enough people had believed that Justice Bradley, respected and authoritative in his own domain, was acting with proper warrant in this new domain, then the legitimacy of the Supreme Court would have been successfully borrowed by the election commission. But as it turns out, enough people didn't believe this.

“Many press accounts of Florida’s election controversy either fail to differentiate normative and descriptive legitimacy or else implicitly suppose that normative legitimacy just is descriptive legitimacy.”

Many press accounts of Florida’s election controversy either fail to differentiate normative and descriptive legitimacy or else implicitly suppose that normative legitimacy just is descriptive legitimacy. Consider this *Los Angeles Times* headline: “Bush Has Legitimacy, But It’s Fragile.”¹² Pause a moment and guess what sort of story would generate such a lead....The story reports the findings of a poll taken shortly after the Supreme Court ruling, in which 52% answered “Yes” to the following question: “Did Bush win the election legitimately?” He’s legitimate, because a majority says he is, but his legitimacy is fragile, because it’s a narrow majority. What Bush has is legitimacy—presumably, the genuine article. He has it, not because he received more valid votes

than Gore in Florida, or because *Bush v Gore* was correctly decided, or because Supreme Court decisions have moral authority even when mistakenly decided. He has genuine legitimacy because 52% *believe* that he received more valid votes or *believe* the case was correctly decided or *believe* that even mistaken courts are authoritative—even if these beliefs are false. Should 3% of the public change their minds—influenced by some fine point about statistical sampling, perhaps, or by a law review article on federalism, or by a political philosophy paper—this fragile legitimacy would crumble, and Bush would revert to a bastard president.

This conflation of legitimacy itself and beliefs about it—between the normative and the descriptive—has its start in the social theory of Max Weber. I don’t think that Weber himself suffers from this conflation: it is fairly clear that his account of legitimacy is an exercise in descriptive social science, not normative political philosophy, and the object of description is the social fact that people have *beliefs* about the normative grounds of legitimacy:

*But custom, personal advantage, purely affectual or ideal motives of solidarity, do not form a sufficiently reliable basis for a given domination [Herrschaft]. In addition there is normally a further element, the belief in legitimacy [der Legitimitätsglaube]. Experience shows that in no instance does domination voluntarily limit itself to the appeal to material or affectual or ideal motives as a basis for its continuance. In addition every such system attempts to establish and to cultivate the belief in its legitimacy.*¹³

Famously, Weber describes three pure types of grounds claimed by rulers to cultivate belief in their legitimacy: rational-legal grounds, traditional grounds, and charismatic grounds. But he takes a shortcut, drops the repeated reference to beliefs about legitimacy, and simply labels these grounds pure types of “legitimate domination” [*legitime Herrschaft*].¹⁴

After Weber, “legitimacy” enters into the lexicon of social science as a descriptive term with unexamined normative entailments. This has had two unfortunate consequences. Either the full-throated normative question about whether a ruler has genuine moral legitimacy becomes difficult to articulate, or—worse—the normative question is thought to be answered directly by empirical observation, so that legitimate rule just is rule believed to be legitimate.

But it is a conceptual confusion to hold that “legitimate” simply means “believed to be legitimate,” for descriptive legitimacy is parasitic on the conceptually prior idea of normative legitimacy. What is supposed to be the content of these beliefs about legitimacy? Consider: when the objects of this social scientific description, the members of some political society, believe that a rule or a ruler is legitimate, they are not (or not simply) engaging in their own social scientific description of each other’s beliefs. If that were so, when the citizens polled by the *Los Angeles Times* were asked “Is Bush legitimate?” each would have to answer “I don’t yet know—I haven’t seen the results of this poll.” What descriptive legitimacy describes are views about normative legitimacy. (This is so, by the way, even if normative legitimacy does not exist, which would be the case if various forms of moral skepticism or anarchism were true. Unicorns do not exist either, but the idea of a unicorn does, and therefore one’s beliefs about what a unicorn is can be mistaken.)

“It is not incoherent to hold that an authority is morally legitimate if and only if most people (for whatever reason) believe that that authority is morally legitimate.”

This is not to assert that the social fact of what people take to be morally legitimate cannot figure in as a condition for having moral legitimacy. It is not incoherent to hold that an authority is morally legitimate if and only if most people (for whatever reason) believe that that authority is morally legitimate. But note that this is a claim about the normative criteria for having moral legitimacy—a particular conception—and not a claim about the meaning of moral legitimacy, which is conceptually more primitive than social facts about beliefs about it. Though not incoherent, such a claim is mistaken. In most cultures over most of history, women have believed that their husbands had legitimate authority over them, but that didn’t make it so. Similarly, the fact that people in a society believe that their rulers have legitimate authority, or the fact that the rulers of other societies believe that the rulers of the society in question have legitimate authority, doesn’t make it so.

Furthermore, it does seem that a conception of normative legitimacy that is wholly a function of beliefs about legitimacy fails the test of transparency, in that it depends on some people holding a different conception. Suppose a two-member polity is subjected to the rule of an outside ruler. Both members believe that the correct conception of legitimacy is that the ruler is genuinely legitimate just in case the other believes the ruler to be legitimate, and illegitimate just in case the other believes the ruler to be illegitimate. Neither has beliefs about the legitimacy or illegitimacy of the ruler, nothing else counts for or against legitimacy, and it is common knowledge between the two that this is their conception. Then there are two stable normative equilibria, legitimacy and illegitimacy, and this is so because there are two stable epistemic equilibria: both members’ believing the ruler to be legitimate and both believing the ruler to be illegitimate. But there are no grounds whatsoever for choosing between the two equilibria. As specified, neither the members nor their conception can deliver an answer to the question “Is this ruler legitimate or illegitimate?”

This result generalizes to the N -person case in which the conception of legitimacy that everyone holds is that the ruler is legitimate if and only if n or greater out of N persons believe the ruler to be legitimate, for n greater than 0 and less than N . To tip one way or another, there need to be exogenous beliefs about legitimacy or exogenous presumptions in favor of inferring beliefs in legitimacy that are precluded by the theory. For even if we suppose that each member of this society subscribes to the general conception that genuine legitimacy is wholly a function of beliefs about legitimacy, but they hold varying specific values for the critical threshold n , ranging from the minimal threshold of $n = 1$ up to the demanding threshold of $n = N-1$, the cascade that will bring about unanimous justified belief in legitimacy (or, symmetrically, illegitimacy) cannot get started unless one person believes that the ruler is legitimate (or illegitimate). But this cannot happen if all form beliefs about legitimacy in accordance with their conception: the cascade

depends on someone believing in the legitimacy or illegitimacy of the ruler on different grounds, or on making a mistake in inference about the beliefs of others.

