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On Communitarian and Global Sources of Legitimacy

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> I was brought up to believe in free will. Although I came to doubt all revelation, I can never accept the idea that the universe is a physical or chemical accident, a result of blind evolution. Even though I learned to recognize the lies, the clichés, and the idolatries of the human mind, I still cling to some truths which I think all of us might accept some day.
>
> —Isaac Bashevis Singer[1]

Although the concept of legitimacy is widely invoked in social science literature, political discourse, and common parlance, key empirical and normative questions about legitimacy are often left far from answered, especially "Legitimated by whom?" and "Legitimate by what criteria?" Recently these questions have been raised with particular acuteness with regard to the nascent international society, for instance, the standing of the International Criminal Court and the 2003 invasion of Iraq by the United States-led coalition.[2]

When, in modern writings, these questions are addressed, they are often treated in a liberal way; that is, legitimacy is viewed as the product of aggregated consent accorded by individuals to a given act, policy, law, public institution, or authority.[3] Moreover, focus is often on empirical questions: whether

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[1]Isaac Bashevis Singer, Nobel Lecture, December 8, 1978 (available at http://nobelprize.org/nobel_prizes/literature/laureates/1978/singer-lecture.html).

[2]Ian Clark, *Legitimacy in International Society* (New York: Oxford University Press, 2005), 200–5.

[3]Alan Cromartie, "Legitimacy," in *Political Concepts*, ed. Richard Bellamy and Andrew Mason (Manchester: Manchester University Press, 2003), 95–104; David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity, 1995); Benjamin Barber, "Democracy and Terror in the Era of Jihad vs. McWorld," in *Worlds in Collision: Terror and the Future of the Global Order*, ed. Ken Booth and Tim Dunne (Basingstoke: Palgrave, 2002), 255; Craig N. Murphy, "Global Governance: Poorly Done and Poorly Understood,"

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a given policy is *considered* legitimate, and what processes or factors account for the fact that a given population considers a given act as legitimate.[4] Much less often addressed is the normative question, which requires an observer to assess the moral standing of the act in question by drawing on exogenous criteria.[5]

In contrast to such liberal and empirical approaches, this essay explores legitimacy from a communitarian, and a mainly normative, viewpoint. This approach suggests (a) that legitimacy is largely advanced by communal processes rather than through individual deliberations; (b) that these processes draw on shared normative cultures as their starting points; and (c) that these normative foundations are subject to communal deliberations, namely, by moral dialogues, but are not based on them. From this viewpoint, the question "Who legitimates?" is largely answered by pointing to a variety of nestling, cross-cutting and overlapping communities (including the nascent global one) rather than to aggregates of individuals making

International Affairs 76, no. 4 (2000): 790; and Richard Devetak and Richard Higgott, "Justice Unbound? Globalization, States and the Transformation of the Social Bond," *International Affairs* 75, no. 3 (1999): 490.

[4]Clark, *Legitimacy in International Society*, 5; Arthur Isak Applbaum, "Culture, Identity, and Legitimacy," in *Governance in a Globalizing World*, ed. Joseph S. Nye and John D. Donahue (Washington, DC: Brookings, 2000), 24–25; Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), 19; Adam Watson, *The Evolution of International Society* (London: Routledge, 1992), 17; Ian Hurd, "Legitimacy and Authority in International Politics," *International Organization* 53 (1999): 381; Mlada Bukovansky, *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (Princeton, NJ: Princeton University Press, 2002), 24; and Jürgen Habermas, *Legitimation Crisis* (London: Heinemann, 1976), 95–96.

[5]Max Weber's analysis of legitimacy as a form of domination led many discussions of the subject to limit explorations of its normative side. Ian Clark writes that for Weber, "rule is legitimate when its subjects believe it to be so" ("Legitimacy in a Global Order," in "Governance and Resistance in World Politics," ed. David Armstrong, special issue, *Review of International Studies* 29 [2003]: 79). Robert Grafstein writes: "In Weber's hands . . . legitimacy no longer represents an evaluation of a regime; indeed, it no longer refers directly to the regime itself. Rather, it is defined as the *belief* of citizens that the regime is, to speak in circles, legitimate" ("The Failure of Weber's Conception of Legitimacy: Its Causes and Implications," *Journal of Politics* 43, no. 2 [1981]: 456). Jean-Marc Coicaud also blames Weber for the way legitimacy has been dealt with in social science writing: "Although legitimacy is indissociable from the faculty of judgment, most works and reflections that make use of it are loath to take into account the dimension of judgment it implies. They refuse to conduct research into the conditions for the right to govern by inquiring about the criteria used to evaluate political life. Max Weber's analyses of legitimacy . . . have a great deal to do with this phenomenon" (*Legitimacy and Politics*, trans. David Ames Curtis [New York: Cambridge University Press, 2002], 1).

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deliberated choices as free-standing agents. In contrast, the question "By what criteria can one judge that which is legitimate?" is not easily addressed. Neither relativism nor proceduralism provides a satisfactory answer. The thesis that there is a select core of values that are universal is a strongly contested position. However, as this essay will show, it has considerable pragmatic justifications.

