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THE ASYMMETRY OF LEGITIMACY

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**ABSTRACT.** State legitimacy is often said to have two aspects: an internal and an external one. Internally, a legitimate state has the right to rule over its subjects. Externally, it has a right that outsiders not interfere with its domestic governance. But what is the relation between these two aspects? In this paper, I defend a conception of legitimacy according to which these two aspects are related in an importantly asymmetrical manner. In particular, a legitimate state's external right to rule affords it protections that include and go beyond what its internal right to rule enables it to do. This asymmetrical view, I argue, is preferable to its two main rivals: the view that a state's internal and external legitimacy are separate issues, and the view that internal and external legitimacy are mirroring.

What happens when a legitimate state passes an ordinary, unproblematic law? One thing that seems natural to say is that this means its subjects have reason, perhaps a *prima facie* moral obligation, to obey that law, or at least that the state is permitted to enforce it. Another thing that seems natural to say is that outsiders, especially other states, are obligated not to interfere. Suppose, on the other hand, that a state passes a law that is seriously morally problematic or deeply unjust. Surely here we are not facing a similar moral situation. Subjects do not seem to have similar reasons or obligations to obey, nor does the state have any special permission of enforcement. And outsiders do not seem similarly obligated not to interfere in such cases either.

These observations are importantly connected to the issue of state legitimacy. We often say that a legitimate state has the right to rule, and that this has what may be called an internal and external aspect. A state's internal legitimacy denotes its domestic right to rule, held *vis-à-vis* its subjects. In virtue of this internal right to rule, a legiti-

mate state has the ability to pass laws that subjects have reasons or obligations to obey, or that it at least can permissibly enforce. A state's external legitimacy is its international right to rule, held *vis-à-vis* other states. In virtue of this external right to rule, other states have, among other things, reasons or obligations not to interfere with a legitimate state's domestic rule. This idea that a legitimate state has a right to rule provides a straightforward way of explaining the two observations above. Unproblematic laws of a legitimate state may be said to count as the product of successful exercises of such a state's right to rule, and thus to have these moral consequences for subjects and other states (against whom it has a right to rule). Laws, on the other hand, that are seriously unjust can be said to be beyond what even a legitimate state has a right to do, so these fail to have the same upshot (or may even void its right to rule altogether).

This much seems plain. More difficult are cases that fall in between these two. What if a legitimate state passes a law that is unjust, but not egregiously so? What situation are subjects facing? And what about other states? Are they still obligated not to interfere? Can it be, perhaps, that the laws of a legitimate state fail, as a matter of its legitimacy, to give subjects new reasons to act while other states remain, as a matter of its legitimacy, obligated not to interfere? Or do the two aspects of legitimacy not come apart in this way?

These are the questions I wish to address here. They concern the relation between a legitimate state's internal (domestic) and external (international) right to rule. As such, they get at the heart of how to understand the idea of state legitimacy. Achieving such an understanding is important for both practical and theoretical purposes. On the practical side, it is essential to answering many of the more difficult questions about how outsiders and subjects are to respond to what they conceive of as significant injustices. On the theoretical side, understanding how internal and external legitimacy are connected helps us to clarify an important and central concept in political philosophy, as well as to see what the moral consequences of a state's right to rule are.

I will propose and defend a conception of how a state's internal and external legitimacy are related. This conception, I will call it the asymmetrical conception, is importantly different from, and I believe superior to, some of the ways in which the relation between a state's

internal and external right to rule is, implicitly or explicitly, typically understood. I will provide two arguments in favor of the asymmetrical conception of legitimacy over these alternatives. The first is that it is uniquely able to incorporate what I will argue are two substantive desiderata of an understanding of legitimacy. This argument will occupy Sects. II through IV below. The second relies on more conceptual considerations, and is set out in Sect. V. But first some preliminary matters need to be addressed.

### I. CONCEPTIONS OF LEGITIMACY

I have said that I will defend a conception of legitimacy. Both the notion of a conception and the notion of legitimacy need clarification. First, legitimacy. Unless stated otherwise, I will here understand legitimacy as a property of institutions, in particular states. As such, I understand a state's legitimacy as denoting its status as the holder of a right to rule.<sup>1</sup>

As said, the right to rule of a legitimate state consists of both an internal and external aspect. A full account of what these aspects imply would have to be rather complex as it would have to include and explain a host of direct and indirect morally required and desirable responses and attitudes that a state's right to rule warrants for subjects and outsiders of various kinds. For example, that a state is legitimate may mean that subjects should provide it with some material and non-material support, that its officials are to be treated with a certain kind of respect, that it has a claim to be represented in certain international bodies, and so on.

To keep things manageable, I will here focus only on what we might call the core of the idea of legitimacy. This core consists, in the case of internal legitimacy, of a state's moral right against its subjects to issue and enforce law. How precisely to understand this core of

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<sup>1</sup> See for a defense of understanding legitimacy as denoting this status, Allen Buchanan, 'The Legitimacy of International Law', in Samantha Besson & John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 79–96. This ignores, of course, other uses of the term legitimacy. As will become clear in Sect. V below, I do not mean to suggest that states alone can be legitimate. All I wish to claim is that states are capable of being legitimate and that states that are legitimate have a right to rule. I take this to be relatively uncontroversial. However, it is worth emphasizing, as an anonymous referee rightly points out, that the connection between legitimacy and obligations for subjects and outsiders can be challenged. Unfortunately, for reasons of space I cannot here deal with this fundamental objection to the outlook of the paper. Instead, I set myself the limited task of investigating and defending a particular conception of legitimacy understood as a right that implies obligations for both citizens and outsiders.

the right to rule is an issue of some controversy. Traditionally, a legitimate state's right to rule has been understood as its ability to bring about *prima facie* moral obligations<sup>2</sup> for its subjects to perform certain acts through successfully exercising that right, such as by passing a law.<sup>3</sup> However, some claim that such exercises provide subjects with reasons of a weaker sort.<sup>4</sup> Others still argue that a state's legitimacy should be understood as its moral permission to enforce its laws.<sup>5</sup> For present purposes we need not settle this issue. I will henceforth proceed as if a legitimate state's internal right to rule implies that its subjects have *prima facie* moral obligations to obey its laws, but the argument below applies, *mutatis mutandis*, to weaker views as well.

In the case of external legitimacy, a state's right to rule consists of its moral right against outsiders that they not interfere with its domestic acts of making and enforcing law.<sup>6</sup> It is again a complicated question what precisely is included in this right. There are two dimensions along which we might adopt different understandings of a legitimate state's external right to rule. On the one hand, different kinds of *acts* may count as interference. Here, a very restrictive account would refer to only coercive acts like military action, cyber-attacks, or sabotage. But interference may also come in milder forms, such as economic sanctions or bribes. On the other hand, different *agents* may interfere with a state's domestic governance. Here, a restrictive account would refer only to other states. But other actors can interfere as well, such as international organizations,

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<sup>2</sup> By saying that the obligation to obey the law is *prima facie* I only mean to say that these moral obligations are not absolute, all things considered obligations, but can be overridden or defeated by countervailing reasons.

