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State Consent and the Legitimacy of International Law

DAVID LEFKOWITZ*

2.1 INTRODUCTION

Like all law, international law is a practice of reason-giving, one in which agents invoke legal norms to justify their conduct. Practitioners of international law generally proceed on the assumption that those norms do, in fact, justify the conduct they sanction. Theorists, in contrast, tend to take a more critical stance towards the practice of international law, including the assumption that the law succeeds in providing a justification for its subjects’ conduct. Why treat the claim that international law prohibits Φ-ing as in itself a reason not to Φ? Or using the terminology I will employ in this chapter, what makes an international legal norm prohibiting Φ-ing legitimate? In the modern era, the consent of States to be bound by international law has played an increasingly prominent role in addressing these questions, with some theorists going so far as to maintain that only State consent can explain why international law binds; that is, why it provides States (and their subjects) with reasons for action. Though not uncontested, the belief in the centrality of State consent to international law’s legitimacy remains widespread today.

In this chapter, I argue that while State consent does contribute to international law’s legitimacy, it does not do so by providing a justification for it. States are not bound to obey international law because they have chosen to submit to its authority. Rather, international law provides them with a reason for

* For their comments on earlier iterations of this chapter, I wish to thank Terry McConnell, Oisin Suttle, Samantha Besson, Jose Luis Martí, and the participants in the ‘Consenting to International Law’ conference at the Collège de France.

† One response is that to participate in the practice of international law just is to treat a norm that prohibits Φ-ing as a reason not to Φ. But, arguably, that offers a descriptive-explanatory response to what is a normative question, namely what reason is there to participate in the practice of treating a norm prohibiting Φ-ing as a reason not to Φ.
action, and indeed they have a moral duty to obey it, if and only if they will do better at realizing justice if they act as the law directs them to act than if they act on their own judgment. As a means for crafting international law, State consent is valuable insofar as it yields international legal norms that satisfy this condition.

My defence of these claims begins in Section 2.2 with a characterization of the concepts of consent and legitimacy (or legitimate authority), and the justifications for according agents the normative powers to which those concepts refer. In Section 2.3, I argue that the consent of the governed cannot justify a claim to political authority, and so the duty of the governed to obey its directives. The role consent can play in building and expressing trust in a practical authority, including a political one, is the subject of Section 2.4. Though trust can provide a basis for a duty to obey the law, it does so only if the law is already legitimate, and so already law an agent ought to obey. In Section 2.5, which comprises the second half of this chapter, I draw on arguments developed in the first three sections to examine the myriad ways in which State consent contributes, or could contribute, to the legitimate exercise of international legal authority.

2.2 Conceptual and Normative Background

2.2.1 The Concept and Justification of Consent

The term ‘consent’ picks out two related but distinct concepts, a narrower normative one and a broader descriptive one. The narrower concept refers to an agent’s exercise of a normative power to alter another agent’s normative position (e.g. to grant that agent permission to perform an act that she would otherwise have no right to perform). Agents occupy normative positions in virtue of their standing in various relationships to other agents, relationships that are constituted by norms that accord them various rights, duties, powers and immunities. Those norms may be moral, social or legal, though as we shall see, the latter provide moral reasons for action only if they are legitimate.

Following Joseph Raz, I maintain that consent is given by any act or omission undertaken in the belief that:

- It will change the normative situation of another;
- It will do so because it is undertaken with such a belief;
- It will be understood by its observers to be of this character.²

Normally, an agent’s behaviour constitutes a successful instance of consent if and only if these beliefs are correct. The third condition that characterizes the performance of consent follows from the rationale for according an agent a normative power to alter another’s normative position, namely that doing so serves to enhance that agent’s control over some aspect of her life, or over the life of another agent. One can exercise that control only if other agents acknowledge that one’s act or omission counts as an instance of consent, and act accordingly.

But what justifies according an agent control over some aspect of her life, or that of another agent? First, agents may often be best placed to determine whether and when a change in another agent’s normative position will advance their own well-being, or that of another. Such a change may be instrumentally valuable, namely if it conduces to the attainment of a good distinct from the normative relationship, as in the case of an ordinary market transaction. Or it may be intrinsically valuable, if it (also) serves to constitute a relationship that is good in itself. Second, the exercise of control over one’s life may be intrinsically valuable apart from whatever contribution it makes to the realization of other elements of a good or flourishing life. If so, then there may be grounds for according agents a normative power to alter another’s normative position even in cases where their exercise of that power detracts from their own or another’s attainment of other goods. Or, to the contrary, it may be that the intrinsic value of self-determination is conditional on the value of what is chosen; choice is good in itself, but only if what is chosen is good, either in itself or as a means to something that is good in itself. I return to this point later in the chapter, when I consider respect for political self-determination as a reason to hold that States, or at least sufficiently democratic States, should for the most part only be subject to exercises of international authority to which they consent.

