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Citation

Fossen, T. (2022). Political legitimacy as a problem of judgment: what distinguishes moralist, realist, and pragmatist approaches? *Social Theory And Practice*, 48(1), 89-113. Retrieved from <https://hdl.handle.net/1887/3303997>

Version: Accepted Manuscript

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Note: To cite this publication please use the final published version (if applicable).

Political Legitimacy as a Problem of Judgment: What Distinguishes Moralism, Realist, and Pragmatist Approaches?

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Published in *Social Theory & Practice*, 48 (1):89-113 (2022)

<https://doi.org/10.1177/00905917211047842>

Abstract: This paper examines the differences between moralist, realist, and pragmatist approaches to political legitimacy by articulating their largely implicit views of judgment. Three claims are advanced. First, the salient opposition among approaches to legitimacy is not between “moralism” and “realism.” Recent realist proposals for rethinking legitimacy share with moralist views a distinctive form, called “normativism”: a quest for knowledge of principles that solve the question of legitimacy. This assumes that judging legitimacy is a matter of applying such principles to a case at hand. Second, neither Rawls nor Habermas is a normativist about political legitimacy. The principles of legitimacy they proffer claim to express rather than adjudicate the legitimacy of a liberal-democratic regime, and thus cannot solve the question of legitimacy at a fundamental level. But perhaps we should question the normativist aspiration to theoretically resolving the problem to begin with. My third claim is that a “pragmatist” approach enables us to rethink political legitimacy more deeply by shifting focus from the articulation of principles to the activity of judging. Implicit in Rawls and Habermas’s theories I then find clues towards an alternative account of judgment, in which the question of legitimacy calls not for theoretical resolution but for ongoing practical engagement.

Keywords: legitimacy, moralism, realism, pragmatism, John Rawls, Jürgen Habermas

Introduction

This paper aims to illuminate what distinguishes the most important approaches to political legitimacy currently on offer in political theory. It does so by articulating the largely implicit views of *judging* legitimacy that various theories presuppose, setting aside the specific conceptions of legitimacy they defend. By ‘political’ legitimacy I mean the normative entitlement (or ‘right to rule’) of the regime or the political order as such, not so much a particular leader, policy, law, or institution. As I interpret the question of legitimacy, this is a question of how to relate practically to the forms of power with which one finds oneself confronted. A fundamental assumption in what follows is that a theory of political legitimacy should somehow make sense of this

encounter of a subject with political power. We inevitably treat the powers that be in one way or another, and in doing so we implicitly or explicitly *take* them to be legitimate or illegitimate. To ask whether the regime is legitimate is to ask what practical stance it would be appropriate to take. Should I behave as a loyal, obedient citizen, or take to the streets and demand the fall of the regime? So the question of legitimacy is a practical predicament that calls for judgment, and such judgment concretely manifests itself in action.

By *judging* legitimacy, then, I mean the task of distinguishing, from a practical point of view, whether the regime with which one finds oneself confronted is legitimate, or merely purports to be so. Philosophical approaches to political legitimacy take different views of what judging legitimacy involves and how one can perform it well, although the issue is not usually framed in these terms. My aim is to explicate and contrast these views. My conjecture is that approaching legitimacy as a problem of judgment offers an unfamiliar angle on the current state of play in the debate, cutting across familiar ways of carving out positions and raising a new set of questions.

Three claims are advanced. First, the salient opposition among approaches to political legitimacy is not between “moralism” and “realism”. Recent accounts of legitimacy put forward under the banner of realism share a distinctive *form* with their moralist opponents, which I call “normativism”: they are preoccupied with the articulation and justification of normative standards or criteria. This tacitly assumes that judging legitimacy appropriately is a matter of applying the principles offered by a philosophical theory to a case at hand. The question of legitimacy appears as theoretical problem that calls for a certain kind of knowledge: the content and justification of valid norms (whether moral or non-moral in character). Apparently, the question of legitimacy is to be resolved, in principle, by philosophy. If realism holds

the potential for a deeper challenge to this picture of what a theory of legitimacy is about, that potential remains untapped.

Second, as an initial step towards a different framing of the issue, I take a closer look at the principles of legitimacy put forward by John Rawls and Jürgen Habermas. Neither theorist, it turns out, is committed to the normativist picture of judgment, at least where the legitimacy of a regime is concerned. The principles of “liberal” and “democratic” legitimacy that they propose express what renders power legitimate against the background of a constitutional democratic order—they are not meant to adjudicate the legitimacy of that order as such. A theory of *democratic* legitimacy is not *eo ipso* a theory of *political* legitimacy.

Still, from the fact that they cast principles of legitimacy in a different role, it does not follow that their theories don’t speak to the latter problem at all. This becomes apparent only once we question the assumption that the job for a theory of political legitimacy is to offer a principled solution in the first place. My third claim is that a “pragmatist” approach offers prospects for rethinking political legitimacy more radically than realists have done thus far. It shifts the direction of enquiry from the content of principles to the activity of judging. The task for a theory of legitimacy, on this view, is in first instance to grasp the various ways in which questions of legitimacy present themselves in concrete situations, prior to, and perhaps instead of, resolving them philosophically. I find *implicit* in the performative upshot Rawls’ and Habermas’ theories of constitutional democracy intimations toward a different picture of what judging the legitimacy of a regime involves. Judging legitimacy, on this approach, is understood to consist in practical engagement with the question of legitimacy, rather than the application of theoretical knowledge. This illuminates what is politically at

stake in the question of legitimacy, thereby rendering explicit what remains implicit in Rawls and Habermas.

Moralism as a form of normativism

A common way to define the task for a philosophical theory of legitimacy is by contrast to social science. If social scientists focus on the empirical efficacy of people's *taking* the authorities *as* legitimate (or illegitimate), philosophers aim to articulate the necessary and sufficient conditions for it to really *be* legitimate, or to have the "right to rule." Put differently, their self-ascribed task is to determine the criteria by which political authority ought to be judged, as opposed to the empirical circumstances in which it is in fact accepted or not (see, e.g., Simmons 1979; Flathman 1995; Copp 1999, 4; Christiano 2004a; Huemer 2013; Buchanan 2002, 689; Estlund 2008, 2; Green 1990, 5). As Robert Paul Wolff expresses this division of labor:

The study of the forms, characteristics, institutions, and functioning of de facto states, as we may call them, is the province of political science. If we take the term in its prescriptive signification, the state is a group of persons who have the right to exercise supreme authority within a territory. The discovery, analysis, and demonstration of the forms and principles of legitimate authority—of the right to rule—is called political philosophy. (Wolff 1970: 5)

Usually the right to rule is conceived as a *moral* right and legitimacy a moral property, although what that means is typically less than clear.¹ Political philosophy is then a kind of applied ethics. In the words of Robert Nozick:

¹ A minority of theorists tries to justify principles of legitimacy prudentially or instrumentally rather than morally (Kühnelt 2008).

Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus. The moral prohibitions it is permissible to enforce are the source of whatever legitimacy the state's fundamental coercive power has. (Nozick 1974: 6)

Theorists in this tradition have produced a wide array of competing views, defending *inter alia* the consent of the people, democratic procedures, a modicum of peace and stability, or respect for human rights as valid criteria or conditions of legitimacy. It is not necessary to treat these accounts comprehensively here. What is crucial is how the question of legitimacy is *framed* as a philosophical problem: a quest for the discovery of valid principles. Accounts along these lines respond to a particular view of what a theory of political legitimacy is meant to provide: a criterion or a set of criteria that enables one to distinguish between what merely appears to be legitimate or is taken as such, and what really is. It is assumed that legitimacy is a problem that can be resolved, at least in theory, by finding the correct standard.

For lack of a better word, I will refer to this framing of the question of legitimacy as calling for a resolution by appeal to the right principles, and the associated task description of political philosophy as focused on finding such principles, as “normativism.”² “Moralism” is just one possible form of normativism, which holds that such norms must be moral in character (whatever that means, exactly). It is easy to see why this approach has wide appeal: it promises to resolve the question of legitimacy by giving subjects a secure standard, a kind of knowledge unencumbered by the relations of power that we seek to assess, which provides critical leverage against the authorities we face. It helps us to speak truth to power. Indeed, it seems to many philosophers

² For a similar term of art (with wider extension), see (Sluga 2014)

obvious that this form of knowledge—a set of determinate normative criteria—is just what we ask for when we raise a question of legitimacy. Just consider the apparent self-evidence with which Nozick and Wolff posit their definitions of the task of political philosophy.

Judging legitimacy—distinguishing in practice whether a regime is legitimate, or merely purports to be so—is at most an afterthought for normativists. If theorizing legitimacy is all about the content and justification of principles of legitimacy, then judgment seems just to be a matter of applying such principles to particular cases. If you find yourself confronted with a regime, and want to know whether it is legitimate, you need to appeal to two distinct forms of knowledge: *principles* and *facts about the case*. These forms knowledge are usually assumed to be independent: the former are to be established by moral theory (a “theory of legitimacy”), the latter by empirical enquiry. Take, for example, theories that posit express consent, rational acceptability, or democratic procedures as the proper standard of legitimacy (Simmons 1999; Nagel 1991; Christiano 2004b). Judging the legitimacy of a regime would then be a matter of determining whether its subjects consented to its rule; whether it met standards of reasonableness;³ or whether it ruled democratically. To see this at work in a nutshell, consider this passage from John Simmons:

The proper grounds for claims of legitimacy concern the transactional components of the specific relationship between individual and institution. Because I subscribe to political voluntarism as the correct account of these transactional grounds for legitimacy, and

³ We would have to know what those standards are, of course, and for Nagel, determining that is precisely the crucial task for political theory: “The question is, what supplies the standard of reasonable, morally permissible rejection which provides the true test of the legitimacy of a system, as opposed to rejection based only on superior leverage and unmodified self-interest?” (Nagel 1991: 39)

because I believe no actual states satisfy the requirements of this voluntarism, I also believe that no existing states are legitimate (simpliciter). (Simmons 1999: 769)

Simmons' judgment appeals to a factual claim about actual states, and a normative doctrine, "voluntarism," which is the idea that individuals can become bound by obligations only through an act of their own will. Judgment takes the form of a subsumption of the former under the latter.

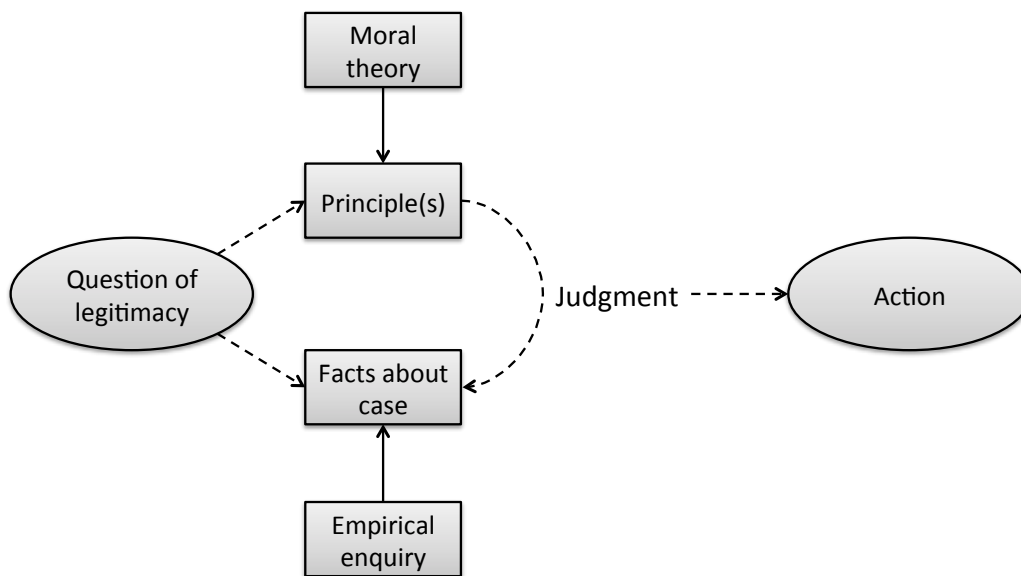


Figure 1: The role of judgment implicit in moralist theories of political legitimacy.

This picture corresponds to a common but controversial view of judgment in moral philosophy: to judge is to apply a general norm or principle to a particular case. As Kant observed, norms never simply dictate their application.⁴ If propriety lies in conformity with a rule, and if a rule cannot dictate its own application, something else

⁴ “[N]o matter how complete the theory may be, a middle term is required between theory and practice, providing a link and a transition from one to the other. For a concept of the understanding, which contains the general rule, must be supplemented by an act of judgment whereby the practitioner distinguishes instances where the rule applies from those where it does not. And since rules cannot in turn be provided on every occasion to direct the judgement in subsuming each instance under the previous rule (for this would involve an infinite regress), theoreticians will be found who can never in all their lives become practical, since they lack judgement.” (Kant 1991: 61)

is required, in addition to the rule and the facts about the case, to establish whether or not an act is appropriate. That extra is the act of practical judgment. Judgment is what bridges the gap between principles and concrete actions. Various moral and legal philosophers have offered complex accounts of what norm-application involves (Richardson 1990; O'Neill 2007), while others have called the whole picture into question, criticizing the very idea that morality should be understood in terms of general principles (McDowell 1979; Dancy 2004; Lance and Little 2006).⁵ But such disputes about judgment have not seeped into the debate about political legitimacy.