<sup>3</sup> See for example A. John Simmons, 'Justification and Legitimacy', in *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), p. 130; David Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008); Anna Stilz, *Liberal Loyalty* (Princeton: Princeton University Press, 2009).

<sup>4</sup> Buchanan, 'The Legitimacy of International Law'.

<sup>5</sup> Robert Ladenson, 'In Defense of a Hobbesian Conception of Law', *Philosophy and Public Affairs* 9 (1980): 134–159.

<sup>6</sup> See e.g. Andrew Altman & Christopher H. Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009); Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979); Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004). Two clarifications are in order. First, this right is also often discussed under the heading of state sovereignty. However, since the concept of sovereignty is used in a wide variety of ways and contexts I will here not use that term in order to avoid any unnecessary confusion. Second, a legitimate state likely also has a right that its subjects refrain from interference as well. However, those obligations are best understood as obligations correlative to a state's internal right to rule. See for further discussion, Sect. V below.

NGOs, terrorist groups, or private individuals. Since our focus is on the minimal core of legitimacy, and to avoid begging certain important questions,<sup>7</sup> I will here understand a state's external right to rule in a restrictive manner along both dimensions. That is, the core of a state's external right to rule on which I will focus consists of the moral right it has, in virtue of its status as legitimate, against coercive interference with its domestic governance by other states.<sup>8</sup>

The argument below defends a conception of this core of state legitimacy.<sup>9</sup> Defending a conception of legitimacy is different from defending a fully worked out theory or justification of state legitimacy. The latter provides a specification of and justification for the normative conditions under which states are to be considered legitimate (such as providing public goods, protecting human rights, and so on). The former, on the other hand, concerns the way in which we should understand what such a theory or justification aims to explain or establish. That is, while a substantive theory of legitimacy is about when and why states possess a right to rule, a conception of legitimacy tells us what states with a right to rule possess.<sup>10</sup>

Defending a particular conception of legitimacy therefore means providing an account of the nature of a legitimate state's right to rule, and this includes an account of how its internal and external aspects are related. This is our topic here.

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<sup>7</sup> For example, it might be the case that it is at the same time impermissible for the government of state A to, say, spread subversive propaganda among the population of state B, and permissible for A's citizens to do so.

<sup>8</sup> Although such a definition would be undesirable in general, we can here understand interference as referring to those acts by those actors against which a legitimate state has, in virtue of its right to rule, a right. For useful discussion, see Beitz, *Political Theory and International Relations*, pp. 71ff.

<sup>9</sup> It is worth emphasizing that a state (not) having an internal or external right to rule will be only one of many considerations informing the issue whether in any given case disobedience to the law or outside interference is permissible, all things considered. Reaching these latter judgments in a responsible manner will almost always be extremely difficult and require great sensitivity to context, issues of feasibility, unintended consequences, to name but a few. Investigating the nature of a state's right to rule, therefore, can only be a small step towards reaching such more complete judgment. However, it will be an important step as a legitimate state's right to rule is likely of significant import.

<sup>10</sup> This distinction is analogous, of course, to the famous distinction between concept and conception made by Rawls and Hart. See e.g. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, Revised Edition, 1999), pp. 5–9. I here resist this terminology since one might worry that even the concept of legitimacy is deeply contestable and that therefore no hard distinction can be drawn between the concept and rival conceptions of legitimacy. I thus formulate my argument in terms of a (contestable) conception of legitimacy. Contrasting this with rival substantive justifications is supposed to indicate that the argument below can be read as involving only a significant degree of generalization of different substantive theories, identifying certain elements that all plausible theories should include.

There are two main questions that need to be addressed:

- (A) *When* is a state internally and externally legitimate?
- (B) *To what* is a legitimate state entitled in virtue of (the core of) its internal and external right to rule?

The first of these asks whether the normative conditions under which a state has an internal and external right to rule are the same or different. The next section addresses that issue. Question (B), discussed in Sect. III, asks whether the moral upshot of a legitimate state's internal and external right to rule is the same or different. In each section I will discuss a common answer to these questions and argue that it should be rejected. This will culminate in the account of the asymmetrical conception of legitimacy, which is outlined in Sect. IV and further defended in Sect. V.

Before turning to this, however, it is worth emphasizing an implication of the present focus on developing a conception of legitimacy. The argument below aims to remain as much as is possible neutral between rival substantive theories of legitimacy. That is, instead of defending a fully worked out and detailed substantive theory, I will be asking what broad understanding of legitimacy (i) would allow such a theory to incorporate a number of desiderata, the attractiveness of which is relatively independent of any particular such substantive view (Sects. II and III), and (ii) is conceptually most attractive (Sect. V). It is my hope that this results in an argument that proponents of different substantive theories of legitimacy can, and will want to, accept. However, this focus also means that at no point a fully worked out substantive theory or justification of a state's right to rule is provided. Instead, the conclusion for which I will be arguing is that the asymmetrical conception of legitimacy enables one to formulate substantive theories of legitimacy that are more attractive than any of its rivals.

## II. WHEN IS A STATE INTERNALLY AND EXTERNALLY LEGITIMATE?

The first question to address concerns the conditions under which a state has an internal and external right to rule. Can states be internally legitimate without being externally legitimate? Can states be externally legitimate without being internally legitimate? Or must

they enjoy either both an internal and external right to rule or neither?

The most straightforward way of answering this question would be to assert that states are either both internally and externally legitimate, or neither. That is, it is attractive to hold that states, quite simply, are either fully legitimate or fully illegitimate. And while I believe this answer is ultimately correct, it is not as straightforward as it may seem. Consider the following example. Suppose Julie lives in a legitimate state. Being legitimate, let us assume, this state is a decent place to live: people's basic human rights are generally respected, the state is democratic, there is freedom of the press, individual property rights are secure, and so on. Then, one day, a morally problematic law is passed, say it forbids women to read romantic novels because they supposedly cannot deal with their emotional impact. Now let us suppose that such a law, though clearly very bad, would not be sufficient to open up this state to interference by other states. It would not be incompatible with this state's continuing external legitimacy. It seems, then, that outsiders will be morally obligated not to interfere with this state's domestic governance, despite its sexist law.<sup>11</sup> But that still leaves open the issue of what Julie is supposed to do. Does the fact that among this state's laws is one prohibiting women to read romantic novels mean that Julie has even a *prima facie* obligation not to read such books? The most intuitive answer, I submit, is no. These laws are deeply discriminatory, and fail to treat Julie as she morally ought to be treated. And while we can of course say that Julie should weigh the pros and cons of this law in order to see whether her *prima facie* obligation not to read romantic novels is outweighed by its injustice, surely the intuitively more plausible stance is that Julie quite simply does not, as a matter of the state's legitimacy, have any obligation to refrain from reading romantic novels at all. For, in passing this law, the state has overstepped the limits of its internal right to rule, it has gone beyond the limits of its rightful authority. And this, in turn, suggests that the state's attempt at exercising this internal right to rule has misfired, that this particular law failed, other things equal, to obligate Julie.

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<sup>11</sup> I do not here mean to suggest that state legitimacy is compatible with such sexism. The example is meant merely as an illustration.

