Government for the people: the primacy of substance in the justification of democracy

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ABSTRACT

Many political philosophers believe that sometimes we ought to tolerate substantive injustice for the sake of the intrinsic importance of democracy. In this thesis, I argue that they are mistaken. The substantive justice of outcomes has primacy over the putative intrinsic procedural justice of democracy. This is a very strong form of instrumentalism: if we face a choice between a minor substantive injustice and massive political inequality, then we ought to accept the political inequality. The thesis is divided into three parts. In the first part, I lay out the conceptual landscape for the discussion. I argue that assertions about justice are reducible to assertions about rights and that assertions about rights can be appropriately dealt with by the Hohfeldian analytic framework. Instrumentalists would gain from using this framework. The Primacy of Substance (POS) is true if people lack non-derivative individual or group democratic claim rights to do injustice. I defend my thesis by appealing to intuitions about injustices committed by gangs. I argue that gangs do not have rights to do injustice and this does not change merely because they choose to do the injustice democratically. Many philosophers accept this for severe injustices, but deny it for mild injustices. I argue that those positions are in error. People do not have democratic rights to do even mild substantive injustice.

In the second part, I argue that popular intrinsic proceduralist arguments from equal respect and autonomy pose no threat to the POS. An appeal to equal respect in political philosophy, on one sense of respect, is equivalent to an appeal to the requirements of political morality. Interpreted in this way, in the absence of further argument, the appeal to equal respect begs the question against the POS. The POS is a theory about the requirements of political morality and so about the requirements of equal respect. Other arguments from equal respect rely on the appeal to contingent social beliefs which may be associated with political power. If this argument were sound, then there could be rights to

do severe injustices such as rape and murder. Since people cannot have rights to do these things, contingent social beliefs cannot ground rights in the way suggested and so cannot ground democratic rights. Arguments from autonomy also do not threaten the POS. People's rights to act autonomously stop at the rights of others. This is true from the point of view of a variety of different theories of autonomy.

Finally, one cannot, contra prominent arguments defend intrinsic proceduralism on the basis of what I call Truth Restricting Intrinsic Proceduralism (TRIP), which holds that people have democratic rights to decide on reasonably contentious matters of substantive justice. When we are responding to the fact that someone reasonably believes that a law ought to be enacted, we ought to pay attention to the content of that belief. Intrinsic proceduralism asks us to pay attention to the fact that they reasonably believe it. This is a mistake. Even if we accept that people have a right to impose their reasonable view, many voters in the real world are not reasonable, many people reasonably deny the reasonableness of others, and many people reasonably deny the proposition that people have a right to impose their reasonable view. Thus, even if we accept the premise, it does not imply that we ought to use democracy in the real world or in a large number of close possible worlds. Moreover, all of the most prominent arguments for TRIP have failed. Finally, proponents of TRIP have failed to recognise that it entails the democratic right to do severe substantive injustice. Since we ought to reject all theories which have this implication, we ought to reject TRIP. There is no remaining way to refute the POS.

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Introduction

In America, non-violent drug offenders make up around 25% of the prison and jail population.[1] In Britain, the starting sentence for someone caught selling 4 ecstasy tablets is 18 months.[2] Selling 4 ecstasy tablets is roughly as dangerous as selling 1 scuba diving lesson.[3] (The prison sentence for teaching scuba diving is 0 years). Insufficient and poorly targeted foreign aid causes the death of millions. Commercialising genetically modified food is impossible in most African countries, despite the massive benefits and minute risks of genetic modification.[4] Every year, billions of animals suffer unnecessarily in the egg, meat and dairy industries. The failure to mitigate climate change is likely to impose massive and unfair costs on future generations. One thing these actions all have in common is that they were voted for or allowed by majorities in particular countries.

Is there anything good or just about the origin of these policies at least? I will argue not. *The substantive justice of outcomes has primacy over the putative intrinsic justice of*

[1] John Schmitt, Kris Warner, and Sarika Gupta, "The High Budgetary Cost of Incarceration," *Washington, DC: Center for Economic and Policy Research. Http://www. Cepr. Net/documents/publications/incarceration-2010-06. Pdf*, 2010, http://core.kmi.open.ac.uk/download/pdf/6414678.pdf.

[2] http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/supply_class_a_drugs/

[3] Michael Blastland and D. J. Spiegelhalter, *The Norm Chronicles : Stories and Numbers about Danger* (London: Profile Books, 2013)., 292. Taking one ecstasy tablet poses the same risk of death as living four normal days in Britain. No-one has yet proposed the criminalisation of living four normal days in Britain.

[4] GMOs are banned in many African countries. See http://uk.reuters.com/article/2013/06/06/eu-africa-gmo-idUSL5N0EG3K520130606. This is despite the lack of evidence that GMOs are harmful to human health. See "AAAS Board of Directors: Legally Mandating GM Food Labels Could 'Mislead and Falsely Alarm Consumers,'" accessed April 27, 2014, http://www.aaas.org/news/aaas-board-directors-legally-mandating-gm-food-labels-could-%E2%80%9Cmislead-and-falsely-alarm.

democracy. There is not a trade-off between substantive justice and intrinsic procedural justice (IPJ). Rather, there is nothing on the intrinsic proceduralist side of the scales. Many philosophers argue that people have discretionary democratic rights so long as they do not produce severe injustice, such as the violation of fundamental rights or the deprivation of an economic minimum. I aim to refute that position. Substantive justice has primacy even when the stakes are low; people do not have democratic rights to do mild injustice. This is true, I argue, even if there is reasonable, conscientious or informed disagreement about substantive justice.

The basic intuition underlying my argument is that if we could, at low cost, prevent gangs from committing even trivial injustices, then we would be permitted to do so. If this is true, then gangs lack the right to do even trivial injustices. Does it make any difference that gangs happen to be in the majority? I argue that the answer is 'no'.

I conjecture that the source of the popularity of intrinsic proceduralism is the consideration of rights to political power abstract what people will or are likely to do with that power. Jason Brennan has provided a useful analogy.[5] There are bad reasons to deprive people of driving licenses: depriving someone of a license because they are black is unjust, for example. However, this does not mean that every single deprivation of a driving license is *pro tanto* unjust. Stopping someone from driving because they are drunk violates no-one's rights: it is not a case of *pro tanto* injustice. Majorities do much worse than drunk drivers all the time. We know what to think about drunk drivers. Should we not think the same about reckless majorities?

[5] Jason Brennan, "The Right to a Competent Electorate," *The Philosophical Quarterly* 61, no. 245 (2011): 700–701.

The lure of Intrinsic Proceduralism

Intrinsic proceduralism has an intuitive pull. It has the virtue that it coheres with some deeply embedded intuitions; it seems to be intimately related to the ideals of equal respect and autonomy; and it appears to allow us to prescind from controversies about substantive justice, which is commonly thought to be a desirable thing to do. This explains why some form of intrinsic proceduralism remains popular among perhaps a majority of philosophers.

In some sense, democracy embodies equality. Each person has one vote, an equal right to stand for office and to engage in deliberation. Many philosophers have argued that these features are justified because they ensure equal respect for our equal basic status as persons. As Allen Buchanan pithily puts it:

> "A theory of political legitimacy must answer the egalitarian challenge to political power—it must explain why it is, if we are all fundamentally equal, that some of us should have the power to make, apply, and enforce laws on the rest of us."[6]

To deny people the vote seems to be to deny their equal status. It fails to recognise them as equals and so expresses disrespect. It is true that equal respect or status can also be expressed in outcomes, but, the intrinsic proceduralist will claim, it is disrespectful to deprive people of an equal say regardless of the quality of the outcomes. We can know that depriving all black people of the vote is wrong without examining whether it produces worse outcomes.

Democracy also appears to be intimately related to the ideal of autonomy, of people ruling themselves on the basis of principles and rules they have given themselves. Under elite rule, people are deprived of influence over or a chance to influence over the rules to which they are subject, whereas under democracy, everyone is, in some way, on an equal footing. In the same way, people are often thought to possess liberal rights, even though

[6] Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112, no. 4 (July 1, 2002): 710.

they may not make the best possible choice with them. For instance, people have the right to free choice of occupation, regardless of how well they choose, within certain limits. If we took these rights away from people, we would violate an important aspect of their autonomy. The same might be true of democratic rights.

The final main advantage that intrinsic proceduralism appears to have is that it allows us to prescind from pervasive controversies about substantive justice. This seems the right thing to do in some circumstances. Take the recent debate over whether the UK should stop using the fairly politically inegalitarian First Past the Post (FPTP) system and instead use the more politically egalitarian Alternative Vote (AV) system. Most people thought it appropriate to appeal to the superior fairness of AV in their arguments. Occasionally, people appealed to the quality of results, such as the threat of extremist parties and the potential disadvantages of the coalitions that AV would produce. Despite that, it would have seemed strange or inappropriate for someone to argue: "FPTP gives Labour a better chance of winning and Labour will produce better policies than the Conservatives. Therefore, we ought to stick with FPTP." The Primacy of Substance (POS) implies that this is exactly the kind of argument we should be making. This is another intuitive challenge faced by any instrumentalist theory.

Intrinsic proceduralism looks appealing when we must retreat from the truth about substantive justice either because of the practical problem of brute disagreement or because of the moral problem of securing acceptability to reasonable people.

What should be the focus of instrumentalism?

I believe that the POS is the foundation stone of a complete instrumentalist theory of political institutions. In this thesis, I hope for the first time to provide a comprehensive defence of the POS. Instrumentalism is by no means dead in political philosophy.

Contemporary philosophers, including Philippe van Parijs, Ronald Dworkin, Joseph Raz, Richard Arneson, David Estlund, Steven Wall and Jason Brennan have defended largely or completely instrumentalist theories of democracy.[7] However, I believe they have not yet provided a completely compelling case for instrumentalism.

The debate about the putative conflict between the intrinsic justice of democracy and substantive justice is one particular instance of the larger debate about the right to do wrong or the right not to do one's duty. I borrow a large amount of the conceptual apparatus of my discussion from the excellent literature on the right to do wrong, as presented by Waldron, Enoch and Øverland.[8] The right to do wrong is a Hohfeldian claim right which places others under duties not to prevent a person doing wrong. The Hohfeldian framework allows us to ask whether and for what reason we would not be permitted to prevent wrongdoing. In some cases we ought not to prevent an agent's wrongdoing, even though the agent does not have a right to do wrong. It might be that we are not permitted to prevent wrongdoing because prevention will impose significant costs on third parties. Perhaps if we have a competence exam on holding the vote, there will be

[7] Philippe van Parijs, "Justice and Democracy: Are They Incompatible?," *Journal of Political Philosophy* 4, no. 2 (1996): 101–17; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass; London: Harvard University Press, 2000), chap. 4; Richard J. Arneson, "Democracy Is Not Intrinsically Just," in *Justice & Democracy: Essays for Brian Barry*, ed. Keith M. Dowding, Robert E. Goodin, and Carole Pateman (Cambridge: Cambridge University Press, 2004); David Estlund, *Democratic Authority : A Philosophical Framework* (Princeton, NJ; Oxford: Princeton University Press, 2008); Brennan, "The Right to a Competent Electorate," 2011; J. Raz, "Disagreement in Politics," *American Journal of Jurisprudence* 43 (1998): 25–53; Steven Wall, "Democracy and Equality," *The Philosophical Quarterly* 57, no. 228 (2007): 416–38.

[8] Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92, no. 1 (October 1, 1981): 21–39; David Enoch, "A Right to Violate One's Duty," *Law and Philosophy* 21, no. 4–5 (July 1, 2002): 355–84; Gerhard Øverland, "The Right to Do Wrong," *Law and Philosophy* 26, no. 4 (July 1, 2007): 377–404.

rioting in the streets. This is a reason not to have a competence exam, but it is not derived from people's right to vote.

The Hohfeldian framework provides a good way to test whether people have the right to do wrong.[9] We can ask: if we could, at low cost to third parties and to the wrongdoer herself, prevent an agent from doing wrong, would we be permitted to do so? If the answer is 'no', then the agent has the right to do wrong; if the answer is 'yes', then she does not. We can apply this test to the question of whether people have the democratic right to do injustice. Suppose that we could produce more just outcomes by destroying the votes of some group in secret. Would we be permitted to do so? I am going to argue that the answer is 'yes'. If so, democratic rights are not a reason to accept substantive injustice. In other words, we ought never to accept substantive injustice for the sake of the putative intrinsic procedural justice of democracy.

The instrumentalists mentioned above do not approach democratic theory as a particular token of the debate about the right to do wrong, and this, in my view, is to the detriment of their theories. I would think that almost all of them accept the liberal right not to do one's duty. Almost all of them accept, for instance, that people have the right not to give blood, even if they are under a duty to do so. If they take this position, they need to explain why it is that they deny the democratic right not to do one's duties of justice. It is not obvious how to explain this difference, so the position requires defence, which most instrumentalists have not provided.

Van Parijs argues that democracies may undermine substantive justice but he assumes rather than argues for instrumentalism. Dworkin confuses normative justification and conceptual stipulation and consequently ends up trying to redefine democracy in such a way that elitist political institutions like the US Supreme Court come out as democratic.

[9] I expand on the Hohfeldian framework in Chapter 1.

Raz presents some good arguments against intrinsic proceduralism, but does not attempt to comprehensively defend instrumentalism. Estlund argues that intrinsic proceduralism does not entail that we have reason to use democratic institutions rather than a random choice of policy. I think it is clear that if each person has an equal right to causal impact over political decisions, then it is unjust to choose a policy at random because this procedure satisfies no-one's claim to influence and gives no-one a chance of satisfaction. Depending on what is the true theory of causation, democracy always or sometimes gives people causal impact, and it always gives people a chance of influence. Thus, if people have rights to political influence, then democracy is more intrinsically just than a random choice of policy. So far as I can tell, Estlund presents no arguments against the existence of democratic rights.[10]

Wall argues for instrumentalism largely on the basis of his dismissal of the argument from equal respect, but he does not fully come to terms with exactly what is wrong with that argument and nor does he provide a more comprehensive defence of instrumentalism. Jason Brennan argues that imposing democratically-made decisions exposes people to undue risk because of voter incompetence. However, he does not deal with the question of whether people have the democratic right to do wrong. Consequently, he does not establish instrumentalism and does not establish that we ought to use restricted suffrage.[11] Richard Arneson focuses on rights to use power or force over others, but, as I argue in Chapter 2, it is not clear whether all injustices must involve power or force. So, his theory is incomplete.

[10] See John Halstead, "Sharing Political Control: Intrinsic Proceduralism and Causation" (unpublished manuscript, 2014).

[11] See John Halstead, "Undue Risk and the Democratic Right to Do Injustice" 2015.

Thus, while many philosophers have the intuition that instrumentalism is true, it has not yet been given complete theoretical defence. The Hohfeldian framework of the right to do wrong promises a solution to this problem. Gerhard Øverland, Christian Barry and Ryan Davis have used the framework of the right to do wrong in order to argue for instrumentalism about democracy.[12] My argument differs from theirs in various ways, but their approach is one that I share and commend.

I do not defend pure instrumentalism here and nor do I argue that no procedures are intrinsically just. I leave it open that there might be intrinsic proceduralist reasons to use democracy if both democracy and an available elite procedure produce perfectly just outcomes. My goal is to provide a theory of how substantive justice and intrinsic procedural justice interact.

The thesis is structured as follows:

Part I – The Conceptual Landscape and The Primacy of Substance

1. The Conceptual Landscape

2. The Primacy of Substance

Part II – Intrinsic Proceduralism

4. Equal Respect and Democracy

5. Autonomy and Democracy

[12] Gerhard Øverland and Christian Barry, "Do Democratic Societies Have a Right to Do Wrong?," *Journal of Social Philosophy* 42, no. 2 (June 1, 2011): 111–31; Ryan Davis, "Justice: Do It" March 2012, https://sites.google.com/site/ryanwdavisphilosophy/research/working-papers.

Part III – Intrinsic Proceduralism and Disagreement

5. Intrinsic Proceduralism, Disagreement and Restricting the Truth

6. Intrinsic Proceduralism, Disagreement and Stakes

Part I – The Conceptual Landscape and Intrinsic Proceduralism

I will spend the first chapter clarifying the conceptual landscape. If I misunderstand the basic concepts or fail to clarify them, then argumentative error is sure to follow. As yet, I do not think that anyone has given a completely adequate account of the conceptual apparatus of democracy and intrinsic procedural justice. I aim to rectify some of these errors, and to set out clearly what I mean by the key terms. It is a very common move in political philosophy to come up with a moral argument for an institution and then define 'democracy' so that the institution counts as democratic. There is nothing wrong with stipulation as such, but it seems to me to be a genuinely open question whether democracy is good or just. If so, we should not define democracy at the end of our moral arguments. I go on to define what I mean by 'intrinsic procedural justice' and 'substantive justice' and introduce the Hohfeldian framework. I argue that if people lack non-derivative democratic claim rights to do injustice, then substantive justice has primacy.

In Chapter 2, I present my positive argument for the POS. I begin by setting out evidence of the various philosophers who endorse the democratic right to do injustice. I then set out a way to comprehensively *test* whether people have claim rights to do injustice. The test involves hypothetical means of prevention: if we are permitted to prevent at low cost to A and to third parties an agent A from doing some unjust act x, then A does not have a claim right to do x. I argue against the democratic right to do injustice by looking at small-scale injustices perpetrated by gangs. Clearly, we are permitted to prevent a gang from taking money justly owned by the worst-off provided the costs of

prevention are low. This does not change merely because the gang happens to be a majority and victims are given the vote. Therefore, the gang do not have democratic claim rights to do injustice. Importantly, this hold for *all* injustices, even trivial ones. Popular forms of intrinsic proceduralism – which hold that people have the democratic right to discretion over distributive justice provided people are above the level of sufficiency – are subject to glaring counterexamples.

My argument does not commit me to denying the liberal right to do wrong. My position is that people do not have rights, democratic or otherwise, to do injustice. Hence, I leave it open that people have the right to do *non-unjust wrongs*. For example, on many moral theories, people have duties of beneficence to donate to famine relief or to give blood. These people have a right to their money and their blood and so may not be prevented from failing to fulfil their duties.

An important practical point has been neglected by those who endorse a hybrid of instrumentalism and intrinsic proceduralism. The stakes are high for the majority of government decisions. So, hybrid theories must accept that if elite institutions would produce more just outcomes in energy policy, transport policy, foreign policy etc, then we are permitted to use those institutions. For the purposes of the practical question of the political institutions we ought to use today, the hybrid theory is very close to pure instrumentalism. Proponents of the hybrid theory emphasise the intrinsic proceduralist part of their theory to an unwarranted degree.

Finally, I argue that the POS is superior to Richard Arneson's prominent instrumentalist theory, which holds that people do not have non-derivative rights to use power or force over others.

Part II – Intrinsic Proceduralism

In Part II, I will look at the two most popular arguments for the intrinsic justice of democracy. In Chapter 3, I consider the argument which holds that political inequality is wrong because it violates equal respect or expresses disrespect to those with less power. I argue that assertions about equal respect are ambiguous between a range of different propositions, only one of which could count in favour of the intrinsic justice of democracy. On one understanding of what it means for our actions to express for others, our actions express respect when they do not violate other's rights. This version of the equal respect argument is question-begging against my argument for the POS. My argument says that people do not have democratic rights to do injustice. Saying that preventing people inflicting injustice expresses disrespect is simply to say it violates their rights, which is merely to restate the position I refute.