Five aspects of this picture are worth highlighting. First, judging is construed as a subjective moment of decision, a conscious act of bringing principles to bear on a case. As such it precedes action in public. Because it occurs *in foro interno*, the subject is sovereign over his or her judgment: its content is determined solely by the subject's will or intention. This equation of judgment and decision is commonplace, but it is not self-evident.

Second, for this act of judgment to begin, two forms of knowledge must be treated as given: a theory of legitimacy (as conventionally understood), and a factual understanding of the situation. These must be ready to hand. This is not to suggest that they must be certain or infallible, but as far as judgment is concerned, they must be treated as settled: one must proceed *as if* the facts and norms are given. The activities that issue in such knowledge are not themselves part of judging legitimacy: they are a matter of philosophical justification, where the norms are concerned, and of empirical enquiry to sort out the facts, perhaps with the help of social science or journalism. In other words, one must first obtain the right normative standards and get a grip on the

⁵ The complications of norm-application are also well known in legal theory, and scholars there see adjudication as much more complex than the subsumption of a particular under a given rule (e.g. Alexy 2003).

situation, *then* judge whether or not the authorities are legitimate.⁶ This makes it rather difficult to see how judgment can get off the ground when we face disagreement and uncertainty about the relevant criteria and about key aspects of the situation, as is frequently the case in situations where legitimacy is in question.

Third, the picture invokes a fairly strict separation of justification and application, or theory and practice. It is true that application is often seen to have a role at the theoretical level as well, as when theorists try to come up with examples and counterexamples in justifying or refuting certain principles. Various approaches in moral philosophy deny that the content and justification of principles is independent of their application. For instance, Rawls' "reflective equilibrium" approach to justice involves a back-and-forth between formulations of principles and considered judgments of concrete cases, and Miriam Ronzoni argues for the "incorporation of judgment within the constructivist procedure that is meant to deliver normative principles" (Ronzoni 2010: 76; Rawls 1999). Still, while this results in a more complex and perhaps more contextual picture of the *theoretical* enterprise, it does not involve a rethinking of what is involved in a practical encounter with authorities. The fact that historical and hypothetical examples are usually seen as functioning just as well for theoretical purposes is revealing. From a practical point of view, judging legitimacy is just a matter of applying principles. This is what enables Simmons, in the passage quoted above, to judge all states illegitimate in one fell swoop.

⁶ To be sure, this view allows that theoretical justification and empirical enquiry involve judgments of some sort, but it would a different kind of judgment. Onora O'Neill expresses this clearly: "When we act we may as a preliminary matter have to decide how to view the situation in which we already find ourselves [...]: here reflective judgement may indeed be needed. But even when reflective judging is completed, and we have determined how to view the situation, we will still need to decide what to do: and that is where practical judgement does its work." (O'Neill 2007: 402–3)

The fourth point is closely related: this picture relies on the crucial assumption that the content and justification of appropriate principles are invariant across the differences of perspective between a theoretical and a practical context, let alone among situated subjects within such a context. That is not to say that criteria are necessarily posited as universally valid—the point holds also for contextualist theories, insofar as they construe the content and justification of principles as independent of their application, even if valid only for a particular context. Judgment so conceived is *impersonal* and *ahistorical*, in the sense that it does not matter who judges, where, and when, as long as the judging subject has knowledge of the relevant state of affairs and valid principles. What is required for judging legitimacy is epistemic access to the correct facts and principles, not a concrete practical relation to the authority in question, or to other subjects.

Finally, on this picture the *quality* of judgments depends on the validity of the norms, the truth of the facts, and a correct subsumption of the latter under the former. Good judgment consists in a certain facility with theoretical knowledge. In other words, judging well is understood in terms of getting the propositional content right. Once we have resolved the question of correct criteria and have gathered the facts, all that's left to do is to “apply” this knowledge. While every good Kantian knows that that apparent ease is deceptive, there appears to be little more that can be said about it theoretically.

Perhaps few normativist theorists would endorse all aspects of this picture, if asked. Is it fair to attribute this rather simplistic picture of judgment to them? We are entitled to treat theorists of legitimacy as committed to this view of judgment when two considerations obtain.⁷ First, the theory of legitimacy in question focuses on normative

⁷ David Copp has written on both legitimacy and judgment, although in different contexts (Copp 1995; 1999). For him, normative judgment is indeed a matter of applying a given,

standards, to the exclusion of any explicit discussion of what judging legitimacy involves. And second, the theorist accepts, implicitly or explicitly, that the question of legitimacy is in the final instance a *practical* predicament, a question that political subjects face in real-life situations, and that calls for judgment. If you think that a theory of legitimacy is supposed to respond in some way to such a practical, political problem, and if that theory essentially consists in an account of normative standards, then apparently judging legitimacy in practice amounts to nothing more than somehow bringing such a theory to bear on particular cases. Normativism (as a task description for a theory of legitimacy) and this conception of judgment (as norm-application) belong together by default.

One could deny the second claim, and argue that a theory of legitimacy need not be practical. The moral principles captured by a theory of legitimacy may still articulate meaningful truths, even if they do not immediately issue in practical judgments. David Estlund (2014), for example, has argued that moral principles need not be problematic just for failing to be immediately action guiding. A theory of legitimacy could still describe the moral truth about a regime, even if people cannot bring themselves to recognize it. However, our question here is not about people's motivations for adopting certain principles, and whether or not such motivations matter for the validity of principles as theoretical *solutions* to the question of legitimacy. The issue here is rather whether the theoretical *problem* is adequately understood as calling for this kind of solution in the first place. It is hard to see what "political legitimacy" *means*, or what philosophical problem it names, in abstraction from a political predicament that subjects encounter in practice. If a theory of legitimacy is not an attempt to grasp what

independently justified standards. So in his case, commitment to the picture sketched here is not implicit but explicit.

is at stake in a concrete practical question, what is it about? Estlund's framing of legitimacy as a fundamental moral property that we can think about in abstraction from the ways in which it manifests itself in practice takes for granted a contentious objectivist moral metaphysics. The approaches discussed below have in common that they deny that we can treat such a conception of morality as an unproblematic starting point when thinking about political legitimacy.