We seem, then, to be confronted by two intuitively plausible but conflicting judgments. On the one hand, it seems plausible that states are both internally and externally legitimate or neither. Yet, on the other hand, it also seems that states can be in a position to claim external legitimacy against other states, while not at the same time being in a similar position to claim internal legitimacy against their subjects. One way in which a number of philosophers have tried to resolve this problem is by rejecting the former intuitive judgment. We should reject, it is said, the idea that a state is either both internally and externally legitimate, or neither. Instead, a 'judgment of legitimacy as made about a government by another state (an 'external' judgment of its legitimacy) is not ... the same as a judgment of legitimacy as made by the people under that government (an 'internal' judgment of its legitimacy)'.<sup>12</sup>

Let us call a view that accepts this answer to question (A) above a *separation-view*. On a separation-view the conditions under which a state is internally and externally legitimate can come apart. Thus, the fact that a state enjoys external legitimacy does not imply that it also enjoys internal legitimacy, and vice versa. Such a view can accommodate Julie's predicament above by suggesting that this is a case in which she is dealing with a state that is externally but not internally legitimate. Being a law of an internally illegitimate state, the law not to read romantic novels does not, as such, pose a *prima facie* obligation for Julie.

However, separation-views are problematic for at least two reasons. The first is that it is not at all clear whether such a response to Julie's predicament better captures our intuitive judgments overall than the straightforward answer mentioned above. One counter-intuitive result is that the suggested solution violates the ordinary way in which the term legitimacy is ordinarily used. We use the term legitimacy to refer to the idea of a state's possessing a certain normative status, a status that is thought to have implications for the requirements of subjects to obey the law.<sup>13</sup> But at the same time the

<sup>12</sup> Alyssa Bernstein, 'A Human Right to Democracy? Legitimacy and Intervention', in Rex Martin & David Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006), p. 288. The omitted word is 'logically' which I leave out since Bernstein clearly intends more than that. The view is also implied by Joseph Raz's recent arguments in 'Human Rights Without Foundations', in Besson & Tasioulas (eds.), *The Philosophy of International Law*, p. 330 (cf. note 31 below). See also Marcus Arvan, 'In Defense of Discretionary Association Theories of Political Legitimacy', *Journal of Ethics and Social Philosophy* (2009): 1–5.

<sup>13</sup> See the references in notes 3 and 4 above.



judgment that a state is legitimate is also commonly taken to imply that other states are required not to interfere with its domestic affairs.<sup>14</sup> And these judgments seem to come and go together, so to speak. Separating the internal and external application of the term legitimacy, then, goes against the common usage. This might lead to potentially serious confusion. We would need to start including the qualifiers ‘internal’ and ‘external’ whenever we discuss the idea of legitimacy, whilst keeping in mind that different normative standards might apply to legitimacy and legitimacy, that legitimacy does not imply legitimacy, nor the other way around.

Perhaps this problem can be avoided by introducing technical terminology. However, even if this successfully dissolved all confusion, such a response can ultimately be only partially satisfactory. Part of the point of philosophical reflection on matters political is to inform our practical debates and deliberations. But this means that our subject matter is to some extent determined by the ways in which political concepts play a role in political affairs. A theory of legitimacy becomes more interesting if it tells us something about how to interact with states that exist in contexts in which we actually find ourselves. In any case, this is the sense of the term legitimacy with which I am here concerned.

There are other ways in which the solution to Julie’s case suggested by separation-views conflicts with our intuitive judgments as well. For example, if it is the case that Julie lives in a state that is internally illegitimate, it follows that she (a subject) is not morally required to treat it as the holder of a right to rule.<sup>15</sup> But this is far too strong. For it would seem inconsistent with a number of other observations that seem apt to Julie’s situation, such as that other laws of her state might still pose *prima facie* obligations for her, that Julie ought to pay her taxes, that her disobedience (should it come to that) must satisfy certain conditions, and so on. These observations are at least as intuitively plausible as the claim that Julie is not obligated to obey the law against reading romantic novels. Whatever else we might want to say about it, surely the state in which Julie lives need not have entirely forfeited its legitimacy as soon as it overstepped the

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<sup>14</sup> See the references in note 6 above. For a study on the uses of the language of legitimacy in this context, see Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005).

<sup>15</sup> External legitimacy, *ex hypothesi*, being a state’s right to rule *vis-à-vis* outsiders.

boundaries of its internal right to rule. Legitimacy (internal or external) is more tolerant of error than that.

Second, there are, in addition to these intuitive concerns, more substantive worries. Recall the straightforward answer to question (A) with which we started this section. One important attraction of that response is that it expresses the thought that a state's internal and external legitimacy are, so to speak, two sides of the same coin. Legitimacy, we said, denotes a state's protected status as an entity that is generally justified in wielding political power within a jurisdiction. The internal and external rights of legitimate states in which we are interested here are rights that such states enjoy in virtue of this status. They are the rights that are supposed to ensure and protect for legitimate states the ability to successfully and appropriately exercise political power. Whereas a state's internal right to rule enables it to perform its generally justified political functions domestically, a state's external right to rule protects it against the sorts of outside interference that will be detrimental to its performance. The corresponding obligations on the respective parts of subjects and outsiders, therefore, are just the moral consequences for different addressees of one and the same thing: a state's status as possessing this status of having a right to rule. A state's internal and external legitimacy denote a state's entitlement that both subjects and outsiders treat it as such.

This fact about the normative status of legitimate states becomes visible when we consider its possible justifications. For when we consider some of the more familiar substantive justifications of a state's legitimacy, we see that these typically support obligations in both the internal and the external context. Consider for example arguments that purport to establish a state's right to rule by pointing to its domestic processes of self-determination. The idea here is familiar. There is significant variation in the rules by which societies can be permissibly governed. And there may be significant value, of both instrumental and non-instrumental nature, in a society deciding for itself which of these is to be implemented. As a matter of a state's internal right to rule, then, the value of these processes is said to support obligations for individual subjects to comply with the rules that are selected. For without such obligations, no meaningful self-determination could be achieved. However, such an argument will

at the same time support holding outsiders to be morally obligated not to interfere with such a state's domestic rule. After all, the value in question here is the value of a society deciding *for itself*, and outside interference is likely to hamper and detract from these processes. Holding that outsiders are morally permitted to interfere with a state even though its laws impose genuine moral obligations on subjects not just fails to take the value of self-determination sufficiently serious, it ignores it altogether.<sup>16</sup>

Much the same can be said for many other justifications of a state's internal legitimacy. Some argue that a well-functioning state is instrumental for the provision of public goods or the protection of people's rights within a jurisdiction, and that adequately performing these tasks supports a right to rule for states and an obligation to obey the law for their subjects. Here, again, the fact that outside interference is likely to harm a state's ability to adequately provide public goods or protect people's rights domestically also supports a right of non-interference for legitimate states.

Note that the same holds in the reverse direction. For while there are many obvious and important instrumental reasons that tell against outside interference with well-functioning states – interference being rarely successful, often leading to violence within societies and between countries, and so on – that would not be sufficient for ascribing to states a *right* against such interference. For such a right holds that outside interference is impermissible even if the instrumental considerations fail to apply. The most natural explanation of how this might be possible, of course, points to a state's internal right to rule. What makes a state morally worthy of respect by outsiders is the relation of legitimacy in which it stands with its subjects. States have an external right to rule, that is, when and because they are domestically governing in a way that is sufficient for them to (also) have an internal right to rule.<sup>17</sup>

It seems, then, that a state's internal and external legitimacy refer to two aspects of the same thing: its right to rule. As a result,

<sup>16</sup> Altman & Wellman, *A Liberal Theory of International Justice*, Chaps. 1 and 4.