There is also a contingent understanding of the equal respect argument. This says that equal political power is important because of the social beliefs that happen to be associated with it. There are three different claims commonly associated with the contingent argument. Firstly, it is said that disenfranchisement is wrong because it is motivated by a disrespectful attitude. If this kind of respect grounds rights, then people could have rights to do things such as beat twelve year olds and commit murder. Since people cannot have rights to do these things, this kind of respect cannot ground rights. Secondly, it might be argued that disenfranchisement has disrespectful symbolic meaning by virtue of social beliefs which happen to have built up around political power. Again, this kind of symbolic meaning, if it exists, could have built up around any act, including the prevention of rape. Consequently, symbolic meaning cannot ground rights. Finally, it has been argued that political inequality is wrong because it produces social stigma and undermines the self-respect of those who have less power. These things are contingent

causal consequences of political inequality and so cannot count in favour of the intrinsic value or justice of political equality. Thus, no version of the equal respect argument shows the POS to be false.

In chapter 4, I discuss whether individual or group autonomy can ground the democratic right to do injustice. Many philosophers have criticised arguments from autonomy on the basis that democracy does not serve autonomous control of political conditions particularly well. There is something to this critique. However, if people do have democratic rights grounded in autonomy to political influence, then it does seem plausible that, for some set of decisions, democracy is the most intrinsically just procedure. I attack the argument on the basis that people do not have rights grounded in autonomy to do injustice. On some theories of autonomy – substantive theories – one cannot autonomously do injustice. So, one cannot defend the right to do injustice on the basis that there is value in autonomously chosen injustices. Moreover, it is not the case that depriving moral agents of the option of doing injustice undermines their autonomy. On other theories – content-neutral theories – one *can* autonomously do injustice. If so, autonomy does not always morally matter. The fact that someone has an authentic higher-order desire to murder people does not entail that we have even *pro tanto* reason not to prevent them committing murder.

Part III – Intrinsic Proceduralism and Disagreement

In part III, I criticise theories which hold that democracy is an intrinsically just way to make political decisions when there is reasonable disagreement about the substantive quality of outcomes. What I call Truth Restricting Intrinsic Proceduralism (TRIP) is the only remaining way to attack the POS. TRIP is false, so the POS is true.

In Chapter 5, I argue at some length that people do not have rights to impose their reasonable but false views about justice. Reasonableness bears on people's blameworthiness, not the claim rights they have to impose their view. I then go on to attack arguments from disagreement put forward by Jeremy Waldron and Tom Christiano, who are the two leading intrinsic proceduralists in contemporary political philosophy. Brute disagreement about substantive justice may pose a practical obstacle to securing justice. This does not, however, entail that instrumentalism is self-defeating. Moreover, contra Waldron, in no way is it question-begging to appeal to the truth about substantive justice merely because there is disagreement about substantive justice.

Christiano claims to defend a form of TRIP which holds that people have equal non-derivative rights to decide on matters on which conscientious and informed people disagree. However, on close inspection, his argument is in large part instrumentalist and does not restrict the extent to which we can appeal to the truth about substantive justice.

In Chapter 6, I argue that all versions of TRIP, in spite of what most of their proponents believe, entail the democratic right to do severe injustice. This is because there are many reasonably contentious high stakes moral matters. If people have discretionary democratic rights to control reasonably contentious issues, then they have discretionary democratic rights to control some high stakes issues and to make high stakes errors. This, I argue, provides sufficient reason to reject TRIP. I consider at some length whether the non-popular Public Justification Liberalism (PJL) poses a threat to this argument. I look at three public justification-based intrinsic proceduralist arguments presented by Gaus, Valentini and (arguably) Waldron and argue that they all fail. Waldron's argument implies the democratic right to do severe substantive injustice. Gaus and Valentini's arguments do not entail their desired conclusions. I construct a more profitable PJL-based argument for

TRIP, but argue that it also implies the democratic right to do severe substantive injustice. This is sufficient reason to reject PJL-based forms of TRIP, as well as all versions of PJL.

Radical implications?

Democracy is just a form of human agency and humans are often rogues and vagabonds. Democracy can be, and has been, a vehicle for massive injustice. Regardless of whether people happen to be in the majority, they do not have the right to perform these injustices. To properly assess principles about the distribution of political influence, we need to consider what will be done with that influence, rather than considering distributions of influence abstract the consequences. Moreover, one cannot defend democracy by retreating from the truth about substantive justice. Disagreement-based theories entail the democratic right to produce catastrophic injustice.

I see no reason to think that the POS is likely to imply that our institutions should remain as they are. We should follow sound arguments wherever they lead, regardless of whether they are radical or not. The popular belief that everyone should have an equal political say by virtue of being an adult seems to me not dissimilar to the belief that everyone should have the legal right to practice medicine or have a driving license by virtue of being an adult. If anything is incompatible with our equal basic status, it is injustice committed by groups, whether they happen to be a majority or not. It is a genuinely open question whether democracy produces the best outcomes. If we could produce better results with restricted suffrage or markets we should have no hesitation. Substantive justice has primacy over the putative intrinsic procedural justice of democracy.

PART I

THE CONCEPTUAL LANDSCAPE AND THE PRIMACY OF SUBSTANCE

1

The Conceptual Landscape

This chapter sets out the conceptual landscape for the discussion in the remainder of the thesis. This must be established from the outset, to avoid error and unnecessary discussion.

In section 1, I will set out what I mean by 'democracy'. I stipulate that it is a procedural notion and explain why I reject arguments which, in one way or another, import substantive justice into the *conception* of democracy. In section 2, I distinguish justice and value and explain how they operate in different moral theories. I argue that these terms ought not to be used interchangeably and say that I will focus on justice, rather than value. I then define substantive justice and retrospective justice.

In the third and most important section, I define intrinsic procedural justice and the surrounding conceptual apparatus. I argue that proving the non-existence of the democratic right to do injustice proves the POS. I then argue that assertions about such rights can be explained within the Hohfeldian analytic framework. I go on to define non-derivative rights and political influence, distinguish opportunities for influence and chances for influence, and point out the distinction between intrinsic proceduralist arguments from individual rights and group rights. Finally, I distinguish pure procedural justice from intrinsic procedural justice. In section 4, I explain the relationship between justice and legitimacy.

1. What is democracy?

I begin by defining what I mean by the term 'democracy'. I believe that democracy is a matter of popular sovereignty:

Democracy – The decisions made by a group are appropriately responsive to the expressed wishes of members of that group.

This stipulates that democracy is a procedural matter; it is not to do with the quality of outcomes. For the sake of simplicity, I will assume that democratic procedures are also politically equal:

Political equality – Each member has an equal opportunity for (a chance of) influence over the group's decisions.

Democracy also ought to be distinguished from majority rule:

Majority rule – The option that gets the most votes is the group's decision.

One alternative to majority rule – lottery voting – seems to be democratic. Under that system, each person gets one vote, but the majority does not necessarily win. Instead, each person is given an equal chance of having the option they voted for win. Lottery voting preserves popular sovereignty and is responsive to the wishes of the group and yet it is non-majoritarian.[1] Therefore, democratic procedures need not be majoritarian.

Definition vs. normative justification

It is important to define terms, but my argument in this thesis is not fundamentally about what the correct *conception* of democracy is. It is about the normative or evaluative issue

[1] See Ben Saunders, "Democracy, Political Equality, and Majority Rule," *Ethics* 121, no. 1 (October 1, 2010): 148–77.

of whether, and in what way, democracy is just. The task is not to find out what justice demands and then to call that 'democratic'.[2] Democracy is a popular word and as a result people are unwilling to accept that they support undemocratic institutions. But it seems to me that it is a genuinely open question whether democracy is just or not, which would be impossible if we thought democracy necessarily just.

Some philosophers fail to recognise the distinction between normative justification and definition. For example, Ronald Dworkin says that the debate about the use of majority rule and judicial review in America is a debate 'not about how far democracy should yield to other values, but about what democracy, accurately understood, really is'.[3] He then goes on to discuss and reject the 'majoritarian premise' which he takes to be one popular view about what democracy really is:

> "This is a thesis about the fair *outcomes* of a political process: it insists that political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favor, or would favor if it had adequate information and enough time for reflection".[4]

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[2] For examples of this approach see Christopher L. Eisgruber, "Democracy and Disagreement: A Comment on Jeremy Waldron's Law and Disagreement," *New York University Journal of Legislation and Public Policy* 6 (2003): 35–47; Corey Brettschneider, "The Value Theory of Democracy," *Politics, Philosophy & Economics* 5, no. 3 (October 1, 2006): 259–78; Henry S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford; New York: Oxford University Press, 2002), chap. 1; Alon Harel, "Notes on Waldron's Law and Disagreement: Defending Judicial Review," *Israel Law Review* 39 (2006): 13–21; Joshua Cohen, *Philosophy, Politics, Democracy : Selected Essays* (Cambridge, Mass; London: Harvard University Press, 2009); John Rawls, *Political Liberalism*, [New ed.]. (New York; Chichester: Columbia University Press, 1996), 233–234; Dworkin, *Sovereign Virtue*, 189.

[3] Ronald Dworkin, *Freedom's Law : The Moral Reading of the American Constitution* (Cambridge, Mass: Harvard University Press, 1996), 15.

[4] Ibid., 16.

He goes on:

> "That goal sounds very reasonable, and many people... have taken it to provide the very *essence* of democracy. They believe that the complex political arrangements that constitute the democratic process *should* be aimed at and tested by this goal: that the laws that the complex democratic process enacts and the policies that it pursues *should* be those, in the end, that the majority of citizens would approve."[5]

The first sentence of the second passage says that proponents of the majoritarian premise believe that it provides the correct description of what democracy is, whether or not it is normatively justified. The second sentence says that proponents of the majoritarian premise believe that it tells us which political procedures are morally justified. His argument against the majoritarian premise is an attack on those who assume that the majoritarian premise states 'the ultimate definition of and justification for democracy'.[6]

But this excludes by stipulation what seems to be an eminently plausible position to hold: the conjunction of the definitional part and the denial of the normative part. I believe a variant of the definitional part of majoritarian premise: I believe at least that majority rule is always democratic. But I also believe that sometimes the use of non-majoritarian procedures is justified. This viewpoint is excluded by fiat in Dworkin's conceptual universe. Dworkin defines his terms at the end of his moral arguments, but we ought to define terms first and then start making moral arguments. The definition of democracy and the moral justification of democracy ought to be treated separately.[7]

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[5] Ibid. Dworkin's distinction of a dependent and a detached conception of democracy makes much the same mistakes in Dworkin, *Sovereign Virtue*, 185–186.

[6] Dworkin, *Freedom's Law*, 16.

[7] For a similar point, see Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), chap. 13.

Democracy is a procedural matter

I have stipulated that democracy is a procedural matter. I will now clarify what I mean by this. Firstly, 'this procedure is good for democracy' does not entail 'this procedure is democratic'. Secondly, the outcomes of a procedure cannot make that procedure democratic or undemocratic. Thirdly, I stipulate that outcomes cannot be democratic.

Firstly, the proposition 'x is good for democracy' does not imply the proposition 'x is democratic'. In a discussion of what is the correct conception of democracy, Dworkin says:

> "Some Americans believe that judicial review of legislation by courts, which have the power to declare such legislation unconstitutional, undermines democracy; others hold that judicial review helps to perfect it."[8]

In this passage, Dworkin suggests that the two sets of Americans he describes hold conflicting views about the relation of judicial review to democracy. But in fact, the fundamental complaint against judicial review is that the procedure itself is undemocratic. This is different to saying it is not an effective way to preserve democracy going forward. The second set of Americans deny this latter proposition: they think that judicial review helps to perfect democracy. That is different to the claim that judicial review is democratic. Throughout his work, Dworkin fails to clearly distinguish the claim that an institution is good for democracy and the claim that it is democratic.[9] If judicial review protects democratic rights, then we ought to say that it is a decision made by an undemocratic procedure which is good for democracy in the future.[10]

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[8] Dworkin, *Sovereign Virtue*, 357.

[9] Ibid., 208–209. In *Freedom's Law*, Dworkin says that the majority rule is not democratic if it does not protect the 'democratic conditions', which include procedural features of democracy, at Dworkin, *Freedom's Law*, 17.

[10] For a similar point see Waldron, *Law and Disagreement*, chap. 13.

Secondly, we have good reason to reject the claim that a procedure can be democratic by virtue of the substantive quality of its outcomes. In *Sovereign Virtue*, Dworkin says,

> "A dependent conception supplies an outcome test: democracy is essentially a set of devices for producing results of the right sort."[11]

Dworkin is defending the view that a procedure is democratic if and only if it produces results of the substantively right sort.

This conflicts with my semantic intuitions. To a large extent, Dworkin is immune to an obvious *reductio* since he freely accepts that judicial review as it is practiced in the United States is a democratic procedure. The following is an accurate description of judicial review: a panel of nine unelected judges have the power to strike down legislation – even if it is supported by a vast majority of the population – which they take to be incompatible with the U.S. Constitution, which is a document written hundreds of years ago. I think this is extremely undemocratic and it is hard to construct what I would take to be a better paradigm case of an undemocratic institution. A king striking down laws on the basis of Locke's *Two Treatises*? An epistocrat limiting the majority where they contravene the dictates of *Sovereign Virtue*? These seem to me only to be a very short walk from judicial review. There are good reasons to accept that politically unequal institutions like judicial review are undemocratic, regardless of how well they protect basic rights.

Finally, I stipulate that outcomes cannot be democratic. Joshua Cohen argues that if a law is not supported by public reasons, then it is undemocratic:

> "Suppose, then, that we prevent others from fulfilling such demands for reasons that they are compelled – by the lights of a view that commands their conviction – to regard as

[11] Dworkin, *Sovereign Virtue*, 186. See also Dworkin, *Freedom's Law*, 70. He says that the 'democratic conditions' include the protection of equal status in the substantive sense at Ibid., 17–25 and 32–33.

> insufficient. This is to deny them standing as equal citizens – full membership in the people whose collective actions authorize the exercise of power. And that, according to the deliberative conception is a failure of democracy."[12]

Coercing someone on the basis of reasons they cannot be expected to reasonably accept is a failure of democracy, according to Cohen. For Cohen, deliberative democracy 'captures the role of "undemocratic" as a term of criticism applying to results as well as procedures'.[13] Again, my semantic intuitions conflict with this definition, though perhaps these intuitions are not as widely shared as I think. That aside, there are reasons of argumentative clarity to stipulate that outcomes cannot be democratic. So, that is what I will do.

2. Justice and value

In this section, I define what I mean by 'justice' and 'value' and explain what is meant by calling something 'intrinsically just'.

Distinguishing justice and value

I define intrinsic proceduralism in the following way:

> *Intrinsic Proceduralism* – A position which holds that democracy is intrinsically just or intrinsically valuable or that democracy is legitimate by virtue of its intrinsic properties.[14]

[12] Cohen, *Philosophy, Politics, Democracy*, 165.

[13] Ibid., 172. Dworkin's account of 'democratic conditions' also appears to allow that outcomes can be democratic. See Dworkin, *Freedom's Law*, 17, 25, 70, 364–365.

[14] I will explain this last condition in section 5.

Some democratic theorists sometimes refer to at least two of intrinsic procedural *value*,[15] intrinsic procedural *justice* (IPJ), intrinsic procedural *fairness*,[16] and procedural *equality*.[17] We ought not to use these terms interchangeably.

Justice and value operate differently in different moral theories. Briefly and roughly, according to consequentialism, goodness determines rightness.[18] So for example, if we have to kill one person to save five people, then, since saving five is better than saving one, we ought to save five. Nonconsequentialist theories hold that goodness does not determine rightness, but that rightness is determined by deontic elements, such as rights, principles and obligations, which are not themselves entirely a function of value.[19] In a case in which we have to choose whether to kill one to save five, even though saving five is better, killing the one might violate his rights or violate some other deontic principle against sacrificing the few for the many. This entails that we must not do it, even if this causes the five to die. For example, rights-based theories commonly hold that we ought not to kill one person in order to harvest their organs to save five people. Doing so violates that person's rights. Or consider antiperfectionism. Antiperfectionists are nonconsequentialists who argue that the state is sometimes not permitted to impose a policy even if that policy

[15] Arneson, "Democracy Is Not Intrinsically Just," 41–42; Thomas Christiano, "Debate: Democracy's Authority: Reply to Wall," *Journal of Political Philosophy* 14, no. 1 (March 1, 2006): 101–10; Harry Brighouse, "Democracy and Inequality," in *Democratic Theory Today*, ed. Carter, April and Stokes, Geoffrey (Cambridge: Polity Press, 2002).

[16] Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Boulder, Colo; Oxford: Westview Press, 1996), 68–69; Estlund, *Democratic Authority*, chap. 4.

[17] Ben Saunders, "Why Majority Rule Cannot Be Based Only on Procedural Equality," *Ratio Juris* 23, no. 1 (March 1, 2010): 113–22.

[18] John Broome, *Weighing Goods : Equality, Uncertainty and Time* (Oxford: Basil Blackwell, 1991), 6.

[19] Ibid., 8–9; F. M. Kamm, "Nonconsequentialism," in *The Blackwell Guide to Ethical Theory*, ed. Hugh LaFollette (Oxford, UK ; Malden, Mass, USA: Blackwell, 2001).

would make people lead more valuable lives. For antiperfectionists, even if it is true that people's lives would be better if they were happier, the state is not permitted to coerce people to make them happier. As a result of this distinction between consequentialism and nonconsequentialism, I stipulate that the deontic elements which determine rightness from the point of view of nonconsequentialism ought not to be called 'values', for obvious reasons.[20]

So, *value* and *justice* have different roles in different moral theories. For a consequentialist, a procedure's intrinsic justice is neither a necessary nor sufficient condition on its being even *pro tanto* morally required. For a nonconsequentialist, showing that a procedure has intrinsic value is neither necessary nor sufficient to show it to be even *pro tanto* morally required. Hence, proponents of those different theories, if they are trying to infer a conclusion about moral rightness, should use the term which, from their point of view, is determinative of moral rightness.

My argument is part of a broadly instrumentalist approach to the assessment of political procedures. I argue that we ought to assess political procedures by how well they do at realising just outcomes. But instrumentalism is not necessarily consequentialist.[21] Firstly, consequentialist moral theories can be intrinsic proceduralist. Consequentialist theories hold that we ought to maximise intrinsic value. This is consistent with the claim that democracy is intrinsically valuable. Secondly, one can defend a nonconsequentialist

[20] This runs contrary to common practice amongst nonconsequentialists. See for example G. A. Cohen, "On the Currency of Egalitarian Justice," *Ethics* 99, no. 4 (July 1, 1989): 908.

[21] For labelling of instrumentalism as 'consequentialism', see for example Gerald F. Gaus, *Justificatory Liberalism : An Essay on Epistemology and Political Theory* (New York ; Oxford: Oxford University Press, 1996), chap. 14; Fabienne Peter, "Democratic Legitimacy and Proceduralist Social Epistemology," *Politics, Philosophy & Economics* 6, no. 3 (October 1, 2007): 337.

pure instrumentalist position. One could, for example, argue that political procedures ought to be assessed entirely by how well they protect Nozickean libertarian rights.