Before proceeding, it is important to note that this essay presumes that legitimacy concerns a *subset* of moral deliberations and judgments—those that apply to political acts, to the use of power. (Hence many of the issues raised about morality also apply to legitimacy, but not necessarily the other way around.) The essay also presumes that legitimacy refers to moral judgments and not merely legal ones. This distinction is reflected in the Independent International Commission on Kosovo's statement that the NATO intervention in Kosovo was *illegal* but *legitimate*.[6]

The Legitimating Agent: A Communitarian Perspective

The differences between liberalism and communitarianism have been often laid out.[7] Hence, this essay assumes that this debate is familiar and provides only a few comments that seek to connect the debate to the issue at hand.

According to premodern thinking, legitimation was often considered to be accorded either by a divine force or by tradition. An act, policy, or institution (from here on, for the sake of brevity, "act" will be used to denote all objects of legitimation) was considered legitimate because it had been declared so by some higher authority, such as the deity or the king, and/or by tradition. Modern thinking, beginning roughly in the seventeenth century, is marked by the transfer of legitimation from a singular, higher authority to those who are governed—who bestow legitimacy on the rulers by granting their consent.[8]

[6]Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (New York: Oxford University Press, 2000), 4.

[7]Daniel Bell, *Communitarianism and Its Critics* (Oxford: Clarendon Press, 1993); *The Stanford Encyclopedia of Philosophy*, s.v. "Communitarianism" (by Daniel Bell), http://plato.stanford.edu/entries/communitarianism/; Shlomo Avineri and Avner de-Shalit, eds., *Communitarianism and Individualism* (Oxford: Clarendon Press, 1992); Phillip Selznick, *The Communitarian Persuasion* (Washington, DC: Woodrow Wilson Center Press, 2004); Elizabeth Frazer, *The Problems of Communitarian Politics: Unity and Conflict* (New York: Oxford University Press, 1999); Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (Cambridge, MA: Blackwell, 1992); Ellen Frankel Paul, Fred. D. Miller Jr., and Jeffrey Paul, eds., *The Communitarian Challenge to Liberalism* (New York: Cambridge University Press, 1996); Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (New York: Basic Books, 1996); Etzioni, *From Empire to Community: A New Approach to International Relations* (New York: Palgrave Macmillan, 2004).

[8]Cromartie, "Legitimacy," 96–99.

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To the extent that premodern views paid attention to the role of the governed in legitimating authority, their consent was typically interpreted as implied; the active participation of the people to manifest this consent was not required. In contrast, at the core of the modern concept of legitimacy is the concept of rights-bearing individuals, wielding the power to grant—or withhold—the legitimation of the government.[9]

Still, contemporary liberal thinking tends to presume that although each individual is free to choose whether or not she will consent to view a given act as legitimate, there is for many purposes some form of aggregation—otherwise one could not rule that a given act is considered legitimate by "the people." Which measures of aggregation are legitimate is a matter of some debate. Voting seems to be an obvious way.[10] Public opinion polls are also used,[11] as is the absence of rebellion.[12] In contrast, the thesis here advanced is that on most occasions when the legitimacy of a given act is explored, reference is actually to *collective* processes and not merely, or even primarily, to aggregation of intraindividual judgments. The question is not whether a given number of *persons* have decided that a given act is legitimate, but whether a given *polity* (drawing on communal processes, for instance on meetings in the agora or town-hall meetings) has so concluded. Hence, questions such as "Which polity is the relevant one?" and "What kinds of *collective* processes are at work?" are essential for the empirical study of legitimacy.

For liberals who view the self as an autonomous agent, the fact that the individual has freely and voluntarily consented provides the normative authority to whatever is being legitimated. That is, the free individual is considered to be the ultimate normative arbitrator. Communitarians challenge the assumption that the self is an autonomous agent.[13] For them, hence, such individual choices do not command the respect that liberals claim for them. Instead, communitarians view the self as, to a significant extent, reflecting the normative culture of the community (or communities) of which she is a member. An individual's personal preferences and deliberations are largely reflective of and affected by communal processes and hence are only partially autonomous.[14] From this viewpoint, it follows that in assessing the legitimacy

[9]Ibid., 101–2.

[10]David Beetham, *The Legitimation of Power* (London: Macmillan, 1991).

[11]Margaret Levi and Audrey Sacks, "Achieving Good Government—and, Maybe, Legitimacy" (paper presented at the Arusha Conference, New Frontiers of Social Policy, December 12–15, 2005).

[12]David Easton, *A Systems Analysis of Political Life* (New York: John Wiley, 1965).

[13]Bell, *Communitarianism and Its Critics*, 24–45.

[14]Charles Taylor, "Atomism," in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985), 190; Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1981), 92–98.

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of a given act one must also assess the normative culture of the relevant community (or communities) and not just of the individual involved.[15] Thus, the large number of Americans killed each year by guns reflects not merely or even primarily a *personal* conclusion by many millions of *individual* Americans that owning a gun is part of their birthright, but rather a *culture* that favors private ownership of guns, that legitimates laws that allow ready access to guns.

Communitarians can point to robust bodies of data generated by behavioral sciences that show that people have systematic, built-in cognitive biases. Thus, whether a given cost (or income, budget, etc.) seems small (and hence affordable) or large (and hence burdensome) depends on how people frame the given item (on what they compare it to). Also, people are found to develop emotional attachments to goods that prevent them from dealing with these goods in a rational way, an outcome known as the endowment effect. And people are deeply affected by relative costs and rewards (what they gain or lose compared to some others) rather than by actual amounts.[16] This essay seeks to explore the implications of these data for a communitarian position on legitimation.