<sup>17</sup> Note, again, that the argument here is compatible with understanding the right to rule as a claim-right, moral permission, or otherwise. For examples of more detailed arguments in favor of the connection between internal and external legitimacy, see Beitz, *Political Theory and International Relations*; Allen Buchanan, 'Reciprocal Legitimation: Reframing the Problem of International Legitimacy', *Politics, Philosophy, and Economics* 10 (2011): 5–19; David Copp, 'The Idea of a Legitimate State', *Philosophy and Public Affairs* 28 (1999): 3–45; Fernando Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998).

separation-views face a considerable drawback. For they propose to treat a state's right to rule as different from the way in which we typically think about rights more generally. To see this, consider an analogous example, say of the right to free speech. Few would suggest, when confronted with the truism that one's right to free speech consists not only of a moral liberty to speak but also, among other things, of a claim-right against others that they not interfere, that these are 'really' two separate rights: the internal and external right to free speech. Nor that the conditions under which people enjoy these could come apart. Instead, we see these as simply two aspects of one and the same right. To adopt a separation-view of legitimacy, then, involves treating a state's right to rule as somehow different from other rights that are similarly structured.

These points show that separation-views fail to satisfactorily accommodate what we can call the first desideratum for a conception of legitimacy: that a state's legitimacy denotes, quite simply, that it has a right to rule. None of this shows, of course, that the straightforward response to the question of the conditions of a state's internal and external legitimacy is correct after all. The problem of Julie's example still exists. However, for now we can draw the following, modest conclusion: if there were a way of understanding legitimacy that allows us to correctly accommodate Julie's case and avoids the problems of separation-views, then that understanding would be preferable.

### III. TO WHAT IS A LEGITIMATE STATE ENTITLED?

This brings us to our second question: to what is a legitimate state entitled in virtue of its internal and external right to rule? In order to address this question it will be useful to introduce a slightly technical notion: that of the *scope* of a right. The scope of a right describes to what its possessor is entitled in virtue of having that right. We can describe all rights in terms of their scope. For instance, Andy's property right over his bicycle entitles him to ride it, sell it, paint it a different color, and so on. These acts fall within the scope of Andy's right. All acts that do not fall within the scope of one's right fall outside of it. Thus, Andy's right does not entitle him to ride or sell Beth's bike, expose Beth to high levels of risk, slam his bike into Beth's body, and so on. More specifically, then, the scope of any of

Andy's rights can be understood as the set of his acts that is potentially morally affected by that right.<sup>18</sup> The same can be said for the right to rule. The scope of a state's right to rule concerns those acts by a state that are potentially morally affected by its right to rule. It consists, in other words, of those acts that its status as a legitimate state enables it to undertake as an exercise of its right to rule.<sup>19</sup>

The idea of a right's scope allows us to state more precisely some of the examples mentioned above. Consider first CASE 1: A legitimate state passes an unproblematic law, the kind of law we think a legitimate state may, and perhaps even should, pass. Say it passes a law that prohibits its subjects from using a cell phone while driving a car. Such a law, we might say, falls within the scope of its state's right to rule. Passing this law can thus be a case of the state's successfully exercising its right to rule. If so, this law can create a *prima facie* moral obligation for its subjects not to use a cell phone while driving a car. Similarly, it follows that outsiders will be obligated not to interfere with its issuing and enforcing this law. This is just what it means for a law to fall within the scope of a state's right to rule.

Laws or acts can also fall outside of the scope of the right to rule. CASE 2: Suppose a state passes a law that clearly falls beyond the scope of its right to rule. Say it passes a law that requires subjects to kill the members of a certain ethnic minority. The passing of such a law could not qualify as the state's successfully exercising a right to rule. Hence, such a law would fail to pose a similar *prima facie* moral obligation for the state's subjects. Nor does this state now have a right against outsiders that they refrain from interfering.<sup>20</sup>

The question to what a state is entitled in virtue of its internal and external right to rule thus is the question what acts fall within the scope of its internal and external right to rule. Here perhaps the most

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<sup>18</sup> I say 'potentially' because an act may lie within the scope of one's right or duty even though the act was never undertaken or required, such as when it is waived.

<sup>19</sup> The idea of a right's scope is neutral with regard to which Hohfeldian understanding of the term right (or right to rule) we adopt. If Andy has a claim-right against Beth, the scope of Andy's right consists of those acts that Beth is required to perform in virtue of Beth's duty that correlates to Andy's claim-right. If Andy has a power-right over Beth, the scope of Andy's right consists of those obligations which Andy has the ability (in virtue of this right) to impose on Beth. And so on.

<sup>20</sup> One might think that such laws actually *void* a state's right to rule altogether. This may well be, but is a question of what are the correct justificatory conditions of (internal or external) legitimacy. As argued in Sect. 1, this question is beyond the topic at hand and will have to wait until another day.

intuitively attractive answer would be that a legitimate state's internal and external right to rule are identical in scope. Call views that adopt this answer *mirroring-views*. Mirroring-views hold that a state is legitimate if and only if its subjects have a *prima facie* obligation to obey its laws, and outsiders are obligated to refrain from interfering with its passing and enforcing all and only these laws.<sup>21</sup>

Mirroring-views of legitimacy seem attractive since they can avoid the problems faced by separation-views. For the idea that a state's internal and external right to rule are mirroring seems a natural expression of the thought that state legitimacy refers to one and the same thing: a state's right to rule. The problem with mirroring-views, however, is that they are incapable of accommodating the example involving Julie that provides a main motivation for separation-views we mentioned above. Call this CASE 3. These are cases in which legitimate states domestically act in ways that are protected by their external right to rule from interference by other states even though their actions are at odds with their internal legitimacy in a way that undercuts the case for *prima facie* obligations for subjects to obey. If such cases exist, and if separation-views are implausible, a state's right to rule may sometimes provide it with external protection even when it fails to successfully exercise its domestic right to rule. In other words, not all laws that a legitimate state might pass and are beyond the scope of its internal right to rule also open it up to outside interference.

The possibility of CASE 3 is controversial and needs defense. One reason CASE 3 deserves to be taken seriously is that it is presupposed by holding that legitimate states have an external right to rule that is of independent significance. That is, CASE 3 is part of any view on which a state's external right to rule denotes more than only that its internal right to rule is exclusively held. Legitimate states of course do have such rights against interference with actions that fall within the scope of their internal right to rule. But this is not to say very much. For given that these are the things that legitimate states are

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<sup>21</sup> Or, to reiterate, that such laws provide subjects with reasons of a weaker sort, or that the state is morally permitted to enforce such laws. The most prominent example of a mirroring-view is John Rawls, who endorsed a general obligation to obey the law in all societies that are to be considered externally legitimate. See John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) especially pp. 65–67. Other examples are Beitz, *Political Theory and International Relations*; Jon Mandle, *Global Justice* (Polity, 2006), Chap. 6; Tesón, *A Philosophy of International Law*, Chap. 2. For a recent and succinct statement of the mirroring-view – and its (in my view unacceptable) implications – see Christopher H. Wellman, 'Taking Human Rights Seriously', *Journal of Political Philosophy* 20 (2012): 119–130, especially p. 129.

supposed to do, there is in fact little reason for outsiders to interfere. To assert, then, that legitimate states have an external right to rule that is of independent significance requires something more; it requires that they be protected against interference when their conduct is problematic despite their internal legitimacy. To have a *right* against interference means others are obligated not to interfere when there is good reason for it. Such acts are described by CASE 3.