In this thesis, I am concerned fundamentally with arguments for the intrinsic procedural *justice*, rather than intrinsic procedural *value*, of democracy. The reason for this is simply that all of my opponents are working in nonconsequentialist theory.

Substantive justice

I am using a broad and ecumenical understanding of 'justice'. Justice is fundamentally to do with the entitlements people have to benefits and burdens.

> *Justice* – The justice of an act or state of affairs is determined solely by the degree to which that act or state of affairs respects entitlements.

For instance, murder is unjust because it violates someone's right not to be murdered. However, if a beggar does not have a right to the money in my pocket, then my failure to give him money does not violate his entitlements and so is not unjust. It might be morally wrong in some other way, but it is not unjust. I do not claim, as a conceptual matter, that duties of justice are enforceable. I return to this point in chapter 2. Some philosophers use 'justice' in a narrower sense. For example, Jerry Cohen has argued that individuals have rights grounded in freedom to make unjust career choices and wage demands.[22] These freedom rights are part of substantive justice on my definition. They are entitlements people have to have an occupation of their choice.

[22] See G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass; London: Harvard University Press, 2008), chap. 7.

The substantive justice of outcomes is to do with the justice of the outcome which is not derived from its procedural pedigree. I define 'outcomes' broadly. Procedures have outcomes, but not all outcomes are produced by procedures. An asteroid crashing into America would have bad outcomes, but is not the product of a procedure. Procedures can themselves be outcomes of other procedures. However, procedures cannot themselves be substantively just. They can produce substantively just outcomes, but, by stipulation, they cannot themselves contribute to the substantive justice of an outcome.

> *Substantive justice* – the justice of an outcome (not including procedures which are part of the outcome) which is not derived from the justice of a procedure which may have produced the outcome.

According to almost all theories of justice, some outcomes are substantively just or unjust. For example, all theories of justice say that genocide is substantively unjust. Genocide is unjust regardless of the political decision-procedure which produces it. Theories of substantive justice disagree on many other issues. According to libertarians, it is substantively unjust for the state to forcibly confiscate someone's property without their consent. Many egalitarians disagree and say that redistributive taxation does not violate rights and so is not substantively unjust. Neither of these claims about justice is dependent on any claims about the procedures that produced these outcomes. So, they are claims about substantive justice.

Procedures can be recommended on the basis of how good they are at realising substantive justice. This is the instrumental justice of the procedure:

Instrumental procedural justice - A procedure is instrumentally just to the extent that it produces substantively just outcomes.[23]

Any procedure, no matter how politically inegalitarian, could be instrumentally just. Some have claimed that instrumentally just procedures realise independently *defined* outcomes.[24] If 'defined' here means known and aimed at, this is not correct. The outcome aimed at might not have been defined, though it might exist. A procedure can be instrumentally just, even if we do not know that it is.

Instrumentalists are concerned with the quality of outcomes and not solely implemented decisions.[25] Outcomes include side-effects of procedures as well as implemented decisions. An epistocratic regency might make better decisions than democracy, but have worse outcomes overall, say because it reduces social solidarity and so causes social conflict. Philosophers including J.S. Mill, Amy Gutmann and Dennis Thompson have defended democracy on the basis of its educative benefits.[26] These are instrumentalist arguments. Offering a cash reward for political knowledge is also likely to have educative benefits, but that does not make the cash reward itself intrinsically valuable

[23] Rawls divides instrumental procedural justice into perfect and imperfect procedural justice. That distinction is not important for my purposes. John Rawls, *A Theory of Justice*, Rev. ed. (Oxford: Oxford University Press, 1999), 74–75.

[24] Ibid., 74.

[25] Richard J. Arneson, "Defending the Purely Instrumental Account of Democratic Legitimacy," *Journal of Political Philosophy* 11, no. 1 (2003): 123.

[26] Amy Gutmann and Dennis F. (Dennis Frank) Thompson, *Democracy and Disagreement* (Cambridge, Mass ; London: Belknap Press of Harvard University Press, 1996); John Stuart Mill, "Considerations on Representative Government," in *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991).

or of fundamental moral concern. We ought to take all causal consequences, including side-effects, into consideration when assessing the instrumental justice of a procedure.

Retrospective justice

Substantive justice should be distinguished from the 'retrospective justice' of outcomes. This is the justice of an outcome which derives from the moral quality of the procedure which produced it.[27]

> *Retrospective justice* – An outcome is retrospectively just by virtue of being produced by a just parent procedure.

A classic example of a retrospectively just outcome is the outcome of a fair gamble. Consider this different example. Suppose that Jack and Jill have equal claims to a kidney, but that there is only one kidney. As the kidney is an indivisible good, we ought to use an equiprobable lottery to decide who gets it. Whoever wins the lottery ought to get the kidney. If Jack wins the lottery, then his getting the kidney is retrospectively just. Giving Jill the kidney may nevertheless be *substantively* just because it satisfies her claim right to the kidney. But this justice is not derived from the justice of the procedure and so is not retrospectively just.

By definition, any outcome of an intrinsically just procedure is retrospectively just. Many philosophers argue that this does not exhaust the kinds of procedures which might produce retrospectively just outcomes. For example, David Estlund has argued that outcomes can be retrospectively just because they are produced by a procedure which is

[27] Estlund, *Democratic Authority*, 69–70.

usually or generally instrumentally just.[28] I remain neutral on these kinds of views in this thesis.

3. Intrinsic procedural justice

I will now define 'intrinsic procedural justice' and the surrounding conceptual apparatus, including non-derivative claim rights, political influence, opportunities and chances of political influence, and pure procedural justice.

Intrinsic procedural justice and the Hohfeldian framework

Intrinsic procedural justice is defined in the following way:

> *Intrinsic procedural justice* (IPJ) – The justice a procedure has by virtue of its intrinsic properties.

Procedures are intrinsically just only if they are non-instrumentally and non-retrospectively just. If a procedure is instrumentally just or retrospectively just, then it is just by virtue of its non-intrinsic properties. As I show below, it seems likely that there are other necessary conditions on a procedure being intrinsically just.

A classic example of an intrinsically just procedure is a fair lottery. The equiprobable kidney lottery between Jack and Jill is intrinsically just. The two possible outcomes [Jack gets the kidney, Jill gets the kidney], are equally substantively just. We could realise one of these outcomes by giving Jack a 100% chance of getting the kidney and giving Jill a 0% chance. However, we have reason to give them each 50% chances of getting the kidney. This reason cannot be derived from the instrumental justice of the

[28] Ibid., chap. 6.

procedure, since both the [100%, 0%] chances procedure and the [50%, 50%] chances procedure are equally instrumentally just. Hence, the 50% chances procedure is non-instrumentally just. It is, in addition, not retrospectively just. By virtue of its intrinsic properties, the procedure is just.

The POS says that we ought never to sacrifice substantive justice for the sake of the putative intrinsic procedural justice of democracy. I have already suggested that justice should be understood conceptually in terms of respect for people's entitlements. I now stipulate further that 'entitlements' are to be understood using the familiar Hohfeldian scheme that encompasses claim rights, privileges, powers and immunities. This stipulation, though not uncommon in the literature, may be perceived as controversial. Hohfeld's scheme was developed to analyse (positive) legal rights. Scholars such as Leif Wenar have claimed that all assertions about rights can be analysed within the Hohfeldian framework.[29] Yet, authors who write both about procedural and about substantive justice often do so without reference to Hohfeld, and it is contestable whether the principles they defend could be explicated in Hohfeldian terms.[30] There is a danger, therefore, that by using this framework I shall be begging some important questions in the dispute over procedural and substantive justice.

[29] Leif Wenar, "The Nature of Rights," *Philosophy & Public Affairs* 33, no. 3 (July 1, 2005): 223–52. Other rights theorists also argue that the Hohfeldian framework is a universal analytical framework in which to talk about rights. See for example Waldron, "A Right to Do Wrong"; Øverland, "The Right to Do Wrong," 378 n5.

[30] Rawls, *A Theory of Justice*; Ronald Dworkin, *Taking Rights Seriously*, New impression, with a reply to critics. (London: Duckworth, 1978); Dworkin, *Sovereign Virtue*; Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974); Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).

Indeed, even those who are sympathetic to the Hohfeldian analysis might quarrel with my focus on political rights as claim rights, rather than as moral powers.[31] After all, democratic rights are legal powers to alter the legal rights and obligations of individual citizens, creating legal claim rights and privileges. It might well then be wondered why I do not focus on moral powers. The reason is that, in my view, showing that people have equal democratic moral powers to create obligations to obey does not show that democracy is intrinsically just. The reason for this is that the duties to obey created by a moral power of political authority are not standardly thought to be *owed to* voters. Yet the intrinsic proceduralist holds that duties to obey or not to interfere with the imposition of democratically chosen laws *are* owed to voters: we would be wronging voters by disobeying or by interfering with the imposition of their decision. As Christiano says

> "The capacity to impose duties does not imply a right on the part of the authority, for the duties may not be owed to the authority… A robust right to rule is first and foremost a valid claim of the authoritative body against others upon whom certain duties are imposed. The valid claim is correlated with a duty owed to the authority on the part of the subjects of the authority and others not to interfere with the activities of the authority."[32]

As a conceptual matter, if voters have democratic claim rights to political influence, then the duties not to interfere with their exercise of political influence are owed to those voters. If, however, voters only have powers to create obligations to obey, it does not follow, as a conceptual matter, that these obligations are owed to voters. Consequently, my target in

[31] Peter Jones, *Rights* (Basingstoke: Macmillan, 1994); Waldron, *Law and Disagreement*; Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008); Estlund, *Democratic Authority*.

[32] Christiano, *The Constitution of Equality*, 240–241. See also David Enoch, "Authority and Reason-Giving," *Philosophy and Phenomenological Research* 89, no. 2 (September 1, 2014): 296–332, doi:10.1111/j.1933-1592.2012.00610.x.

this thesis will be the proposition that people have equal *claim rights* to political influence, rather than equal powers to create obligations to obey. More specifically, since I am interested in whether we ought to sacrifice substantive justice for the sake of the intrinsic justice of democracy, I am interested in whether people have *equal non-derivative claim rights to do substantive injustice*.

This is an arguably controversial way to characterise the intrinsic proceduralist position. I nevertheless believe that greater clarity can be achieved by treating political rights as (substantive) claim rights. Rather than trying to show in advance why Hohfeldian analysis is an appropriate methodology for tackling the problem that this thesis addresses, I hope that as the argument unfolds, its virtues will become apparent. I hope that I can plausibly demonstrate that on any conception of rights, people do not have democratic rights to do substantive injustice. I also believe that the arguments I make in the thesis in favour of the POS also show that people do not have Hohfeldian powers to create obligations to obey unjust laws. Nonetheless, for the reasons given above, this conclusion is orthogonal to my chief concern and I will not argue for it directly.

Intrinsic procedural justice and non-derivative rights

I define non-derivative rights as follows:

> *Non-derivative rights* – rights which are not justified by their contingent causal consequences.

Throughout this thesis, I will refer to ‘non-derivative rights’ and not ‘fundamental rights’. The latter term also means ‘very important’ and this invites confusion because non-derivative rights might be trivial.

If rights are derivative, then they are justified by their contingent causal consequences. Contingent causal consequences clearly cannot count in favour of the intrinsic justice of democracy. Therefore, democracy is intrinsically just only if political rights are non-derivative. Rights can be partly derivative and partly non-derivative. Many philosophers hold that people have equal political rights so long as they do not produce grossly unjust outcomes. The right is partly non-derivative because people have it, in part, regardless of how well they choose; but it is also partly derivative because they lose it when they make choices which are too unjust.

Note that I do not say that the condition of non-derivativeness is *sufficient* for democracy to be intrinsically just. It is possible that some rights could be justified by virtue of their relational properties, even though the rights are non-derivative. For example, it might be argued that people have the right to political power because those who attempt to disenfranchise people are motivated by disrespectful attitudes. Disenfranchisement is wrong because it expresses disrespect in this way, but this wrongness is not a property of the causal consequences of disenfranchisement. Nonetheless, it is a relational property of disenfranchisement: disenfranchisement need not always be motivated by disrespectful attitudes. Thus, political equality is non-instrumentally just but justified by virtue of its relational properties. On standard accounts of intrinsic properties, intrinsic properties are non-relational properties.[33] So, if people do have equal rights to political power in the way suggested, this would not prove that democracy is intrinsically just.

[33] See for example Michael J. Zimmerman, "Intrinsic vs. Extrinsic Value," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2015, 2015, http://plato.stanford.edu/archives/spr2015/entries/value-intrinsic-extrinsic/. There is a great deal of controversy about what an intrinsic property is. I do not think there are any accounts of intrinsic properties which would entail that the relation of democracy to contingent social beliefs could make democracy intrinsically valuable or just.

Some people might deny this and argue that political rights justified by their relational properties can justify the intrinsic justice of democracy. I will bypass this controversy in this thesis. In Chapter 3, I consider the only extant arguments which defend equal political rights not on the basis of their contingent causal consequences but nevertheless on the basis of their relational properties, specifically their contingent relation to certain social beliefs. I argue that that argument cannot ground rights, full stop. So, we do not need to broach the subject of whether political rights justified by their relational properties can ground the intrinsic justice of democracy. Disproving the existence of non-derivative individual and group rights to do substantive injustice is sufficient to prove my thesis.

The POS is true if individuals lack equal non-derivative democratic claim rights to do substantive injustice and groups lack non-derivative group rights to do substantive injustice. Note that here I say 'if' but not 'only if'. I have just argued that it is controversial whether equal non-derivative political rights imply that democracy is intrinsically just. Some such rights might not have that implication. Therefore, I exclude 'only if' from the above proposition. I do not say: 'if individuals have equal non-derivative claim rights to do injustice, then the POS is false'.

Note also that I do not say that rights are non-derivative if and only if they are not justified by the fact that they serve other *rights*. I say rights are non-derivative if and only if they are not justified by the deontic importance of their contingent causal consequences. Some theories of rights disagree with this definition. For example, Joseph Raz defines non-derivative rights as rights which are not grounded in other rights.[34] For Raz, and other proponents of the interest theory of rights, rights are justified by their service of the

[34] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 168.

interests of the right-bearer or others.[35] Thus, on Raz's account, a right may be non-derivative, even though it is justified by virtue of the fact that it causally produces well-being. This understanding of non-derivative rights is clearly not congenial to my approach. If one defends equal political rights on the basis that they will secure individual well-being, one is clearly defending an instrumentalist argument for democracy, even though, in Raz's terms, these rights are non-derivative.

At first glance, it is not clear that there are any non-derivative rights on the interest theory of rights. If rights are justified entirely by their service of individual interests or well-being, then it seems as though interests and not the rights themselves are of fundamental concern. I think that the interest theory can, as a conceptual matter, make room for non-derivative rights, as I define them. For example, one could argue that people have an interest in choosing their own job, regardless of how well they choose. This interest might justify a right to free choice of occupation. Even though the right is justified by interests, it is not justified by its contingent causal consequences. If Jim freely chooses to be a fireman, then this serves his interest in freely choosing his job, not only his interest in being a fireman. The satisfaction of the former interest is an intrinsic property of the exercise of choice. Therefore, the interest theory can justify non-derivative rights, as I define them. As I show in Chapter 4, the interest theory of *group* rights may also be able to justify a non-derivative group right to democracy.

The other main theory of rights which intrinsic proceduralists have appealed to is the status theory.[36] According to this theory, people have rights by virtue of having a

[35] Ibid., chap. 7.

[36] See Nozick, *Anarchy, State and Utopia*, chap. 3; F. M. Kamm, "Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status," *Philosophy & Public Affairs* 21, no. 4 (October 1, 1992): 354–89; Warren Quinn, *Morality and Action* (Cambridge: Cambridge University Press, 1993), chap. 7; Thomas Nagel, *Concealment and Exposure : And Other Essays* (Oxford: Oxford University Press, 2002), chap. 3.

certain status which makes them fitting for rights. For example, by virtue of being a person and having a conception of the good, individuals have the right to free choice of occupation. This places others under correlative duties not to force people into a job they do not want. I discuss this theory in more depth in Chapter 3.

Intrinsic proceduralists ordinarily argue that people have *equally strong* claims to political influence. If Jack and Jill have equally strong claims to x, then the duties we have to enable each to x or not to interfere with either of them x-ing are equally strong. If Jack had a stronger claim than Jill, then we would have stronger reason to satisfy him. If people have unequally strong political rights, then politically unequal decision-procedures would be a requirement of justice. If people have equally strong non-derivative claim rights to political influence, then democracy is required by justice.

Political influence and causal control

I understand political influence to be a person's causal impact on a political decision.[37] If someone has no causal impact on a decision, then they have not had any influence on that decision. In liberal societies, most people have complete causal control over a variety of decisions which affect them, such as which toothpaste to use. If the government mandated that everyone must use Colgate, then people would not have causal control over which toothpaste they use. The democratic claim right to do substantive injustice can be understood as a right to causally bring about substantive injustice. For example, if people

[37] Various philosophers accept this definition. See for example Dworkin, *Sovereign Virtue*, 191; Harry Brighouse, "Egalitarianism and Equal Availability of Political Influence," *Journal of Political Philosophy* 4, no. 2 (1996): 119; Saunders, "Democracy, Political Equality, and Majority Rule," 158–159; David Estlund, "Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (MIT Press, 1997), 192–193.

have the democratic claim right to produce unjust tax laws, then they have the right to causally bring about unjust tax laws through the democratic process. Democratic procedures such as majority rule and lottery voting set up certain ways in which 'the people' can causally determine an outcome.[38] What I deny is that people have the right to causally bring about a substantively unjust outcome.

Opportunities and chances

Many intrinsic proceduralist theories do not argue for the equalisation of political influence *simpliciter*. Instead, they follow theories of substantive egalitarian justice by incorporating an 'opportunity' element into their distribuendum. This allows there to be some permissible inequalities of influence. Unequal influence from some sources, such as bribery, blackmail or arbitrary additional wealth, does seem to be intrinsically unjust or unfair. But the same does not hold for all sources of unequal influence. A crude equal influence version of intrinsic proceduralism must hold that there is something intrinsically wrong with someone who turns out to vote having a higher chance of influence than someone who abstains. Intrinsic proceduralists can avoid this by saying that the relevant currency is *opportunity* for influence. We need to keep clearly in view that we are assessing *non-derivative* rights to opportunity for influence. We cannot defend the opportunity features of the rights on the basis of their causal consequences. While it seems obvious that there are, for instance, good instrumental reasons to allow those who offer better reasons to have more influence, it is not obvious that there are reasons of IPJ to

[38] The matter is complicated because on some theories of causation, if a majority vote is decided by more than one vote, then no single individual exercises causal control over the outcome. I believe, but will not argue it here, that nonetheless it would either be rational or morally right to disenfranchise overdetermining voters in this circumstance. See Halstead, "Sharing Political Control."

allow this inequality. We must, at all times, bear in mind the distinction between derivative and non-derivative rights.