In some games with multiple equilibria, aren't some strategies dominant? Yes, but this is not a game of strategy, in which players choose actions to their rational advantage. What to believe here is given by one's normative theory, and is not a matter of choice. Pascal's wager notwithstanding, a rational person cannot choose to believe. One can choose to *consent*, and on a normative account of legitimacy in which only consent matters, with the added assumption that it is to the rational advantage of each (or, on Kant's view, the duty of each) to live under legitimate rule, choosing to consent and thereby making the ruler legitimate is indeed a dominant strategy. But now consent, and not belief in legitimacy, is doing the work.

The appeal of taking perceived legitimacy as a sufficient condition for genuine legitimacy may arise from conflating perceived legitimacy with consent. An obvious way that belief in legitimacy and consent can come apart is when the belief has been fraudulently manufactured. If I agree to be governed by the winner of an election who actually stuffed the ballot boxes, or if I agree to be governed by God's prophet who actually is a con artist, I have not genuinely consented. Perceived legitimacy and consent also can come apart in a deeper way. I can believe that a government has the right to govern us without our consent without that belief itself constituting consent. When the bastard Edmund's nonfictional contemporary, James I of England, argued for the divine right of kings, he explicitly denied that the legitimacy of his power depended on any sort of consent. Now imagine you are an English subject taught to believe that the king is God's lieutenant on earth, answerable to God alone.¹⁵ You chafe at James's violations of his subjects' liberties, and have the mischievous thought that if your consent mattered, you would not grant it, but, alas, you believe that consent doesn't matter. I think it odd to say of a person whose belief in the legitimacy of a ruler depends on the belief that human volition is irrelevant to legitimacy has consented to be ruled.

More plausibly, descriptive legitimacy might be a necessary but not sufficient condition of normative legitimacy. This would be so if some measure of effectiveness were a condition for the justified exercise of coercive control, and the perception of justification were necessary for effectiveness.

Rather than Weber, we should return to the usage of Rousseau. When Rousseau in the opening lines of *The Social Contract* famously writes, "Man is born free, and everywhere he is in chains.... How did this change occur? I do not know. What can make it legitimate [*légitime*]? I believe I can answer this question," he is using legitimacy in the full-throated normative sense, a sense that is both historically and conceptually prior to Weber's.¹⁶ For Rousseau, legitimacy does not simply mean the social fact of legality. What are our chains, if not existing legal and political institutions? Though everywhere we are under law, the legitimacy of such law for Rousseau is an open question, not a tautology. Again, one can make the substantive moral argument that the social fact of valid law is a necessary and sufficient condition for legitimate law, but this is a substantive claim, not an analytic definition. For Rousseau, legitimate doesn't simply mean legal. Henceforth, when I refer to legitimacy unmodified, I mean normative, not descriptive, legitimacy.

III. WORD, CONCEPT, AND CONCEPTION

Let us now turn to the second set of distinctions: the word "legitimacy"—the concept or idea of legitimacy—and particular conceptions of legitimacy—the content of the concept. I'll begin by making an elementary and obvious point about words and concepts that has, in our case, an insufficiently appreciated implication. Take the word "bank." You say a bank is a good place to put your money, and I say not unless you like your dollars soggy. You mean the financial institution and I mean the side of a river,

and we do not have a real disagreement between us. As with the polite boxer's "civil right," we are using the same word to refer to two different concepts, and so we are talking past each other. What conceptual analysis does is help figure out when we are having a real disagreement and when we are just talking past each other.

With banks, however, there is an etymological twist. Bank first means a raised mound of earth, as in a riverbank. By analogy, the word comes also to mean a long platform, table, or raised set of stalls—what looks like a riverbank. From there, we get the stalls or the tables of money-changers, eventually followed by the financial institutions we call banks. So riverbanks and money banks have a common linguistic history. We might imagine some simple soul shlepping along, as etymological baggage, the idea that banks have to have something to do with raised mounds. He might think that, to really be a bank, there must be a teller behind a counter, and somewhere in the basement vault there must be a raised mound of money. An Internet site whose deposits are simply entries in a database cannot be a bank. That, he says, is a conceptual error. This is of course foolish. Perhaps a substantive argument can be mounted in defense of tellers and gold deposits, but it will not be an argument about the proper meaning of the word "bank."

“The connection between actual political rule and rightful political rule has of course always been a central question in political philosophy....”

The word "legitimacy" also comes with baggage, and if we want conceptual clarity, we had better pack lightly. The connection between actual political rule and rightful political rule has of course always been a central question in political philosophy, and one that takes on a special urgency during the religious strife of the early modern period, when so much of our current political vocabulary is shaped. But "legitimate" and "illegitimate" as the normative terms of art that characterize this connection arrive late on the scene, and, because of earlier uses, nearly always present problems of interpretation. The Latin root—*lex*—and various cognates—*legislator*, *legitimus*—all initially refer simply to law and legality. Over time, legitimacy comes to mean as well a normative property that law can have or fail to have, so that by the time Rousseau writes, the open normative question of the legitimacy of law can be posed in so many words. To be clear: the question was never unaskable; what begins to happen around the French Wars of Religion and is firmly in place by Rousseau's time is that the question is askable in so many words. Earlier, however, depending on the conceptual map and normative commitments of the writer—in particular, depending on the author's position on the connections between God's law, natural law, positive law, and morality—legitimate may mean simply lawful (if valid positive law can be at odds with natural law or morality); simply rightful (if morality can be at odds with valid positive law); lawful because rightful (if valid law simply is the natural law); or rightful because lawful (if the command of the sovereign creates moral obligation). Alternatively, the author may be deploying a concept that simply does not distinguish lawful from rightful.

We should not, however, be too quick to suppose that early modern writers divided their conceptual space in ways that are distant from ours.¹⁷ The source of any strangeness may be closer to the surface, in a different account of the content of and criteria for recognizing legal and moral rights and duties. For example, the king's prerogative to contravene common and statutory law was defended by Stuart absolutists in two ways, which showed two different ways of understanding the connection between valid law and legitimacy. On one account, the king's exercise of his prerogative was legitimate because it was lawful, since the King's command made new law; on another account, the King's prerogative was the legitimate exercise of an extralegal power, which morally overrode, but did not become, the law.¹⁸ This intramural disagreement among royal absolutists is best understood as substantive, not conceptual. There is a difference between the view that legitimate simply means lawful and the view that the necessary and suffi-

cient condition for being legitimate is this other property, lawfulness. If we fail to make this distinction, we are liable to misinterpret the thought of the writer.