In this context, a subtlety is best taken into account which has caused some communitarians to stumble. Some communitarians have argued against the liberal treatment of individuals as isolated atoms by proposing a view of the individual as a "socially embedded" entity.[17] Liberals have correctly responded to this assertion by stating that the fact that individuals "read" and respond to communal signals and inputs merely means that these

[15]Etzioni, *The New Golden Rule*, 217–227; Etzioni, "Self-Evident Truth (Beyond Relativism)," in *Universalism vs. Relativism*, ed. Don Browning (Lanham, MD: Rowman and Littlefield, 2006), 19–32.

[16]See, e.g., Daniel Kahneman, "Maps of Bounded Rationality: Psychology for Behavioral Economics," *American Economic Review* 93, no. 5 (2003): 1449–75; Daniel Kahneman and Amos Tversky, "Prospect Theory: An Analysis of Decision under Risk," *Econometrica* 47, no. 2 (1979), 263–91; Daniel Kahneman and Amos Tversky, eds., *Choices, Values and Frames* (New York: Oxford University Press, 2000); Richard Thaler, *Quasi-Rational Economics* (New York: Russell Sage Foundation, 1991); Robert Frank, *Falling Behind: How Rising Inequality Harms the Middle Class* (Berkeley: University of California Press, 2007); Colin F. Camerer and George Lowenstein, "Behavioral Economics: Past, Present, Future," in *Advances in Behavioral Economics*, ed. C. F Camerer, G. Lowenstein, and M. Rabin (Princeton: Princeton University Press, 2004), 3–51; Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (New York: Harper Collins, 2008); Bernard Berelson and Gary Albert Steiner, *Human Behavior: An Inventory of Scientific Findings* (New York: Harcourt, Brace and World, 1964); Herbert Simon, "The Potlatch between Political Science and Economics," in *Competition and Cooperation: Conversations with Nobelists about Economics and Political Science*, ed. J. Alt, M. Levi, and E. Ostrom (Cambridge: Cambridge University Press, 1999), 112–19.

[17]Michael J. Sandel, introduction to *Liberalism and Its Critics*, ed. Sandel (New York: New York University Press, 1984), 5.

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signals and inputs serve as additional informational fodder for personal deliberations.[18] Thus, liberals conclude, at the end of the day, individual deliberations still determine whether a given act is legitimate.

Actually, the key relevant implication of these data for communitarians is that the self is both originally shaped and continuously affected by the communal environment in ways that the self is unaware of. That is, the community influences both the self's initial preferences and—to a significant extent—the changes in these preferences.[19] The internalization of values, through such communal processes as moral education, persuasion, and leadership, forms the individual's initial preferences as well as changes them over time.[20] A brief examination of the very familiar way education and the formation of personalities take place supports this claim.

Children are born with broad, vague predispositions; they are predisposed to food over hunger, warmth over coldness, soothing sounds over aggressive ones, and other such leanings. These general predispositions are translated into specific preferences in line with the particular values of their culture and subculture that children internalize. Thus, while children have an inborn need for food and perhaps even for variation in foods they consider desirable, preferences for kosher food, soul food, fancy cuisine, or health food are culturally acquired tastes. Which tastes are acquired largely reflects whatever their parental or peer cultures cherish. Moreover, the acquisition is often only partially the result of conscious, "rational" reasoning. Once children become adults their preferences do not suddenly become immune to social influences, a fact that the data assembled by behavioral sciences, cited above, highlights. These observations lead to the question of what the main ways and processes are by which people's notions of what is legitimate are shaped and reshaped—the subject of the next section.

Communal Moral Dialogues as Agents of Change

One widely shared liberal answer to the question just articulated is provided by the students of deliberative democracy. These authors point to "reasoned deliberations" as the key way in which citizens of free societies come to change their judgments about what is legitimate. They see these as "cool" and rational processes that minimize the role played by emotions and other such "hot" factors. Proponents of deliberative democracy emphasize the exchange of information and weighing of evidence,[21] the "dispositions of

[18]Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989), 166.

[19]Bell, *Communitarianism and Its Critics*.

[20]Etzioni, *The New Golden Rule*, 93–118.

[21]Bruce Ackermanm and James Fishkin, "Deliberation Day," *Journal of Political Philosophy* 10, no. 2 (2002): 129–52; Joshua Cohen, "Deliberative Democracy," in

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reasonableness,"[22] reasoned arguments,[23] impartiality,[24] and enlightened understanding.[25]

Deliberations are said to appeal "to reasons we genuinely believe all reasonable persons could accept."[26] Deliberators must be "self-reflective about their commitments … and open to the possibility of changing their minds or modifying their positions at some time in the future if they confront unanswerable objections to their present point of view."[27] Shawn Rosenberg writes that "participation in deliberation leads individuals to reflect and interact in a way that is more logical, rational, just, considerate of others, self-critical, and oriented to the common good."[28] Joshua Cohen writes that "the point of Deliberative Democracy is to subject the exercise of political power to reason's discipline, to what Habermas famously described as 'the force of better argument.'"[29] Samantha Besson and Jose Luis Marti hold that deliberation "aims at a reasoned consensus achieved through rational persuasion by strong arguments, and deliberative parties are supposed to be impartially motivated."[30]

Communitarians hold that such "cool," rational deliberations are difficult to achieve under most circumstances and point to a rather different way in which communities reach a shared understanding of what they consider legitimate—namely, moral dialogues. Unfortunately, there are very few

Deliberation, Participation and Democracy: Can the People Govern? ed. Shawn W. Rosenberg (New York: Palgrave MacMillan, 2007).