An equal *opportunity* to get a good is different to an equal *chance* to get a good. That Jim and Susan have an equal opportunity to get some good *x* does not necessarily entail they have an equal chance to get the good, and neither does the entailment necessarily run the other way.[39] If Jim has put in more effort that is relevant to *x* than Susan, i.e. that creates a claim to *x*, then Jim should have a higher chance than Susan to get the good. Equality of opportunity says unequal claimants should have unequal chances to get a good (e.g. 0% for the person who has put in no effort and 100% for the person who has put in some effort). It might be contingently true in some circumstances that if people have an equal opportunity to get a good, then they have equal chances to get it. For instance, they might both be equally matched in the relevant criteria of getting an indivisible good. If they are, then according to the equal opportunity principle, they ought to get an equal chance to get the good. But this is merely a contingent possibility, not a conceptual necessity. Therefore, chances and opportunities ought to be treated separately. This point should also be taken on board by theories of substantive justice.

For felicity of expression, I will refer to 'political influence', as opposed to 'opportunity for a (chance of) political influence' in the remainder of the thesis, except where the latter term is necessary.

Individual rights and group rights

On some theories, people have non-derivative group rights to democracy, even if the individual members of that group do not have equal individual rights to political power. If

[39] Wall and Saunders confuse opportunities and chances at Wall, "Democracy and Equality," 2007, 421–422; Saunders, "Why Majority Rule Cannot Be Based Only on Procedural Equality," 116–119.

groups do not have such rights, then there is no intrinsically proceduralist argument from group rights which is inconsistent with the POS. I discuss and reject arguments from group rights in Chapter 4.

Pure procedural justice and intrinsic procedural justice

In *A Theory of Justice,* Rawls considered only three conceptually possible kinds of procedural justice: perfect, imperfect and pure.[40] However, as a conceptual matter, not all intrinsically just procedures are instances of pure procedural justice.[41] Rawls argues that fair pure procedures have the following conditions. Firstly, he says that we ought to use purely fair procedures when there is no independent criterion for the right result. Secondly, he says that 'there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been followed properly'.[42] What the procedure decides metaphysically determines the correct outcome.

All fair pure procedures are intrinsically just by the definition given above. However, as a conceptual matter, not all intrinsically just procedures are fair pure procedures. Firstly, it is not true, as a conceptual matter, that there must be no independent criterion of the right outcome for a procedure to be intrinsically just or for it to be the case that we ought to use an intrinsically just procedure. It might be the case that people have equal non-derivative rights to decide on political matters, even if there is a right answer about what ought to be done (and some people know it). Secondly, as a consequence of the first point, the decision of an intrinsically just procedure is not necessarily the right one,

[40] Rawls, *A Theory of Justice*, 74–75.

[41] For a similar point see Charles R. Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton: Princeton University Press, 1989), 46–48; Christopher G. Griffin, "Democracy as a Non–Instrumentally Just Procedure," *Journal of Political Philosophy* 11, no. 1 (2003): 111–21.

[42] Rawls, *A Theory of Justice*, 75.

i.e. the one we ought all-things-considered to pursue. One might hold that an intrinsically just procedure confers some retrospective justice on an outcome, but that this does not imply that this is the one we ought to pursue. It might be the case that substantive justice outweighs the IPJ of democracy and so we ought to use an undemocratic procedure to veto the popular will. For these reasons, IPJ and pure procedural justice are not conceptually identical. All instances of pure procedural justice are instances of IPJ, but not all instances of IPJ are instances of pure procedural justice.

Summary

To sum up this section, the rights I am interested in are equal non-derivative democratic claim rights to causally produce substantive injustice. These are rights which place others under negative duties not to interfere with a person's exercise of political power when that is used to produce substantive injustice. They also place people under positive duties to enable people to commit substantive injustice by, say, providing polling booths. If people have equally strong non-derivative rights to produce substantive injustice, then we have reasons to use democracy regardless of the substantive quality of the outcomes it produces. If people lack these rights, then substance has primacy. It should be made clear that the democratic rights I deny are *pro tanto* rights to do injustice, not merely all-things-considered rights to do injustice. I expand on this in Chapter 2.

Finally, it should be pointed out that my thesis is compatible with a form of intrinsic proceduralism which says that if democracy and elite rule would both produce perfect substantive justice, then we have intrinsic proceduralist reasons to use democracy. From the instrumentalist point of view, this form of intrinsic proceduralism is much less interesting than the form I attack. Pure instrumentalists care fundamentally about substantive justice and this form of intrinsic proceduralism cannot make us accept

substantive injustice. My neutrality on this form of intrinsic proceduralism does not pose a problem for my theory. In the same way, one could discuss in depth the question of whether people have the right to do wrong while remaining neutral on the rights people have to do acts which are not wrong.

4. Justice and legitimacy

A major project in recent contemporary political philosophy has been to provide an account of state *legitimacy*. Legitimacy is often said to be distinct from justice. States can be legitimate, even if they are not perfectly just. I will now explain how my thesis relates to legitimacy.

What is legitimacy?

There are competing definitions of legitimacy in the literature. The most popular definition says that state legitimacy is the complex moral right to be the exclusive imposer of duties on its subjects and to use coercion to enforce these duties.[43] On this definition, legitimacy creates political obligations. My definition is weaker than this:

> *Legitimacy* – the moral claim and/or privilege right to issue and enforce commands.

There are two important things to note about this definition of legitimacy. Firstly, legitimacy does not include the moral power to create political obligations. For the reasons given in section 3, I put moral powers to one side. Secondly, as I explain in the next subsection, I use this definition to be ecumenical between different theories of legitimacy.

[43] A. John Simmons, "Justification and Legitimacy," *Ethics* 109, no. 4 (July 1, 1999): 746.

Why separate legitimacy from justice?

Many political philosophers believe that legitimacy ought to be separate from substantive justice. Rawls states this popular view:

> "A legitimate king or queen may rule by just and effective means, but then they may not; and certainly not necessarily justly even though legitimately. Their being legitimate says something about their pedigree: how they came to their office."[44]

According to Rawls:

> "A significant aspect of the idea of legitimacy is that it allows a certain leeway in how well sovereigns may rule and how far they may be tolerated... Laws passed by solid majorities are counted as legitimate, even though many protest and correctly judge them unjust or otherwise wrong."[45]

This is an account of one *conception* of legitimacy. It is not an account of the *concept* of legitimacy because some theories of legitimacy deny that justice is distinct from legitimacy in the way suggested. These are 'correctness theories of legitimacy'. They are defined by two features: instrumentalism and the espousal of true substantive justice as the standard by which we ought to assess outcomes.[46]

> *Correctness theory of legitimacy* – a theory of legitimacy which is instrumentalist and uses true substantive justice as the standard by which to assess outcomes.

[44] Rawls, *Political Liberalism*, 427.

[45] Ibid.

[46] For discussion see Estlund, *Democratic Authority*, chap. 6; Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2011), 131–132. For defences of correctness theories see for example Carlos Santiago Nino, *The Ethics of Human Rights* (Oxford: Clarendon Press, 1991); William N. Nelson, *On Justifying Democracy* (London ; New York: Routledge, 2010).

For instance, a correctness theory of legitimacy for juries says that people have the right to enforce the decisions of a jury if and only if it is the correct one, as given by the true account of substantive justice.

The two features of correctness theories are separable. Non-correctness theories are defined by which of these features they deny. There are three possible kinds of non-correctness theory. Firstly, a theory could be instrumentalist but deny that true substantive justice is the standard by which we ought to assess outcomes. For example, a theory could be instrumentalist but say that we ought to assess outcomes by a reasonably acceptable political conception of justice, rather than by true substantive justice. It could be the case that every reasonable person can accept a justification for a 40% tax rate and a 50% tax rate, even though it is true that the 50% tax rate is unjust. A correctness theory would say that the state does not have a legitimacy right to impose the 50% rate, whereas public justification-based instrumentalism would say that the state may legitimately impose the 50% rate. This is a non-correctness instrumentalist theory.[47] I present some arguments which bear on some non-correctness instrumentalist theories in Part III, though they are not my main concern.

Cashing out the position of the non-correctness instrumentalist theory in Hohfeldian terms is tricky. That position can perhaps be understood as defending a *general* derivative claim right to political influence. The theory must say that sometimes the state has the privilege right to issue and enforce commands because sometimes it will enforce true justice. But there will be occasions on which the state lacks a privilege because it enforces a law it is under an obligation not to enforce, such as the wrong income tax rate. It

[47] See for example Jonathan Quong, "Disagreement, Asymmetry, and Liberal Legitimacy," *Politics, Philosophy & Economics* 4, no. 3 (October 1, 2005): 301–30. Estlund also appears to endorse something like this. See Estlund, *Democratic Authority*, chap. 6.

has a claim right to enforce this law which is correlative to duties on the part of others not to interfere with the enforcement of this law. But this right is part of a general claim right to issue and enforce laws which is justified by the fact that it causally produces outcomes which are 'good enough' but need not be perfect.

All non-instrumentalist theories are necessarily non-correctness theories. There are two possible kinds of non-instrumentalist theory. Firstly, one might argue that we ought to use democracy to make a range of decisions simply because that is what true justice demands. Secondly, one might argue that the true theory of justice does not imply that people have equal non-derivative claim rights to political influence, but argue that the true theory of legitimacy *does* have this implication. On my interpretation, this is the position taken by many of the public justification liberals, which I discuss in Chapter 6. These public justification liberals remain neutral on the true theory of justice, but they say that democracy is legitimate. They hold that each person has equal non-derivative democratic claim rights to political influence, provided these do not violate the substantive limits set by public justification. This clearly makes it intrinsic proceduralist: it says that we have reason to use democracy regardless of the substantive quality of the outcomes produced (within limits). It says that democracy is legitimate by virtue of its intrinsic properties. We have reasons grounded in legitimacy not to interfere with democracy regardless of the outcomes produced.

Nothing of any importance rides on calling equal non-derivative political rights 'legitimacy rights' as opposed to 'justice rights'. Whether we class democratic rights as legitimacy rights or justice rights, if there are such rights, then my argument here does not succeed. So, such theories of legitimacy are inconsistent with my argument and I will try to refute them.

The Task Ahead

The conceptual landscape should now be clear. If I can show that people lack non-derivative democratic rights to do substantive injustice, then I will prove the POS.

2

The Primacy of Substance

Many contemporary political philosophers have argued that people have discretionary political rights as long as they do not violate the most fundamental requirements of substantive justice. They deny the democratic right to do severe injustice but accept the democratic right to do mild injustice. We are not permitted to use politically inegalitarian procedures in order to prevent mild substantive injustice. In this chapter I will try to refute that position. We do not even have *pro tanto* reasons of intrinsic procedural justice (IPJ) not to institute political inequality in order to prevent substantive justice. Gangs do not have the right to commit injustice and neither do majorities. This goes for both severe and mild injustices.

The chapter is structured as follows. In section 1, I set out evidence for the popularity of the democratic right to do injustice. In section 2, I argue that people do not have the democratic right to do severe substantive injustice. We should never accept severe substantive injustice for the sake of the putative intrinsic procedural justice of democracy. In section 3, I argue that the same goes for mild substantive injustice. This completes the case for the Primacy of Substance (POS), at least for obvious injustices. In section 4, I explain why the POS is superior to the most prominent existing instrumentalist theory, as proposed by Richard Arneson.

1. Evidence for the popularity of the democratic right to do injustice

I shall now provide evidence of the popularity of the democratic right to do substantive injustice.[1]

The only mainstream philosopher who appears to accept the democratic right to do severe injustice is the Jeremy Waldron of *Law and Disagreement* and earlier. Waldron argues that there is deep reasonable disagreement not only about comprehensive doctrines and conceptions of the good, but also about the most fundamental matters of justice.

> "In the world we know, people definitely disagree – and disagree radically – about justice. Moreover their disagreement is not just about details but about fundamentals."[2]

All appeals to the truth about substantive justice are unavailable when there is deep reasonable disagreement about justice. Thus, when we find ourselves in circumstances of deep reasonable disagreement, we cannot appeal to the truth about substantive justice; 'all one can work with' is the kind of equal respect which democracy shows to people and 'majority-decision is the only decision-procedure consistent with equal respect in this necessarily impoverished sense'.[3] Waldron grants in some places that democracy can produce substantively unjust outcomes:

> "Let us concentrate, then, on some particular person who passionately holds a particular view about justice and is utterly convinced of its truth - notwithstanding the fact that he knows others in society, equally sincere and equally passionate, disagree with him. On the

[1] Others not mentioned here who explicitly endorse it include Richardson, *Democratic Autonomy*, pt. 1; Gaus, *Justificatory Liberalism*, pt. 3; Griffin, "Democracy as a Non–Instrumentally Just Procedure," 2003; Brighouse, "Egalitarianism and Equal Availability of Political Influence," 1996; Brettschneider, "The Value Theory of Democracy."

[2] Waldron, *Law and Disagreement*, 153. See also Ibid., 111–113.

[3] Waldron, *Law and Disagreement*, 116.

> occasions when he is outnumbered, it will seem *to him* that justice is being sacrificed to democratic principles of political fairness. And he may be right."[4]

If someone's belief that 'justice is being sacrificed for the sake of the putative IPJ of democracy' is right, then the propositional content of that belief is true. As we shall see in Chapter 5, Waldron says some things which are inconsistent with this. Nonetheless, we have some evidence that Waldron thinks we have intrinsic proceduralist reasons to use democracy even if it produces severely substantively unjust outcomes. He accepts that people have democratic rights to produce severe substantive injustice.

In his later work, Waldron appears to move away from the democratic right to do severe substantive injustice. He starts to accept that some instrumentalist considerations are available. Applying his theory to the contemporary practice of judicial review, he argues that the instrumental considerations are 'at best inconclusive' and that procedural considerations are 'quite one-sided' and 'operate mainly to discredit judicial review while leaving [democratic] legislative decision-making unscathed'.[5] For the later Waldron, some instrumentalist considerations are available in political justification and can compete with intrinsic proceduralist considerations. If so, then it must be possible for the latter to outweigh the former. In other words, we ought in some cases to accept substantive injustice for the sake of the intrinsic justice of democracy. Throughout his work, Waldron accepts the democratic right to do mild injustice, but in his later work, he appears to move toward denying the democratic right to do severe injustice.

In Rawls' theory of justice, the first principle of justice says that each person has an equal claim to a fully adequate scheme of basic liberties, including the political liberties –

[4] Ibid., 199.

[5] Jeremy Waldron, "The Core of the Case against Judicial Review," *The Yale Law Journal* 115, no. 6 (April 1, 2006): 1375. See also Jeremy Waldron, "Disagreement and Response," *Israel Law Review* 39 (2006): 50–68.

the rights to political power – and that the political liberties are to be distributed fairly (equally). The second principle requires fair equality of opportunity and the Difference Principle. The first principle is given priority over the second. [6] If the majority fails to realise the Difference Principle, then they have done an *injustice* to the worst-off group: their right to a fair share of primary goods has been violated.

However, because the political liberties are lexically ranked above the second principle of justice, we are not permitted to use elite rule in order to prevent the majority violating the Difference Principle. This entails that the majority has the right to do mild substantive injustice: it has the right to violate the Difference Principle and fair equality of opportunity, which places others under duties not to prevent them from doing so by, say, erecting a body of experts to choose policies which better realise the second principle of justice. However, Rawls denies the democratic right to do severe substantive injustice. For instance, although people have political rights to violate the Difference Principle, they must ensure that there is a social minimum providing for people's basic needs.[7]

Here is Joshua Cohen:

> "Decisions should also be substantively just, according to some reasonable conception of justice, and effective at advancing the general welfare. But a principle of political equality states norms that will normally override other considerations, apart from the most fundamental requirements of justice."[8]

For Cohen, within certain limits – 'the most fundamental requirements of justice' – we have reason to use democracy regardless of the substantive quality of the outcomes it produces. People have democratic rights to violate the non-fundamental requirements of justice.

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[6] Rawls, *Political Liberalism*, 5–6.

[7] Ibid., 228–229.

[8] Cohen, *Philosophy, Politics, Democracy*, 271–272.

Simon Căbulea May argues:

> For instance, democratic majorities have the right to promulgate laws that interfere with the liberty of citizens in unjust ways, as long as this interference is not excessively unjust. Similarly, majorities have the right to impose economic policies that are not in the interest of the worst off members of society."[9]

This is a very clear statement of the democratic right to do mild substantive injustice and the denial of the democratic right to do severe substantive injustice.

Laura Valentini argues that we ought to give 'the most fundamental requirements of justice the status of constitutional rights, thus removing them from the democratic process'.[10] A state that did not provide for 'basic needs and liberties, including nutrition, shelter, education, sanitation, bodily integrity, freedom of movement, freedom of thought and equality before the law' could not claim to show equal respect to its citizens.[11] Rights to liberty and subsistence are, as she says, the most fundamental requirements of justice, and democracies do not have the right to violate them. Thus, she denies the democratic right to do severe injustice. However, she argues that we have intrinsic proceduralist reasons to use democracy to decide on what Valentini believes to be non-fundamental matters, such as abortion, school curricula, distributive justice and so on.[12] As Valentini says, 'we have no guarantee that democratic majorities will always identify the right answer'.[13] She does not, then, deny that majorities can produce unjust outcomes. Rather,

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[9] Simon Căbulea May, "Religious Democracy and the Liberal Principle of Legitimacy," *Philosophy & Public Affairs* 37, no. 2 (March 1, 2009): 138.

[10] Laura Valentini, "Justice, Disagreement and Democracy," *British Journal of Political Science* 43, no. 01 (2013): 180.

[11] Ibid.

[12] Ibid., 192–197.

[13] Ibid., 180.

she thinks they can but that they also have the right to do so. Thus, Valentini accepts the democratic right to violate the non-fundamental requirements of justice. In other words, she accepts the democratic right to do mild injustice.

Tom Christiano argues:

> "[Democratic] institutions are partly evaluated by whether they manage to protect democracy, liberal rights, and the economic minimum. But beyond these there is no agreement on justice in law and policy in terms of which we can evaluate democracy from the egalitarian standpoint. Therefore, with the exception of these, democracy will be entirely intrinsically justified from the egalitarian standpoint."[14]

For Christiano, people do not have democratic rights to produce severe injustice, but they do have democratic rights to produce mild injustice by, say, implementing the incorrect theory of distributive justice. He argues that his theory 'grounds only a limited scope for democracy'.[15] We are permitted to use undemocratic institutions to protect 'equally or more fundamental rights', including liberal rights and the right to an economic minimum.[16] However, we have intrinsic proceduralist reasons to use democracy to decide on non-fundamental matters. Christiano does not deny that democracies can produce laws which are in fact substantively unjust:

> "But it is clear that [democratic] proposals can be objectively right or wrong, so some citizens' proposals for substantive law and policy will be mistaken... Moreover, many times the majority will choose the lesser proposal in the democratic process... [The democratic process] does not change unjust legislation into just legislation."[17]

He continues:

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[14] Christiano, *The Constitution of Equality*, 73.

[15] Ibid., 97.

[16] Ibid., 98.

[17] Ibid., 97.

> "What I have argued is that even in these cases, resolving the matter democratically is intrinsically important."[18]

Thus, Christiano denies the democratic to do severe injustice but accepts the democratic right to do mild injustice.

All of these philosophers defend, usually with provisos, the democratic right to do injustice. If people have these rights, then we are not permitted to prevent democratically-endorsed injustices, even if the costs are low. It might be argued that they defend the general democratic right to political influence, which may be used to do injustice in some cases. I do not see how this is different to defending the democratic right to do injustice. This is just what it means to defend the democratic right to do injustice. In the same way, if one were to defend a general right to freedom of movement, one would be defending the right to do injustice if one argued that this extended to the freedom to move so as to beat people up. One can endorse the right to freedom of movement without endorsing the latter right. Likewise, one can endorse democratic rights without also endorsing the democratic right to do injustice. Anyway, as we have seen, intrinsic proceduralists explicitly defend the democratic right to do injustice. They all state that we are not permitted to subvert democracy in order, for instance, to enhance distributive justice, provided people are above the level of sufficiency.