The broader descriptive notion of consent refers to the fact of agreement, typically to terms that purport to structure interactions between the parties to it. Oftentimes, such agreements accurately reflect the exercise of a normative power to alter another’s normative position by one or more of the parties to it. But not always; the agreement may concern the performance of an act the parties have no right to perform, or it may be reached under conditions at odds with the underlying rationale for according agents a normative power to alter another’s normative position. Thus, we may say that a person who responds to the threat ‘your money or your life!’ by handing over her money consents to the transfer of her property, in the sense that she agrees to it, but also maintain that her consent is not genuine, meaning not a successful exercise of her normative power to alter another’s normative position (in this case, by granting another a property right in her money).
2.2.2 The Concept and Justification of Legitimacy
(or Legitimate Authority)

Now consider the concept of legitimacy, understood here as a property of law. Law is legitimate, I contend, if and only if it constitutes a justifiable exercise of practical authority by one agent over another, that is, if it consists of directives issued by an agent with a moral right to rule to an agent with a correlative duty to obey that agent’s directives. A attempts to exercise practical authority over B with respect to some domain of conduct if and only if A maintains that B ought to defer to A’s judgment regarding what B should do. When A does so, she maintains that her directives provide B with content-independent and exclusionary reasons for action. So, if A claims authority over B and she directs B not to Φ, then she maintains that B has a reason not to Φ simply because A instructed him not to do so, a reason that makes no reference to the content of A’s direction to B (i.e. what Φ-ing is). Moreover, she maintains that B ought to treat A’s instruction not to Φ as a reason to exclude from his deliberation some or all of the reasons that bear on whether he ought to Φ. From B’s perspective, to treat A’s directive as a content-independent and exclusionary reason just is to defer to A’s judgment, or in other words, to recognize her as having practical authority over him.³

As in the case of consent, we require a normative theory of legitimate authority, one that explains why we are justified in according A the moral power to impose on B a duty to defer to A’s judgment regarding what B ought to do. Following Raz again, I maintain that A’s claim to practical authority over B is justifiable when the following two conditions are met:

– The Normal Justification Condition (hereafter NJC): the subject would better conform to reasons that apply to him anyway (i.e. to reasons other than the directives of the authority) if he intends to be guided by the authority’s directives than if he does not.
– The Independence Condition (hereafter IC): the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority.⁴

A’s claim to authority over B is justified, then, if B is more likely to act as he has most reason to act by deferring to A’s judgment regarding what he should do, than by acting on his own judgment, except in cases where it is more important that B decide what to do for himself than that he decides correctly. Raz labels this the service conception of legitimate authority.

Three brief expository remarks are in order, since they bear on the contribution that State consent can make to international law’s legitimacy. First, the NJC entails that law’s legitimacy may be piecemeal, its claim to practical authority justifiable on some matters, or with respect to some agents, but not others. Second, the service conception provides an account of the rationality of deferring to authority; a description of the conditions under which practical authority enables us to better conform or respond to any of the reasons for action that apply to us. Questions of legitimate authority, however, only concern a subset of the reasons that apply to us, namely moral ones. Only in those cases where an agent is more likely to act as she is morally required to act by deferring to another’s practical authority does she have a moral duty to do so.

Finally, the same understanding of rationality, as responsiveness to reasons, that justifies deference to authority also provides two reasons not to do so. One is instrumental; in some cases, an agent is likely to do better in the long run at acting on right reason if she develops her own prudential or moral judgment than if she relies on the judgment of another. For example, the fact that parents will not always be available to instruct their children on what to do provides a weighty reason for them to develop their children’s ability to make good judgments. Like any skill, however, judgment can only be developed with practice, and that requires giving children the opportunity to act on their own judgment even though they will sometimes err when doing so. The other reason why agents should not defer to another’s judgment is non-instrumental: certain valuable experiences, accomplishments and relationships can only be realized if an agent chooses them for herself. This is true of intimate relationships, for example, which are partly constituted by individuals’ choosing to make themselves exceptionally vulnerable to one another. The fact that there are certain reasons for action that agents cannot better conform to by acting on another’s judgment places an inherent limit on the scope of justifiable practical authority.

2.3 PRINCIPLED ARGUMENTS AGAINST CONSENT AS A JUSTIFICATION FOR LEGITIMATE AUTHORITY

The service conception of legitimate authority undergirds the first of three principled objections to grounding international law’s legitimacy in State
Recall that the justification for according agents a normative power to alter their normative position is that doing so serves to enhance their ability to advance or honour something valuable. Deference to another’s authority does so if and only if the NJC and IC are satisfied. Thus, if A claims authority over B, and A satisfies the NJC and IC vis-à-vis B with respect to the conduct at issue, then B already has a duty to defer to A’s judgment regarding the performance of that conduct. From the standpoint of justifying A’s right to rule and B’s correlative duty to obey, B’s consent to A’s rule is superfluous.

Suppose A does not yet claim authority over B. Will not B’s consent to A’s rule change B’s normative position? If so, does that not prove that consent can and often does justify one agent’s claim to authority over another? These questions reflect a common confusion. B may agree to A’s rule (e.g. to accept the jurisdiction of the International Court of Justice (hereafter ICJ) in a particular dispute), and it is true that absent that agreement A would not claim a right to rule B. Nevertheless, the question that concerns us is why, having agreed to A’s rule, B now has a moral duty to defer to A’s judgment regarding what to do, rather than ignoring it, or treating A’s directive as merely advisory? To say that agreements must be kept (pacta sunt servanda) is simply to restate the problem. Why must B keep its agreement to obey A? The answer, I maintain, is that B has a duty to do so if and only if B is more likely to conform to right reason by deferring to A’s judgment than if B acts on its own judgment, and it is more important that B get it right than that B act on its own judgment. Of course, B might still have compelling reasons to act as A directs even if A lacks a legitimate claim to authority over B. Doing so may be prudent, or the best available means for avoiding or mitigating injustice. Nevertheless, if A does not satisfy the criteria set out in the service conception of authority, B has no moral duty to do what A directs because A so directs, regardless of whether B has consented to rule by A.