By insisting on the identical scope of the internal and external right to rule, then, mirroring-views see a state's external legitimacy as denoting only that its internal right to rule is exclusively held. This is to trivialize the idea of the external legitimacy of states. But there is good reason for not trivializing this idea. A right for legitimate states against outside interference even when their actions do not fall within the scope of their internal right to rule can be supported on at least two counts. The first again is the value of processes of collective self-determination that can take place within states. The importance or value of these processes calls for protections of the kind provided by a legitimate state's external legitimacy. However, processes of self-determination are not valuable only when their outcomes are unproblematic. That is, even in cases where these processes produce results that are themselves morally problematic, the fact that they can be interpreted as the product of genuine processes of self-determination can still mean that there is some value to them. Similarly, there can be value, both instrumental and non-instrumental, in a society finding its own way, without external interference, towards a better state of affairs.<sup>22</sup> As such, outsiders can be required to show states a certain respect even when their internal laws or policies are problematic.<sup>23</sup>

A second source of support lies in the instrumental benefits that come from a general norm of non-interference in international affairs. Judgments about legitimacy and justice are obviously but importantly fallible. And judgments made from a distance are likely

<sup>22</sup> See for example John Tasioulas, 'The Legitimacy of International Law', in Besson & Tasioulas (eds.), *The Philosophy of International Law*, p. 10 or Michael Walzer, 'The Moral Standing of States: A Response to Four Critics', *Philosophy and Public Affairs* 9 (1980): 209–229.

<sup>23</sup> Consider the analogy with families. Suppose that Beth's parents push her to go to music school, but Beth does not enjoy music at all. While in a variety of cases Beth may owe it to her parents to do as they say, it seems that her parents are here overstepping the boundaries of their authority. However, if Beth may permissibly pursue her own life-goals, this does not mean that outsiders are permitted to interfere. There is a sense in which this is the family's business; outsiders are under a wider requirement of non-interference. And while there are, of course, many deeply important disanalogies between states and families, the structure of the morality of interference, I submit, is similar. (This does not mean, of course, that outsiders are never permitted to interfere).

even more susceptible to mistake and bias than those made by persons who are directly involved. Moreover, even in cases where outsiders are correct to believe that a society's domestic governance is at odds with its internal legitimacy, there are still significant risks and costs attached to permitting outside interference. Not only is outside interference likely to hamper a state's ability to undertake its domestic activities but, as recent history shows, it is hard to overestimate the perils of interventionist policies. Indeed, there is evidence suggesting that the recognition of states as legitimate based on their more or less peaceful and decent conduct fosters both peace among states and decent internal behavior.<sup>24</sup> This is not to say, of course, that states should be considered to have rights against interference come what may, but it does support considering legitimate states as enjoying a significant external right to rule.

Perhaps the supporter of the mirroring-view might object here that her view can accommodate both points above as indeed relevant and weighing against interference, but insist that these matters are separate from the issue of a state's legitimacy. That is, those inclined to accept a mirroring-view might argue that the considerations above should indeed play a role in answering the question of whether or not outside interference with a state will be permissible, but do not show that states have a more robust *right* against interference. On such a view, the question of the permissibility of outside interference with states that are overstepping the limits of their right to rule depends entirely on facts about each particular case. And while these facts include the value of self-determination and the perils of interference, they have to be weighed against other reasons such as the harm of the laws in question.<sup>25</sup>

But this is awkward. For both these considerations do not just weigh against outside interference as such, but weigh against outside interference with *legitimate states*. We have little reason to respect the processes of self-determination, such as they are, of illegitimate states. States that are illegitimate rule in ways that have more to do with oppression by powerful elites than with a community's ongoing

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<sup>24</sup> Clark, *Legitimacy in International Society*, especially pp. 5, 24–28; Ian Hurd, 'Legitimacy and Authority in International Politics', *International Organization* 53 (1999): 379–408.

<sup>25</sup> See e.g. Kok-Chor Tan, *Tolerance, Diversity, and Global Justice* (University Park: Pennsylvania State University Press, 2000), p. 82; Simon Caney, 'Cosmopolitanism and the Law of Peoples', *The Journal of Political Philosophy* 10 (2002): 95–123, p. 107.



political self-determination. Similarly, virtually no one accepts that an international norm of non-intervention extends to even illegitimate states. While this traditional doctrine of sovereignty may once have been the dominant view about the morality of international relations, it is now widely, and rightly, thoroughly discredited.<sup>26</sup> This suggests that these considerations really do support extending the external right to rule of a legitimate state to protect it against outside interference to some cases where its domestic actions are beyond the scope of its internal right to rule. At the very least, the defender of the mirroring-view owes us an explanation of why these considerations would so neatly line up with the issue of legitimacy, yet not be a part of it.

Another possible objection by the defender of the mirroring-view of legitimacy would be to accept that a legitimate state can have an external right to rule in cases that are problematic, but to deny that these are cases where that state is overstepping the boundaries of its internal right to rule. She might argue, that is, that a state's external right to rule protects it against interference even when its domestic actions are morally problematic, but that the same can be said about its internal right to rule. According to this objection, then, CASE 3 mistakenly suggests that non-egregiously unjust laws do not fall within a legitimate state's internal right to rule.

Unfortunately, this is no less awkward. It is not clear why the two considerations above should be thought to support extending the scope of a legitimate state's internal right to rule in exactly the same manner as they support extending the scope of its external right to rule. For while the value of collective self-determination will clearly matter for establishing the internal right to rule of a legitimate state, it is not clear that its value will support obligations to obey in each case where subjects are the victims of their state overstepping the limits of its right to rule in a way that still warrants protection against outside interference. For it does seem natural to say that sometimes those who are insiders to such processes of self-determination may have the requisite standing to disobey, while outsiders will fail to have the standing to interfere.<sup>27</sup> More importantly,

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<sup>26</sup> For a forceful critique, see Buchanan, *Justice, Legitimacy, and Self-Determination*. Note also that the evidence referred to in note 24 points to the beneficial effects of adopting an international norm of non-intervention with regards to legitimate states as well.