2. Gangland democracy and severe injustice

I will argue for the POS by comparing substantively unjust acts committed by gangs to substantively unjust acts committed by majorities. I call this the 'Gangland Democracy Argument'. The argument has two main parts. In the first I argue that gangs neither individually nor severally have non-derivative claim rights to commit substantive

[18] Ibid.

injustices. In the second, I argue that this does not change merely because they happen to make their decisions using a recognisably democratic procedure.

I concede that the analogies I draw here may seem farfetched. Those who defend the intrinsic procedural justice of democracy may not be plausibly interpreted as believing that a democracy can be reduced to majority votes taken by randomly assembled groups of individuals. More charitably, what they typically have in mind is a properly constituted democracy that satisfies various conditions of legitimacy vis-a-vis its members, and in which majority voting takes its place alongside other components, such as deliberation, respect for minority rights, and the rule of law. None of these further components is present in the gangland examples that I shall use. Their purpose is simply to cast doubt on the idea that prior majority voting *by itself* can justify what would otherwise be substantively unjust outcomes—be they grossly or mildly unjust. Later on I shall examine more closely how defenders of intrinsic proceduralism such as Rawls and Christiano understand democracy. *If* my arguments in subsequent chapters succeed, then, ultimately, the analogies I draw in this chapter become less farfetched: holding that democracy is intrinsically just is indeed on a par with holding that gangs have pro tanto rights to commit unjust acts.

The Test

I will now propose a way to *test* whether people have non-derivative claim rights to do substantive injustice.[19] The test focuses on three necessary conditions of such rights: *correlativity*, the *directedness of duties* and *non-derivativeness*.

[19] Like me, Gerhard Øverland, Christian Barry and Ryan Davis approach the debate between instrumentalists and intrinsic proceduralists by using the Hohfeldian framework, though their arguments differ from mine in

A. The directedness of duties

The duties not to prevent the agent's x-ing (where x-ing is an active verb) must be owed to the putative claimant.

B. The correlativity of duties

The duties not to prevent the agent's x-ing must be correlative to the putative claim to x.[20]

These two conditions entail that we can test whether an agent has democratic rights to x by imagining that we can prevent the agent x-ing without imposing costs on the agent or on third parties.[21]

Consider firstly the directedness of duties. It might be that people are under a duty not to prevent Mike from x-ing, without that duty being owed to Mike. The duty might be owed to a third party. For example, it could be that we are under a duty not to prevent Mike from killing Brian because the only possible way to prevent him would be to kill 50 people. Our duty not to prevent Mike from killing Brian is owed to the 50 people, not to Mike. For an agent to have a claim to x, the duty not to prevent the agent from x-ing must be owed to the agent herself. If Mike had a claim right to kill Brian, then even if there were no costs to third parties, we would not be permitted to prevent him killing Brian. Thus, we

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various ways. Davis, "Justice: Do It"; Øverland and Barry, "Do Democratic Societies Have a Right to Do Wrong?"

[20] For excellent accounts of some of these conditions see Øverland, "The Right to Do Wrong"; Enoch, "A Right to Violate One's Duty."

[21] Prevention in the sense I am interested in can be coercive, forcible or neither. To explain 'neither': we may prevent someone doing something without threatening them or physically stopping them: we can stop someone stealing a car by taking the car key off the table before they have the chance to get it.

can test whether Mike has a claim to kill Brian by imagining that preventing him would not impose costs on third parties. If in this case we *are* permitted to prevent him killing Brian, then he does *not* have a claim right to kill Brian. So, we have the following general test of a claim right to do injustice: for some agent A and some putative claim C to do injustice, if the costs to third parties of preventing the injustice are low and we are permitted to prevent the injustice, then A does not have C.

Secondly, the duties not to prevent must be correlative to the putative claim. Suppose that the only possible way to prevent Alice from stealing Dave's bike is to kill her. We have a duty not to kill Alice, which is owed to Alice herself. But the duty is not *correlative to* her right to take the bike, it is correlative to her right to life, which trumps or outweighs Dave's right to the bike. If Alice has a claim right to steal the bike, then even if preventing her imposed no costs upon her, we would not be permitted to prevent her stealing the bike. Therefore, we can test whether she has a claim by asking: if we could prevent her at low cost, would we be permitted to do so? Generally: for some agent A and some putative claim C to do injustice, if the costs to the putative claimant themselves of preventing the injustice are low and we are permitted to prevent the injustice, then A does not have C.

Note that this second condition – of proportional treatment to the putative claimant – cannot in part be a function of the putative claim itself. If it were, it would not provide an appropriate test of the existence of that right. So, to properly test the existence of that right, we need to use a conception of costs to the agent which is not a function of the putative right.

The two tests combined are: for some agent A and some putative claim C to do injustice, if the costs to the putative claimant and to third parties of preventing the injustice are low and we are permitted to prevent the injustice, then A does not have C.

Non-derivative claims to do injustice have an additional property, which I defined in chapter 1:

> (iii) Non-derivativeness
>
> The claim right is not justified by its contingent causal consequences.

As I argued in chapter 1, intrinsic proceduralists aim to establish the existence of non-derivative claim rights to political influence. If someone's claim to political influence is non-derivative, then we have reason not to interfere with his exercise of political influence regardless of the substantive quality of the decision he makes. In what follows, I shall choose examples in which the democratically-produced injustice does not causally produce any other moral benefits. This allows us to determine whether the right is truly non-derivative.

Gangs and severe substantive injustices

It is intuitively clear that people do not have democratic rights to commit severe substantive injustice. Consider the following scenario:

> *Mildred and the Bridge* – Mildred, a gang of five men – call them 'the droogs' – and six other people live on Earth in 2100. One day, all members of the droogs decide to push Mildred off a large bridge to her death.

I contend that the following propositions are true:

1. None of the droogs have an individual non-derivative claim right to cause Mildred to be pushed off the bridge.

2. The droogs do not have a non-derivative group claim right to cause Mildred to be pushed off the bridge.

The case for 1 and 2 is as follows. Mildred's right to life places everyone else under a correlative duty not to murder her. Thus, the droogs do not have privilege rights to murder Mildred. However, 1 and 2 are about the *claim* rights the droogs have. We can now apply the test of claim rights: suppose that Mildred's murder can be prevented without imposing significant costs on third parties or on the droogs. Suppose that the droogs are cowardly and would be deterred by bystander Billie threatening to throw their matchboxes into the river. It is clear that Billie is permitted to make this threat and so to prevent them killing Mildred. Therefore, the droogs do not have claim rights to kill Mildred. I believe that we can switch in any other severe substantive injustice for murder, such as rape, grievous bodily harm or denial of the means of subsistence, and still conclude that people lack claim rights to do it. So, individuals and groups do not have non-derivative rights to cause severe substantive injustice.

In *Mildred and the Bridge*, there are no other benefits from killing Mildred. This allows us to determine whether the claim right is non-derivative. 1 and 2 do not deny that people sometimes have privilege rights or derivative claim rights to commit a *pro tanto* substantive injustice for the sake of some other moral benefit. It might be true that Peter is permitted to kill Paul to prevent one billion deaths. His act is *pro tanto* unjust because it violates Paul's rights, but he nevertheless has a permission and perhaps a derivative claim to do it. He has a permission because he is not under an all-things-considered duty not to kill Mildred. It could plausibly be argued that Paul only has a privilege right to kill Peter.

Others are under duties not to prevent him killing Peter, but these are owed to the one billion, not to Paul.

Alternatively, it might be argued that he also has a derivative claim right to kill Peter. People are under duties in part *owed to Paul* not to prevent him killing Peter. It is debatable that Paul does have such a claim, though I remain neutral on that here. The existence of such claim rights is compatible with instrumentalism because they are justified by the moral benefits they causally produce. We can test whether Paul has a non-derivative claim to kill Peter by imagining that killing Peter would not save one billion. In that case, as I have argued, we would not be under duties not to prevent him killing Peter.

Acts and omissions

People lack claim rights to do severely substantively unjust acts and severely substantively unjust *omissions*. Nonconsequentialists are typically less willing than consequentialists to accept that an omission is morally wrong. While, for example, many consequentialists would endorse coercing people not to omit to donate money to prevent animal suffering, nonconsequentialists might argue that people do not have duties in this case or, if they do, they are not duties of justice. However, we ought not to confuse the proposition that an omission is not unjust with the proposition that an omission is unjust and nevertheless people have the right to do it.

On any plausible moral theory, there are some severely unjust omissions. Leaving one's baby to starve is severely unjust; it violates the baby's right of justice to be fed. Again, it is clear that we are permitted to prevent people starving their baby by, say, threatening them with a £1 fine.

To determine exactly which acts and omissions are severely substantively unjust, requires an in-depth examination of theories of substantive justice and I will not do that

here. Some high stakes moral issues such as legal kidney sales, abortion, forcing people to donate blood, paying people to donate blood, forcing charitable giving to distant needy strangers, climate change, duties to future generations, duties to avoid risks of extinction, are epistemically complex. To cancel out intuitive noise, I mostly discuss acts which are *obviously* severely substantively unjust. I return to this point in Chapter 5.

A pro tanto claim?

It might be argued that my argument does not prove that the droogs do not have a *pro tanto* claim right to kill Mildred. What I have shown is that her right to life to life trumps their right, but preventing the droogs from killing Mildred is nevertheless *pro tanto* unjust. It is necessarily true that when assessing the existence of claims to commit severe substantive injustices, one cannot construct examples which abstract away from the severe substantive injustice itself. So, for some, there might always be the initial suspicion that there is a conflict of *pro tanto* elements of justice. I have three comments on this.

Firstly, even if this is true, I can still endorse a position which makes exactly the same normative recommendations as the POS. The duties to prevent an individual or gang from committing a severe substantive injustice all-things-considered outweigh the putative duties *not to* prevent. All-things-considered, we ought always to prevent a severe substantive injustice even though we have *pro tanto* duties not to prevent it. Thus, even if it is correct, the response under consideration makes no difference to the fact that we ought all-things-considered to be guided by solely instrumentalist concerns, even though it refutes the POS. Secondly, the response is implausible. It would be a deeply strange moral theory which held that people have non-derivative claims to commit actions like rape and murder, even with the accompanying proviso that such rights are always outweighed by the substantive rights at stake.

Thirdly, I will show in section 3 that we ought all-things-considered to prevent even trivial substantive injustices. This proves the response to be in error. If people have non-derivative democratic rights to commit substantive injustice, then they would outweigh or trump the most trivial substantive rights. Consequently, we would be under obligations not to prevent the substantive injustice even where the costs of prevention are zero. But this, I shall argue, is not the case. We are permitted to prevent even very trivial substantive injustices when the costs of prevention are low. Therefore, people do not have non-derivative claim rights to commit substantive injustices.

A conceptual or substantive point?

It might be argued that my argument works by stipulation. If it is a conceptual point that obligations of justice are those that may permissibly be enforced under certain hypothetical conditions, then my argument is trivially sound, but contributes nothing of substance to the debate. However, my argument does not do this.[22] I have defined justice to be to do with people's entitlements to certain benefits and burdens. At no stage do I *stipulate* that these entitlements have correlative duties which are enforceable in hypothetical conditions. Rather, my method has been to provide support for this additional proposition by considering intuitions about particular cases in which justice, so defined, is at stake. The intuitive reaction, I have argued, is clear for severe substantive injustices. The general principle which we ought to infer from this is the substantive one that people do not have claim rights to do severe injustice. It is the intuitive picture of particular cases which does the work. If it were my definition of 'justice', then I would not need to appeal to such

[22] For more on the distinction between conceptual and substantive claims see Enoch, "A Right to Violate One's Duty."

examples. I could simply draw out the implications of my definitions. But the examples are necessary to the argument. So, my argument makes a substantive point.

Democratic gangland injustice

With the first step of the Gangland Democracy Argument defended, I now move on to the second: we make the example recognisably democratic. For *Mildred and the Bridge*, suppose that three of the inhabitants of Earth die, and everyone else is allowed to deliberate before the decision and is given an equal right to vote on the decision. I contend that this makes no difference to 1 and 2. Let's examine each part of this in turn. Firstly, three people dying is an almost paradigmatic case of a morally irrelevant difference so far as 1 and 2 go. It is simply not the case that this could give the droogs individual or group non-derivative claims to kill Mildred. Secondly, the same goes for giving Mildred the right to deliberate. Mildred gets to make her case in the most persuasive terms possible. There is no reason that this would give the droogs individually or severally a non-derivative claim right to kill her. Thirdly, the same goes for giving Mildred an equal vote. Giving her the vote does not allow the droogs to do whatever they want to Mildred. They can say to her "we have counted your vote and as it is you are outvoted and we will kill you anyway. Which way to the bridge?" The popularity of a law makes a morally important difference *on the assumption that* people have equal non-derivative rights to political influence. What popularity does not affect is whether people have these rights in the first place.

We can imagine cases in which the costs of preventing people from committing substantive injustices by democratic means are low. For example, we could allow the Droogs to vote, but then destroy their ballot paper in secret. The Droogs suffer no psychological costs or upset as a result of this. Since we are permitted to prevent them by mildly coercing them, we are clearly permitted to prevent them by destroying their ballot

papers. The same goes for all examples of gangland severe substantive injustice. People do not have non-derivative democratic claim rights to do severe substantive injustice. Therefore, substance has primacy for severe substantive justice. We ought never to accept severe substantive injustice for the sake of the putative IPJ of democracy.

The scope of instrumentalist reasons

As I have said, most philosophers agree with me in denying the democratic right to do severe substantive injustice. They endorse a hybrid of intrinsic proceduralism and instrumentalism about political procedures: instrumentalism when the stakes are high, intrinsic proceduralism when the stakes are low. I believe it is worth making a brief detour to point out that if one accepts that instrumental considerations trump or have primacy when the stakes are high, then one must usually rely only on instrumentalism to justify political institutions in the real world.

The reason for this is that all areas of government policy and, in my view, the majority of laws, have high stakes. In light of this, with regard to the practical question of which government institutions we ought to use, the difference between hybrid theories and full-blown instrumentalist theories is largely one of emphasis: hybrid theorists emphasise the intrinsic proceduralist part of their theories to an unwarranted degree.[23] To illustrate: in his 'The Right to a Competent Electorate' Jason Brennan defends what appears to be a very strong form of instrumentalism and argues that *because most government decisions have high stakes*, incompetent voters ought to be disenfranchised *today and across the*

[23] There are, as I will show in the next section, important philosophical and practical differences between hybrid theories and instrumentalism.

world.[24] What is surprising is that the popular hybrid theory has no specifically intrinsic proceduralist reasons with which to resist Brennan's conclusion because the hybrid theory is also instrumentalist when the stakes are high.

Here are some examples of high stakes areas. Firstly, consider drug policy. As I mentioned in the Introduction, non-violent drug offenders make up around 25% of the US prison and jail population. It has plausibly been argued that America's crackdown on drugs has been a significant cause of the Mexican drug war, which has claimed the lives of nearly 30,000 people.[25]

Secondly, consider foreign policy. In 2001, American support for the US invasion of Afghanistan was very high in response to the September 11th attacks, in which 3,000 people died.[26] As result of the invasion, at least 21,000 Afghan civilians have died at a cost of nearly $720bn to the US government.[27]

Finally, consider health prioritisation. In choosing the budget to give to healthcare and the way in which the budget is spent, governments will determine whether people live or die. In the face of public pressure, UK Prime Minister David Cameron introduced a Cancer Drugs Fund. This fund vets drugs more quickly and less stringently than the utilitarian-minded National Institute for Health and Care Excellence (NICE) which predominantly controls healthcare resource prioritisation in UK healthcare. The fund is more likely to allow the NHS to buy expensive cancer drugs than NICE. According to a York University cost calculator, if the money spent on the Cancer Drugs Fund from April 2013 to April 2014 had instead been spent on the wider NHS under the rubric of NICE,

[24] Jason Brennan, "The Right to a Competent Electorate," *The Philosophical Quarterly* 61, no. 245 (2011): 700–724.

[25] http://www.theguardian.com/world/series/mexico-drug-war.

[26] http://www.gallup.com/poll/167471/americans-view-afghanistan-war-mistake.aspx

[27] http://costsofwar.org/.

17,800 Quality-Adjusted Life Years (QALYs) would have been saved.[28] This is roughly equivalent to 450 lives. Small changes in healthcare policy are a death sentence to some; fundamental rights and interests are at stake.

In my view, the majority of government policies have high stakes. If we were to take a law at random, whether it concerns energy, transport, welfare or whatever then it would be more likely than not to be high stakes. For all of these laws, the hybrid theory and instrumentalism agree that if we could use an elite body to subvert the democratic will and produce better outcomes, then we ought all-things-considered to do so. With regard to the question of the political institutions we ought to use, the hybrid theory is very close to pure instrumentalism.

3. Gangland democracy and mild injustice

All of this said, it remains an interesting philosophical and practical question whether people have the democratic right to do mild injustice. I will use the Gangland Democracy Argument to show that people do not have such rights.

Mild gangland injustice

There is a vast range of relatively trivial substantive injustices which people do not have non-derivative claim rights to commit. Consider the following example:

> *Dead Arm for David* – David, a gang of five people, call them 'The Jets', and six other people are the sole inhabitants of Earth in 2300. One day, all members of The

[28] http://www.economist.com/news/britain/21640343-well-meaning-gesture-causing-more-and-more-trouble-benign-or-malignant.

> Jets decide to punch David reasonably hard in the arm, giving him a dead arm for half an hour.

Punching David is only a mild injustice. Nevertheless, I contend, the following propositions are true:

> 3. None of The Jets have a non-derivative claim right to punch David in the arm.
> 4. The Jets do not have a non-derivative group claim right to cause David to be punched in the arm.

Each of these judgements is as plausible as 1 and 2 and my discussion of those propositions also applies to 3 and 4. The other Earthlings are at least permitted to prevent the Jets from punching David in the arm, provided the costs of prevention are low. If we could prevent the Jets by threatening to throw their hats into the river, we would be permitted to do so. I believe that the same holds uncontroversially for a wide range of mild substantive injustices such as stealing someone's chocolate bar, physically stopping someone playing a board game, spraying graffiti on an old woman's wall, deflating someone's bike tyres. As before, it makes no difference to 3 and 4 if the procedure by which the Jets make the decision becomes recognisably democratic.

The primacy of substantive justice also extends to matters of distributive justice. As we have seen, many intrinsic proceduralists, including Joshua Cohen, Rawls and Christiano deny this. They believe that, so long as people are not below the level of sufficiency, people have democratic rights to discretion over distributive justice. In light of this, consider the following example:

> *Frank's money* – Frank, a gang of five people – call them 'The Pickpockets' – and 100 other people live on Earth in 2400. Everyone on Earth is above the level of sufficiency and everyone is equally well-off. Each person works equally hard, has roughly similar levels of natural ability and marketable talent, and convert resources into welfare roughly to the same extent. They have also all acquired property in the appropriate way from a libertarian perspective. One day, all members of The Pickpockets decide to take £500 off Frank and burn it. This still leaves him comfortably above the level of sufficiency.