In Section 2.2.2, I noted that consent may be justifiable in part because it constitutes an intrinsically valuable exercise of autonomy or self-determination. Might the intrinsic value of self-determination justify a duty

5 Much of the criticism of State consent as a basis for international law’s legitimacy targets the existing practice of soliciting and giving consent on the grounds that it is not free, or informed, or both. That an act must satisfy these conditions in order to qualify as an exercise of the normative power to alter another’s normative position follows from the rationale for according agents that power. These objections are moot if in principle State consent cannot provide a basis for international law’s legitimacy. They remain relevant to the success of purported exercises of consent to alter another agent’s normative position that do not involve granting the latter authority, however. Examples include one State granting another a right to military overflights, or to tariff-free trade.
to obey an authority to whom an agent has consented even in cases that do not satisfy the NJC and IC? Raz maintains that it cannot justify an individual’s consent to rule by the government (State) that claims her as a subject because ‘governments typically claim authority to govern any and all aspects of their subjects’ lives’, and so may act in ways that directly or indirectly deprive their subjects of their autonomy.\(^6\) Just as a proper regard for the value of liberty is incompatible with selling oneself into slavery, so too a proper regard for the value of autonomy is incompatible with consenting to the rule of an agent who claims comprehensive authority to determine what one ought to do. Nicole Roughan suggests that this argument does not apply to international legal authorities because (the political community constituted by) international law does not advance a claim to comprehensive authority.\(^7\) This response may confuse empirical facts regarding how the international community currently exercises its authority with a conceptual claim regarding the authority law (or a political community) necessarily claims over its subjects, namely that of having the final say on any moral question, including the conditions for its own legitimacy and whether it satisfies them in any particular case. If so, then even assuming that the exercise of political self-determination by (the community constituted by) a State is intrinsically valuable, that State’s consent to the rule of international law cannot justify its duty to obey it.

Two further considerations warrant a sceptical response to the argument that, in virtue of its constituting an intrinsically valuable exercise of autonomy, an agent’s consent to rule by another justifies a duty to obey the other’s directives. First, as I noted previously, it may be that the exercise of autonomy is valuable only when it is exercised well, that is, when an agent chooses to do something that is valuable, or warranted by an undefeated reason. If so, then consent to another’s authority is valuable only if an agent has an undefeated reason to do so, and that will be the case only when the other agent satisfies the NJC and IC. Second, consent to another’s authority over some aspect of one’s life is not so much an exercise of self-government as it is an abdication of it. The fact that one chooses to grant another control over that aspect of one’s life does not change the fact that, from that point forward, it is the other agent and not you who decides what you should do in that domain. That need not be a bad thing; we should not make a fetish of autonomy, but instead recognize that in some cases it is more important that we get it right than

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\(^6\) Joseph Raz, ‘Government by Consent’ \((1987)\) 29 Nomos 76–95, at 85.

that we decide for ourselves. Nowhere is that claim more compelling than with respect to the just treatment of others.

On the basis of the foregoing arguments, I conclude that the consent of the governed cannot justify a political community’s or its agents’ claim to legitimate authority over them.

2.4 CONSENT, TRUST AND RESPECT FOR LAW

Thus far, we have considered consent as an act whereby an agent alters his normative position vis-à-vis another agent. But Raz observes that consent can also serve as a means for expressing trust or loyalty. Consent is most likely to carry this expressive meaning when it constitutes a change in an agent’s normative relationship to another that the consenting agent views as leaving him or her exceptionally vulnerable to the other agent(s). Indeed, it is the fact that consent will have this consequence that makes it a suitable vehicle for expressing one’s trust in another agent. As expressions of trust, acts of consent serve to constitute valuable relationships, such as those between lovers, or among friends. This constitutive role in creating, sustaining and deepening intrinsically valuable relationships makes trust-expressing acts of consent intrinsically valuable.

Raz maintains that under certain conditions agents can express their trust in, and loyalty to, the political community with which they identify by consenting to the rule of its government. As an example, consider the practice of requiring individuals who wish to become members of a political community to take an oath of allegiance to it. As we have seen, a promise to obey the law creates a moral obligation to do so only if the NJC and IC are satisfied, and where that is the case agents have a duty to obey the law regardless of whether they have promised or consented to do so. Nevertheless, the ritual of pledging allegiance to the political community offers individuals an opportunity to publicly express their trust in, and loyalty to, the other members of that community, as well as the institutions through which the community governs itself. Like all expression of trust, however, a pledge of allegiance to a political community has value only where it serves to constitute a valuable relationship. Therefore, a promise to obey the law counts as an intrinsically valuable relationship.

\[\text{Raz, fn. 2, pp. 90–94; Raz, fn. 6, at 90–93.}\]

\[\text{‘Exceptionally’ indicates a deviation from the normal or standard degree of physical or emotional vulnerability that characterizes relationships between agents in a given society.}\]
valuable expression of trust in, and loyalty to, a political community only if its government’s rule is generally legitimate.\textsuperscript{10}

A constitutive element of trust in government is an attitude Raz labels respect for law. As he describes it, respect for law ‘takes the form (among others) of trusting these institutions, taking it on trust that they have the authority to do what they do, not questioning their conduct too closely to see whether they exceed their authority’.\textsuperscript{11} Where respect for law is warranted, it may involve ‘a certain slackening of vigilance regarding the two conditions of legitimacy [the NJC and IC]’ so that ‘while the conditions themselves are unaffected, people would be justified in maintaining that the government has authority on evidence that would not be sufficient to reach such conclusions but for the trust they have in the government’.\textsuperscript{12} Note that consent is not a necessary condition for respect for law; one may have trust in one’s government, and so an attitude of respect for law, even if one has never consented to its rule (e.g. one has never pledged allegiance to it). Nor does Raz maintain that one has a moral duty to cultivate trust in, or loyalty to, one’s government, and so an attitude of respect for law, even if one’s government is worthy of those attitudes. Nevertheless, identification or a sense of community with others with whom one cooperates to realize justice can certainly contribute to a flourishing life, and insofar as the performance of an act of consent contributes to the creation or strengthening of that bond, agents have a compelling reason to do so.\textsuperscript{13}