[22]Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000).

[23]Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996); Shawn Rosenberg, "An Introduction: Theoretical Perspectives and Empirical Research on Deliberative Democracy," in *Deliberation, Participation and Democracy*, 7; Jack Knight and James Johnson, "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy," *Political Theory* 22, no. 2 (1994): 289; Samantha Besson and Jose Luis Marti, introduction to *Deliberative Democracy and Its Discontents*, ed. Besson and Marti (Burlington, VT: Ashgate, 2006), xvi.

[24]Jon Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998), 8; Besson and Marti, introduction, xvi.

[25]Colin Farrelly, *An Introduction to Contemporary Political Theory* (London: Sage, 2004), 140; Young, *Inclusion and Democracy*.

[26]Farrelly, *An Introduction to Contemporary Political Theory*, 141.

[27]Gutmann and Thompson, *Democracy and Disagreement*, 79–80.

[28]Shawn Rosenberg, "An Introduction," 7.

[29]Cohen, "Deliberative Democracy," 220.

[30]Besson and Marti, introduction, xvi; see also Knight and Johnson, "Aggregation and Deliberation," 289; James H. Kuklinski et al., "The Cognitive and Affective Bases of Political Tolerance Judgments," *American Journal of Political Science* 35, no. 1 (1991): 1–27.

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empirical studies of such dialogues. In the absence of systematic social science studies of moral dialogues, one draws on reports in the popular media and personal observations of a variety of meetings, ranging from those of the U.S. Congress and the British parliament to those of faculty in universities. These observations suggest that, to a significant extent, communities reach shared understandings about what they consider legitimate by a give-and-take that combines passion with *normative* arguments.[31]

Even a very cursory examination of moral dialogues, such as those about the death penalty, the scope of the community's obligations to the environment, or relations between the genders, suggests that they often have no clear opening point or closing event. They are prolonged, heated, and seemingly meandering. However, over time they often seem to lead to new or reformulated shared normative understandings. Even very large and complex societies *do* engage in moral dialogues that lead to changes in that which is considered legitimate. These dialogues take place by linking millions of local conversations (between couples, in neighborhood bars, in coffee- or teahouses, around water coolers at work) into society-wide networks and shared public focal points. They take place during regional and national meetings of many thousands of voluntary associations in which local representatives engage in dialogue; in state, regional, and national party caucuses; in state assemblies and in Congress; and increasingly via electronic links (such as groups that meet on the Internet). Focal points of these dialogues are national call-in shows, debates on network television, and nationally circulated newspapers and magazines. Such dialogues led in earlier days to new shared understandings about the abolition of slavery, the extension of the right to vote to groups that had been previously excluded (especially women and minorities), and the taboo on military interventions in the internal affairs of other nations, and more recently about the definition of death (and when it is morally acceptable to stop medical interventions) and the danger of unfettered capitalism.

The opening up of many societies (especially former communist societies), the spread of education, the widening of people's attention horizon from the local toward the national and even global public affairs, the rise of worldwide TV networks (the "CNN effect"), increased travel and immigration, and the world wide web—all have led to the development of transnational moral dialogues in general and dialogues about that which is considered legitimate in particular. These dialogues are global not in the sense that all citizens participate, let alone agree, but that these dialogues reach across most borders.[32] Thus, concern for the environment now is widely shared; following transnational moral dialogues, a near-global shared understanding evolved that the 2003 invasion of Iraq by the Bush administration was not legitimate; shared

[31]Etzioni, *The New Golden Rule*, 16–17.
[32]Clark, *Legitimacy in International Society*; "Legitimacy in a Global Order," 75–95.

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moral understandings are developing about matters as different as the bans on child pornography, sex tourism, land mines, and whale hunting.

In sum, to answer "Who are the main agents of legitimation?" a communitarian approach focuses on communities and not on individuals, and pays mind to the ways such communities change their normative cultures, rather than merely or even mainly to intraindividual processes.

So far the discussion has focused on the question "Who is the major legitimating actor(s)?" The next step is to determine whether the acts that a single community, a majority of communities, or even all communities consider legitimate can be judged to be actually legitimate and what normative criteria can be employed in rendering such a judgment.

Normative Assessments of Legitimation

It may at first seem that the question of the normative standing of legitimation has already been answered: whatever a given community or set of communities *considers* legitimate—or that which conforms to their normative cultures—*is* legitimate.[33] Indeed, several commonly used definitions of legitimacy so assume; for instance, where legitimacy is understood as that which "conforms to established norms."[34] At least one leading communitarian has stated that the community itself is the ultimate arbiter of that which is good.[35] This is the position that communities not only reach conclusions as to what *is* considered legitimate, but that they also can bestow on such acts a moral seal of approval, that the political acts legitimated by a given community are deemed to be as they *ought* to be.

One can readily demonstrate that this is not a tenable position. Consider a community in Turkey or Pakistan that strongly and fully supports honor

[33]This conception of legitimacy stems in large part from the work of Max Weber (see footnote 5 above). As one author puts it, this understanding of the concept makes the test for legitimacy "not the truth of the philosopher, but the belief of the people" (Tilo Schabert, "Power, Legitimacy and Truth: Reflections on the Impossibility to Legitimise Legitimations of Political Order," in *Legitimacy*, ed. Athanasios Moulakis [Berlin: Walter de Gruyter, 1985], 102; quoted in Clark, "Legitimacy in a Global Order," 80).