<sup>27</sup> This, at least, was the point of the example in note 23 above. There we said that Beth is morally free to disregard her parents' wishes, but that outsiders are nonetheless obligated not to interfere.

however, the point of an international norm of non-intervention seems utterly irrelevant to the issue of whether subjects are obligated to obey certain laws. So the defender of a mirroring-view again owes us an argument as to why the scope of the internal right to rule should include any and all laws or actions that the importance of a norm of non-intervention suggests should be included in the scope of a legitimate state's external right to rule.<sup>28</sup>

Mirroring-views are thus faced with a dilemma. They must either accept that states that engage in domestic conduct that is problematic are acting plainly in accordance with both their internal and external legitimacy or reject the legitimacy of all but those states whose actions fully remain within the limits of their internal right to rule. Neither option is attractive. The former option seems *ad hoc* in the absence of support from the two considerations discussed above and importantly ignores the fact that subjects are owed a certain kind of respect by their state if they are to be obligated to obey its laws. The latter ignores the importance of including in the class of externally legitimate states more than only those that act in perfect accordance with their internal right to rule.

I conclude, then, that it is plausible that there are cases like CASE 3. A legitimate state's external right to rule can render other states morally obligated not to interfere, even while its domestic actions are beyond the scope of its internal right to rule (and thus do not support moral obligations for subjects to obey). The ability to incorporate this is the second desideratum for a conception of legitimacy. Mirroring-views, we have seen, fail to be able to meet this: a state's internal and external right to rule can come apart in a way that is incompatible with such a conception of legitimacy.

#### IV. THE ASYMMETRICAL CONCEPTION OF LEGITIMACY

We are now in a position to tie together these observations in order to outline and defend the asymmetrical conception of legitimacy.

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<sup>28</sup> It is worth emphasizing that the point here is that these two considerations support including certain laws in the scope of a legitimate state's external right to rule, but do not similarly support including these same laws in the scope of its internal right to rule. It does not, then, assume that such laws are particularly egregious or outweigh obligations, all things considered. Since such laws are not included in the scope of a state's internal right to rule to begin with, no obligation to obey them needs to be outweighed. I thank an anonymous referee for pressing me to clarify this point.

We have seen that an account of legitimacy should ideally incorporate two seemingly contradictory elements: (A) states are either both internally and externally legitimate or neither, and (B) legitimate states can act in ways that are protected by their external right to rule, but beyond their internal right to rule. Separation-views capture (B) but fail to adequately incorporate (A). Mirroring-views capture (A) but fail on (B).

The asymmetrical conception of legitimacy, by contrast, holds that there is a single set of conditions the satisfaction of which means that a state enjoys both internal and external legitimacy, but that there is an important asymmetry between the scope of a legitimate state's internal right to rule and the scope of its external right to rule. Stated more precisely, a legitimate state has both an internal right to rule and an external right to rule, where the scope of its internal right is narrower than and contained in the scope of its external right to rule. As such, the asymmetrical conception of legitimacy regards a state's internal and external legitimacy as the different practical consequences for different addressees of one and the same thing: a state's right to rule.

Let us look at this conception in some more detail. The most obvious question one might have is how it is possible for a single right to have different scopes. The answer lies in understanding the right to rule as a *bundle* of rights. Many rights are best understood as bundles of rights. For example, Andy's property right over his car consists of a claim-right, correlating to obligations in others not to use or damage Andy's car without his permission, a liberty-right for Andy to use it, a power-right enabling Andy to alter his right over his car (for example by selling it to Beth), and so on. A legitimate state's right to rule is similarly best understood as a bundle of rights. Some of the elements making up the bundle-right to rule we refer to by the term internal legitimacy. These a legitimate state holds *vis-à-vis* its subjects. Their scope consists of the set of laws that it has a right to issue and (would) pose *prima facie* moral obligations for its subjects. Other elements of a legitimate state's bundle-right to rule we identify as its external legitimacy. These it holds *vis-à-vis* outsiders or non-subjects and impose on them obligations of non-interference. Their scope consists of those laws and activities with respect to which outsiders are under a moral obligation not to interfere.

There is no reason to assume that each element in a bundle-right must have the same scope. Indeed, it is relatively common for the bundles of elements that make up rights to have elements that differ in scope. Consider, for example, the idea that right-holders can have a so-called *right to do wrong*. In defending the idea that there is such a right Jeremy Waldron writes that ‘the cutting edge of a rights-claim’ is not that it renders one’s acts morally unproblematic, but ‘the claim it entails about the wrongness of interfering with the action that the right-bearer has chosen’.<sup>29</sup> An important part of the idea of a right to do wrong, in other words, is the idea that a right-holder can have a claim of non-interference against others that has a scope that is wider than the scope of her liberty-right to act.<sup>30</sup>

Similarly, the key claim of the asymmetrical conception of legitimacy is that the scope of the internal part of a legitimate state’s bundle of rights is narrower than and contained in the scope of the external part. That is, certain laws or activities of a legitimate state can fall within the scope of its external right to rule while falling outside of the scope of its internal right to rule. If the asymmetrical conception is correct, then, the straightforward examples discussed in CASE 1 and CASE 2 above do not exhaust the total set of acts a legitimate state might undertake, and something like CASE 3 is a genuine possibility.

The asymmetrical conception of legitimacy explains how CASE 3 is possible and how it differs from CASE 1 and CASE 2. Since the law with which Julie is confronted in CASE 3 is beyond the scope of the state’s internal right to rule, its passing that law cannot constitute a successful exercise of that right. It thus fails to bring about, as such, *prima facie* moral obligations for subjects. Nevertheless, since the state in question remains legitimate, this law can fall within the

<sup>29</sup> Jeremy Waldron, ‘A Right to Do Wrong’, *Ethics* 92 (1981): 21–39, p. 34, see also p. 29.

<sup>30</sup> Since Waldron’s original formulation, the idea of a right to do wrong has been debated, disputed, and articulated with more sophistication. The relevant notion of a right to do wrong here is a right to violate one’s duty since CASE 3 seems most naturally interpreted as a state violating a moral duty it owes to its subjects. For a defense of such a right, see David Enoch, ‘A Right to Violate One’s Duty’, *Law and Philosophy* 21 (2002): 355–384, and William A. Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004), Chap. 8. For a denial that there can be such a right, see William A. Galston, ‘On the Alleged Right to Do Wrong: A Response to Waldron’, *Ethics* 93 (1983): 320–324. Note that the duties correlative to X’s right to do wrong are duties of non-interference. Thus, ‘X has a right to do wrong’ does not entail ‘if X acts wrongly but within her rights, X cannot be appropriately sanctioned in some other way’. Note also that this is consistent with the observation in Sect. 1 above that the core of legitimacy on which we are focusing here does not exhaust the relevance of the idea of legitimacy. I thank an anonymous referee for pressing me to clarify these points.

scope of the state's external legitimacy. And if it does, outsiders will be obligated not to interfere.

This means that the asymmetrical conception of legitimacy is able to incorporate the two desiderata mentioned at the beginning of this section. First, like mirroring-views but unlike separation-views, the asymmetrical conception conceives of a state's legitimacy as straightforwardly referring to its status as having the right to rule. This means that the asymmetrical conception is in an important respect compatible with our ordinary understanding of legitimacy. It is also compatible with our ordinary understanding of rights. In particular, it allows one to explain how legitimate states have a right to do wrong. The asymmetrical view considers a legitimate state to have precisely the kind of right to do wrong that Waldron describes. It considers legitimate states as capable of acting in ways that are in an important sense wrong – beyond what their internal right to rule enables them to do – while being protected from outside interference by their external right to rule. The asymmetrical view thus understands the idea of a right to rule in a way that is structurally similar to an attractive way of understanding rights more generally.<sup>31</sup>

Second, like separation-views but unlike mirroring-views, the asymmetrical conception accommodates the thought that a state's external legitimacy can protect laws and activities that are beyond its internal legitimacy. It thus avoids the unpalatable choice that mirroring-views are facing. Asymmetrical views need neither endorse an implausibly narrow set of externally legitimate states, nor an *ad hoc* and implausibly permissive view of the conditions under which subjects can have obligations to obey the law.