Reflection on the role that consent plays in other contexts highlights the contribution that seeking consent, and restricting one’s interactions with another to those forms of treatment to which they have consented, can make to sustaining and deepening trust. For example, a number of bioethicists argue that the requirement of informed consent to treatment in both medical practice and research is partly justified by the need to sustain (or restore) people’s trust in both their particular medical providers and the field of medicine as a whole.\textsuperscript{14}

In the latter case, the rationale appears entirely instrumental; medical professionals’ ability to advance human well-being will be severely curtailed if potential or actual patients or test-subjects do not trust them. In some cases of

\textsuperscript{10} Raz, fn. 6, at 92.

\textsuperscript{11} Raz, fn. 4, at 1028.

\textsuperscript{12} Ibid., at 1028–1029.

\textsuperscript{13} For various qualifications to this claim, see Leslie Green, ‘Law, Legitimacy, and Consent’ (1998) 62(6) \textit{Southern California Law} 795–825.

interactions between patients and medical providers, the soliciting and offering of consent may also be a constitutive element of a genuinely fiduciary relationship. Such a relationship is one in which (a) the provider is motivated by the trust the patient places in her, and not simply conformity to professional ideals (which may be restated or specified in the law) or fear of the (legal) consequences of violating that trust, and (b) the patient treats that motivation on the part of the provider as a reason to trust her. Typically, genuinely fiduciary relationships develop over time through repeated interactions, and when they do, patients tend to adopt an attitude of respect for professional judgment that is analogous to the attitude of respect for law a person manifests if she trusts her government. The increasingly bureaucratic and industrial nature of medicine in many parts of the world raises significant obstacles to the development of genuinely fiduciary relationships between patient and provider. If trust figures at all in this environment, it does so in the form of patients’ trust ‘in the institution’, a belief in the practitioner having been formed by professional training and a professional culture so that the patient is warranted in taking it on faith that the practitioner will treat her with a proper regard for her rights and interests.

In sum, giving, seeking and honouring consent can all serve as vehicles for expressing and building trust, including in political authorities. To trust a political authority is, in part, to presume that it satisfies the conditions for legitimate authority, and so to take oneself to have a duty to obey it. Trust in political authorities is justifiable, however, only if it is merited, and only political authorities that generally meet the conditions set out in the service conception of legitimate authority do so. Thus, trust-expressing and trust-building acts of consent provide a supplemental justification for obeying the law, a reason to do so in addition to, and conditional on, the law constituting an exercise of legitimate authority.

2.5 STATE CONSENT’S CONTRIBUTIONS TO INTERNATIONAL LAW’S LEGITIMACY

The arguments set out in Section 2.3 entail that international law’s legitimacy is not a product of States’ exercise of a moral power to subject themselves to another agent’s rule, but is instead a function of the extent to which specific exercises of international authority satisfy the NJC and IC. And indeed, there are a number of ways in which international law can help those over whom it claims jurisdiction improve their conformity to right reason.\(^{15}\) It can correct

\(^{15}\) I focus here solely on what makes an exercise of international legal authority legitimate, and set aside questions regarding what counts as evidence, or reason to believe, that an exercise of
for ignorance or mistaken beliefs that lead even well-intentioned agents to act unjustly. Multilateral treaties, for instance, are likely to reflect more information than any single party to them would be able to acquire on its own, and the process of crafting a treaty to which all parties can agree can serve as a useful corrective to biases that undergird mistaken beliefs. International law can also protect its subjects against volitional defects. For example, State officials may come under great pressure from more powerful States, representatives of multinational corporations or domestic interest groups to engage in conduct that promotes those actors’ perceived interests but that is contrary to right reason. International law provides a mechanism for resisting such pressure, by enabling officials to claim that their hands are tied.\footnote{John Tasioulas, ‘The Legitimacy of International Law’, in Samantha Besson and John Tasioulas (eds.), The Philosophy of International Law (Oxford: Oxford University Press, 2010), pp. 97–116, p. 101.}

Perhaps most importantly, international law can enhance its subjects’ conformity to right reason by facilitating coordination on common standards of right conduct.\footnote{Samantha Besson, ‘The Authority of International Law: Lifting the State Veil’ (2009) 31(3) Sydney Law Review 343–380, at 352–357; Tasioulas, fn. 16, p. 102; Allen Buchanan and Robert Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20(4) Ethics and International Affairs 405–437, at 407–408.} In some cases, it may do so by rendering more determinate a shared but vague standard, where the parties are rightly indifferent between any of a number of possible ways in which the abstract standard may be made more concrete. Far more common, however, are disputes over what the standard of right conduct is. Examples include disagreements regarding the moral principles that govern the use of force, international migration, trade, financial transactions and the use of and control over the oceans or the Earth’s atmosphere. In all of these cases international actors are generally likely to do better at approximating justice by conforming to common standards set out in international law than by acting on their own judgment. In some instances, such as addressing climate change, this may be because justice can only be achieved via the cooperation of (nearly) all States. In others, the attempt by a State or international organization to act on its own understanding of what justice requires, even when it is accurate, may well result in an overall increase in international (and perhaps domestic) injustice. That is partly because one State’s genuinely just war or trade policy may appear to another to be an act of aggression or beggar-thy-neighbour protectionism. But in addition, State officials acting in bad faith may offer the example of another State’s just but illegal
conduit as cover for their own unjust conduct. Both of these observations provide reasons to conclude that injustices are likely to follow when States and other international legal subjects deviate from the common standards of right conduct set out in international law. Indeed, Samantha Besson speaks for many political and legal theorists when she writes that ‘in conditions of pervasive and persistent reasonable disagreement about justice, the creation of a legal order as a means of general co-ordination over matters of justice is actually in itself a requirement of justice’. 18