The earliest work I have found that uses “legitimacy” as the primary normative term of art by which to evaluate rulers is the Huguenot book *Vindiciae, contra tyrannos*, published in 1579 but probably written around 1575. The weight of recent scholarship attributes this justification of resistance to tyranny to Philippe du Plessis-Mornay (1549-1623), a young Protestant aristocrat who served Henry of Navarre as a military officer, diplomat, and counselor—though authorship may have been shared with his older and more scholarly friend Hubert Languet (1518-1581).¹⁹ Written in the aftermath of the St. Bartholomew’s Day Massacres of 1572, the *Vindiciae* is the most developed and the most influential of the French Protestant works of political thought that address the question of justified resistance. It is not all that original—that distinction goes to François Hotman’s *Francogallia* or Théodore Beza’s *Right of Magistrates*. But unlike Hotman, Beza, or the major absolutist writer of the day, Bodin, the *Vindiciae*, beginning with its subtitle, “Concerning the legitimate power [*legitima potestate*] of a prince over the people, and of the people over the prince,” repeatedly deploys the term “legitimacy” as a normative property of rulers that doesn’t simply mean legality or procedural correctness.

The term legitimacy also comes down to us with the sense that Edmund the bastard rails against: proper birth. A legitimate child is a child born of a lawful marriage. Almost all instances of *legitimus* in medieval scholarship on Roman law concern the laws of inheritance. In a world where kings are the lawful rulers and the firstborn legitimate son ordinarily is the proper successor to the throne, political legitimacy can seem to be inextricably a matter of pedigree or procedure, a property of rulers who are not bastard kings. Commentators on *Lear* often point out that Edmund confuses primogeniture with bastardy when he complains,

... Wherefore should I
Stand in the plague of custom, and permit
The curiosity of nations to deprive me
For that I am some twelve or fourteen moon-shines
Lag of a brother?

But Edmund is not confused—he is taking aim, not merely at the status of natural children in England, but at pedigreed conceptions of political legitimacy in the customary law of nations. Edmund doesn’t simply want to be acknowledged. He wants to rule.

In commenting on the 2000 election, William F. Buckley captures (and lampoons) the sensibility that ties political legitimacy too tightly to paternity:

Nevermind, for the moment, whether the true Florida count will be ascertainable. ... What can be generated here is a mood: Is that man really the father of that child? ... Did “the people” really bear George W. Bush as president? ... What is raised is the question of legitimacy as rising from the loins of “the people”: the ultimate mystique of self-government, the transubstantiation of the single voter who, begetting a majority, creates a legitimate government.²⁰

You can almost hear the irony of Edmund. “Fine word, legitimate!”

I propose to check lawfulness and pedigree, the two pieces of conceptual baggage just discussed, at the door. The connections, if any, between legitimate rule, lawful rule, and pedigreed rulers are not conceptually necessary—they are not built into the very idea of legitimacy. Rather, such connections are features

of particular conceptions of legitimacy—the content and criteria of the concept—that must be established through substantive moral argument. The concept of legitimacy—in our rough draft, the moral right to rule—puts fewer constraints on possible conceptions than one might at first think.

When I claim that a ruler is legitimate just in case he is God’s anointed, and you claim a ruler is legitimate just in case she is freely and fairly elected under the provisions of a liberal constitution, we disagree about the criteria for having moral legitimacy, but we agree, roughly, about what the disagreement is about. Unlike with riverbanks and money banks, we are not talking past each other.

The concept itself makes no essential reference to a procedure or to pedigree, so “a government is morally legitimate if and only if it is morally good” is a possible conception. Edmund offers another possible substantive conception: “Why bastard? Wherefore base?/ when my dimensions are as well compact,/my mind as generous, and my shape as true/as honest madam’s issue?” Why are you reaching for pedigreed criteria for political legitimacy? Look at me! I’ve got all these fine features. Why shouldn’t the right to rule follow from the qualities of the ruler, rather than his origins?

“What more can we expect of political actors than that the best method of decision be employed?”

But neither does the concept make an essential reference to substantive goodness, justness, or all-things-considered moral correctness. Possible conceptions of legitimacy can refer exclusively to an authoritative text, or a line of familial descent, or the enactments of a legislative body. Particular conceptions of legitimacy might specify either some procedure or some substantive attribute or both as necessary or sufficient conditions.

Moral legitimacy is usefully distinguished from two other concepts, justice, on the one hand, and legal validity, on the other. On some conceptions, these concepts are coextensive: one could hold the view that a law is valid if and only if it is morally legitimate, and one could hold that a law is morally legitimate if and only if it is substantively just. But the three concepts pick out three different properties that a law can have.

The most plausible conceptions, I believe, require both a sufficiently close connection between the rulers and the ruled and the protection of at least a short list of basic substantive rights and liberties. Perhaps governments that aren’t fully democratic and fully liberal can be legitimate, but not governments that are tyrannical or that violate fundamental human rights. This, however, is a normative conception, and so something I will need to argue for.

The concept of valid law makes no essential reference to moral justification. The concept of valid law refers simply to the institutional fact of the matter of what counts as the law for those who are subject to it. If validity is an institutional fact, it depends on shared understandings. It is quite plausible to suppose that cultures would include a shared understanding of moral legitimacy as a condition of legal validity, even if such a condition is not a formal requirement for having a shared understanding about valid law. But what a culture considers to be morally legitimate is not, by itself, morally legitimate. Cultural understandings about moral legitimacy can be mistaken. Recall the earlier distinction between perceived legitimacy and consent. It may be a social fact about a people that their laws are valid only if widely believed to be legitimate, and they may in fact believe their laws to be legitimate, and yet their laws, though valid, may fail to be legitimate.²¹

One could argue that built into the very concept of legal validity is the claim of moral legitimacy, or beliefs about moral legitimacy. This may be so, but neither the *claim* of moral legitimacy by rulers nor

the *belief* by the ruled that this claim succeeds get you all the way to moral legitimacy, for such claims and beliefs can be mistaken.

On particular conceptions of legal validity, laws are valid only if they are morally legitimate, or only if they are just. But valid law doesn't simply mean morally legitimate law or just law. A natural lawyer and a legal positivist disagree about what counts as valid law, but they agree about what they are disagreeing about. If the Kosovo Report is mistaken, and there is no wedge to be driven between legality and legitimacy, it's not a conceptual error that Justice Goldstone has made. To defeat the Kosovo Report, one has to provide a moral argument. If Richard Gephardt errs in saying that George W. Bush, though legal, is not legitimate, it is not a conceptual error. To show that Gephardt is mistaken, one has to provide a moral argument to demonstrate that the content of legitimacy is not what he says it is.