Political realism as a form of normativism

Political realists call into question the view of morality as the authoritative, determinate and knowable starting point for political thinking, rejecting what they call "ethics-first" approaches to political theory and denying the "priority of morality to politics" (Geuss 2008; Williams 2005; cf. Hall and Sleat 2017). It is notoriously difficult to pin down exactly what distinguishes realism from moralism. The basic distinctions in terms of which realists frame their critique are often overdrawn, such as a distinction between politics and morality as mutually exclusive domains of human interaction, or a dichotomy between moral and political values (see Erman and Möller 2015a; Jubb and Rossi 2015a; Erman and Möller 2015b; Jubb and Rossi 2015b). What is clear is that, for realists, a preoccupation with moral knowledge comes at the cost of understanding political phenomena.

However, realists' opposition to moralism does not automatically translate into an alternative to normativism. If we look carefully at the proposals for rethinking political legitimacy recently offered under the banner of realism, we see that they typically exhibit essentially the same picture of what a theory of legitimacy is supposed to provide, except that they hold that the principles must not be "moral" but "political" in character. The point of the exercise is still construed in terms of specifying "more

realistic criteria for legitimacy”, as Matt Sleat put it (2014: 315; cf. Cozzaglio and Greene 2019).⁸ What it means for criteria to be “realistic” is difficult to spell out, and realists disagree about this. For some it has to do with the content of the criterion, where a standard is taken to be more realistic if it sets a lower bar, which is more easily met by a regime (Horton 2010). For others it has to do with the scope of criteria, where what makes a regime legitimate depends on the historical context (Williams 2005). Still others construe it as a matter of justification, insisting that relevant criteria must have their source “within” politics rather than “outside” it, for instance with reference to the point and purpose of the political practice at stake (Rossi 2012). Insofar as these are the terms in which they frame the problem theoretically, realists do not fundamentally call the normativist view of judgment as norm-application into question (see Figure 2).⁹

⁸ Hence John Horton’s suspicion is apropos: to what extent does the realist project really differ from that from which it sets itself apart? (Horton 2010: 445–46)

⁹ For a critique of realist criteria of legitimacy, see Erman and Möller (2018); Wendt (2016).

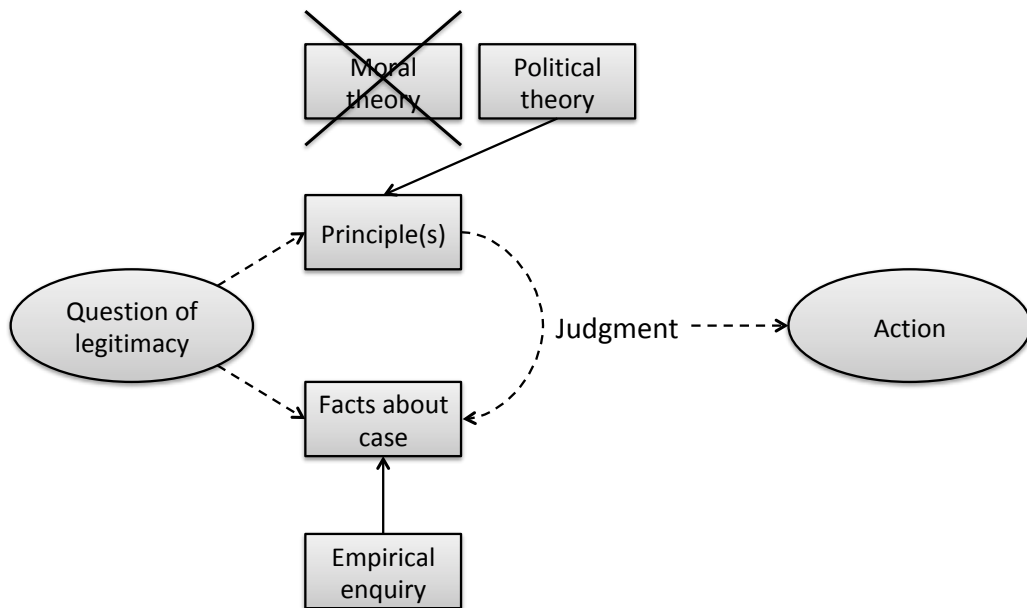


Figure 2: Realist accounts of legitimacy usually (implicitly) accept the normativist picture of judgment with minor adjustments.

There is no reason in principle why realists should find this job description particularly attractive, and indeed some, like Glen Newey, regard a purely normative approach to political philosophy as being “unduly narrow and [having] a constricted sense of its possibilities” (Newey 2001: 34). Still, while the realist literature does offer intimations of a more radical rethinking of political legitimacy, this has not been systematically pursued.

The reception of Bernard Williams’s reflections on political legitimacy is instructive in this regard. In search of an alternative to moralistic conceptions of legitimacy, Williams insists that what matters crucially for legitimacy is whether rule “makes sense” to those subjected to it, where what makes sense is understood not from a moral standpoint that all must rationally accept, but in terms of their actual normative expectations (Williams 2005). According to Williams, historically contingent

circumstances have made it so that “liberalism”, understood in some broad sense, informs what makes sense “now and around here”, but that does not mean liberal principles should be elevated to the status of universally valid criteria that each and every regime ought to meet. What counts as an acceptable response to the question of legitimacy (or the “Basic Legitimation Demand”, as Williams calls it) crucially depends on *who* is subjected (when, and where), not in terms of their essential constitution as human beings, as rational agents, or as social animals, but in terms of who they contingently and first-personally *take* themselves to be, and the specific beliefs and expectations in relation to the regime that characterize them. Put differently, the question of legitimacy is first and foremost a question of what one can live with, given the historically specific self-conception one finds oneself with.¹⁰

Williams did not flesh out the idea much further than this. Working out in more depth what “making sense” might mean in connection to the question of legitimacy could point in the direction of a different way of thinking about the problem. But realists who draw on Williams have thus far been more concerned with working out whether this idea yields a non-moralistic “generally applicable standard of basic legitimacy” and with the *content* of what makes sense in some particular context, not with examining the *activity* of sense-making (Bavister-Gould 2013: 594).¹¹ John Horton and Matt Sleat in particular have drawn on Williams to propose what they regard as realistic criteria of legitimacy. On their view a regime is legitimate to the extent that the normative

¹⁰ The “first political question” is not therefore, as Williams seems to suggest, a matter of establishing order and stability but of asking what kind of order one can live with (Fossen 2019b).