Again, it is clear that if we could, at low cost, prevent The Pickpockets from taking Frank's money we would be permitted to do so. Despite the obviousness of the moral facts about *Frank's Money* and *Dead arm for David*, the argument here refutes all of the forms of intrinsic proceduralism I mentioned in section 1. Against Joshua Cohen, for example, we can say "Frank's £500 is not of fundamental importance, but nevertheless there is no norm of political equality which entails that The Pickpockets have the right to take the money." Against Rawls we can say "there is no reason to lexically rank the fair value of the political liberties above the Difference Principle and the other parts of the second principle of justice. The Pickpockets simply do not have democratic rights to take money from the worst-off." Against Christiano we can say "even though The Pickpockets do not push Frank below the level of sufficiency, they do not gain rights to burn his money and leave him worse-off merely because they are in the majority." We have, then, a conclusive case against intrinsic proceduralism in its current form.

This victory may seem too easy and might raise suspicions that I am attacking a straw man. I do not think so. As section 1 showed, it is clear that intrinsic proceduralists do believe that people have democratic rights to do mild injustice. The point may seem too

easy because, I conjecture, intrinsic proceduralists implicitly interpret the democratic right to discretion over distributive justice as one only allowing democracies to *omit* to redistribute. But the democratic right to discretion over distributive justice implies a plethora of very implausible rights. *Frank's Money* shows that it entails the right to forcibly, coercively or by stealth take money which rightfully belongs to the worst-off. It also entails (amongst other things) the right to ban charitable donations to the worst-off and the right to force others to commit, or contribute to committing, injustices against the worst-off, provided the sufficiency proviso is met. Since people do not have these rights, people do not have the democratic right to do mild distributive injustice.

Acts and omissions again

One option for the intrinsic proceduralist now is retreat. They might accept the critique of the democratic right to do some mild injustices, but argue that people still have the democratic right to *omit* to redistribute in accordance with substantive justice. The first thing to say about this is that it is a significant weakening of the intrinsic proceduralist position. It entails that majorities may be prevented from imposing iniquitous taxes, tariffs and other inept polices which actively deprive people of what they are due. This greatly diminishes discretionary democratic rights.

Furthermore, we also ought not to accept the existence of rights to do mild omissive injustices. For example, we are permitted to prevent, by coercive or other means, the Pickpockets from omitting to return Frank's money. They are under duties of restitutive justice to return the money and these may be enforced if the costs are low. It is also widely acknowledged that people may be prevented from omitting to fulfil commercial contracts, no matter how trivial. If I make a contract with a builder to mend my patio, then he may be coerced to mend my patio, even though his failure to mend my patio is not a severe

substantive injustice. States enforce commercial contracts all the time and they ought to do so.

Again, we should be careful not to confuse the proposition 'this omission is not unjust' with the proposition 'this omission is unjust and people have the right to omit'. Once we class it as an injustice, we ought to accept that people do not have the right to do it. A close consideration of the intuitive picture for clear omissive injustices proves this. Therefore, one cannot defend the democratic right to do injustice on the basis of some kind of general right to do omissive injustices. The intrinsic proceduralist must now admit defeat.

The liberal right to do wrong and the democratic right to do injustice

Many philosophers have defended the liberal, as opposed to the democratic, right not to do one's duty. A comparison between the liberal right to do wrong and the democratic right to do injustice casts further doubt on the existence of the latter. The following examples of the liberal right to do wrong have been given in the literature:

> The right not to give money to charity to relieve famine in the third world.
>
> The right to choose an occupation which is much less beneficial to the least well-off than an available alternative.
>
> The right not to give blood.[29]

[29] These examples are selected from Waldron, "A Right to Do Wrong"; Enoch, "A Right to Violate One's Duty"; Ori J. Herstein, "Defending the Right To Do Wrong," *Law and Philosophy* 31, no. 3 (May 1, 2012):

Liberal rights to do wrong typically involve *non-unjust* wrongs.[30] My stance on these actions is: if they involve *injustice*, then people do not have non-derivative claim rights to perpetrate them. However, I remain neutral on whether people have the right to perpetrate these actions if the actions involve non-unjust wrongs.

Consider the putative right not to donate to famine relief. If the duty to donate to famine relief is merely a duty of beneficence, then rich people have a claim to their money and those in poverty do not. Thus, the rich may not be prevented from failing to donate the money because this would violate their right to the money. Nevertheless, the rich have a duty of beneficence to donate. So, they have a right not to do their duty. Many libertarian entitlement theories are compatible with this position. Conversely, if the duty to donate is a duty of *justice*, then the poor are entitled to the money which happens to be in the possession of the rich. If this is true, there is no reason that people would not be permitted to prevent the rich from failing to donate. We can again use our test of claim rights and imagine that the costs of prevention are low: suppose that careless rich Sharon has left £1000 unprotected in her garden and that she would not notice if the money were taken. It is clear that if she does not have a claim to the money, her neighbour Michael is permitted to take the £1000 and send it to its rightful owners in the third world. Thus, Sharon does not have a right not to donate. This is because, on the present assumption, she does not

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343–65; Michael Otsuka, "Freedom of Occupational Choice," *Ratio* 21, no. 4 (December 1, 2008): 440–53; Cohen, *Rescuing Justice and Equality*, chap. 5.

[30] Jerry Cohen is one notable exception. He argues that people have the right to make unjust career choices. Cohen, *Rescuing Justice and Equality*, chap. 5. However, three of Cohen's four arguments fail the directedness and correlativity test on someone having a claim. Moreover, as Cécile Fabre has argued, the fourth argument seems questionable. Cécile Fabre, "Distributive Justice and Freedom: Cohen on Money and Labour," *Utilitas* 22, no. 04 (2010): 393–412.

have a right not to do her duty of *justice*. If she does have a right to the money and others do not, then we are not permitted to take the money.

Similarly, consider the right not to give blood. If individuals are self-owners, then no-one else has a claim right to their body and so they alone have claim rights to their own blood. If so, people may not be forced to give blood, even if the costs are low. If, on the other hand, people do not have full property rights to the blood that is in them, then they do not have a right not to give blood. Suppose that Lance leaves bags of his blood in an unlocked freezer in his front garden and he has no need for it as his red blood cells have replenished. Sally is in need of a blood transfusion. Suppose that Lance is a self-owner. If he is, then he owns the blood and no-one else does so Sally cannot have a claim to it. In this case, even though the costs are low, on self-ownership, we are not permitted to take the blood and give it to Sally. If, on the other hand, Lance does not have a claim to the blood, then Sally's need for blood could generate a sole claim right for her to the blood. If this is true, it is clear that we are permitted to take the blood and give it to Sally. Therefore, Lance lacks the right not to do his duty of *justice*. It might be true that it would be wrong to force people to give blood using threats of violence. But this must be because of the costs of the threats of violence not because of his right not to give blood. For, as we have seen using our test of claim rights, if he had a right to the blood, then we would not be permitted to take it in the hypothetical case in which he left the blood in his garden.

The liberal analogue to the democratic right to discretion over distributive justice is a sufficientarian libertarian hybrid. According to this hybrid view, provided everyone is above the level of sufficiency, each person has the inviolable right to choose whether to donate to the worst-off, even though the better-off possess money which is not rightfully theirs. Neither the majority nor anyone else would be permitted to force each person to give to the worst-off, but each individual could choose to do so if they wished. The

sufficientarian libertarian hybrid is implausible.[31] Libertarianism ordinarily denies that duties to give to the poor are duties of justice. If it classed them as duties of justice, then there would be no justification for coercively protecting the money possessed, but not *owned*, by the better-off. If the better-off possess things to which the worst-off are entitled, then the ordinary libertarian response is to say that the better-off may permissibly be forced or coerced to donate to the worst off. The point of all of this is that, on this score, intrinsic proceduralism is at least as implausible as the sufficientarian libertarian hybrid, even though no-one has ever defended the latter.

It should now be clear that there is something strange about the democratic right to do mild injustice. Any argument for the claims of the worst-off to a set of resources looks like a very strong argument *against* the claims of everyone else to discretionary political control over those resources. That is to say, it seems as though the argument entails not merely the existence of the former claims, but the non-existence of the latter claims. If the arguments already incorporate appeals to ideals like basic equality and autonomy, there is no reason that these ideals would justify a competing set of claims on the part of everyone else to dispose of those resources as they wish.

For example, Rawls tries to find out what the just distribution of primary goods is. He argues that natural endowments are undeserved and so people ought not to get more primary goods merely because they have endowments which bring higher market rewards. So, after bringing in his views about the incentives of the better endowed, we get to the Difference Principle.[32] These arguments are meant to convince us of what is the best

[31] Christiano rejects the libertarian sufficientarian hybrid, but his argument is flawed. His own version of intrinsic proceduralism is compatible with the democratic implementation of the hybrid which he claims to be publicly unjust. Therefore, Christiano inadvertently refutes his own theory. Christiano, *The Constitution of Equality*, 115.

[32] Rawls, *A Theory of Justice*, sec. 13.

expression of the ideals of equal respect and autonomy. It is difficult to see why these ideals would be brought in at a later stage to show that in spite of the fact that they do not deserve the primary goods, the better-off are entitled to discretionary political control over them. Imagine that Brian, Sally and Susan are the only people alive and that there are some resources to be distributed. Rawls presents all his arguments to show that, since he is the worst-off, Brian alone has a right to the resources. And yet the intrinsic proceduralist side of his theory commits him to saying that Sally and Susan also have the right to dispose of the resources as they wish (with a sufficientarian proviso). This is simply a very strange feature of Rawls' theory and any theory which denies the primacy of substance.

It might be argued that people have democratic rights only on the assumption that the three of them have cooperated through economic production in the past. Firstly, this concedes the point to me because it grants that Sally and Susan do not have democratic rights to control over these resources, even though Brian is above the level of sufficiency. Secondly, I do not see why it would make any difference that the three cooperated in the past. Even assuming that they did, if the Difference Principle is true, it is just as implausible to say that Sally and Susan have a right to discretionary political control over the resources.

I have simplified matters in the discussion so far by talking only about duties not to interfere or prevent someone from x-ing. But an agent's claim to x may sometimes place others under positive duties to help the agent to x. Claim rights to political influence (if they exist) place people under positive duties to send out polling cards, to pay to set up voting booths, to take special measures if some people are unable to exercise their vote etc. Positive duties correlative to a right are usually thought to be harder to justify than negative duties correlative to that same right. Therefore, establishing the lack of the

negative duty not to prevent a person x-ing also establishes the lack of the positive duty to enable the agent to x.

Mild injustice and reasonable disagreement

As we shall see in part III, many philosophers argue for the democratic right to do mild injustice by appealing to the fact that there is (reasonable) disagreement about non-fundamental substantive justice. I have not yet directly engaged with such theories. However, my argument does demonstrate an important fact which all of those theories neglect. This is that there are some mildly unjust acts which are *obviously* mildly unjust. Stealing money from the worst-off, punching people in the arm, deflating their bike tyres, reneging on trivial contracts etc are all obviously mildly unjust. So, there are many propositions 'x is mildly unjust' which are not the subject of reasonable disagreement. If one argues that democracy should decide over reasonably contentious matters of substantive justice but that we may only appeal to instrumental reasons when justifying ways to decide on the uncontentious matters, then we may appeal only to instrumental reasons when deciding on some relatively trivial issues of justice. Therefore, the scope of instrumentalist reasons is much greater than proponents of disagreement-based theories have acknowledged.

Deliberation

Voting is not the only way to exercise political influence in democracies. One may also exercise influence by convincing others of one's view during deliberation. But I have not yet said anything about how the POS bears on deliberation. There appear to be strong instrumentalist reasons to allow people to try to rationally convince one another before

making a political decision.[33] Rational debate is likely to improve the quality of the decision made. Intrinsic proceduralists might also argue that there are reasons to allow people to exercise influence through deliberation, regardless of the instrumental benefits of doing so. I will try, in large part, to bypass these larger debates, but nevertheless come out on the side of the instrumentalist.

In democracies, people can bring about injustices by convincing others to vote for an unjust decision. If Alex, the head of the droogs, convinces the rest of the droogs to vote to kill Mildred, then he has exercised influence over and above the influence of his own individual vote. His deliberation has caused Mildred to be killed. In my view, if we could deprive him of the opportunity to convince the droogs at low cost to him and others, then we would be permitted to do so. I think this is intuitive and is practiced in all democracies.

Democracies regularly limit the space for deliberation to a select few. The British government asked Nicholas Stern for moral and scientific advice on what to do about climate change.[34] This gives Stern greater opportunities for influence than everyone else on climate policy and on the theory of intergenerational justice which the British government (and other governments) will act on. If the British government were genuinely committed

[33] Philosophers commonly associated with intrinsic proceduralism, like Tom Christiano and Joshua Cohen, accept the largely instrumental worth of deliberation. See Cohen, *Philosophy, Politics, Democracy*, chap. 5; Thomas Christiano, "The Significance of Public Deliberation," in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (MIT Press, 1997).

[34] The Stern Review dealt in part with the purely ethical matter of the rate at which we ought to discount the welfare of future people. His decision not to include pure time preference has been the subject of disagreement. For two contrasting view see Geoffrey Heal, "Climate Economics: A Meta-Review and Some Suggestions for Future Research," *Review of Environmental Economics and Policy* 3, no. 1 (January 1, 2009): 4–21, doi:10.1093/reep/ren014; William D. Nordhaus, "A Review of the 'Stern Review on the Economics of Climate Change,'" *Journal of Economic Literature* 45, no. 3 (September 1, 2007): 686–702.

to equal deliberative opportunities on moral matters, then it would select someone at random and pay them to make the report and then pay to publicise that person's opinions. This is true regardless of that person's expertise in the science of climate change or their pre-existing knowledge of intergenerational ethics. The same argument would also count against asking John Broome to provide ethical advice for the Intergovernmental Panel on Climate Change, and instead in favour of choosing someone at random regardless of their expertise in moral argument, population ethics and climate ethics.[35] Again, this seems to be a mistake.

I think the same holds for minor injustices precipitated by malign deliberation. If we could at low cost prevent Fagin, the leader of the Pickpockets, from causing the money to be taken from Frank using his persuasive abilities, then we would be permitted to do so. By extension, we are permitted to give people unequal opportunities to deliberate for the sake of relatively minor elements substantive justice.

Many people are likely to disagree with what I have said. Surely, it might be said, we cannot deprive people of the right to deliberate because they will convince people of resource egalitarianism when welfare egalitarianism is true. However, this view is subject to a fatal objection. If I have proved that people may be deprived of the vote for the sake of substantive justice and the vote is ultimately how deliberation comes to have influence over a decision, then any putative claim to deliberate and rationally convince others is not a claim to political influence. One exercises political influence by convincing people only if those people then go on to vote. Suppose that Ronald's persuasive abilities swing the vote for a policy in favour of resource egalitarianism. If what I have argued above is correct, then we are permitted to destroy the votes for the resource egalitarian policy, provided the

[35] See https://www.ccc.ox.ac.uk/News/a/Corpus-Fellow-Named-Lead-Author-for-the-IPCC/archive/1/page/6/.

costs are low, resource egalitarianism is false and destroying the votes would produce more just outcomes. If so, Ronald's putative right to convince people is not a right to political influence. If it were, then *he* would have a right that I not destroy the votes of the others. I have argued that he does not have this right. Therefore, ultimately, any denial of my claims about deliberation must refute my argument for the proposition that we are permitted to destroy unjust votes in secret if there are no other costs of doing so. People might have rights to convince others, but this must be a substantive right to free speech, not one to political influence.

4. Substantive injustice, power and force

The POS is preferable to the best existing instrumentalist theory, as presented by Richard Arneson.[36] Arneson's defence of instrumentalism is about people's rights to exercise power or force over others:

> "To rule out this possibility in the course of offering support to the ''maximize rights fulfillment'' version of a best results approach, I stipulated that the rights that enter into the

[36] Another excellent instrumentalist theory has been presented in Brennan, "The Right to a Competent Electorate," 2011. Brennan argues that people have rights not to be exposed to undue risk and so have rights not to be exposed to decisions made by unreasonable political decision-making bodies, such as democratic assemblies. Brennan's argument is persuasive but problematic because it is controversial whether people have the right not to be exposed to undue risk. Objectivists about rightness (like myself) deny this. For an account of the implications of subjectivism for claim rights see Michael J. Zimmerman, *Ignorance and Moral Obligation* (Oxford: Oxford University Press, 2014), chap. 5. Moreover, Brennan does not defend the crucial claim that we are permitted to prevent injustices committed by democratic assemblies. See Halstead, "Undue Risk and the Democratic Right to Do Injustice."

> determination of best results do not include rights to power over others. Rights to power over others are in all cases derivative, nonfundamental rights."[37]

Here, Arneson can be taken to be defending one of two principles:

> *Power and Rights Principle 1* – If a right entails that one may permissibly exercise power or force over others, then that right is derivative.

> *Power and Rights Principle 2* – People do not have non-derivative rights to power or force over others.[38]

I think the second Power and Rights Principle is probably true, but it is inferior to the POS. Many injustices do not involve the use of force against others and it is controversial whether they involve the use of power.[39] Consider for example creating hyperinflation by printing lots of money, theft of external resources by stealth, failing to feed one's child, failing to pull a drowning child out of a fountain and failure to provide assistance to starving people in one's own country. None of these injustices involve the use of force against others. Do they involve the use of power? This depends on how we understand

[37] Richard J. Arneson, "Defending the Purely Instrumental Account of Democratic Legitimacy," *Journal of Political Philosophy* 11, no. 1 (2003): 122–32. Griffin has attacked Arneson's argument in Christopher G. Griffin, "Democracy as a Non–Instrumentally Just Procedure," *Journal of Political Philosophy* 11, no. 1 (2003): 111–21.

[38] Arneson appears to clearly endorse the former at Arneson, "Defending the Purely Instrumental Account of Democratic Legitimacy," 2003. He endorses the latter at Arneson, "Democracy Is Not Intrinsically Just," 48. Given the weaknesses of PR_1 highlighted by Griffin, PR_2 is the more plausible of the two.

[39] Another drawback of these principles is that they do not tell us about how democracies may treat non-human animals. In my opinion, the treatment of animals in democracies is amongst the biggest substantive injustices occurring at present. The POS provides guidance on these matters, but Arneson's principles do not.

power. My intuition is that many of the injustices I have mentioned do not involve the use of power. If so, Arneson's theory would be silent on whether we may use undemocratic procedures to prevent some injustices, some of which, like the failure to prevent a domestic famine, are severe. This is a serious drawback for any instrumentalist theory.

It might be true that we can *define* power such that all unjust acts involve the use of power and all just acts do not. But this makes the appeal to power redundant in the argument and makes Arneson's principle equivalent to the POS, except the former has the disadvantage of semantic contortion. It might also be true that some *substantive* argument could show that all unjust acts involve the use of power and all just acts do not. But this premise is less probable than any of the premises I have used in my argument for the POS. Since the greater the collective probability of the premises, the greater the reason to believe the conclusion, the argument for the POS provides more reason to believe the conclusion than does Arneson's argument. This is true even though, on this construal of Arneson's argument, his theory has exactly the same substantive content as my theory. If we can avoid making controversial claims about power and still get to the desired instrumentalist conclusion, then we ought to do so.