Consider a common objection to accounts of legitimacy that include substantive criteria. There is no alternative to relying on some procedure or another, under the jurisdiction of some institution or another, to decide whether political practices are legitimate, so procedural legitimacy is conceptually prior to substantive legitimacy. Constitutions need to be adopted and amended, legislation enacted, and legal cases decided by some procedure. When Supreme Court justices disagree on the substance of law, they settle their disagreements by a procedure—majority rule.²²

This objection confuses methods for achieving legitimacy and criteria of legitimacy. Of course, as a pragmatic matter, political decisions need to be made one way or another, by some actors or others, and some ways of making decisions by some actors are more likely than other ways by other actors to result in laws and policies that satisfy the criteria of legitimacy. What more can we expect of political actors than that the best method of decision be employed? Perhaps nothing more, but that is consistent with the possibility of failure: the best method for achieving legitimacy can still misfire. This is so for any account of legitimacy that isn't purely procedural—that is, any account that doesn't claim that legitimacy just is whatever the result of a proper procedure happens to be. But though there is much to be said for *hypothetical* pure proceduralism in moral philosophy, it is question-begging to assume that *actual* pure proceduralism is a conceptually necessary test of legitimacy. Now, something important may follow from the observation that, *ex ante*, the most that we can demand of political actors is that they follow the correct procedures and employ the best methods of decision. They may be immune from blame or criticism of a certain sort. Their mistakes may be owed some measure of respect. But it does not follow that their mistakes are owed obedience or are immune from interference.

A perspicuous way to put this point borrows a distinction made by Nomy Arpaly in a different context.²³ There is a difference between the contents of a user's manual for an intendedly legitimate actor and a theory of legitimacy containing necessary and sufficient conditions for legitimate action. Critics of the substantive conception of legitimacy rightly insist that the legitimate actor's manual necessarily is procedural, but why would I want to deny this? Judgments of legitimacy have their primary bite from the second- and third-person perspectives. From the first-person point of view, one ought to follow not merely the legitimate actor's manual but the more stringent just actor's manual. Legitimacy primarily arises as a problem for moral patients and third-party observers who judge a political action to be unjust. From those perspectives, however, the legitimacy of an observed actor can be evaluated on other than procedural grounds. They can say to the actor, even if it is so that no method other than the one you followed had a better chance of generating legitimate law, still, you failed to generate legitimate law. Following the best method for producing legitimate law doesn't *constitute* legitimate law any more than following the best recipe for *crème brûlée* constitutes *crème brûlée*. The proof is in the pudding. The practical upshot of such an evaluation from the point of view of the second or third party may justify disobedience, resistance, or intervention.

IV. LEGITIMACY AND LIABILITY

Because the concept of legitimacy is thinner than historical usage of the word suggests, there are fewer conceptual constraints on possible criteria for legitimacy—how one gets it. Similarly, the concept puts fewer constraints on what legitimacy necessarily gets you—the normative implications of being legitimate. The standard view is that moral legitimacy entails two other normative relations: the moral obligation of those legitimately ruled by the ruler to obey, and moral immunity of the ruler from coercive interference in the exercise and enforcement of legitimate rule. On this view, it is incoherent to hold that an authority is legitimate, but that those subject to the authority are not morally obligated to comply with its commands, or that others are not morally disabled from stopping the legitimate authority from exercising its legitimate powers. To think that legitimate commands do not necessarily obligate is like thinking that parenthood does not necessitate children.

My stance on this claim of incoherence is by now familiar. It is a virtue in conceptual analysis to seek the least restrictive specification of a concept that is still useful and fruitful, because if we don't we risk making two mistakes. The first is to misdescribe a genuine disagreement as a semantic misunderstanding. The second is to dismiss rival moral arguments too quickly as logical mistakes. In this case, the dismissal indeed is too quick. If the exercise of legitimate authority creates moral obligation, this is so for substantive moral reasons. If legitimate authorities have immunity, it is not an analytic truth.

Joseph Raz is the contemporary philosopher who has made the strongest case for a conceptual connection between legitimate authority and obligation (though he has not, to my knowledge, taken a stand on immunity).²⁴ Raz has convincingly argued that the exercise of legitimate authority by an actor entails some change in the normative situation or status of another. Otherwise, having authority cannot be distinguished from merely having a moral permission to causally affect another. To use one of Raz's examples, having the liberty to burn rubbish in my backyard despite the objections of my neighbor does not give me legitimate authority over my neighbor.²⁵ When we invoke legitimate authority, we ascribe to the actor something more powerful than merely a liberty or privilege. Raz says that this power is the power to obligate.

I think Raz is right that legitimate authority is more powerful than mere permission, and it is a deep insight of his to recognize that this something more is the power to change the normative situation of others. But there is one very good reason to hope that there are other ways that legitimate authorities can change the normative situation of others aside from obligating them, and that reason is civil disobedience. On Raz's account, civil disobedience disappears as an important and poignant moral phenomenon. If legitimate authority entails moral obligation to obey, then civil disobedience against an unjust but legitimate authority never is justified. If, by assumption, disobedience is justified, then the authority that is disobeyed cannot have been legitimate. The Rawlsian account of nonviolent civil disobedience as an illegal practice that nonetheless expresses respect for and fidelity to the laws of a nearly just democratic society that has fallen short of its own aspirations is, on Raz's view, so much tortured sentimentality. When disobedience is justified, the authority that is disobeyed is not legitimate, is not due respect, and so presumably is a fair target for even sharper tactics of dissent, such as militant resistance or subversion. There may be other moral reasons to refrain from sharper tactics, but if any disobedience is justified, respect for democratic authority is not among those reasons. If, contrary to Raz, you do find civil disobedience and the conditions that justify it to be an important form of dissent midway between lawful protest and armed insurrection, then you had better hope that there is some way to drive a wedge between legitimate authority and moral obligation. The way to drive that wedge is to recognize that the power of a legitimate authority to change the normative situation of the subject is not necessarily the power to obligate. But what else can that power be?

To get at what I think is the correct conceptual account of moral legitimacy, we need to return to the well-known analytic jurisprudence that Wesley Hohfeld developed early in the twentieth century.²⁶ Hohfeld distinguished four legal advantages that A can have in relation to B, which, correlatively, entail four legal disadvantages of B in relation to A. If A has a *right* (or, more specifically, a claim-right) against B, B has a correlative *duty* to A; if A has a *privilege* (or liberty) with respect to B, B has *no-right* against A; if A has a *power* with respect to B, B faces a *liability* from A; and if A has an *immunity* from B, B has a *disability* with respect to A. Each legal advantage also has its negation: having a *claim-right* is the opposite of having *no-right*; a *privilege* is the opposite of a *duty*; a *power* is the opposite of a *disability*; and an *immunity* is the opposite of a *liability*. Hohfeld's elegant scheme was formulated to show the connection between legal concepts, but, with some minor tinkering, it illuminates connections between *moral* concepts as well: if A has a moral claim-right against B, then B has a correlative *moral* duty to honor the claim, and so on.