[34]Seymour Martin Lipset, *Political Man: The Social Basis of Politics* (New York: Doubleday, 1960), 77; Applbaum, "Culture, Identity, and Legitimacy," 24–25; Franck, *Power of Legitimacy*, 19; Watson, *The Evolution of International Society*, 17; Hurd, "Legitimacy and Authority," 381; Bukovansky, *Legitimacy and Power Politics*, 24; Habermas, *Legitimation Crisis*, 95–96; Beetham, *Legitimation of Power*.

[35]Michael Walzer argues that a "given society is just if its substantive life is lived . . . in a way faithful to the shared understandings of the members" (*Spheres of Justice* [New York: Basic Books, 1983], 313). For a comprehensive critique of Walzer on this point, see Etzioni, *The New Golden Rule*, 233. Walzer later changed this position, asserting a robust set of universal values (*Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. [New York: Basic Books Classics, 2000]).

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killings—that it considers it legitimate for brothers or fathers to kill their sister or daughter because she violated their code of good conduct by having premarital sex, even in cases in which she was raped.[36] The members of these communities, even the women involved, may consider such killings legitimate, but outsiders nevertheless can and do pass normative judgments of their own. The same point can be made with reference to numerous acts that were considered legitimate by particular communities throughout history, communities that legitimated lynching people of a different color, burning books, or "merely" terrorizing people who hang a UN flag on their porch.

Some argue that there is no need for recognizing shared moral values to find transcultural sources of legitimacy, that people who are committed to different core values can still come to legitimate the same political acts. This position has been referred to as overlapping consensus.[37] However, such agreements are much more readily achieved when people share basic values; some have even argued that they are impossible otherwise.[38] Moreover, such agreements are much more stable when commitments to them are not expedient, prudential, or instrumental, but fundamental, based on shared core values.

Locating a robust normative Archimedean point for the legitimacy of decisions rendered by a community poses a credible challenge. Hence it is hardly surprising that various attempts have been made to deal with this challenge while avoiding the central question: Which overarching, possibly universal, values can provide a basis for transcommunal, normative judgments in general, and that which is legitimate in particular?

One popular exit strategy is the position that an act is legitimate if it is formulated through a specified procedure; for example, a majority vote, a Supreme Court ruling, a decision by the UN Security Council, by random selection such as flipping a coin, or some other such "neutral" measures.[39] Such procedural sources of legitimation are often contrasted with substantive

[36]Sally Bland, "So-Called Honor Crimes Revisited," *Knight Ridder/Tribune Business News*, April 2, 2007; Katherine Zoepf, "A Dishonorable Affair," *New York Times Magazine*, September 23, 2007, 22; Lauren Sandler, "When Love Is a Crime," *The New York Times*, October 7, 2004.

[37]John Rawls, "The Idea of an Overlapping Consensus," *Oxford Journal for Legal Studies* 7, no. 1 (1987): 1–25; Charles Taylor, "Conditions of an Unforced Consensus on Human Rights," in *The East Asian Challenge for Human Rights*, ed. Daniel Bell and Joanne Bauer (New York: Cambridge University Press, 1999), 124–46.

[38]*The Stanford Encyclopedia of Philosophy*, s.v. "Original Position" (by Fred D'Agostino), http://plato.stanford.edu/archives/fall2008/entries/original-position/.

[39]Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, MA: MIT Press, 1990), 94; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996), 110; Habermas, *The Postnational Constellation* (Cambridge, MA: MIT Press, 2001); Held, *Democracy and*

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judgments, which are based on compatibility of the decisions with a given set of values.[40] Thus, under proceduralism, a decision—and, in substantive terms, its opposite—could be equally legitimate, depending on which was endorsed, say, by the majority. For example, torture–or a ban on torture—have here the same standing, as long as the proper authority, following the proper procedures, so rules. However, we realize that such an exit is flawed.

Moreover, which procedures are considered legitimate is based on one's *substantive* values. Some criticize deliberative democracy in these terms, by pointing out that its own status as a legitimating procedure has not been arrived at through deliberation, but is based on substantive values.[41] Others level this criticism at Habermas's theory of "constitutional patriotism."[42] In short, substantive normative judgments lurk closely behind the seemingly substance-free procedures.

Moreover, even strong advocates of democracy as the procedural wellspring of legitimate decisions hold that some values ought not to be subjected to majority rule, or to any kind of voting; for instance, minority rights and, more generally, individual rights. Furthermore, although courts are another source of legitimate rulings, especially the Supreme Court, observers regularly question whether a given ruling by the Supreme Court is, in fact, legitimate (e.g., *Plessy v. Ferguson*, *Bush v. Gore*) by appealing to substantive values.

In short, the quest for an overarching normative Archimedean point is not satisfied by pointing to legitimating procedures.[43]

Select Universal Values? A Global Perspective

A highly contested answer to the question "Legitimate by what criteria?" is the thesis that there is a core of universal values, a set of moral obligations that hold for all human beings, and that such values provide the needed Archimedean point and can serve as a basis for cross-cultural judgment about which acts are legitimate.

the Global Order; Barber, "Democracy and Terror," 255; Murphy, "Global Governance," 790; Devetak and Higgott, "Justice Unbound?" 490.