Given this understanding of what makes international law legitimate, we can now consider the role that State consent plays, or should play, in generating justifiable claims to international authority. All else equal, a legal order should be designed so that, as much as possible, it claims authority if and only if it is justified in doing so. 19 The international legal order includes two mechanisms for issuing authoritative directives. One is the practice of customary international law, while the other is the practice of using treaties to create institutions imbued with legislative (rule-making) or adjudicative (rule-applying) authority, or both. Thus, the question regarding the contribution that State consent makes to international law’s legitimacy takes two specific forms. Given the morally mandatory aim of optimizing international law’s legitimacy, what considerations (if any) justify the persistent objector rule, according to which a norm of customary international law is binding on a State only if that State does not persistently object to being so bound when the norm is first emerging or ‘crystalizing’? And what considerations, if any, justify the norm that States are usually subject to authoritative institutions only if they agree (‘consent’) to be ruled by those institutions, as well as the exceptions to that norm?

The service conception of legitimate authority provides a framework we can use to answer these questions. Broadly, State consent contributes to international law’s legitimacy if, but only if, it makes it more likely that international legal actors’ exercise of authority satisfies the NJC and the IC. State consent can do so by enhancing the ability of international legal authorities to improve international legal subjects’ conformity to right reason. Or it can do so by serving as an acknowledgement of the limits of legitimate claims to authority, that is, as a means for recognizing cases where it is more important that international legal subjects act on their own judgment than that they act

18 Besson, fn. 17, at 353.
19 Thus, we should infer who should rule, and what procedures they should follow in doing so, from the service conception’s account of what it is to rule well. For a contrasting approach to theorizing political legitimacy, see Besson and Martí, Chapter 14 in this volume.
as they have most reason to act. In what follows, I explore each of these potential contributions in greater detail.

2.5.1 State Consent and De Facto Legitimacy

The ability of any legal order to contribute to the production of social order in the way law purports to contribute depends primarily on the treatment of its norms as legitimate, that is, on the law normally being treated as a sufficient justification for action. Where law is so treated, it enjoys de facto legitimacy. In a vertically organized or hierarchical legal order, one characterized by a considerable degree of specialization in legislation, adjudication and enforcement, the law can contribute to the production of social order as long as most officials treat it as legitimate, even if many ordinary subjects do not. The latter may simply view legal norms as a means for predicting how legal officials will respond to various types of conduct. But in a largely horizontal legal order like the international one, it is the members of the community constituted by law that must view it as legitimate. That is because responsibility for determining whether an agent is complying with the law, as well as for enforcing it in the case of violations, lies with the members themselves, acting either collectively or via the collective authorization of individual States.

The importance of creating, sustaining and strengthening international law’s de facto legitimacy provides a weighty consideration in favour of treating international legal actors as subject only to those norms to which they agree to be subject, or at least those to which they do not persistently object. To do otherwise – that is, to subject States to norms against their will to be so bound – risks not only their disregard for the norms in question, or where prudence favours it, their resentful and possibly incomplete compliance. It also risks a loss of trust in other members of the community that can erode the de facto legitimacy of other international legal norms, and indeed, faith in the very conception of the international legal order as an attempt to contribute to the realization of justice through the enactment, application and enforcement of legitimate law. And where trust in other members of the community and faith in that conception of international law is already lacking, subjecting States to norms against their will may well reinforce existing cynicism and scepticism. These reactions may lead in turn to conduct that is both unjust and further weakens international law’s ability to help its subjects conform to right reason.

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Consequently, even if a legal norm would satisfy the NJC and IC were it treated as legitimate by the international legal subjects to whom it is addressed, the fact that some of them will not do so, and may well respond in ways that significantly weaken international law’s legitimacy, militates against adopting, issuing or finding that norm. To illustrate this point, John Tasioulas observes that were international law to deny borrowing privileges to States that systematically and persistently flouted certain basic human rights against discrimination on the grounds of sex, the upshot might be a backlash against international law leading to all sorts of undesirable geopolitical consequences. Thus, due regard for international law’s de facto legitimacy places a pragmatic constraint on the directives an international authority should issue, namely that they apply only to those States that agree (‘consent’) to their application, or in the case of a norm of customary international law, only to States who do not persistently object to its application. The constraint is pragmatic because it is a concession to a failing on the part of some international legal subjects, namely their refusal to acknowledge certain legal norms as legitimate even though they satisfy the NJC and IC. It contrasts with the principled limits on legitimate authority discussed earlier, which follow from the nature of reasons and rationality (i.e. the capacity to respond or conform to reasons).

2.5.2 State Consent and the Satisfaction of the Normal Justification Condition

Earlier in this section, I noted several ways in which international law can satisfy the NJC, and so enable States and other international legal subjects to better conform to the reasons that apply to them. These include facilitating coordination on common standards of right conduct, correcting for mistaken beliefs that reflect bias or ignorance, and buttressing the commitment to conform to norms in the face of a temptation to defect from them. State consent, in the sense synonymous with agreement on terms, plays a critical role in producing legal norms with these features. For example, States’ consent to a third party’s authority to resolve disputes regarding (non)conformity to an international legal norm can enhance that norm’s capacity to facilitate coordination on a common standard of right conduct. The need to secure consent to an exercise of international authority often provides States

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21 The same conclusion holds for interpretations of an existing legal norm.

with an incentive to work together to craft norms acceptable to all, a process of negotiation that can generate both more information and better understanding among the parties. And the act of agreeing to (‘consenting to’) obey the directives issued by an international authority can ‘stiffen the spine’ of an international legal actor in much the same way that promising to tell the truth can strengthen a witness’s commitment to fulfilling her duty to do so.