¹¹ Whether Williams would go along with this is questionable. Edward Hall plausibly suggests that “the primary purpose of Williams’ account is not to provide an alternative (albeit minimal) set of principles that ground a state’s right to rule, but to enable us to understand the nature of politics itself.” (Hall 2015: 469)

commitments embodied in the regime are “congruent” with the commitments (or beliefs, attitudes, and values) endorsed by those subjected to it.¹²

What does judging legitimacy consist in, on this view? Sleat is explicit about this (2014: 326): “Judgements about the legitimacy of a political order, or the use of political power, are assessments of the degree of congruence, or lack of it, between that order and the beliefs, values and normative expectations that its subjects have of political authority”. Of course, the governed are quite likely to disagree about that in struggles for legitimacy. But the criterion does not presuppose that there is a single, unambiguous answer to what subjects regard as legitimate. Sleat and Horton rather conclude from this that legitimacy is a matter of degree, and that a regime is never perfectly legitimate. Getting a sense of the views that predominate in a particular context (and thus of the standards that the regime should meet) is a difficult interpretative exercise and there is no presumption that any resulting interpretation will be without remainder.

The congruence principle is obviously highly sensitive to the contingent ways in which subjects think of themselves and their political situation. In this way Horton and Sleat mean to avoid treating morality as a given prior to politics, while nonetheless gaining some critical purchase on regimes, although that critical purchase must be worked out in concrete cases in a manner that is highly contextual. Notice, however, that this does not fundamentally alter the normativist picture. The *content* of judgments of legitimacy which result from applying the congruence principle is highly sensitive to context, since the principle makes reference to the beliefs and values of those

¹² Horton (2010: 141): “Fundamentally, it is about the acknowledgement of state as having authority [...] in terms that are taken to be salient within the context in which such authority is exercised and affirmed.” Sleat (2014: 325): “What matters is that the political order makes sense as a form of legitimate authority in relation to the beliefs (moral, political, social, economic, etc.) of those who are subject to it, that it conforms to people’s values and standards, and that it meets the normative expectations that we have of it.”

subjected to power. But the *form* of judgment remains impersonal and ahistorical: it does not matter who does the judging, where and when, as long as one has normative knowledge the correct standard (congruence, on this proposal) and epistemic access to the facts at hand (the views of the subjected, and the actions of the regime). It does not matter who judges, it only matters who (and what) is judged *about*.

Aside from this structural similarity to the moralist views it seeks to avoid, the congruence view is inherently problematic as a philosophical account of political legitimacy. Its conception of what judging legitimacy involves does not make sense from a practical point of view. It would be odd to say that people take different views about the legitimacy of a regime because they disagree which beliefs and values are prevalent in society, rather than because *they themselves hold* different beliefs and values. Making a legitimacy claim involves committing oneself, taking a stance toward the regime. Measuring congruence involves just the opposite: to avoid bias and distortion, one must bracket one's own normative expectations and substitute those of the governed, asking not whether it meets one's own commitments, but impartially whether it meets those one attributes to the community at large. It is telling in this respect that the congruence view of legitimacy was initially proposed by David Beetham as a social-scientific and decidedly not a philosophical view (Beetham 1991: 13). Regardless of Beetham's insistence that claims about legitimacy are judgments and not mere descriptions of people's beliefs—judgments of “the degree of congruence [...] between a given system of power and the beliefs, values and expectations that provide its justification” (ibid.: 11)—these are judgments from a distinctly third-personal point of view, and not first-personal attributions of a normative status. What makes such judgments scientifically respectable is that the social scientist does not judge by reference to his or her own preferred standards, but by standards that “pertain within

the society in question” (Ibid.: 13) Taking a practical stance toward a regime and measuring congruence therefore involve very different ways of relating to oneself and to others. A crucial consequence of this is that “legitimacy” means something very different in the hands of the social scientist than in the hands of those claiming and contesting legitimacy in practice. This renders the congruence conception ill-suited for a political realism that aims to grasp what judging legitimacy involves from a participant’s standpoint. As Simon Hope aptly puts it: “the realist political philosopher is thinking merely *of* subjects participating in a practice, in a way that cannot be to think *as* such a subject.” (Hope forthcoming: 15)

This concern could be alleviated by saying that congruence is not what legitimacy consists in, but just a normative condition for legitimacy, conceived more traditionally as the right to rule. Perhaps one thing that matters normatively for legitimacy is that those subjected to a regime are able to regard it *as* legitimate, according to criteria that they endorse. Along these lines, Amanda Greene recently argued that shared recognition of a regime as legitimate is a normative standard of legitimacy (Greene 2017: 314). But this takes us back where we started, as such a view straightforwardly fits with the normativist framing of the question of legitimacy as calling for resolution in terms of knowledge of the correct normative standards.

The congruence view relies on an interpretation of Williams’ notion of sense-making that remains caught up with a normativist picture of judgment, which construes judging as the application of given principles, and in which the task for philosophy is to spell out those principles. I have not been able to find a realist account of legitimacy that questions this outlook. The scope of the salient criteria may be understood to be rather narrow, or the bar may be set rather low, but the task of political philosophy remains to discover a distinctive form of theoretical knowledge—the content and

justification of principles and criteria, however context-dependent. Judgment is still thought of as a moment of decision, in which one brings theoretically articulated norms to bear on the given facts of a particular situation. And the quality of such judgments is a matter of their propositional content. Such theories all make the same move of abstraction, a move astutely diagnosed by Raymond Geuss: they abstract the propositional content of political judgments from the practical situation that calls them forth—with its characteristic historical background, relations of power, and plurality of agents:

It is not false to think of a political judgment as a belief, but it is an abstraction, an artificial isolation of one element or component or aspect from a wider nexus of actions and action-related attitudes, habits, and institutional arrangements, within which alone the judgment (finally) makes sense. (Geuss 2010: 8)

Geuss exaggerates when he dismisses much of political philosophy in a single stroke, but as a characterization of normativist approaches to legitimacy, whether moralist or realist, this is spot on. And it points in the direction of a different way of thinking about legitimacy, perhaps more true to the realist spirit, which tries to comprehend judging legitimacy as an activity.

Principles of legitimacy in Rawls and Habermas

One way to begin questioning the taken-for-granted job description for a theory of political legitimacy as narrowly concerned with the content and justification of principles is to take a closer look at the principles of legitimacy offered by two giants of twentieth century political philosophy: John Rawls and Jürgen Habermas. While they are often considered prime exponents of moralism and figure as the butt of realist critiques, that framing of their position in the landscape obscures both the

distinctiveness and the limitations of their work on legitimacy. Engaging with Rawls and Habermas will help us to open up different set of questions for a theory of political legitimacy to answer. It also helps to counter the perception that all attempts to articulate principles are by definition normativistic, i.e. a quest for knowledge of principles that solve the question of legitimacy.