Indeed, it seems as though the attempt, whether by stipulation or substantive argument, to construct an expansive conception of power so that omissive injustices or things like printing money count as exercises of power, is likely to put pressure on the existence of all non-derivative rights, not just non-derivative democratic rights. If printing money counts as an exercise of power, then my opening an Italian restaurant to rival an incumbent must also counts as an exercise of power. Nonetheless, on many liberal theories, I have non-derivative rights to open the restaurant. In contrast, the POS does not put us under any pressure to deny any other liberal rights. For these reasons, the POS is preferable Arneson's theory.

Conclusion

Despite its initial intuitive appeal, intrinsic proceduralism is actually unattractive. Once we get clear on a way to test whether people have claim rights, the case against the democratic right to do injustice looks strong. Gangs do not have the right to do injustice and they do not gain such rights because they make their decisions democratically. If we could prevent injustice at zero cost, then we would be permitted to do so. This is true for both severe and mild injustices. People do not have democratic rights to murder, and they don't have rights to punch people or steal their money either. The democratic right to discretion over distributive justice is very implausible, even with a sufficientarian proviso. It entails that provided everyone is sufficiently well-off, we may steal money from the worst-off group, even though the money rightfully belongs to the worst-off on all plausible theories of justice.

What has been proved and what remains to be proved? So far I have mainly discussed cases of *obvious* substantive injustice. So, given the popularity of disagreement-based forms of intrinsic proceduralism, the case for the POS is at present incomplete. That said, the case against a democratic right to do all mild substantive injustices is complete. Some mild injustices are obviously unjust; they are not reasonably contentious. Therefore, disagreement-based theories imply only the right to do *some* mild injustices.

Moreover, many forms of intrinsic proceduralism are not disagreement-based. They do not hold that the IPJ of democracy comes into its own when there is reasonable disagreement about substantive justice. My arguments here cast significant doubt on those theories, even without a consideration of the positive arguments they make for their conclusions. In part II of this thesis, I aim to refute those positive arguments.

Finally, I have not offered any arguments against a form of intrinsic proceduralism which holds that there are reasons of IPJ to use democracy when substantive justice is not

at stake.[40] It might be true that if democracy and elite rule produce perfectly just outcomes, then we ought to use democracy. Even if we accept this, it does not matter very much from the point of view of instrumentalism because this theory cannot make us accept substantive injustice.

[40] See for example Ben Saunders, "Estlund's Flight from Fairness," *Representation* 46, no. 1 (2010): 5–17; Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven; London: Yale University Press, 1980), chap. 9; Brian Barry, *Justice as Impartiality* (Oxford: Oxford University Press, 1995).

Part II

INTRINSIC PROCEDURALISM

3

Democracy and Equal Respect

The most popular argument for equal non-derivative political rights appeals to the notion of equal respect or equal basic status. The appeal to equal respect is ambiguous in a way which many philosophers have not recognised. In many cases, talking about the requirements of equal respect is the same as talking about the requirements of political morality. So, to say that political inequality is disrespectful is another way of saying that it is morally wrong. This kind of argument is question-begging against the POS. Assertions about equal respect can also be taken to be assertions about the contingent significance political power happens to have in our society. But an argument about the contingent significance of political power cannot entail the intrinsic justice of democracy. Contingent social beliefs could attach to the prevention of any act, whether that be disenfranchisement or the prevention of rape. Since it is false that people could have *pro tanto* rights to rape, it is false to say that contingent social beliefs can create rights in the way suggested by proponents of the contingent equal respect argument.

This chapter is structured as follows. In section 1, I set out various examples of the argument from equal respect. In section 2, I point out that the assertion 'this act expresses disrespect' is ambiguous between a range of different propositions, which have not been adequately distinguished in the literature. In one sense, an action expresses respect when it does not violate people's rights. I discuss this sense in section 3 and argue that it does not constitute an argument against the POS. In sections 4 to 6, I discuss the contingent understanding of respect according to which the wrongness of political inequality is produced by contingent social beliefs which happen to have built up around political rights. I argue that the contingent equal respect argument cannot prove the IPJ of democracy.

1. The argument from equal respect

Consider the following examples of arguments from equal respect for democracy.[1] Harry Brighouse says:

> "We must consult and consider the preferences of people in decisions that will affect them because to ignore their preferences is to treat them as if their own judgements about their own good had no significance. But that is only true if they are incompetent or wicked. Neglecting their judgements, then, embodies a presumption that they are not worthy of our respect."[2]

He later concludes that his case 'rests not on the right to have one's interests considered, but on the right to have one's judgements considered'.[3] Political inequality fails to implement a presumption of equal respect.

In places, Rawls defends democracy by appealing to respect or similar ideas:

> "By publicly affirming the basic liberties citizens in a well-ordered society express their mutual respect for one another as reasonable and trustworthy, as well as their recognition of the worth all citizens attach to their way of life."[4]

Rawls is referring to all of the basic liberties in this passage, including the political liberties.

Jeremy Waldron says:

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[1] Other proponents include Griffin, "Democracy as a Non–Instrumentally Just Procedure," 2003; Richardson, *Democratic Autonomy*, pt. 1; Ackerman, *Social Justice in the Liberal State*, chap. 9; Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112, no. 4 (July 1, 2002): 689–719; Andrew Altman and Christopher Heath Wellman, "The Deontological Defense of Democracy: An Argument from Group Rights," *Pacific Philosophical Quarterly* 89, no. 3 (2008): 279–93; Cohen, *Philosophy, Politics, Democracy*, 189; Robert A. Dahl, *Democracy and Its Critics* (New Haven ; London: Yale University Press, 1989), chap. 6–8.

[2] Brighouse, "Democracy and Inequality," 56.

[3] Ibid., 57.

[4] Rawls, *Political Liberalism*, 319. See also Rawls, *A Theory of Justice*, 477.

> "[The wrong of political inequality is] to do with the insult, dishonour or denigration that is involved when one person's views are treated as of less account than the views of others on a matter that affects him as well as others."[5]

When we deny someone a say, we deny their equal status as someone with a sense of justice adequate to the task of making political decisions.[6] Thus, political inequality expresses disrespect.

Finally, consider Tom Christiano's appeal to equal respect:

> "To be treated in a way that entirely ignores one's way of perceiving how one is treated constitutes a serious loss of status for a person in a society. A person whose judgment about that society is never taken seriously by others is treated in effect like a child or a madman... The society is expressing its indifference to the capacity of this person to appreciate justice and is thus expressing its indifference to his special moral status of humanity."[7]

Again, Christiano says that to disenfranchise someone is to treat them like a child and so to deny their fundamental equal status.

It should be said that not all proponents of the argument from equal respect use it to argue against the POS. Some use it to argue that we ought to use democracy provided substantive justice is not at stake.

2. The ambiguity of expressing respect

The argument from equal respect is apparently simple and appears to go as follows:

1. We ought to express equal respect for each person.

[5] Waldron, *Law and Disagreement*, 238.

[6] Ibid., 239.

[7] Christiano, *The Constitution of Equality*, 63. See also Christiano, *The Rule of the Many*, 72–74.

2. We express equal respect for each person only if we give each person equal political influence.

3. Therefore, we ought to give each person equal political influence.

The obvious question to ask is: what does it mean it to say that an action expresses respect for someone? As one of the foundational texts on respect, Darwall's 'Two Kinds of Respect' seems to be a good place to start to find an answer.[8] However, in fact that paper illustrates, and is perhaps one of the causes of, the lack of clarity in the literature on that point. In it, Darwall defines 'respect' in a multitude of ways. He says that respect consists in at least one of the following: weighing the fact that someone is a person appropriately in one's deliberation; the disposition to weigh that fact appropriately; behaving appropriately towards a person; the disposition to behave appropriately towards a person; and *not* in behaviour which would be produced if people weighed inappropriately some feature of a person. For example, consider the following passages:

> "To respect something is thus to regard it as requiring restrictions on the moral acceptability of actions concerned with it. And crucially, it is to regard such a restriction as not incidental, but as arising from the fact or feature itself."[9]

Here, he defines respect as 'regard', as a belief or attitude one takes towards a person. However, on the page before, he says:

> "It is true that in order to indicate or express [appraisal] respect, certain behavior from us will be appropriate. But unlike recognition respect, appraisal respect does not itself consist in that behavior or in the judgment that is appropriate."[10]

[8] Stephen Darwall, "Two Kinds of Respect," *Ethics* 88, no. 1 (October 1, 1977): 36–49.

[9] Ibid., 40.

[10] Ibid., 39. Raz's discussion of respect reflects this ambiguity at Joseph Raz, *Value, Respect and Attachment* (Cambridge: Cambridge University Press, 2001), 137–138.

Here, Darwall claims that recognition respect *is* appropriate behaviour towards persons and/or is the judgement that the behaviour is appropriate. Darwall conflates respect as an attitude and respect as acting appropriately towards another person. This confusion is important for our understanding of the argument from equal respect.

3. Respect and political morality

The only version of the argument from equal respect which could count in favour of the IPJ of democracy relies on an understanding of respect according to which our actions express respect for people if and only if we treat people justly or, in other words, do not violate their rights. This kind of respect is often used in association with the status theory of rights, according to which people have rights by virtue of having a certain status which makes them fitting of rights.[11] This feature of persons is generally referred to as the 'basis of respect'.[12] The basis of respect is some feature of persons by virtue of which they ought to be treated in accordance with the requirements of justice. For example, according to many liberal theories, if people have the capacity to form and revise a conception of the good, then they have the right to pursue this conception by, say, choosing the occupation they wish to.[13] If an individual were forced to be a farmer for the sake of the overall social good, then this would violate his rights, which he has by virtue of being a person. It would treat him as a tool for the social good and so fail to recognise his status as a person for whom rights are fitting.[14]

[11] For defences of the status theory, see Nozick, *Anarchy, State and Utopia*, chap. 3; Kamm, "Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status"; Quinn, *Morality and Action*, chap. 7; Nagel, *Concealment and Exposure*, chap. 3.

[12] Ian Carter, "Respect and the Basis of Equality," *Ethics* 121, no. 3 (April 1, 2011): 538–571, at 539.

[13] See for example Rawls, *Political Liberalism*., 302. See also Rawls, *A Theory of Justice*, sec. 77.

[14] See Quinn, *Morality and Action*, 171.

The relevant basis of respect with regard to arguments for equal political rights is political competence, the capacity for a sense of justice or something similar, rather than the capacity for a conception of the good.[15] This feature must be realised to the *requisite minimum degree* in order to make a person fitting of rights to political power.[16] This allows intrinsic proceduralists to defend political equality even in the face of manifest and large differences in political knowledge and competence between citizens.

Against the POS, the status theorist can only appeal to the intuition that by virtue of their possession of some property, like political competence, people have democratic rights to do injustice. So, to the Frank and The Pickpockets case I discussed in Chapter 2, the challenge would be that the Pickpockets have a minimally realised sense of justice and therefore are fitting of rights to take Frank's money. This is not a persuasive response to my argument. Pointing to this property of the Pickpockets makes no difference to the intuitive judgement that they lack the right to take Frank's money. The same goes for all gangland injustices and so goes for all democratic injustices.

Although proponents of the status theory often appeal to the notions of equal respect and status, it does not in fact serve any function in particular arguments for the proposition that people have a particular right. It is certainly intuitive that people have a right not to be forced into the occupation which is best for society. But saying in addition

[15] See for example Christiano, *The Constitution of Equality*, 128; Ackerman, *Social Justice in the Liberal State*, 284; Brighouse, "Democracy and Inequality," 55–57; Griffin, "Democracy as a Non–Instrumentally Just Procedure," 2003, 117–118.

[16] Rawls, *Political Liberalism*. It is controversial whether anyone has yet found a plausible basis for equal respect. See Jeremy Waldron, "Basic Equality," *NYU School of Law, Public Law Research Paper*, no. 107 (2008); Richard J. Arneson, "What, If Anything, Renders All Humans Morally Equal?," in *Singer and His Critics*, ed. Dale Jamieson (Oxford: Blackwell, 1999); Carter, "Respect and the Basis of Equality." Waldron and Arneson draw generally sceptical conclusions or say that arguments are inconclusive.

that equal respect requires that people should not be forced into those occupations does not add anything of substance to the initial intuition.

The same can be said about the appeal to equal respect from within any theory of rights. On this understanding, talking about equal respect is simply a way to describe what other people's rights require of us.[17] Respecting someone on this account just *is* not violating their rights. If the Difference Principle is true, then violating the Difference Principle expresses disrespect; if equality of welfare is true, then violating equality of welfare expresses disrespect, and so on. So, determining what rights people have is determining what it takes to respect them. Therefore, if one were to say 'disenfranchising someone express disrespect for them regardless of the outcome of disenfranchisement', one would simply be saying 'disenfranchising someone violates their non-derivative democratic rights'. These assertions might be true, but they are not an argument against instrumentalism; they are simply a denial of it.

Moreover, proponents of the argument from equal respect only occasionally appeal to intuitions about particular cases to defend their position. Consequently, most arguments involving equal respect are not persuasive because they do not consider intuitions about democratically-endorsed injustices. Therefore, I need add nothing to the argument of Chapter 2 for the POS.

One philosopher who does appeal to intuitions about particular cases is Harry Brighouse. He argues that we express respect among a group of friends deciding which restaurant to go to by giving each person an equal say.[18] Depriving a sane adult of an equal say over this decision would intuitively be wrong. He argues that the same holds by

[17] See Rawls, *A Theory of Justice*, 455, 513; William K. Frankena, "The Ethics of Respect for Persons," *Philosophical Topics* 14, no. 2 (1986): 149–67.

[18] Brighouse, "Democracy and Inequality."

extension for political associations. At this time, Brighouse denied the POS and evidently took this to be his main argument against it.[19] However, Brighouse's example does not involve injustice and so is ill-suited to defend the democratic right to do injustice. As I argued in Chapter 2, the intuitive picture for majority-endorsed injustices is clear: people do not have democratic rights to do injustice. This is not to say that there are not intuitions running the other way. I doubt that many people would initially accept that it would be permissible to institute restricted suffrage in order to produce slightly more substantively just outcomes. My point is that we ought to give up this intuition in the face of its implausible implications, as laid out in Chapter 2.

It might reasonably be argued that the injustices I discussed in Chapter 2 were capricious and clearly unjust. It might be true that the intuitions are different when people are trying to impose *reasonable* views about justice. I discuss this argument in Part III.

I have denied that people have, by virtue of their possession of political competence or of some similar property, rights to commit injustice. The Pickpockets, for instance, do not have democratic rights to take £500 from Frank. This does not commit me to denying that the Pickpockets have equal basic moral status. I believe they do have such status if this means that they have certain rights which we ought not to violate. Analogously, almost everyone accepts that it is not the case that people have the right to drive or practice medicine merely by virtue of being a full person. Saying that not all persons are entitled to do an act x, does not commit me to denying equal basic status.

[19] In his later work he accepts pure instrumentalism about political procedures. See Harry Brighouse and Marc Fleurbaey, "Democracy and Proportionality," *Journal of Political Philosophy* 18, no. 2 (2010): 137–55.

4. Contingent respect and respect as an attitude

The kind of respect discussed in section 3 has nothing to do with the contingent social beliefs which happen to be associated with political power. Disenfranchising someone expresses disrespect for them regardless of the attitudes of the disenfranchiser, regardless of the symbolic significance of political power and regardless of whether it diminishes the self-respect of those disenfranchised. However, the equal respect arguments set out in section 1 can also be interpreted to be saying something about the contingent significance of political power. The contingent argument is fundamentally about the relationship between political power and contingent social beliefs. One can tell a causal story about these social beliefs, which, it may be argued, entails that people have equal political rights. The story is as follows. In the past, people were motivated by disrespectful attitudes to deprive certain groups, such as women and black people, of the vote. White men thought that women and black people were too stupid or ill-informed to be given the responsibility to vote sensibly. As a consequence of this, political power has a symbolic meaning in our society. If we were to disenfranchise some group, then we would show the disenfranchised that we had disrespectful attitudes towards them, or we would give them reason to believe that we did. This could cause social stigma to build towards the disenfranchised and cause them to lose self-respect. For some or all of these reasons, we ought to have political equality.

There is a lot going on here and we need to separate out what it is that is supposed to make disenfranchising someone wrong. Firstly, it might be argued that political inequality expresses an attitude of disrespect and is wrong by virtue of that fact. Secondly, there is the suggestion that disenfranchisement could express *symbolic* disrespect regardless of the attitudes of the disenfranchiser. Thirdly, there is the claim that disenfranchising someone produces social stigma and the loss of self-respect. Any or all of

these could be taken to be the thing which makes disenfranchisement wrong or grounds political equality. I will examine each of these parts in turn and argue that none of them can ground equal non-derivative political rights.

It is unclear whether we ought to interpret formulations of the argument from equal respect to be using the contingent or non-contingent understanding of expressing respect. Some philosophers explicitly reject the contingent approach. Brighouse, for instance, says that defending political rights by appeal to their symbolic meaning is 'too contingent' a defence of democracy.[20] For Brighouse, even if people did not associate political power with status in any way, political inequality would still be wrong. Others are quite explicit in endorsing the contingent argument. For example, David Miller says that to be given fewer votes than other voters is 'to be declared a low-grade citizen':

> "That is why plural voting has become politically unthinkable in the present century. Once the status of citizenship is extended to all competent adults, it becomes essential that every member of the political community is treated equally, and that is given material expression in equality of voting rights."[21]

And:

> "It is not a universal truth about human beings that they need recognition in this form… But for people like us recognition must take this form, and so we insist that our most important memberships – above all membership of the nation-state – should be on the basis of equality."[22]

For Miller, the value of political equality is derived from conventional and contingent facts. If our history and social beliefs were different, political equality would not matter.

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[20] Harry Brighouse, "Egalitarianism and Equal Availability of Political Influence," *Journal of Political Philosophy* 4, no. 2 (1996): 122.

[21] David Miller, "Equality and Justice," *Ratio* 10, no. 3 (December 1, 1997): 231.

[22] Ibid., 231–232.

Respect as an attitude

The claim that Jim's actions express disrespect for Jane can naturally be understood as the claim that his action shows her that he has a disrespectful attitude towards her. One could certainly interpret many of the equal respect arguments mentioned in section 1in that way. This is the kind of respect David Estlund seems to be referring to when he says that 'inequality does not express disrespect unless it is owed to disrespect'.[23] Call this 'attitude-dependent dis/respect'. Following Darwall, we should distinguish the attitude of *appraisal* respect from the attitude of *recognition* respect. Appraisal respect is the positive appraisal of features of persons. People must have manifested characteristics which make them deserving of appraisal respect.[24] For example, we might give appraisal respect to a great boxer and this might determine how we act towards them: we could praise them for their efforts in the ring. We might also say to a boxer that he should respect Floyd Mayweather's jab. But this is to tell the boxer to take an attitude towards Mayweather's jab for prudential reasons. Proponents of the contingent equal respect argument are interested in a *moral* attitude we have towards others. They are interested in *recognition* respect. This is an attitude we have towards a person or a fact about that person, which concerns how we ought, morally, to relate to that person. What counts as a disrespectful attitude is a function of what morality requires. If people have a right to life by virtue of features of their personhood, then we ought to have the attitude that they are the kind of being we cannot

[23] David Estlund, "Political Quality," *Social Philosophy and Policy* 17, no. 1 (2002): 138. Jason Brennan also assumes that arguments for democracy from equal respect are about contingent social beliefs. Jason Brennan, "Political Liberty: Who Needs It?," *Social Philosophy and Policy* 29, no. 01 (2012): 1–27.