Some theorists maintain that the consent of (sufficiently) democratic States to the rule of international law is especially or even uniquely valuable. For example, Thomas Christiano argues that in circumstances characterized by the moral necessity of coordination on common standards of right conduct and disagreement as to what those standards should be, justice requires that people organize their lives together on the basis of rules that publicly treat them as equals.\textsuperscript{23} This entails that law, including international law, must be made democratically.\textsuperscript{24} To defend these claims, Christiano introduces three concepts: fundamental interests, the facts of judgment and the fundamental interests in judgment. An agent’s fundamental interests are those that figure centrally in a person’s well-being. Justice, Christiano maintains, requires the equal advancement of fundamental interests. The facts of judgment include (a) diversity in people’s cultural surroundings; (b) cognitive biases in the interpretation of their own and others’ interests (including what counts as their advancement) and the importance of their own interests in comparison to that of others; and (c) fallibility in both moral and non-moral judgment. The facts of judgment explain why disagreement as to what justice truly requires will be rife, even amongst those committed to the equal advancement of interests. Finally, the fundamental interests in judgment consist of the interest in correcting for others’ cognitive biases, the interest in being at home in the world, and the interest in being treated as a person with equal moral standing. Each of these interests provides a moral basis for a claim against others that one’s judgment regarding matters of justice be given equal weight in the collective task of determining how the shared aspects of social life ought to be arranged.

Against a background constituted by diversity, cognitive bias and fallibility, and the pervasive disagreement to which they give rise, agents will have compelling reason to believe that their fundamental interests in judgment, and so their other fundamental interests, are not being unjustifiably set back only if political power is exercised within institutions that publicly realize


\textsuperscript{24} Democracy refers here not only to voting and a majoritarian decision procedure but also formal and informal practices of public deliberation and contestation.
equality. Democratic decision-making satisfies this criterion, since it ‘enables us all to see that we are being treated as equals despite disagreements [regarding the true demands of justice] as long as we take into account the facts of judgment and the interests that accompany them’.\(^\text{25}\) Interestingly, Christiano argues against the creation of a global parliament that creates international law via a majoritarian decision-making process. Instead, he defends a fair democratic association as the optimal institutional structure for exercising international legal authority in a manner that publicly treats all people as equals. In such an association, law is the product of agreement (‘consent’) by sufficiently democratic States to terms reached via a fair process of negotiation.\(^\text{26}\)

On Christiano’s account, democratic State consent yields legitimate law in part because of its instrumental value in correcting for cognitive biases and ignorance. Importantly, the consent of democratic States to an exercise of international authority can serve this end even if some of the other States that consent to it are not democratic. Still, we should not exaggerate this contribution. Democratic States are likely to be insufficiently responsive to the perspectives of individuals in other States, since those individuals have no formal say on what policies the State pursues, and limited opportunities for participating in its public deliberation. Moreover, the absence of fair bargaining conditions may distort the terms to which democratic States are willing to agree. These observations point to a possible caveat to the claim that, with a few exceptions, no democratic State should be subject to an exercise of international authority without its consent (i.e. without its agreement to be subject to that authority).\(^\text{27}\) If other democratic States have agreed (‘consented’) to submit to an exercise of international legal authority, and there are compelling reasons to conclude that a particular democratic State’s decision not to consent to that authority owes to the aforementioned shortcomings in its deliberations, then extending the authority’s jurisdiction to that State may well be warranted even in the absence of its consent. Or, at least, this is so insofar as the rationale for treating democratic State consent as a necessary condition for legitimate authority is the instrumental one under discussion here.\(^\text{28}\)

\(^{25}\) Christiano, fn. 23, p. 76.


\(^{28}\) Again, a concern for international law’s de facto legitimacy may offer a pragmatic justification for not asserting a claim to authority over a State, even if that exercise of authority would be legitimate.
I doubt that obedience to law in any international political–legal order short of a fair democratic association can honour all people’s fundamental interests in being at home in an egalitarian world, or in being treated as a person with equal moral standing. Neither obedience to the authority of a political community composed partly of non-democratic States nor to institutions that owe their existence and claim to authority in part to the consent of non-democratic States, can carry that meaning. Yet it is not clear that either of these fundamental interests provide an independent basis for (international) law’s legitimacy. Like the exercise of autonomy or self-determination, the value of feeling at home in the political society one inhabits, rather than alienated from it, may well be conditional on how well that society’s institutions do at advancing justice. If so, then even if identification with one’s political society is an element of human well-being, it is only a secondary and dependent reason for creating and obeying legal authorities that enable one to better fulfil one’s duty to treat others justly. As for the interest in being treated as a person with equal moral standing, given that Christiano characterizes it as one of our fundamental interests in judgment, it seems plausible to describe it as grounding an equal right to have one’s moral judgment taken into account when determining the form that morally necessary collective action ought to take. We have already considered an instrumental justification for such a right, namely that its exercise serves to correct for cognitive biases. But why think the exercise of judgment, or at least of moral judgment, is valuable even if it fails to track the truth? If it is not, then the fact that democratic government accords equal moral standing to all of the governed is also a secondary and dependent basis for the legitimacy of democratically enacted law. The primary justification for deferring to democratically enacted law is that one will better respond to the reasons for action provided by others fundamental interests, or what is the same, one will do better at treating others justly.