In contrast to normativist approaches, these thinkers do not aim to philosophically resolve the question of legitimacy, as staged at the outset—the question of how to relate practically to the regime with which one finds oneself confronted. Although they undeniably proffer normative standards of “legitimacy”, these principles do not purport to govern our basic stance toward a regime, but rather to provide immanent criteria for evaluating institutions, laws, or decisions in the context of that regime. With regard to the legitimacy of the regime as such, these principles are expressive rather than adjudicative: they are not meant to adjudicate how one ought to relate practically to just any regime one might happen to find oneself with. Rather, *assuming* the context of a purportedly constitutional-democratic regime, they claim to express what would it mean for that regime to live up to its own expectations, and ours, qua citizens.

To see this, it is crucial to recognize that the problems at the heart of Rawls’ and Habermas’ work are subtly but importantly different from the question of legitimacy as considered thus far. The aim of Rawls’ theory of justice as fairness—at least as presented in *Political Liberalism*—is to spell out the fair terms of cooperation among free and equal citizens, by articulating a set of principles that all citizens can reasonably accept despite profound disagreements, and which they can use to evaluate institutions and guide reforms. Habermas’ project in his most systematic political work, *Between Facts and Norms*, is to explicate the normative core of constitutional democracy. This

similarly provides a critical standard for evaluating the democratic credentials of political processes and a horizon for their improvement.

Habermas and (more tangentially) Rawls do frame this as a matter of legitimacy. This is how Rawls formulates the “liberal principle of legitimacy”: “Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason” (Rawls 2005: 137). And Habermas’s democratic principle says that “only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted” (Habermas 1996: 110). However, it is crucial to see that the point of these principles is different from what normativists are after, namely a moral or political criterion that enables one to determine whether a regime is fundamentally legitimate or illegitimate. Rather they express the *liberal* (Rawls) or *democratic* (Habermas) legitimacy of laws, policies, or institutions against the background of a constitutional democratic regime, the more fundamentally *political* legitimacy of which is already granted once we get to consider these principles. A theory of justice or a theory of democracy is not *eo ipso* a theory of political legitimacy.¹³

To be clear: I am not saying that these theories do not bear profoundly on the legitimacy of the political order in the context of constitutional democracies, but just that that question is not thematic as the explicit focus of theoretical reflection. And consequently the criteria they offer should not be taken as their theoretical answer to it. One has to consider the questions to which these principles of legitimacy are meant to

¹³ Pace Christopher Meckstroth, who offers a sophisticated theory of what is involved in judging when a law or a reform appropriately counts as *democratic*, but not as such, I think, an account of judging *political* legitimacy (Meckstroth 2015: 7).

respond. Rawls and Habermas do not ask, as moralists do, in the abstract ‘what renders political authority morally acceptable’ (cf. Sleat 2013: 351)? The point of these criteria for them is rather to articulate what it means to see ourselves as free and equal citizens in the context of a constitutional democratic regime, not to explain why we ought to see ourselves as such. Habermas, for one, says that the democratic principle “explains the performative meaning of the practice of self-determination on the part of legal consociates who recognize one another as free and equal members of an association they have joined voluntarily” (Habermas 1996: 110) In other words, the principle articulates the meaning of a practice from the standpoint of its participants; it does not explain the legitimacy of that practice to those unwilling or unable to see themselves as such. Similarly, Rawls takes himself to be interpreting in a coherent and systematic way the basic moral and political commitments that he claims to find “implicit in the public political culture of a democratic society”, that is to say, in “the political institutions of a constitutional regime and the public traditions of their interpretation [...], as well as historic texts and documents that are common knowledge” (Rawls 2005: 13–14). The posture that Rawls and Habermas adopt, and invite the reader to take as well, is that of a fellow democratic citizen, and in doing so they appeal not to the truth of some moral doctrine but only to an immanent account of what that posture entails. As Anthony Laden has put this point, for both thinkers “doing political philosophy within and for a democratic society requires abandoning the perspective of the theorist favored by utilitarians and many other political philosophers and adopting the perspective of the citizen” (Laden 2004: 289). Nuanced differences between them aside, Rawls and Habermas share this basic orientation of political thinking (cf. James 2005; Laden 2004; Gledhill 2012; Jubb 2015).

The upshot is that the role of principles of legitimacy with respect to the political order as such (as opposed to particular institutions, laws, or decisions within that order) is *expressive* rather than adjudicative. If the question of legitimacy, at bottom, is how to relate practically to the regime with which one finds oneself confronted, here that question is recast more narrowly and specifically in terms of how to relate *as free and equal citizens* to each other and to the practice of *collective self-government* in which we, in their view, find ourselves engaged. Rawls and Habermas' principles of legitimacy do not explicitly address the question of legitimacy at a deeper level than this (Langvatn 2016; Fossen 2015).¹⁴ They do not feel a need to, I think, in large part because they assume that doing so could only involve an appeal to moral truth, and they recognize that politically, we cannot treat morality as given.¹⁵ But the question of legitimacy does cut deeper, for nothing guarantees—certainly not the principles proposed by Habermas and Rawls (as they would acknowledge)—that the presuppositions of this starting point cannot be called into question, philosophically and politically. Insofar as a principle is expressive of what legitimacy requires within a particular type of order, it cannot determine the legitimacy of that order as such. Why commit to this type of regime and regard myself as a citizen in the first place? That is the question a normativist would want to adjudicate. But neither Rawls nor Habermas

¹⁴ Langvatn observes that, while Rawls' understanding of political legitimacy shifts throughout his career, he always tries to account for it against the background of a constitutional democratic regime (Langvatn 2016: 136).

¹⁵ Rawls may be taken to espouse a moralized principle of legitimacy in his discussion of civil disobedience and the natural duty to support more or less (but not fully) just institutions (Rawls 1999: 293ff). The most Habermas provides in response to this issue is this consideration: "Philosophy makes unnecessary work for itself when it seeks to demonstrate that it is not simply functionally recommended but also morally required that we organize our common life by means of positive law, and thus that we form legal communities. The philosopher should be satisfied with the insight that in complex societies, law is the only medium in which it is possible reliably to establish morally obligated relationships of mutual respect even among strangers." (Habermas 1996: 460) Karl-Otto Apel challenges Habermas on precisely this point (Apel 2002).

purports to resolve this philosophically. To a normativist, it will then seem as if their theories do not address the problem at all, since for the normativist the only meaningful theoretical response to the predicament is an attempt at a principled solution. But that is too quick: as I elaborate in the next section, we can see Rawls and Habermas engaging politically with the problem if we attend to the performative dimension of their work.

If one wants to think through the question of legitimacy, the problem with Habermas and Rawls is that their accounts of legitimacy bear on the issue in a way that is too dependent on the context of a constitutional democratic regime. Their approach to legitimacy is too contextual not because it is biased toward the status quo, but because it fails to get to the bottom of the political problem. To be sure, we need to acknowledge that any such philosophical enquiry is situated in certain historical and political conditions, and that only a regime that facilitates free thought enables its unconstrained pursuit. Still, it is one thing to proceed theoretically from the stance of a citizen *qua* self-governing citizen, and another from that of a perplexed subject trying to grasp what is going on. The point here is not to demand a more fundamental principle of legitimacy, but to ask for a conceptual and ontological diagnosis of the problem that Rawls and Habermas leave implicit.