[40]Clark, *Legitimacy in International Society*; Christopher Zurn, "Deliberative Democracy and Constitutional Review," *Law and Philosophy* 21, no. 4/5 (2002): 510.

[41]Lynn Sanders, "Against Deliberation," *Political Theory* 25, no. 3 (1997), 347–48.

[42]Robert Fine, *Cosmopolitanism* (New York: Routledge, 2008); Patchen Markell, "Making Affect Safe for Democracy? On 'Constitutional Patriotism,'" *Political Theory* 28, no. 1 (2000): 38–63.

[43]Although these do help narrow the field of that which remains to be judged, a variety of proceduralism is, of course, at the heart of one version of democratic theory. My criticism is not that all procedures are worthless, but rather that they cannot, in and of themselves, provide a grounding point for the question at hand.

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How is one to recognize a value that is universal? A significant branch of philosophy holds that there are select values (or "moral causes") that speak directly to all human beings, which those who hear their voice find compelling.[44] People find that these values demand their compliance (somewhat the way religious people speak about revelation or a calling). America's Founding Fathers based the legitimacy of the new regime they created on what they referred to "self-evident" truths—evident not to Americans but to all human beings.

Michael Zuckert has provided in this journal a very carefully argued case that the Founding Fathers did not mean by this phrase truths that everyone will immediately recognize as valid, but truths that "we" (i.e., Americans) "hold" (i.e., believe) to be valid.[45] There can be little question that the text can be interpreted in this way, and Zuckert provides many reasons to hold that this is indeed what was on the Founders' minds. However, it does not follow that we cannot understand the claim that certain truths speak to us in a particularly compelling, direct way. For instance, while Peter Singer may argue against the ethical precept that we have extra obligations to our children, above and beyond those we have to all children, for the rest of us the moral truth of our extra obligations to our own children is so self-evident that it requires no reflection. Surely, we can and do probe this precept to see if it holds up against criticism, but this reflection comes after our recognition of the precept's validity and—to be truthful—most of us will not find reflection necessary. The claim is simply too self-evident. Also, as I show below, it makes a world of difference—for the world—if we interpret the Founding Fathers' declaration in a "naive" way (that they claimed that only those who are morally blind will not see the light) instead of in a "sophisticated" way, that these truths are some kind of American, political, positional statement.

Several social scientists have provided additional examples of such moral causes. James Q. Wilson points to a "moral sense" that informs people what these values are.[46] Fairness is often given as an example of a value that people of very different backgrounds "sense" as compelling.[47] Frances Harbour provides a list of primary values, including justice, beneficence, special beneficence to compatriots, subordinating interests of individual to group, good faith and veracity, courage, and self-control.[48]

[44]This is a core concept of deontology (see *The Stanford Encyclopedia of Philosophy*, s.v. "Deontological Ethics" [by Larry Alexander and Michael Moore], http://plato.stanford.edu/entries/ethics-deontological/), although philosophers add to it numerous assumptions and implications, none of which are here embraced.

[45]Michael P. Zuckert, "Self-Evident Truth and the Declaration of Independence," *Review of Politics* 49, no. 3 (1987): 322.

[46]James Q. Wilson, *The Moral Sense* (New York: Free Press, 1995), 141.

[47]Stephen Pinker, "The Moral Instinct," *New York Times Magazine*, January 13, 2008, 36.

[48]Frances V. Harbour, "Basic Moral Values: A Shared Core," *Ethics and International Affairs* 9, no. 1 (1995): 163.

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The present author has asked groups on four hundred different occasions, in a large variety of cultures and subcultures, whether children should be taught that truth telling is morally superior to lying (with the qualification "under most conditions," allowing for exceptions, typically in extreme situations and situations where the lie serves others and not oneself—for instance, one in which a Nazi solider knocks on one's door and asks whether one is hiding Jews). The response in all of these groups was the same: they were puzzled. They could not see a question. The preferred course was self-evident. (Even in cultures that put a high value on saving face, doing so without lying was preferred to lying.)

The obligation of stewardship toward Mother Earth, to at least not bequest it to our children in a worse condition than it was bequeathed to us, is another example of a universal value and, as such, a major source of legitimation. Reference to "Kyoto protocols" is often used as shorthand both to evoke this commitment and to criticize the nations that have failed to live up to it (either by not endorsing these protocols or not abiding by the requirements spelled out in these protocols). The compelling nature of this obligation is highlighted by the observation that no nation denies the legitimacy of this normative commitment, and that instead they limit themselves to arguing about how best to abide by it or when they can expect to be able to live up to this obligation given their state of economic development.

Human rights as a basic moral concept command universal respect, even by those who violate it often and grossly. This observation is supported by violators' tendency to become defensive about their failure to act in line with the dictates of human rights, rather than dismiss their normative standing.

The thesis that there is a limited core of select values whose normativity is self-evident across cultures, and that these can and do serve as an Archimedean point for bestowing legitimacy, is not based on some survey that shows that all the people of the world see these values as self-evident. The thesis is merely that (a) those who recognize these sources of normativity do not base them on rational deliberations but "automatically" see their moral validity (as illustrated by the response to the question about lying), and (b) that those who do not share this moral sense will do so if allowed open access to moral dialogues.

The first point is so far supported only by informal observations and introspection. The second point is very much subject to empirical verification by studying the people who formerly lived in closed cultures (whether totalitarian or theocratic) or were otherwise prevented from access to open dialogues. The test is the direction they move once their societies or their minds are opened up and they have continued access to moral dialogues. If they move toward the aforesaid values, their universality would be supported. Large scale systematic studies of such changes seem unavailable.