29 Christiano acknowledges this point when he maintains that the fundamental interest is in being at home in an egalitarian world.

30 One common answer is that we owe others respect for their exercise of moral judgment, so long as it is reasonable: see, for example, David Lefkowitz, ‘A Contractualist Defense of Democratic Authority’ (2005) 18(3) Ratio Juris 346–364; Besson, fn. 17; Jeremy Waldron, Law and Disagreement (Oxford: Oxford University Press, 1999). I am less confident than I once was in this response, and persuaded that instrumental considerations suffice to justify democratic rule.
2.5.3 State Consent and Principled Limits on Legitimate Authority: The Instrumental Argument for Cultivating Moral Judgment

The successful exercise of moral judgment depends on the integration of information and understanding. The former consists of data, both contemporary (e.g. the maternal mortality rate), and historical (e.g. changes in maternal mortality rates over time). The latter consists in theoretical constructions of data, either causal-explanatory or normative. In attempting to design legal institutions that optimize our ability to act on the basis of correct moral judgments, we must pay careful attention to the capacity of different actors to gather information, and to comprehend it. We should also recognize that the exercise of moral judgment is a skill, and so must be developed through practice. Finally, we should take as our aim maximizing conformity to right reason over time (or across all times), and not simply at one point in time, such as the present. Taken together, these considerations point to a limitation on the ability of one agent to exercise legitimate authority over another, namely where the latter will do better on the whole or in the long run at acting on right reason if they cultivate their own moral judgment rather than relying on that of another.

Plausibly, justice is most likely to be realized through the development of a multi-level institutional structure that includes local, sub-State regional, national, supra-State regional and global legal institutions. That is because some permutation of such an institutional structure will generate the best possible integration of information and understanding that human beings can achieve.\(^{31}\) If so, one implication is that States ought not to agree to (‘consent to’) the rule of the international community or specific international institutions, if doing so will result in less overall conformity to right reason. Moreover, because long-run improvements in conformity to right reason will often depend on the honing of State officials’ and citizens’ facility at making moral judgments, they will need to retain some degree of freedom to make and act on their judgments even when, in the immediate or near term, they would do better at acting as they should, were they to defer to the rule of an international authority.

As will likely be clear, the instrumental argument for cultivating moral judgment can be used to justify several features of the existing international legal order. These include the development or adoption of abstractly formulated human rights norms that leave States a good deal of latitude when it

\(^{31}\) I set aside here breakdowns between judgment and action, as occurs when executive agents fail to exhibit sufficient fidelity to the ideal of government in accordance with the rule of law.
comes to their application in domestic legislation or courts, as well as some international courts’ adherence to the margin of appreciation doctrine when adjudicating human rights disputes. However, the instrumental argument for acknowledging or preserving States’ freedom to act on their own moral judgment is conditional on the fact that doing so produces greater conformity to right reason in the long run. That conclusion is most plausible in the case of States that effectively secure the conditions for the development of better moral judgment, which includes respect for human rights, robust democratic politics, fidelity to the rule of law and a commitment to reasoned inquiry. It may still be persuasive in States that fall short to a considerable degree on one or more of these metrics, insofar as there remains some reasonable prospect of its leaders and citizens improving their moral judgment, including recognition of those changes they need to make to refine it still further. Where this is not the case, the instrumental argument for cultivating moral judgment provides no justification for treating a State’s subjection to international authority as conditional on its agreement, even if other considerations, such as the need to preserve international law’s de facto legitimacy, do so.

2.5.4 State Consent and Principled Limits on Authority: The Intrinsic Value of (Political) Autonomy

As I noted earlier in this chapter, all human beings have a fundamental interest in autonomy, the exercise of some degree of control over the shape or course of their lives. That is partly because individuals are often more likely to judge correctly what will best serve their other interests, fundamental or not, than is any other agent. But it also owes to autonomy’s intrinsic value; self-government is good in itself, and not simply in virtue of its consequences. Where individuals’ exercise of control over the shape of their lives includes a say in how they are governed – for example, in the crafting, application and/or enforcement of a community’s law – then the community’s political self-determination is also intrinsically valuable. Of course, it is impossible for a community to realize the value of political self-determination if, on every issue of government, it defers to another agent’s judgment. Thus, the intrinsic value of political self-determination appears to provide a justification for a State’s refusal to agree to (‘consent to’) rule by an international authority. Though hardly uncontroversial, I contend that the foregoing (and highly condensed) argument becomes much more problematic if we add the following claim: the intrinsic value of political self-determination precludes or defeats an international agent’s claim to legitimate authority even in those cases where a State
will do better at realizing justice if it defers to that international agent than if it acts on its own judgment.

While acknowledging the complexity of the issue, Tasioulas concludes that ‘it is plausible that, when it comes to at least some human rights matters, the idea of a “margin of appreciation” or “subsidiarity” can be defended in part in terms of the importance of communal self-determination, even if the cost of recognizing this discretion is an inferior outcome with respect to conformity with human rights morality on the point at issue’.\(^{32}\) Besson also invokes respect for autonomy to justify the conclusion that so long as a State is democratic it should enjoy a good deal of freedom to act on its own judgment of what justice requires, rather than that of an international authority.\(^{33}\) Yet when what is at issue is one agent’s just treatment of another, it is hard to see why the intrinsic value of acting on one’s own judgment should ever outweigh getting the right answer. Indeed, while acting on one’s own moral judgment may be intrinsically valuable, I submit that the realization of that value is conditional on one judging correctly what morality requires. When (or if) we experience a sense of accomplishment in acting on our own moral judgment, or take pride in having done so, we do so in the belief that we have judged well. Where this condition is not met, we do not feel pride or a sense of accomplishment, even if we have a compelling excuse for why we judged erroneously. These responses are evidence that we take the value of having chosen to perform a certain act to be conditional on our having an undefeated reason to perform that act – something that is not normally true of unjust conduct.