Toward a pragmatist approach to political legitimacy

To recapitulate: for normativists, distinguishing appropriately whether a regime is legitimate is a matter of applying the norms found by political philosophy. For judgment to go well, the judging subject must get the content right: the norms must be valid and the facts of the situation true. Judgment is cast as an ahistorical, impersonal moment of decision on the basis of independently given knowledge. Recent realist proposals to rethink legitimacy leave this picture of judgment in place, challenging only

how it is filled in. Neither approach has paid sustained attention to the ways in which the question of legitimacy presents itself, and the forms of political activity through which it might be addressed in practice (if not resolved).

Rawls' and Habermas' theories of legitimacy adopt a viewpoint within the setting of a constitutional democratic regime. Contrary to normativism, the principles they proffer express rather than adjudicate judgments of the basic legitimacy of such a regime, while offering critical standards for its amelioration. Thus they do not purport to resolve the question of legitimacy philosophically. These principles make sense only from the citizen standpoint, whereas normativists remain indifferent as to the perspective from which a judgment of legitimacy is made. But if their principles are expressive of the legitimacy of the regime as such, they do not seem to get to the bottom of the problem. And although Rawls and Habermas cast their principles of legitimacy in a different role, we have not yet found an explicit alternative to the normativist picture of what judging legitimacy involves.

None of the approaches discussed so far offers an explicit and systematic account of what it means to take a stance toward the regime from a first-person practical standpoint, and what is involved in doing that well. Raising this question opens room for a different mode of engaging philosophically with the question of legitimacy, which we could label "pragmatist".¹⁶ As I see it, the distinctiveness of a pragmatist approach lies in reversing the *direction of enquiry*. Instead of treating judgment as an afterthought, we make it our central theoretical concern. Instead of starting by determining the content and justification of principles, and then enquiring how those principles might be applied in practice, a pragmatist approach starts by accounting for

¹⁶ Alternative labels could work just as well. The approach I am sketching is akin to what Hans Sluga proposes to call a 'diagnostic practice' and John Horton 'interpretive realism' (Sluga 2014; Horton 2017).

the activity of judging legitimacy. It inquires *what it is we are doing* in asking whether a regime is legitimate or not, seeking to make explicit how the question of legitimacy presents itself and engages us in practice. What are the conditions in which this predicament presents itself as a real-life, practical problem? What must one know, and what can one do, in order to distinguish whether the authorities with which one finds oneself confronted are legitimate, or merely purport to be so?

Pursuing this line of enquiry would involve rethinking the concept of judgment in conjunction with the question of legitimacy. This could conceivably lead to various views of judgment and the role of principles therein. One possibility is that an account of judging legitimacy would just make explicit what normativist theories of legitimacy are already doing, complementing them with a more explicit and reflexive understanding of how the principles it seeks to articulate bear on practice. Alternatively, it could have revisionary implications, bringing out unacknowledged limitations of the exercise of codifying principles, and new possibilities for thinking about the problem. In short, how much room a judgment-oriented approach to legitimacy leaves for traditional normative theories really depends on the outcome of further investigation—on a concrete philosophical account of the practical encounter between subject and authority.

Such an account has not yet been systematically developed, so I can merely sketch some contours here (cf. Fossen 2013; 2014; Erman and Möller 2014; Festenstein 2016; Fossen 2019a). We can get a preliminary sense of what this could mean concretely by extending our examination of Rawls and Habermas. The previous section suggested that their principles of legitimacy take the fundamental legitimacy of constitutional democracy for granted. It seems that the citizen standpoint takes too much political work for granted. Insofar as the legitimacy of the regime as such is concerned, judgment

has to a considerable degree already happened before the principles enter the picture. But if we are interested in rethinking what judging legitimacy involves, this could offer a clue. Perhaps, in putting forward these principles, Rawls and Habermas enact a different mode of engaging with the question of legitimacy, one which reveals, by showing rather than telling, something of what is involved in judging legitimacy. What sort of activity or activities are they engaging in, in proffering their principles?

Consider more closely the passage that leads up to Rawls's formulation of the liberal principle of legitimacy.

The background of this question [about the legitimacy of the constitution in a democratic regime—TF] is that, as always, we view citizens as reasonable and rational, as well as free and equal, and we also view the diversity of reasonable religious, philosophical, and moral doctrines found in democratic societies as a permanent feature of their public culture. Granting this, and seeing political power as the power of citizens as a collective body, we ask: when is that power appropriately exercised? That is, in the light of what principles and ideals must we, as free and equal citizens, be able to view ourselves as exercising that power if our exercise of it is to be justifiable to other citizens and to respect their being reasonable and rational? (Rawls 2005: 136–37)

This is the question to which the liberal principle of legitimacy responds. Notice how much work is required to set the stage: we are asked to view others and ourselves *as* free and equal citizens; to see political power *as* “the power of citizens as a collective body”; and to regard diversity—the “fact of reasonable pluralism”—as a permanent fixture of our historically given situation.¹⁷ Only then can we see the problem as Rawls does (namely: how is fair cooperation possible despite profound disagreement?), and can the liberal principle of legitimacy enter the scene to help address it.

¹⁷ “History tells of a plurality of not unreasonable comprehensive doctrines” (Rawls 2005: 140)

This specific framing, much more than the liberal principle itself, is what constitutes Rawls' response to the question of legitimacy. Rawls deliberately represents power in a specific way, expresses a sense of who we are, and offers us a historically situated sense of our present. Crucially, though, this framing is not rendered thematic by Rawls as part and parcel to his account of legitimacy, but is presented as *prior* to it.

It would not be right exactly to say that Rawls and Habermas simply take for granted that the addressees of their theories are already willing and able to see themselves as citizens engaged in collective self-rule, even though the criteria they offer have their point only insofar as they do. That would miss the hortative dimension of their theorizing. They adopt the standpoint of a self-governing citizen not because they are sure that constitutional democracy has already been achieved, but because they believe it can only be realized if we collectively take up the standpoint they exhibit—however imperfectly the regime may presently live up to its ideals. I have argued elsewhere that implicit in the performative upshot of Habermas's theory of democratic legitimacy is a view of judgment as a practice of world-building, a view which is otherwise associated much more with Hannah Arendt (Zerilli 2016). Habermas can be understood as inviting us to imagine our political world in such a way that, *if* we accept his invitation, we keep alive the promise of democratic self-government. "Rational reconstruction" in this context means *re-construction* as much as *re*-construction (Fossen 2015).