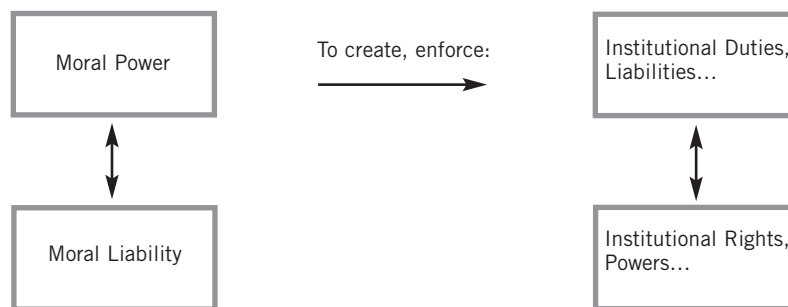
FIGURE 1 HOHFELDIAN LEGAL RELATIONSHIPS

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

Vertical pairs are correlatives. Diagonal pairs are opposites.

On my account, legitimacy is a kind of *moral* power, the power to create and enforce *nonmoral* (or perhaps I should say not yet moral) prescriptions and social facts. A legitimate authority has the moral power to author legal, institutional, or conventional rights and duties, powers and liabilities, which change the legal, institutional, and conventional situation or status of subjects. In what way, though, does the exercise of this moral power change the *moral* situation or status of the subject? If Hohfeld's scheme is correct, when A exercises a moral power with respect to B, and thereby imposes upon B an institutional duty, then B must have a correlative moral *liability*. What is this liability? It is that B is subject to morally justified enforcement. But a moral liability is not a moral duty, and an institutional duty is not a moral duty. Raz's requirement that the exercise of legitimate authority change the normative situation of the subject of that authority is satisfied because B now is subject to a moral liability—justified enforcement. It is not conceptually necessary that, if A exercises legitimate authority in imposing upon B an institutional duty, B has a moral duty to comply.

FIGURE 2 THE CONCEPT OF LEGITIMACY



Moral Liability ≠ Moral Duty
 Moral Power ≠ Moral Immunity
 Institutional Duty ≠ Moral Duty

How are we to understand a moral liability that is not yet a moral duty? Note that the opposite of a liability is an immunity: the subject of legitimate authority has no moral immunity from the imposition of legal duties and their enforcement, and this limits the sort of justified complaints the subject can make. When such legal duties are imposed and enforced, the subject can complain that the law is mistaken, stupid, or unfair, but he cannot justifiably complain that the law is an unauthorized abuse of power. He can complain that he has been wronged in one way, but not in another: if legitimate, this is the sort of mistake about right and wrong that is the authority's to make. As a conceptual matter, a legitimate law need not be a just law.

Now, it would be quite odd for a lawmaker to defend creating and enforcing an unjust law on the grounds that it is legitimate. Surely, from the first-personal perspective, I am morally prohibited from issuing an unjust law, even if I have the legitimate authority to do so. But this shows why legitimacy is primarily a practical judgment made from the second- and third-person perspective: it governs how you, the moral patient, should react to my unjust or unwise moral agency, whether lesser officials should enforce, and whether third parties should intervene. Or, to put it another way, the question of legitimacy arises when there is disagreement about the justice or goodness of an authority's command. Raz holds that to judge an authority legitimate simply is to judge that the subjects of that authority have a moral duty to obey it. I hold that to judge an authority legitimate simply is to judge that the subjects of that authority are morally liable—that is, not morally immune—from the imposition and enforcement of nonmoral duties. Whether they face a moral duty as well remains an open question. The idea that legitimate authority necessarily creates moral obligation may get its grip in part from the baggage left over from theological voluntarism, the view that there is no moral obligation until God creates it by his command. But even if there is no obligation without a commander, there can be a commander who fails to obligate.

What about the reigning orthodoxy in international law, that a legitimate authority has immunity from outside intervention? Again, if Hohfeld's scheme holds up, having a moral power is not the same as, and does not entail, having a moral immunity. When A exercises a moral power over B, and imposes upon B an institutional duty, this imposes upon B a morally justified liability to enforcement, which is the opposite of a moral immunity from enforcement. But just because B lacks moral immunity from A, A does not have moral immunity from the interference of some third party C. There is no conceptual route from having legitimacy—having moral power—to having moral immunity. Nor does having legal immunity under international law entail having moral immunity. These all are connections that will have to be established by moral argument, not conceptual analysis.

One such argument is that respect for less-than-just laws, policies, and practices abroad follows from the respect owed to members of a political community who have collectively decided, in a way collectively acceptable to them, how to govern themselves. A political community that fails to have just practices may reasonably claim that the offending practices are still *their* practices, and that, within bounds, mistakes about what justice demands are theirs to make. I said within bounds: the bounds are marked by whether interference would be disrespectful to those who are being treated unjustly—whether it is reasonable for those most burdened by unjust practices nonetheless to endorse the practices as their own. Surely, if those burdened correctly held that the burdensome practices imposed upon them genuine moral duties, outsiders would have no cause to interfere for *their* sake.²⁷

Recall, however, that legitimate authority to impose an *institutional* duty does not entail a *moral* duty to comply. Governors (or the majority, or the powerful) may be sufficiently connected to the will and interests of the governed (or the minority, or the weak) to pass the threshold of legitimate authority, but not

sufficiently connected to make the burdensome practices the practices of the burdened, and generate in them genuine moral duties to obey. Contrary to Raz, justified civil disobedience against a legitimate authority is not an empty category. Unjustly treated minorities can be forgiven if they reject a reified account of “we” in “We the People” under which their injuries are self-inflicted. When this is so, it shows no disrespect to *them* for outsiders to intervene on their behalf. Moral legitimacy and moral immunity can come apart, moral legitimacy and moral duty can come apart, and therefore duty and immunity can stand and fall together. When oppressed minorities and dissenters aren’t morally obligated to obey unjust but legitimate authority, outsiders aren’t morally disabled from helpful meddling on their behalf. What forms of meddling are morally permitted are shaped and constrained by the respect owed to an unjust but legitimate regime by outsiders, but it isn’t at all clear why this should be any greater than the respect owed by unjustly burdened insiders.