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Beyond Intuitionism

Some refer to the thesis that there are moral values that speak to people directly, in a compelling manner, as moral intuitionism (or moral emotionalism). Critics of this thesis argue (a) that the position is empirically flawed, given that one is hard put to find a uniform "moral sense," a globally shared foundation for judging which acts are legitimate (to the extent that such shared values are found, they are said to be very general and vague); and (b) that the thesis that there are such values dismisses much of philosophy, which draws on deliberations.

The first criticism is addressed by the observation already cited, that for people to "hear" the moral claims of the select core of universal values, they require unencumbered and continued access to moral dialogues. Without such access, the communitarian thesis holds, people may be "deaf" to these moral voices—as one sees in some traditional theocracies and authoritarian or totalitarian secular regimes, which impose an ideology that prevents people from discerning the universal moral claims.[49] The same "deafening" effect can be engendered by obsessive consumerism, substance abuse, and severe forms of mental illness.[50]

Adding openness—i.e., access to unencumbered moral dialogues—as a condition for the spread of universal values is supported by some evidence (admittedly inconsistent and debatable) that as closed societies (e.g., China) open up and as people gain more access to moral dialogues, especially transnational ones, citizens tend to embrace the same, albeit limited, core of universal values. For instance, although these citizens continue to differ in their interpretations and justifications of human rights as well as the proper scope of these rights, they come to see basic human rights (e.g., the right not to be killed, maimed, or tortured) as self-evident. (Note that just as opening is a gradual process, and setbacks occur, so is the aforesaid realization of self-evidence of select values.) Moreover, as democratic societies reduce their openness, as they did at the height of the Cold War or after 9/11, the realization of the same values is dimmed.

Even in relatively open societies there are sizable pockets of people who cannot "hear" the universal moral claims of at least some of the universal values, because of inadequate access to moral dialogues. This may be due to life's hardships, which keep them focused on making a living; to their being subject to extensive prejudice and discrimination; or to their being

[49]Actually a closer examination may reveal that universal values have nevertheless at least some appeal even to people so indoctrinated; however, this cannot be demonstrated here.

[50]It is important to recall that moral dialogues are not the source of legitimacy for these universal values; they merely allow people access to the self-evident truths that otherwise might be hidden from one.

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under the influence of controlled substances and alcohol. The same observations help explain the fact that not all people worldwide, or even within one community, however relatively open, "hear" the moral voice, at least initially.[51]

As to the second criticism that the moral claims are intuitive (or emotive) and not based on deliberations, I stress that the approach here outlined starts with values that speak to us directly, but that are then subject to the scrutiny of communal moral dialogues as well as personal deliberations, rather than remaining free from examination. Indeed, moral dialogues are essential not merely to peel off layers of traditionalism and indoctrination, but also to provide for the examination and specification of the initial claim.

Thus, for example, although one *at first* realizes that whether to lie or tell the truth is not a question—the answer is self-evident—on examination one finds that there may be exceptions to the rule (e.g., for truly altruistic lies), exceptions that specify the value at hand, truth telling, but that do not in any way invalidate the core claim. Also, upon deliberation, one finds no reason to question the initial claim under consideration. Hence, unlike moral intuitionism, that substitutes intuition for deliberations, the position advanced here starts with revelation but subjects it to the kind of scrutiny philosophy provides.

The same point can be seen in religion. Those who believe in God, and who take his existence for granted, do not vacate theology or refrain from arguing about the nature of God.

A Pragmatic Justification for Moral Universalism

The strongest justification for the position that there is a limited core of universal values, which serve as a major basis for the normative grounding of legitimation, may well be pragmatic and consequentialist. From a sociological viewpoint, values (whether they serve to determine which acts are legitimate or to judge nonpolitical acts) serve as the springboard of specific moral claims. These claims, in turn, help formulate and motivate that which people demand of themselves in normative terms, rather than in terms of their self-interest or that which others expect.

If one adopts a full-blown relativistic position, one has no foundation (by definition) to judge the legitimacy of the acts of others, at least not if they are members of other communities. Such a rejection of the possibility that there are values that hold for all people precludes transcultural moral

[51]For the same reason, in earlier eras, in which much of the world was dogmatic and sealed off, many people were prevented from hearing the voice of the same basic values. One would expect these values to apply to all futures, however in the same basic way constitutions apply, namely through interpretations that reflect the ever changing historical context.

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claims. This in turn leads one not merely to give up the moral high ground, but to give up any ground for laying moral claims on others.

To the extent that laying moral claims has socially beneficial effects on those who are judged, on third parties (say, those not yet converted to either position), and on one's own normative culture, the relativist in effect forfeits her role in the ensuing moral give-and-take concerning which acts are legitimate, as well as in the struggle over that which is legitimate in the eyes of the more encompassing communities. For instance, it seems obvious that if members of other societies cease criticizing the Chinese government for the way it deals with dissent, the government is likely to trample citizens' rights even more, other nations are likely to conclude that they will not face censure if they follow a similar course, relevant global normative standards will be weakened, and even in one's own community questions may be raised about the legitimacy of the policies at issue. Laying a moral claim need not be negative, and surely not self-righteous. It can pay homage to progress made, but if one refrains from anchoring one's moral claims on values that cut across cultures, one in effect greatly undermines the capacity to move members of communities other than one's own toward values whose judgments they ought to abide by. Thus, if the Founding Fathers would have declared that "we hold these truths to be American," their text would not have carried much water, at least not overseas.