This completes the first argument in favor of the asymmetrical conception of legitimacy. Before moving on, two things merit emphasis. First, the argument that legitimacy is asymmetrical is not itself *ad hoc*. A state's internal and external right to rule have different addressees, and the practical issues affected in each case are significantly different. Subjects are typically directly addressed by the law, and different laws purport to pose them with different demands.

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<sup>31</sup> As Joseph Raz writes: 'not every action exceeding a state's legitimate authority can be a reason for interference by other states, whatever the circumstances, just as not every moral wrongdoing by an individual can justify intervention by others to stop or punish it'. See Raz, 'Human Rights without Foundations' (p. 330). Unfortunately, Raz uses this (correct) observation to endorse an (incorrect) separation-view of legitimacy. However, as I have argued above, the analogy *itself* provides reason for rejecting the separation-view.

Outsiders are not among the law's potential addressees and thus do not similarly face decisions about whether or not to comply with individual laws. Their decision is primarily one of what practical stance to adopt towards the state as a whole, whether to treat it as an entity with rights of non-interference. Given that a state's legitimacy affects fundamentally different questions for these parties, the nature of the answers we should accept may be different as well.

Second, as mentioned above, the asymmetrical view of legitimacy is meant to be compatible with a variety of substantive views. This includes views according to which state legitimacy is something that comes in degrees.<sup>32</sup> There are two ways in which legitimacy can be both asymmetrical and gradual in nature. First, legitimacy can be gradual if the weight of subjects' obligation to obey the law – or the obligations of outsiders to not interfere – increases or diminishes in proportion to a state's conduct. The asymmetrical view of legitimacy is neutral on this matter. More importantly, second, the asymmetrical view opens up an additional way of understanding of a state's legitimacy as gradual. If legitimacy is asymmetrical, a state can, consistent with its legitimacy, do things that fall within the scope of both its internal and external right to rule, and things that fall within the scope of only its external right to rule. The total set of acts by a legitimate state can thus to a greater or lesser degree fall within the scope of both its internal and external right to rule. Given that only those actions that fall within the scope of both are a fully proper exercise of its right to rule, we might say that a state achieves a greater degree of legitimacy to the extent that its actions remain within these confines. A state becomes more legitimate, then, the more the total set of its laws is such as to impose on its subjects *prima facie* obligations to obey.

## V. LEGITIMATE STATES AND LEGITIMATE LAW

The argument so far depends on the force of the two desiderata identified in Sects. II and III and the asymmetrical conception's unique ability to accommodate both. Perhaps those desiderata can be resisted. In this section I will argue that the asymmetrical conception is attractive for another reason as well. This concerns how to

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<sup>32</sup> Mandle, *Global Justice*, p. 85; Christopher Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), Chap. 4.

morally assess different kinds of laws that a state with the right to rule might pass. In particular, the asymmetrical conception is necessary for providing a compelling explanation of the distinction between how law can be judged to be legitimate and how law can be judged to be justified.

There is, of course, a difference between judging states legitimate and judging law legitimate. Judgments of the legitimacy of states are, we have said, about whether states have a right to rule. But since law is the main product of the exercise of the right to rule, judgments of the legitimacy of law must be about something else. Nevertheless, there is one intuitive sense in which the two can be connected: for we might understand legitimate law as law that it is, in some appropriate sense (yet to be specified) the law of a legitimate state. This is the sense of legitimate law on which I will focus here.<sup>33</sup>

Writing about judgments of a state's legitimacy, A. John Simmons has famously argued that we should keep judgments about their justification separate from judgments about their legitimacy. Collapsing this distinction, Simmons argued, is problematic because each concerns a dimension of moral evaluation of states that is independent of the other and important in its own right. To say that there are good moral reasons for a state to exist and undertake certain activities is one thing, to say that it has the right to rule is quite another.<sup>34</sup> In an analogous manner, we can draw a distinction between the justification of law and its legitimacy (understood as the law of a state with a right to rule). Judging law to be justified law is similarly independent of judging law to be legitimate. And collapsing the distinction is similarly problematic since, I will argue, it obscures an important judgment about the law of a legitimate state.<sup>35</sup>

How law can be both unjustified and illegitimate is not particularly difficult to understand. If a state passes a law that is morally problematic and falls outside of the scope of both its internal and external right to rule, it presumably passes a law that is both unjustified and illegitimate. Nor, on the other hand, is it puzzling

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<sup>33</sup> Just as the term 'legitimate state' is used in many different senses, so too is the term 'legitimate law' used in many different senses. While only one among many, the interpretation used here is, I believe, both intuitive and the one most relevant for present purposes.

<sup>34</sup> Simmons, 'Justification and Legitimacy'.

<sup>35</sup> For other arguments against collapsing the distinction between the justification and legitimacy of law, see Wojciech Sadurski, "Law's Legitimacy and 'Democracy-Plus'", *Oxford Journal of Legal Studies* 26 (2006): 377–409 and Jon Garthoff, 'Legitimacy is Not Authority', *Law and Philosophy* 29 (2010): 669–694.

how law might be both justified and legitimate. Ordinary cases in which a legitimate state passes morally innocent or desirable law that falls within the scope of its internal and external right to rule presumably present cases in which law is both justified and legitimate.

The two judgments can come apart as well. For it also seems clear that law can be justified without being legitimate. Examples might be law that is independently morally justified law but imposed by a heinous regime or a foreign government. In such cases the reasons of subjects to obey and of other states not to interfere depend on the law's (just) content alone. Finally, it also seems that law might be legitimate without being justified. Such law, it would seem, is morally problematic but still recognizably the result of a legitimate state's exercising its right to rule. In what follows, I will focus on this category of legitimate but unjustified law.

The asymmetrical conception of legitimacy suggests the following way of understanding how laws can be both legitimate and unjustified: these, again, are laws that fall beyond the scope of a legitimate state's internal right to rule but within the scope of its external right to rule (CASE 3). Such laws involve the state overstepping the proper limits of the right to rule it holds against its subjects, and thus involve a state acting in a way that is importantly unjustified. However, in an important sense these laws can be said to remain legitimate laws since they are relevantly connected to the state's right to rule: they are within the scope of, and are thus protected by, its external right to rule.

Views that deny the asymmetry of legitimacy, on the other hand, must struggle to provide a satisfactory account of the distinction between law as legitimate and law as justified. Consider, first, mirroring-views. The most obvious way in which one might think to explain this distinction on a mirroring-view is as follows: law that is legitimate but unjustified is law that falls within the scope of both a state's internal and external right to rule, the content of which is morally problematic. One thing this would mean is that, contrary to what is suggested by asymmetrical views, the moral situation with which such laws present other states and subjects is similar to the situation with which law that is both legitimate and justified presents them. That is, subjects may still have a *prima facie* obligation to obey, and other states will also still be obligated not to interfere.