V. WHAT IF EVERYONE DID WHAT?

With Hohfeld’s help—in particular, by contrasting Hohfeldian legal relationships with moral ones—we now can interpret and evaluate the Goldstone Commission’s claim that NATO’s intervention in Kosovo, though illegal, was legitimate. Milosevic’s Yugoslavia claimed the legal power to impose binding legal duties on the Kosovars, who had no legal right of resistance. Under international law, Yugoslavia had standing as a sovereign state immune from intervention. NATO’s member states are bound by international law—or, to put it in a more cumbersome but precise way, international law has the power to impose duties and other legal disadvantages on states, and one such disadvantage is that states are legally disabled from intervening in the internal affairs of other sovereign states.

When subjected to even minimally demanding criteria of moral legitimacy, however, Milosevic’s Yugoslavia fails miserably. Having amply demonstrated their capacity for slaughter, rape, and ethnic cleansing on a grand scale in Bosnia, Serb nationalists had begun operations in Kosovo. The Kosovars were deprived of their most basic political freedoms and faced massive human rights violations. It would be perverse to maintain the fiction that the Milosevic regime impersonated the will or protected the basic interests of its Kosovar citizens. Surely the Kosovars had the moral right to defend themselves. But did the United States and other member states of NATO have the moral right to intervene on their behalf? If the United States is subject to legitimate international law that immunizes Yugoslavia against interference, and if Raz is correct that legitimate authority entails moral obligation, then the answer is no. For the answer to be yes, either the international law that grants Yugoslavia immunity must not be legitimate, or Raz must be mistaken. Of the three claims—(1) NATO’s intervention to prevent massive human rights violations in Kosovo was morally permitted, (2) international law prohibiting such intervention is legitimate, and (3) legitimacy entails obligation—at most two can hold. I am more sure of the truth of (1) than I am of anything else in this paper, even if that requires giving up (2). But one does not need to give up (2) if one gives up (3) in favor of the moral liability view of legitimacy.

On the moral liability view, international law, insofar as it is legitimate, is a kind of moral power to create and enforce nonmoral legal obligations, and this entails that those subject to these legal obligations face moral liability, but not necessarily moral obligation. So the Hohfeldian picture of the moral relationships looks like this: Milosevic has no legitimate moral power over the Kosovars, and the Kosovars have no moral duties to the Yugoslav regime. Yugoslavia has no moral immunity from intervention, and outsiders are not morally disabled from aiding the Kosovars. Insofar as international bodies such as the United Nations are legitimate, they have the moral power to create nonmoral legal rules, and states that are subject to those rules are morally liable to enforcement, sanction, or censure. But, by analogy to

domestic civil disobedience and conscientious refusal, conditions can be specified under which an actor is morally justified in violating such rules.²⁸ When those conditions are met, it does not follow that the law that is justifiably violated is illegitimate law.

Specifying the necessary and sufficient conditions for justified disobedience of legitimate international law is a task for another time; here I will simply assert that protecting a large civilian population from massacre, systematic rape, and massive dislocation will easily meet any plausible test of justified disobedience. How international conventions that legally prohibit such intervention can meet the test of legitimate law is not so easily supposed in the absence of a well-worked-out normative theory of international law, which I do not have. But any normative theory of legitimate law, municipal or international, will need to acknowledge the irreducible asymmetry between the perspective of the legislator whose task is to frame an *ex ante* institutional rule that anticipates bad judgment and bad will and the perspective of the agent exercising principled moral judgment *ex post*. One way that space for justified disobedience of legitimate law opens up is in the gap between these two perspectives.

Failure to appreciate the difference between institutional rules and moral principles is at the bottom of a lot of ill-considered legal and moral reasoning. Consider this non sequitur by U.N. Secretary General Kofi Annan, made in the years between Srebrenica and Kosovo:

*Can we really afford to let each state be the judge of its own right, or duty, to intervene in another state's internal conflict? If we do, will we not be forced to legitimize Hitler's championship of the Sudeten Germans, or Soviet intervention in Afghanistan?*²⁹

Now, it is unclear whether the judgments, rights, duties, and legitimization in question here are moral or legal, but on any construal, the answer to the second question is a resounding No! Each state's judging its own right or duty (whether legal or moral) is consistent with objective standards for such judgments, and a state that fails to properly meet those standards, either mistakenly or willfully, can be in turn judged (whether legally or morally) and held to account. An individual judging her right to use force in self-defense, a manufacturer judging its right to impose reasonable risks on consumers, a legislature judging its right to enact constitutionally questionable legislation all are subject to judgment for the exercise of judgment. Does Kofi Annan think that if a person being mugged has the right to defend herself without obtaining a court order first, every claim of self-defense, no matter how groundless, must be accepted on its face?

Now, there may indeed be good reasons to have an international rule that says:

R1. "No state may intervene in another state's internal conflict without the explicit approval of the UN Security Council,"

and this rule may have advantages over alternative rules, such as:

R2. "No state may intervene in another state's internal conflict except to prevent imminent humanitarian disaster and only when peaceful means have no reasonable chance of success."

"Here I will simply assert that protecting a large civilian population from massacre, systematic rape, and massive dislocation will easily meet any plausible test of justified disobedience."

But it is obvious that R2 does not legitimize Hitler's armed robbery of Czechoslovakia or the Soviet's imperial misadventure in Afghanistan, any more than R1 legitimizes a claim that the Security Council approved some action when in fact it did not. Any criterion can be invoked disingenuously. The empirical prediction that a criterion will be invoked and misapplied disingenuously or mistakenly, and that misapplication will lead to bad consequences, counts against writing that criterion into a rule. If, predictably, more unjustified acts of aggression will occur under R2 than under R1, that is a reason to enact R1. But if, predictably, fewer justified humanitarian interventions will occur under R1 than under R2, that is a reason to enact R2. Either way, we are never "forced to legitimize" the exercise of judgment by a state, if the phrase means something like disabled from challenging the legitimacy of a state's actions.

Multilateralists sometimes talk as if unilateralists are guilty of a practical contradiction, as if unilateralists are proposing a maxim that fails the test of universalizability. But as typically invoked, the "What if everyone did it?" objection confuses moral principles with institutional rules. True, a candidate for a moral principle that fails the test of universalizability fails as a moral principle. But the proper retort to the objection "What if everyone did it?" is "What if everyone did *what*?" Without contradiction, one can put forward criteria for unilateral, extralegal intervention that do universalize, are not simply self-dealing, and wouldn't be self-defeating if other state actors did the same, where "doing the same" is acting in accordance with precisely those criteria. It is no embarrassment to a correctly formulated moral principle that disaster would result if others acted on some different, incorrectly formulated principle, either through error or cynicism. Moral reasoning is paralyzed if one's commitment to the soundness of a moral argument is undermined by the fact that one's argument could be misunderstood, misapplied, and misused by others.