It may be that certain demands of justice are characterized by a degree of ineliminable vagueness or indeterminacy. While some specifications of the demand are inferior to others, there are two or more where either no compelling reason to believe that one is superior to the other will be forthcoming (ineliminable vagueness), or there is no fact of the matter as to which is superior to the other (indeterminacy). This may be true of many human rights. While some conduct clearly violates the right to be free from cruel or degrading punishment, or the right to engage in peaceful assembly consistent with due regard for national security and public order, some conduct is likely to fall into a ‘gray area’ in which disagreement is not only reasonable but also rationally irresolvable. It is also possible that certain values are incommensurable, meaning that there is no common measure that can be used to compare or rank those values, and thereby provide a rational basis for making trade-offs

\(^{32}\) Tasioulas, fn. 22, at 21.

\(^{33}\) Besson, fn. 27, at 305–308.
between them. This may be true of the right to freedom of religion and the right to freedom from discrimination on the basis of sex or gender. Each of these considerations – ineliminable vagueness, indeterminacy and incommensurability – can justify making a State’s subjection to the jurisdiction of an international authority conditional on that State’s agreement (‘consent’). Where these properties characterize the demands of justice, either States will not better conform to right reason if they defer to the international authority than if they act on their own judgment, or they might, but it is impossible to determine whether this is so. In such cases, States have no duty to submit to an international authority, and given the intrinsic value of political self-determination, they may prefer to act on their own judgment.

2.5.5 State Consent and Respect for Law

To reiterate a point I made in Section 2.4, trust in another agent is partly constituted by a distinctive sort of respect for them, namely a less careful policing of their conduct to determine whether they are conforming to standards of right conduct than one would carry out in the absence of that trust. Thus, trust in one’s government involves a strong presumption that it satisfies the conditions for legitimate authority, and so a belief that one ought to defer to its authority by obeying the law. Though not a necessary condition for the cultivation of trust in a practical authority, a practice of limiting claims to authority to those who consent to be subject to them, and only on those matters to which they consent, can serve to foster it. The agent whose consent is sought may take the request for it as a demonstration of the other agent’s appropriate regard for his or her rights and interests, while the agent whose request for consent is granted may take that fact as evidence that the consenting agent views him or her as morally upstanding.

Besson suggests in passing that State consent to international legal authority may be valuable because it generates respect for law. Presumably the idea is that by consenting to the rule of an international authority, States express their trust in it (e.g. in the international community), and in doing so contribute to the constitution of a relationship characterized by respect for that authority’s directives (e.g. norms of customary international law). Yet State consent can serve as a means for expressing trust in an international authority only if it is publicly understood as doing so, and it is far from clear that the participants in the international legal order share such an understanding. Moreover, even if

Besson, fn. 17, at 371; Besson, fn. 27, at 300.
State consent is available to serve as a means for expressing trust, it seems likely that many State officials do not intend to use it for that purpose when they agree (‘consent’) to an international institution’s exercise of authority over them, or do not persistently object to an emerging norm of customary international law.

Still, it may be worth investigating whether certain instances of State consent do constitute trust-expressing or trust-building acts. Consider, for example, North Atlantic Treaty Organization (hereafter NATO) Member States’ consent to a unified command for planning and executing military operations: the Supreme Allied Commander Europe (hereafter SACEUR). Admittedly, SACEUR does answer to the North Atlantic Council, which consists of permanent representatives from each of the Member States. Nevertheless, the willingness of the other twenty-nine (and counting) States to have an American officer serve as SACEUR, and so exercise the authority to order their military personnel to risk their lives, may serve in part to express their trust in the United States’ commitment to the collective defence of NATO’s Member States.

In some cases, States’ consent to the jurisdiction of the ICJ may serve in part to express their trust in that institution, and its ability to satisfy the criteria for legitimate authority. In submitting their dispute to the ICJ, and so agreeing to abide by its judgment, States may act in the belief that the judges’ professional training and culture warrant taking it on faith that they will act with a proper regard for the parties’ rights and interests. Moreover, consent to the ICJ’s jurisdiction may also express States’ trust in one another, and in particular, in the commitment of officials in the other State to the ideal of government in accordance with the rule of law. Note that in making the case that State consent expresses trust, and so constitutes a trust-building act, there is no need to maintain that trust alone explains why States consent to an international authority. States may also count on international authorities’ and other international actors’ prudential interests motivating them to act with proper regard for the States’ rights and interests. But then the same is often true for individuals; attaching legal penalties or punishment to violations of patients’ fundamental interests can provide medical practitioners with a prudential incentive to respect them, and so provide patients with assurance that they will do so, without crowding out trust as a motivation for both parties’ actions.

2.6 CONCLUSION

As a slogan, the consent of the governed has its virtues. For example, it expresses the belief that legitimate rule requires accountability to the ruled,
and perhaps also that the purpose of government is to serve the needs of the
governed. It also misleads, however, in that it suggests that the justification for
a political community’s right to rule its members owes to their exercise of a
moral power conferring that right upon the community or its agents.
Hopefully, a clearer understanding of how consent contributes to legitimate
government, and how it does not, can aid us in improving the legitimacy of
the practice of government constituted by international law.