On a mirroring-view, then, we can see legitimate but unjustified law as the result of an unfortunate but otherwise ordinary exercise of a state's right to rule. However, this way of understanding the distinction misconstrues the difference between justified and unjustified law. For law can be unjustified even when its content is not morally problematic or, indeed, when it is morally desirable. Sometimes, that is, law can be unjustified not because it is discriminatory, unjust, or inefficient, but because there are compelling reasons against making it a publicly enforceable norm. Consider for example laws prohibiting adultery. Adultery, let us assume, is morally problematic. However, we might still think that a law prohibiting adultery would be unjustified given the serious infractions on people's privacy that it would bring about or encourage, or simply for the reason that it would involve an inappropriate degree of interference with people's personal lives by the state. Such a law would be unjustified not because of the moral nature of its content, but simply for the reason that it is *law*.<sup>36</sup>

Sometimes, in other words, law can be unjustified simply for the reason that it lies beyond what a legitimate state has the right to do. This means that theories that hold that legitimate but unjustified law is simply law with morally dubious content, law that nonetheless falls within the scope of a state's internal right to rule, are problematic. For they obscure an important dimension of moral evaluation of law according to which the law of a legitimate state can be unjustified simply for the reason that it is beyond the limits of the right to rule it holds against its subjects. The asymmetrical conception of legitimacy avoids this problem.

Separation-views might avoid this objection. The defender of such a view might insist that legitimate but unjustified law is, say, the law of a state that is externally but not internally legitimate. However, such an understanding of legitimate but unjustified law is unacceptable. For it radically severs the connection between a law's legitimacy and the reasons it provides subjects for action. A state's

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<sup>36</sup> It is worth emphasizing here the way in which the present distinction between justified and legitimate law is analogous to Simmons' distinction between justified and legitimate states in the following sense. To Simmons, roughly, state legitimacy denotes the holding of the right to rule, whereas a state's justification concerns its moral and rational desirability. Here, law's legitimacy expresses that it falls within the scope of the right to rule (of the state of which it is a law), whereas law's justification concerns its moral justification *as law*. I am grateful to an anonymous referee for emphasizing that I clarify this difference.

external right to rule, after all, is a right states hold against outsiders, in particular other states. A state's external legitimacy, then, has implications for the reasons for action of such outsiders, not those of its subjects. And given that on a separation-view a state's external legitimacy does not imply its internal legitimacy, this response on behalf of the separation-view therefore implies that there is no practical difference for a state's subjects between legitimate but unjustified law and illegitimate law. This is implausible.

The asymmetrical conception does better here as well. On this view, law that is legitimate but unjustified is still the law of an internally (as well as externally) legitimate state. As such, it can still present subjects with reasons, despite failing to present *prima facie* obligations to obey. Most importantly, although far from exclusively, such law can be disobeyed only if doing so is consistent with the wider requirements of subjects to recognize the state's continuing internal right to rule. As said in Sect. I above, obligations of obedience hardly exhaust the practical interest of judgments of legitimacy.<sup>37</sup>

Before finishing, let me briefly consider one more potential objection. It might be said that the asymmetrical view suggests that all law that falls within the scope of a legitimate state's internal right to rule must be justified, and that this is implausible because such law might still be morally problematic. However, this is a mistake. All the asymmetrical conception holds is that law that falls within the scope of a state's internal right to rule can be the product of that state's successfully exercising a right it holds against its subjects. (Absent this, such laws could not, as such, pose *prima facie* obligations for subjects to obey). But this is consistent with their being morally problematic. The asymmetrical conception of legitimacy simply leaves open the question whether such morally problematic laws actually do or do not fall within the scope of a legitimate state's internal right to rule. The view requires neither.

## VI. CONCLUSION

I have argued that we should think of state legitimacy as importantly asymmetrical in nature. Legitimate states have a bundle-right to rule,

<sup>37</sup> As such, then, the asymmetrical view does not presuppose that legitimate but unjustified law can only be understood from the 'external' point of view. The asymmetrical conception holds only that there is a possible, though not necessarily actual, class of laws that falls within the scope of a legitimate state's external right to rule but beyond the scope of its internal right.

and the scope of the external elements of that bundle is wider than and includes the scope of its internal elements. In closing, I want to quickly draw two substantive conclusions that follow if this argument is correct.

First, the asymmetrical conception of legitimacy suggests a particular take on what international toleration requires of states. For it implies that state A can be morally obligated to refrain from interference with a legitimate state B even when B's domestic acts are those that A could not permissibly undertake itself. Here is an illustration. Suppose, to add an additional premise to the argument, that only those states can be legitimate that are sufficiently liberal in nature. It follows from the asymmetrical nature of legitimacy that states, including those deeply committed to liberal values, can be morally required to refrain from interfering with other states that are engaged in non-liberal activities. This is controversial, of course, but the possibility of this conclusion follows from the fact that legitimate states have a right to do wrong.<sup>38</sup>

Second, if legitimacy is indeed asymmetrical, it follows that one traditional view of legitimacy must be mistaken. This is the view that a state's legitimacy does not only imply *prima facie* obligations for subjects to obey laws, but implies that they have a *general* obligation to obey, an obligation to obey all of its laws.<sup>39</sup> The asymmetrical conception denies that this connection holds since it allows for CASE 3 discussed above. It thus suggests an important and novel reason for which this traditional view of legitimacy is false: not (as is often argued) because it is too demanding or difficult to justify, but because it presupposes a faulty view of the very nature of the right to rule.<sup>40</sup>

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<sup>38</sup> Note that in addition to conceiving of the right to do wrong of legitimate states as structurally analogous to the right to do wrong of persons, the asymmetrical conception also suggests an international norm of toleration that is structurally similar to the domestic norm of toleration (of certain non-liberal ways of life) to which at least liberal societies are committed.

<sup>39</sup> See for example A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), p. 196. Cf. George Klosko, *The Principle of Fairness and Political Obligation* (Lanham: Rowman and Littlefield, 1992), pp. 4, 91, calling this the requirement of 'universality'. For discussion, see Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), pp. 228–229.

<sup>40</sup> To state the obvious: the view of legitimacy defended here does not imply that there can be no general *prima facie* obligation to obey the law. It only holds that there will be no such obligation as a matter of a state's legitimacy. There may be other grounds that justify obedience to law when a state oversteps the boundaries of the state's internal right to rule.

We need not choose, then, between a view on which a state's legitimacy implies no obligations to obey the law for subjects and a view on which legitimacy implies a general obligation to obey – between a view, so to speak, on which legitimacy means nothing for what subjects are obligated to do and a view on which it means everything. The correct view, I submit, is that legitimacy means some things, and only some things. A state's legitimacy implies that its subjects have *prima facie* moral obligations to obey certain of its laws, but not a general obligation. The real task for theories of legitimacy that focus on the obligations of subjects is then to specify what precisely is the scope of a state's internal right to rule.<sup>41</sup>

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