In contrast with moral principles, the bad consequences of incorrect interpretation and misapplication do count against an institutional rule (just as the unavoidable overinclusiveness and underinclusiveness of *correct* interpretation and application counts for and against a particular formulation of an institutional rule).³⁰ But the way these considerations count is through their empirical consequences, not through some hypothetical generalization. One asks the empirical question, "Will the promulgation and enforcement of this formulation of the rule predictably lead to more serious misapplications than some other formulation of the rule?" and not the hypothetical question "What if everyone misapplied the rule?" Institutional rules requiring multilateralism and those permitting unilateralism are held to the same empirical test.

What is properly subjected to a universalizability test is one's specification of the moral criteria that govern when actors are morally permitted (or required) to disobey institutional rules in order to defend human rights. Once the necessary conceptual link between the legitimate authority of law and the moral obligation to obey is broken, whether there is such a specification and, if so, what it contains becomes an open moral question settled by moral argument and judgment. Appeals to authority obviously will not settle questions about the moral powers of that same authority, and since it is authority all the way up, it is judgment all the way down. This, in his way, is what Edmund told us at the start:

*Thou, Nature, art my goddess; to thy law
My services are bound.*

* * * *

This account of the concept of legitimacy and the range of its possible conceptions has taken us quite some distance from the standard view adopted by most social scientists and lawyers. Consider, for an illustrative and striking contrast, the definition of legitimacy offered by the international legal scholar Thomas Franck:

*Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.*³¹

Legitimacy for Franck is the property of a rule that motivates a perception of obligation because of a belief in proper pedigree or procedure. I reject Franck's account at every step. The account of legitimacy that I have presented makes the following claims:

- 1 Normative legitimacy is conceptually prior to descriptive legitimacy, and it is a confusion to think that legitimacy simply means beliefs about legitimacy. The source of this fairly recent but endemic error can be traced to sloppy readings of Max Weber.
- 2 The idea of legitimacy is conceptually distinct from the idea of legality. Any connection between law and legitimacy is a matter for substantive moral argument, not conceptual analysis. This is so despite the etymology and early senses of the word legitimacy and its cognates.
- 3 The idea of legitimacy is not essentially tied to notions of procedure or pedigree. This too is a matter for substantive moral argument, not conceptual analysis. This is so despite the linguistic and historical association of illegitimacy with bastardy.
- 4 Legitimacy is a moral power that entails moral liability, but it does not entail moral obligation, and it does not entail immunity. This is so despite the baggage left behind by theological voluntarism and its secular successors. The connections between legitimacy, obligation, and immunity must be established by normative argument, not conceptual analysis.
- 5 Responsibility for judging whether claimed legitimate authority is genuine or not cannot be avoided. Any appeal to higher authority simply pushes the inquiry back a step. Similarly, responsibility for judging whether a legitimate authority may nonetheless be disobeyed cannot be avoided. The answer to the question "Who is to say?" ultimately is "You are to say." Moral reasoning requires judgment all the way down.

The ground is now prepared for a normative conception of legitimacy that:

- 1 Is conditioned in part on satisfying substantive criteria for the treatment of those subject to rule;
- 2 Underwrites the legitimacy of a substantive liberal constitution implemented in part by countermajoritarian institutions;
- 3 Contains a robust account of justified civil disobedience of legitimate municipal law;
- 4 Contains a robust account of justified governmental disobedience of legitimate international law.

The development of this normative conception of legitimacy is the task ahead.

NOTE

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ENDNOTES

- 1 Shakespeare, William. *King Lear* (1606), 1:2
- 2 *Lear* 1:1
- 3 For a chilling hour-by-hour reconstruction of these shameful events, see David Rohde, *Endgame* (New York: Farrar, Straus & Giroux, 1997).
- 4 Independent International Commission on Kosovo, *The Kosovo report* (Oxford: Oxford University Press, 2000), 10.
- 5 *Kosovo Report*, 290.
- 6 Or rather, the Commission held that the illegality of the campaign was straightforward, which is all that is needed here. Some have argued that the Kosovo intervention made new international law. I do not have a considered view about how new international law is made, except on a point that I hope is not controversial: if international law simply is whatever international bodies do, then such “law” is not recognizably law-like, because it does not guide or constrain prospective action.
- 7 *Kosovo Report*, 288-89.
- 8 Meet the Press [television show]. December 17, 2000.
- 9 *Bush v Gore* I, 531 U.S. 1047 (December 9, 2000), Stevens, J. dissenting; citation omitted.
- 10 *Bush v Gore* I, 531 U.S. 1046 (December 9, 2000), Scalia, J. concurring.
- 11 *Bush v Gore* II, 531 U.S. 157 (December 12, 2000), Breyer, J. dissenting.
- 12 Brownstein, R. (2000 December 17). The presidential transition; Bush has legitimacy, but it's fragile. *The Los Angeles Times*, p. A1.
- 13 Weber, Max. *Economy and society* (c. 1920). 1968. Guenther Roth (Ed.). Vol. I, chap. III.1, 213. Berkeley: University of California Press.
- 14 “There are three pure types of legitimate domination. The validity of the claims to legitimacy may be based on
 1. Rational grounds—resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority [*legale Herrschaft*])
 2. Traditional grounds—resting on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority [*traditionale Herrschaft*]); or finally,
 3. Charismatic grounds—resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him (charismatic authority [*charismatische Herrschaft*]).” Weber, vol. I, chap. III.2, 215.