Something similar can be said of Rawls, as Anthony Laden has argued. By showing that *if* we bring ourselves to see each other as free and equal citizens of a constitutional democracy, then there is a coherent way of addressing our political problems fairly, Rawls invites us to indeed conceive of ourselves thus.¹⁸ Performatively, theorizing

¹⁸ As Laden makes this point: "Very roughly, citizens in a pluralistic society might come to doubt whether a constitutional democratic regime is possible given that citizens can not be brought to agree on fundamental matters without the use of oppressive force. Faced with such

from the citizen standpoint can be understood not just as a defensive move—renouncing the philosopher-king’s throne and ceding the moral high ground—but also as offensive in stimulating those who are reluctant to see themselves as self-governing citizens to overcome their scruples and enter the forum.

The key point, for now, is this. As we have seen, three acts of stage setting precede Rawls’s formulation of the liberal principle of legitimacy: Rawls invites his readers to see themselves as a body of free and equal citizens, and to view the regime with which they find themselves confronted as an expression of their own, collectively shared power. And he situates this in a narrative according to which pluralism is the inescapable historical condition in which we find ourselves. If my interpretation of the intended performative upshot of his theorizing is correct, then Rawls is here not merely stating what he takes as uncontroversial assumptions we (his readers) must already share. Rather, these acts of stage setting are political acts that we are asked to carry through, and our willingness or refusal to do so shapes our stance toward the regime.

Now, what if we think of these acts of stage setting as acts of judgment? Perhaps it is precisely these kinds of political activity that constitute what judging the legitimacy of a regime consists in. That would mean that, in making these remarks, Rawls is not just setting the stage, preparing the ground for a moment of judgment in which a principle is applied. These apparently antecedent moments would in fact be at the heart of judgment. One’s grasp of who one is in relation to the authorities, what the regime is like, and the significance of events—these aspects of a situation in which one

a crisis of faith, we may find ourselves unable to muster the commitments and efforts at compromise and self-sacrifice necessary to make such a pluralistic democracy work. So this lack of faith is a political, not merely a philosophical, problem. Nevertheless, a large part of its solution lies within the conceptual domain of philosophy, insofar as our faith can be restored by a philosophical demonstration of the conceptual coherence of a pluralistic democracy. Rawls describes this role for philosophy as ‘philosophy as defense.’” (Laden 2004: 292)

encounters authority are not given prior to judgment, but at stake in it (see Figure 3). The question of legitimacy would then not appear as a problem that calls for theoretical solution, but for philosophical explication and practical engagement.

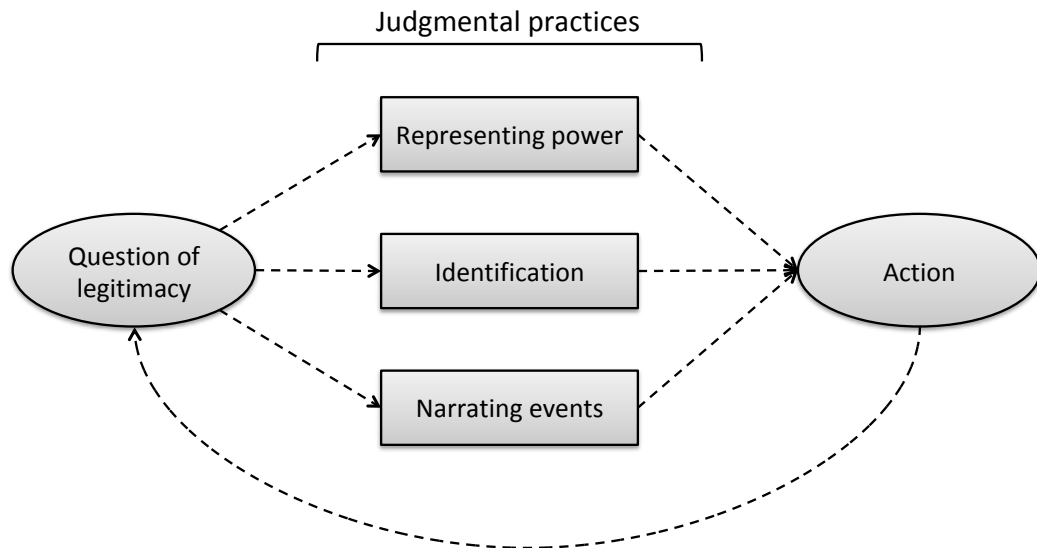


Figure 3: Provisional sketch of a picture of judgment as a set of world-shaping activities. Rawls' acts of stage setting are here regarded as constitutive dimensions of judgment.

Philosophical pragmatists typically view thought and meaning as bound up with action in some fundamental sense, and resist what they regard as problematic forms of abstraction in other philosophical approaches. Along these lines, one might conceive of judging legitimacy not as mental moment of decision, but as a certain kind of political practice. A pragmatist approach could thus construe judging legitimacy as consisting in practical engagement with the question of legitimacy, rather than the application of theoretical knowledge. This takes to heart Geuss' suggestion (noted above) that political judgments make sense only in a specific context of action, with a distinctive

history, relations of power, and multiple points of view. It matters crucially who judges, where and when. How and why it matters would of course need to be further spelled out.

This is of course just a sketch. A pragmatist theory of political legitimacy would need to explain which forms of activity should be seen as constitutive of judgment, and what is involved in performing them well. This opens up new terrain for theories of legitimacy. Theorists of legitimacy have not so far provided a systematic account of how and why the activities in which Rawls engages here—portraying power, articulating identity, and interpreting events—bear on the question of legitimacy, and what is involved in performing them in better and worse ways. Developing this thought could yield a way of thinking about the quality of judgment in terms of form, rather than just content. What it is for judgment to go well or poorly could be re-cast as depending on our modes of involvement in a situation, on the ways in which we experience and respond to various aspects of political reality, rather than our possession and subsequent application of the correct normative-theoretical and factual knowledge. The question is not just what one ought to know, but also what one can do to address the question of legitimacy aptly. This is not to deny that criteria may play a significant role in judging well, or that it is impossible to make them explicit, but to suggest that the quality of judgments of legitimacy cannot be reduced to their propositional content, but is a matter of how they are performed, how they form part of an ongoing activity. The challenge of explicating such forms of activity does not appear on the horizon of a theory of legitimacy if one frames the task for such a from the very start as a quest for knowledge of normative principles.

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Acknowledgments

Thanks to Janosch Prinz and the anonymous reviewers for their constructive feedback on this text. I am indebted to many others for discussion of these matters.

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