A less radical relativistic position holds that one is entitled to judge the legitimacy of the policies of others, but one should make clear that one is merely expressing one's own culturally conditioned normative position, and that people of other cultures may well justify rather different positions, by drawing on their respective cultures. This approach has been developed, among others, by Richard Rorty and Stanley Fish.[52] In Rorty's words, we should be "ironists," and "continue to speak with the vulgar while offering a different philosophical gloss on this speech than that offered by the realist tradition,"[53] a gloss, that is, that denies the existence of universal claims.[54]

Although this position is not as preemptive as the full-fledged relativism, it still greatly undermines the essence of moral claims—the call on the other to recognize the value for which one is appealing. Moral judgments become like

[52]Richard Rorty, *Contingency, Irony and Solidarity* (New York: Cambridge University Press, 1989); Rorty, "Putnam and the Relativist Menace," *The Journal of Philosophy* 90, no. 9 (1993), 443–61; Stanley Fish, "Don't Blame Relativism," *The Responsive Community* 12, no. 3 (2002), 27–31.

[53]Rorty, "Putnam and the Relativist Menace," 444.

[54]On his philosophical antifoundationalism, Rorty writes: "When we go, so do our norms and standards of rational assertibility. Does truth go too? Truth neither comes nor goes. That is not because it is an entity that enjoys an atemporal existence, but because it is not an entity at all. The word 'truth', in this context, is just the reification of an approbative and indefinable adjective" (ibid., 453). See Rorty, *Contingency, Irony and Solidarity.*

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expressions of taste. I like broccoli and recommend it to you, but I rush to declare that you may well have strong reasons to prefer carrots, and I have no standing to complain about your preference. Such conditional, contingent claims are pale ones, unlikely to sway anyone, or even foster serious deliberations, especially in the world in which many others pose strong, unhedged claims. In contrast, if one maintains that the moral truth of one's position is self-evident—that one expects everyone to hear the voice that makes the position compelling and that those who do not hear it have not been properly subject to open dialogue—the potency of one's claim is sustained.

When one stakes an unhedged moral claim, others may respond (a) by validating said claim, which leads to an expanded shared moral understanding, to a more encompassing community of values, and ever-widening circle that holds the same policies as legitimate. For instance, more and more people will accept that the environment must be protected, that not just developed nations but also developing ones must do their share.

Or (b) others may validate the claim but lay out reasons why they cannot immediately abide by it, or why they will abide by it in other ways than expected (i.e., they will pay homage to the claim and may move toward honoring it in the future). For instance, Singapore claims that it will turn democratic after it has achieved a higher standard of economic development.

Or (c) others may respond by articulating claims of their own, which in turn will have salutary effects on the first actor—even if only leading it to reexamine elements of its own normative culture. For instance, Southeast Asian intellectuals and leaders have claimed that the public policies of the West are not respectful of the elderly. Thus, as each side chooses which "self-evident" universal truth to champion, such exchanges of moral claims may lead to a world more attentive to claims of all sides.

The argument here advanced is not that we should lay nonrelativist, universalistic claims because laying such unhedged claims serves well the values we hold dear, although at least those who subscribe to consequentialist doctrines might well favor such a position. For instance, Dale Jamieson argues on utilitarian grounds for adopting and promoting a kind of universal pro-environmental moral value in the face of the threat of global warming.[55] The argument laid out here is that to the extent that we recognize a core of self-evident truths, giving it voice—rather than muting it—yields a consequentialist bonus: it moves transnational public policies, as well as intranational ones, toward those that are legitimate.

There has been a long debate between those who hold that intentions make acts good and those who stress consequences. Increasingly, it seems the tendency is to accept that both matter. If one accepts this position, and if it is true

[55]Dale Jamieson, "When Utilitarians Should Be Virtue Theorists," *Utilitas* 19, no. 2 (2007), 160–83.

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that laying moral claims as universal ones is what might be called morally productive, this provides strong reason for advancing such claims.

Finally, without cross-cultural moral judgments, one cannot reach the next step—asking what legitimate measures we must take to enforce those judgments we do share. Thus, key questions concerning the conditions under which it is appropriate to impose economic sanctions and, above all, to engage in military interventions (whether humanitarian, to avoid genocides and ethnic cleansing, or to engage in just war or preemptive attacks) are all secondary to the recognition that there are illegitimate developments that take place in other nations that one is morally compelled to stop. Only after one concludes that others engage in conduct we deem illegitimate can we ask what we legitimately might do about such behavior.

There are those who fear cross-cultural moral judgments because they believe that all such judgments will legitimate the use of force, the invasion or bombing of other countries. However, one can readily draw a clear line between judging that a given public policy is morally reprehensible or illegitimate, on the one hand, and deeming it sufficiently troubling to justify the use of force, on the other. Indeed, this is very often the case. These considerations come into play, for instance, in the considerable literature on just wars. (Just wars are the exception; most are not justified.)

Critics who fear judgments lest they lead to military action may wonder whether our transnational moral judgments are useless without action. Far from it. In a world which is increasingly interconnected, people in different parts of the world do care about the moral judgments of others about what are legitimate acts both in their own lands and on a transnational level.

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