- 15 See, for example, the royally mandated instructional text, *God and the King: or, a Dialogue shewing that our Sovereigne Lord King James, being immediate under God within his Dominions, Doth rightfully claime whatsoever is required by the Oath of Allegiance* (1615). It teaches that the King has no superior besides God, the bond of allegiance from his subjects is inviolable, and neither tyranny, infidelity, heresy, apostacy, or acts of the pope can dissolve it.
- 16 Rousseau, Jean-Jacques. 1762. *The social contract*. I:1.
- 17 Many years ago, I was taught that Buddhism was utterly transformed when it migrated from India to China because the Chinese had no word for zero, and so could not conceive of nothingness. I thought this profound, perhaps because a sophomore lacks the concept of sophomore. But consider: Mei-Mei has two rice bowls. She gives one to Ching and another to Chang. How many rice bowls are left in Mei-Mei's head?
- 18 Sommerville, J.P. 1986. *Politics and ideology in England, 1603-1640*. London: Longman.
- 19 More ink has been spilled on attributing all or parts of the *Vindiciae* than in assessing it as a work of political philosophy. Skinner definitively gives it to Mornay. See Quentin Skinner, *The foundations of modern political thought*, vol. II, 305 (Cambridge University Press, 1978). Garnett, who prepared the excellent and painstaking contemporary translation, concludes that the work most likely is the result of close collaboration with Languet. See Stephanus Junius Brutus, the Celt (pseud.), *Vindiciae, contra tyrannos: or, concerning the legitimate power of a prince over the people, and of the people over a prince* (1579). George Garnett (Ed.). (Cambridge University Press, 1994), lxxvi.
- 20 Buckley, William F. (2000 December 2). Be skeptical about Bush 'illegitimacy.' *The Houston Chronicle*, p. A42.
- 21 Applbaum, Arthur Isak. 1999. Cultural convention and legitimate law, *Chicago Kent Law Review*, 74:2, 615-24.
- 22 This objection is at the core of Jeremy Waldron's critique of Ronald Dworkin's defense of the legitimacy of counter-majoritarian institutions and practices such as judicial review. See Jeremy Waldron, *Law and disagreement* (Oxford: Clarendon Press, 1999).
- 23 See Nomy Arpaly, On acting rationally against one's best judgment, *Ethics* 110:488 (2000), where she distinguishes between a manual for rational actors and a theory of rationality.
- 24 See Joseph Raz, *The authority of law* (Oxford, 1979), and *The morality of freedom* (Oxford, 1986).
- 25 *The morality of freedom*, 24.
- 26 Wesley Necomb Hohfeld's work is collected in *Fundamental legal conceptions as applied to judicial reasoning* (Yale, 1919).
- 27 This, I think, is how to avoid the unappealing conclusion that Rawls's *Law of Peoples* requires liberal societies to be deaf to the cries of unjustly treated minorities inside illiberal but decent hierarchical societies. Among the requirements for a decent society are that its laws impose *bona fide* moral obligations on its subjects, that basic human rights, including some measure of liberty of conscience, be secured, and that the society be well-ordered, meaning that it be stable for the right reasons. Now, since Rawls clearly rejects moral relativism, exactly how law that is unjust is supposed to generate genuine moral obligation in decent societies isn't clear, but it must have something to do with nearly universal and genuine endorsement of the illiberal conception of justice in that society sufficient to reproduce that conception from one generation to the next without resort to repression (which is ruled out by the requirements of human rights, liberty of conscience, and stability for the right reasons). But if these conditions are all satisfied, the unjustly treated will not be crying out to liberal ears—not because they have been silenced or brainwashed, but because they (mistakenly but reasonably in light of the burdens of judgment applicable across cultures) do not consider their treatment to be unjust, or they (perhaps correctly, or perhaps mistakenly but reasonably) do not consider their treatment sufficiently unjust to justify illegal activity. Conversely, an illiberal society that has a significant minority crying out for help from liberal quarters doesn't meet the criteria of

a decent hierarchical society, and so wouldn't be immune from interference. Other readers of Rawls might reasonably (but mistakenly) take my reading to be too charitable.

- 28 There are important disanalogies too—perhaps the most important that we are here contemplating is the use of violence, and violence is constitutive of a rejection of legitimacy. But note that the target of violence here is Milosevic's regime, not the United Nations. If, counterfactually, the only way to save Srebrenica were to attack the U.N. peacekeepers, such a strike would be incompatible with the view that the U.N. had legitimate authority in Srebrenica. The general point is that tactics of dissent express views about the authority that is resisted, and so the justification of dissent will depend in part on a proper match with the normative status of the authority. Civil disobedience in a nearly just democracy requires tactics that, by appealing to the sense of justice of the mistaken majority, express sufficient respect for one's fellow citizens. Tyrants are owed no such respect.

The practical importance of this expressive quality of resistance arose with resistance theory itself in the late sixteenth century. It is possible that a critical turning point in the history of modernity depended on the outcome of a political philosophy seminar on this topic held at Montaigne's chateau—no doubt over excellent Sauternes—the night of October 23, 1587. After Henri of Navarre's brilliant defeat of a Catholic army at the Battle of Coutras a couple of days before, the Protestant heir presumptive to the French throne baffled expectations by not pressing his advantage. The resistance theory of Mornay, Navarre's closest adviser, would have justified a decisive campaign: in an obvious allusion to the Guise family's dominance in the Valois court, the *Vindiciae* pointedly considered courtiers who in effect usurp power from a properly titled but weak ruler to be tyrants in title. But after spending a night at Montaigne's chateau, Navarre withdrew his forces from the field and tarried for a month with his mistress. Corisande's domestic charms do not completely account for this turn. A better (though speculative) explanation is that Montaigne, a tolerant and politique Catholic, persuaded Navarre that pressing on would signal open rebellion against the rule of King Henri III, and this would contradict Navarre's own understanding that he was protector of the Protestant minority, but loyal to the king. Navarre took Montaigne's counsel—perhaps over Mornay's objections, and perhaps heeding letters from Corisande, whose mentor was none other than Montaigne. Although Navarre's restraint resulted in an inconclusive end to the eighth war of religion, the "War of the Three Henri's" (the duke of Guise was also a Henri), it helped secure the loyalty and trust of a critical portion of moderate Catholics when Navarre claimed the throne as Henri IV after Henri III died childless two years later. It isn't entirely fanciful to say that political philosophical reflection on the expressive meaning of resistance influenced Navarre's restraint after Coutras, and this restraint was a critical moment in the establishment of religious tolerance as a political principle.

- 29 Annan, Kofi. 1998. Secretary-General reflects on 'intervention' in thirty-fifth annual Ditchley Foundation lecture. United Nations Press Release SG/SM/6613, June 26. To be fair, I must stress that Annan's lecture is a forceful defense of intervention in a state's internal affairs in cases of extreme violation of human rights—but only on the authority of the U.N. Security Council.
- 30 Rules, as Schauer has convincingly argued, are to be understood as entrenched generalizations, and so are necessarily overinclusive or underinclusive with respect to their underlying justifications, even when properly interpreted and applied. See Frederick Schauer, *Playing by the rules* (Oxford, 1991). Moral principles are generalizations too, but not entrenched generalizations. If a piece of moral reasoning pitched at a certain level of generality does not accord with our considered judgments about particular cases, that puts pressure on the specification or ordering of moral principles that gave the discordant answer, and consistency demands that something give: we either revise the specification or ordering of our principles, or our judgment about particular cases. So, it is always an embarrassment to a candidate for a moral principle that, when correctly applied, it gives the wrong answer, but it is never an embarrassment to the correct moral principle that, when incorrectly applied, it gives the wrong answer. It needn't be an embarrassment to an institutional rule that, when correctly applied, it gives the wrong answer, and it sometimes is an embarrassment to an institutional rule that, when incorrectly applied, it gives the wrong answer.

- 31 Franck, Thomas M. 1990. *The power of legitimacy among nations*. Oxford. 24.