[24] Darwall, "Two Kinds of Respect." See also Stephen Darwall, "Respect and the Second-Person Standpoint," *Proceedings and Addresses of the American Philosophical Association* 78, no. 2 (November 1, 2004): 45–46. Raz argues that Darwall has not picked out two different kinds of respect. Rather, according to Raz, Darwall picks out two different *objects* of respect. See Raz, *Value, Respect and Attachment*, 137 n17.

murder for our convenience. If people have the right to equal welfare, then it is disrespectful to believe that someone is not due equal welfare.

What then, does it mean for actions to *express* the attitude of recognition respect? There are two possible answers. Firstly, actions express dis/respect when they are motivated by a dis/respectful attitude. Secondly, actions express dis/respect when they are motivated by dis/respectful attitudes and successfully convey that attitude to others.

Any action could be motivated by a respectful or disrespectful attitude. For instance, Natalie might have a whole host of irrational and false beliefs and so be led to believe that unless she stands on Jeremy's foot, he will explode. And yet she might see Jeremy as a free and equal person with the same rights as everyone else. Natalie's actions express an attitude of respect. Natalie has acted wrongly, not because she is motivated by a disrespectful attitude, but because her irrationality has led her to violate Jeremy's right not to have his foot stood on. Conversely, Nasty Nick might see Karen as a contemptible worm bereft of any of the capacities or powers relevant to personhood. However, he might also believe that if she is left to make her own decisions, she will bring about her own ruin, which is no more than she deserves, in Nick's eyes. On the current definition, Nick's actions express disrespect for Karen, even though he treats as he ought to have done had he been rational, informed and respectful.

It might also be argued that for an action to express respect, the action itself must *successfully convey* one's attitude to others. That is, unless Natalie standing on Jeremy's foot conveys to Jeremy Natalie's motivations and attitudes, her action does not express respect. Likewise, Nick's actions towards Karen do not express disrespect for her, unless the action itself conveys Nick's attitudes towards Karen. I remain neutral here on whether this is required for an action to express an attitude of dis/respect.

Bad attitudes and political rights

The contingent equal respect argument is supposed to prove that people have equal non-derivative rights to political influence. If disenfranchisement is motivated by disrespectful attitudes, then it is wrong and this proves that people have claim rights to political power. However, the appeal to attitude-dependent respect cannot support this conclusion. Firstly, the argument has limited scope because it implies that disenfranchisement is wrong only if it is motivated by a disrespectful attitude. But disenfranchisement need not always be motivated by a disrespectful attitude. A person might disenfranchise someone by accident or because they have the crazy belief that if that person is given the vote, the world will explode. Neither of these attitudes is disrespectful.

Furthermore, the proponent of the attitude-dependent equal respect argument is not entitled to the assumption that a person motivated purely by instrumentalist attitudes is disrespectful, or, in other words, has immoral attitudes. The intrinsic proceduralist is supposed to prove that instrumentalism is false so prove that such attitudes are immoral. In the absence of further argument, the proponent of the argument from attitude-dependent respect cannot show that there is anything wrong with political inequality when motivated by instrumentalism.

Secondly, the argument proves too much because it can in principle be used to defend the existence of the right to do severe injustice. Suppose that there is a society, Fightland, in which adults occasionally pummel twelve year old children in order to let off steam. Mike wishes to stop Steve, who is black, doing this because he believes black people are inferior and should not be allowed to have the same level of enjoyment as white people. If attitude-dependent respect grounds rights in the way suggested by the political egalitarian, then in this case it grounds Mike's right to pummel twelve year olds. This is absurd. There are *no constraints* on the kinds of acts which might be prevented by acts

motivated by disrespectful attitudes. The acts could include rape, murder, or child molestation. Therefore, attitude-dependent respect simply cannot ground rights in the way suggested by the political egalitarian.

Why has the argument gone wrong? There are a few possible explanations. Firstly, it might be true that Mike lacks even a *pro tanto* duty not to prevent the pummelling, even though his actions express an attitude of disrespect. In other words, expressing an attitude of disrespect is in no way wrong. The most natural way to justify this is by the appeal to welfarism – a plausible and fairly popular philosophical position – according to which expressing an attitude of disrespect does not matter unless it impacts on someone's welfare. If Sandra is completely unaffected by Jim flicking the V-sign at her, then, on this view, we are not even under a *pro tanto* duty to stop him. However, in some cases it does seem as though people are under a duty not to express a disrespectful attitude even though the disrespectee's welfare is unaffected. For example, many people might argue that people are under a duty not to shout racist abuse at others, even if the disrespectee's welfare is unaffected. This is a controversial area, so I only put it forward as a possible explanation of what is wrong with the appeal to attitude-dependent respect.

Secondly, if Mike from Fightland *is* under a duty not to express an attitude of disrespect with his actions, this duty cannot be *correlated* to Steve's claim right to pummel. Rather, if it exists, it must be correlated to Steve's claim right not to have disrespect expressed towards him and it happens to be true in this circumstance that preventing Steve pummelling would express disrespect. Claim rights to x cannot come and go merely because the would-be preventer has changed their attitudes. If Steve had a claim right to commit grievous bodily harm, then this places people under *pro tanto* duties not to prevent him, regardless of their attitudes. Since, on the current argument, the duties *do* come and go depending on people's attitudes, Steve cannot have such a claim right. Thus,

the contingent equal respect argument cannot show that people have a democratic claim to do injustice. At best, it shows that people have a claim not to have disrespect expressed towards them. The putative wrong of expressing disrespect is, then, a cost of prevention which does not bear on whether someone has the right to do injustice. It is worth restating that if one believes that attitude-dependent respect *can* ground rights in the way suggested, then one must also accept that it is possible that people can have *pro tanto* claim rights to murder, torture and rape. This position is clearly mistaken.

5. Symbolic disrespect

The causal story told by the proponents of the argument from equal respect appeals to the notion of the 'symbolic meaning' of political rights. Some philosophers have argued that an assignment of political power can express disrespect by virtue of contingent social beliefs, even if the assigner herself is not motivated by disrespectful attitudes. This is attitude-independent symbolic disrespect, or for short *symbolic disrespect.*[25] I shall argue that actions cannot, in any meaningful or morally undesirable way, express attitude-independent symbolic disrespect. Moreover, arguments for symbolic respect are subject to parallel problems to arguments from attitude-dependent respect.

The meaning of expressing symbolic disrespect

Certain actions come to have social meaning by virtue of contingent social beliefs and conventions. It is a contingent truth in Britain that flicking the V-sign is a good way to show someone that you have disrespectful attitudes towards them. In the USA, flipping the bird is a good way to show someone that you have an attitude of disrespect towards them.

[25] The meaning is attitude-independent in the sense that it is independent of the attitudes of the person acting. It is not independent of the social attitudes which may have built up around the act.

In many countries, shaking one's shoe at someone is a good way to show them you disrespect them. These actions have a meaning which is determined by contingent social beliefs and they make certain actions a good vehicle to communicate one's attitudes. However, the claim of the proponent of attitude-independent symbolic respect is that an action can express symbolic disrespect, even if the action is not motivated in any way by a disrespectful attitude. So, if Johnny Foreigner, in whose home country flicking the V-sign is a sign of great respect, flicks the V-sign in Britain not knowing the meaning it has here, then his action express symbolic disrespect even though it is not in any way motivated by a disrespectful attitude. Thus, it might be said, by virtue of the social meaning which has built up associating political power and status, disenfranchising someone expresses disrespect regardless of the attitudes of the disenfranchiser.

I find the claim that symbolic respect exists implausible. I don't think there is any sense in which a foreigner expresses disrespect if he non-culpably has false beliefs about the social conventions in his host country. It might be true that it would be reasonable for bystanders to believe that the foreigner does express disrespect with his actions, but the right thing to say seems to be that although the belief is reasonable, it is wrong and his actions do not in fact express disrespect. An examination of leading accounts of symbolic disrespect confirms my scepticism about its existence.

Steven Wall has argued that certain acts can come to have morally significant symbolic meaning by virtue of their perceived significance, regardless of the attitudes of the actor.[26] Wall argues that the fact (if it is one) that political inequality expresses

[26] Steven Wall, "Democracy and Equality," *The Philosophical Quarterly* 57, no. 228 (2007): 416–38. Surprisingly, instrumentalists like Wall, Raz and Ronald Dworkin have tended to put forward the fullest arguments for political equality from symbolic respect. Raz and Dworkin's accounts are subject to almost exactly the same problems as Wall's. See Dworkin, *Sovereign Virtue*, 200–201; Raz, *Value, Respect and Attachment*, chap. 4; Joseph Raz, "On Frankfurt's Explanation of Respect for People," in *Contours of*

disrespect is a 'belief-dependent social fact'. If citizens regard an institution as expressing a disrespectful message, 'then this will be true in virtue of the fact that they hold certain beliefs about the institution and its significance'.[27] The fact that people may perceive political inequality to be objectionable renders political inequality actually objectionable by virtue of its expressive meaning.

However, he argues that there are constraints on the kinds of beliefs which can create attitude-independent symbolic meaning.

> "The mere fact that an individual perceives an institution as objectionable does not show that the institution is in reality objectionable. The perception must get something right. The something right, however, cannot be that the institution is inherently objectionable, for then the perception would not ground the objectionable feature. What then is there for the perception to get right? The answer must be that the perception gets right what the institution expresses. The opponent of the plural voting scheme can argue that the scheme is objectionable because it expresses an insulting message, e.g., that some citizens are more important than others."[28]

Wall's argument here is flawed. He is supposed to be offering an account which explains how social beliefs make an institution express an insulting message. He says that perceptions make an institution express disrespect. Yet he says that only perceptions which *correctly* perceive what the institution expresses can make an institution express disrespect. But then, his account cannot explain why an institution expresses disrespect in the first place. If the perception is correct, then the institution must already express disrespect. But then it cannot express disrespect if a necessary condition on expressing disrespect is pre-

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Agency: Essays on Themes from Harry Frankfurt, ed. Lee Overton and Sarah Buss (Cambridge, Mass; London: MIT Press, 2002).

[27] Wall, "Democracy and Equality," 2007, 430.

[28] Wall, "Democracy and Equality," 2007.

existing disrespect. If Wall's account does not explain how institutions can express disrespect in the first place, then it does not explain how institutions express disrespect at all because his account relies on the existence of initial disrespect.

Wall develops his account by arguing that only 'rationally optional' beliefs can create conventional symbolic meaning.[29] He gives the example of a stockholding group which makes decisions by plural voting. He argues that the scheme might at first not express disrespect, but could come to by virtue of rationally optional social beliefs.

> "Suppose now the members of the group were to come to believe (and not irrationally) that the plural voting scheme expresses the judgement that some of them are more worthy than others. If this were to happen, I have suggested, then the scheme would indeed express an insulting message. At this point, the expressive argument would come into play and ground a reason to reject the scheme."[30]

Again, this cannot explain attitude-independent symbolic meaning. Wall says that the members not irrationally believe that the plural voting scheme expresses the judgement that some members are more worthy than others. But then he cannot explain how the plural voting scheme expresses the disrespectful judgement in the first place.

Wall could perhaps say that the initial belief could be directed towards whether an institution expresses an attitude of disrespect. He could then argue: people correctly perceive this fact and by virtue of these correct perceptions, the institution also expresses symbolic disrespect. I do not think this is a plausible account of how political inequality can express attitude-independent symbolic disrespect. A more plausible explanation is that the argument confuses attitude-dependent respect (and beliefs about it) with attitude-independent symbolic respect. If people correctly believe that political inequality expresses

[29] Ibid., 431–434.

[30] Ibid., 431.

attitude-dependent disrespect, then the right thing to say is only that political inequality expresses attitude-dependent disrespect, not that it also expresses a distinct kind of symbolic respect. If people reasonably but falsely believe that an institution expresses attitude-dependent disrespect, then we ought to say, not that this creates a new kind of disrespect, but simply that the institution does not in fact express disrespect. We might well worry about the psychological costs such reasonable beliefs could impose in terms of lost self-esteem, but these costs do not indicate that symbolic meaning itself is what matters. It seems to me that symbolic meaning matters insofar as it is a vehicle for expressing social esteem and perhaps insofar as this impact on people's well-being. Acts with symbolic meaning are not intrinsically important by virtue of their symbolic meaning alone.

Symbolic meaning cannot ground political rights

Perhaps other people will have the contrary intuition and will say that an act *can* express symbolic disrespect. If we accept this for the sake of argument, the proposition we are now interested in is whether the symbolic disrespect associated with political inequality can ground non-derivative democratic rights. In spite of his general scepticism about the relation between equal respect and democracy, Wall argues that, as a matter of contingent fact, the symbolic meaning of political inequality would today 'probably tell against even the best designed plural voting scheme'.[31] However, arguments from symbolic respect are subject to parallel problems to arguments from attitude-dependent respect. As we have seen, symbolic respect must either be created by correct or reasonable beliefs about attitude-dependent respect, or must be created by any social belief, whether rational or not. This implies that it is possible for symbolic meaning to attach any act, including preventing rape and murder.

[31] Ibid.

The first problem, then, is that the symbolic respect argument has limited scope. Even if it is sound, it entails that people have non-derivative democratic rights only if symbolic meaning attaches to political inequality. But it is only a contingent fact that symbolic meaning has attached to disenfranchisement in our society. Indeed, there are various forms of political inequality which are instituted now across the world, which are not generally associated with symbolic disrespect.[32] For example, judicial review and districting both involve unequal opportunities for influence, but it is certainly true to say that disenfranchisement has much more symbolic meaning than does judicial review or districting.

Secondly, the argument from symbolic respect can in principle prove the right to do any act, including rape and murder. Consider Fightland again. This time, Susan wishes to pummel children and Darren wishes to stop her. Suppose that social beliefs and symbolic meaning have built up around preventing people pummelling because in the past certain groups were prevented from pummelling merely because of their gender or race. Darren wants to stop Susan because he believes that pummelling twelve year olds is barbaric; he is not motivated by a disrespectful attitude. On the symbolic respect argument, he nevertheless has a *pro tanto* duty not to prevent Susan which is correlative to her claim right to pummel twelve year olds. The argument can, in principle, prove the existence of *pro tanto* rights to murder, rape and torture. People do not have these rights, so the argument from symbolic respect must be in error.

As with attitude-dependent respect, one can explain where the argument goes wrong in a few ways. Welfarists would argue that Darren is not under a *pro tanto* duty not to prevent the pummelling. Others might argue that Darren *is* under a *pro tanto* duty not to prevent the pummelling by virtue of the symbolic meaning of preventing pummelling. But

[32] See Dworkin, *Sovereign Virtue*, 200–201.

again, such duties cannot be correlative to Susan's right to pummel because she does not have a right to pummel. At best, the duty is correlative to her right not to have symbolic disrespect expressed towards her, which happens in this case to be fulfilled by not preventing her pummelling 12 year olds.

Arguments from attitude-independent symbolic respect go the way of arguments from attitude-dependent respect.

The historical association with disrespectful attitudes

It is true that disenfranchisement has historically been motivated by attitudes of disrespect. Women were deprived of the vote in all countries for disrespectful reasons. Joshua Cohen takes this to be a consideration which bears on whether we ought to have political equality today. The historical association of political inequality with justifications based on race and gender 'establishes a further presumption in favor of the principle of participation'.[33] This cannot be correct. The mere existence of a historical connection between an action and an unpleasant attitude cannot by itself make that action wrong in any way. Consider: white men in America in the 19th Century, motivated by racist and disrespectful attitudes towards blacks, prevented blacks from owning firearms with the Slave Codes and after the Civil War and emancipation, the Black Codes.[34] By Cohen's reasoning, this alone establishes a presumption against gun control *today*. But I would wager that Cohen and all other political egalitarians want a lot less political inequality but a lot more gun control. This cannot be explained by the historical association with disrespectful attitudes. The Fightland example can *also* be adapted to refute Cohen. Preventing people from

[33] Cohen, *Philosophy, Politics, Democracy*, 171–172.

[34] See Don B. Kates Jnr, "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82, no. 2 (November 1, 1983): 204–73., at 256-257.

pummelling children may well have been motivated by disrespectful attitudes in the past, but in no way does this ground a presumption against preventing pummelling today.

6. Social stigma and self-respect

The third and final element of the contingent equal respect argument holds that depriving people of equal political power creates social stigma towards those with less power and causes the disempowered to lose self-respect.

Completing the contingent equal respect argument

As we have seen, many political egalitarians argue (and I have not disagreed with them) that depriving someone of political power is, as a result of our history, a good way to communicate to them that you have disrespectful attitudes towards them. This is different to the proposition that disenfranchising someone creates social stigma towards the person disenfranchised. An act might express attitude-dependent or attitude-independent disrespect without causing social stigma to build towards the disrespectee or without causing the disrespectee to lose self-respect. Oppression could, after all, lead to an outpouring of support for the oppressed and provide the oppressed with a sense of purpose. Charles Beitz argues that disenfranchisement is, nonetheless *likely* to cause social stigma to build towards the disenfranchised.

> "In the extreme case, when some are excluded entirely from any public role (as, for example, with the wholesale denial of the franchise to blacks in the antebellum South), it has been said that those excluded "are not publicly recognized as persons at all" and might be described as "socially dead." Something similar occurs when procedural roles are

> assigned in a way that conveys social acceptance of a belief in the inferiority or lesser merit of one group as distinct from others."[35]

He concludes:

> "[It] is a fixed point in a democratic culture that public institutions should not establish or reinforce the perception that some people's interests deserve less respect or concern than those of others simply in virtue of their membership in one rather than another social or ascriptive group. The political roles defined by democratic institutions should convey a communal acknowledgment of equal individual worth."[36]

Beitz criticises political inequality on two grounds here. Firstly, he says that assignments of political power should not 'convey' or express disrespectful attitudes. Secondly, he asserts the distinct proposition that assignments of procedural roles must not 'establish or reinforce' generally disrespectful social attitudes towards people on the basis of their membership of a particular group.

Claims about expressing disrespect and social stigma often go hand in hand with claims about the self-respect of those disrespected or stigmatised. Rawls says:

> "The effect of self-government where equal political rights have their fair value is to enhance self-esteem and the sense of political competence of the average citizen. His awareness of his own worth developed in the smaller associations of his community is confirmed in the constitution of the whole society."[37]

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[35] Beitz, *Political Equality*, 110.

[36] Ibid.

[37] Rawls, *A Theory of Justice*, 205. See also Rawls, *Political Liberalism*, 318–320. For criticism see Steven Wall, "Rawls and the Status of Political Liberty," *Pacific Philosophical Quarterly* 87, no. 2 (2006): 245–70. Other philosophers who mix the respect argument with the appeal to self-respect include Griffin, "Democracy as a Non–Instrumentally Just Procedure," 2003, 117–121; Christiano, *The Rule of the Many*, 74; Cohen, *Philosophy, Politics, Democracy*, 117–121.

For Rawls, the political liberties should have fair value because they causally produce self-respect. This completes the conjectural causal story offered by proponents of the contingent equal respect argument.

The problems with appeals to social stigma and self-respect

Social stigma and self-respect cannot show that democracy is intrinsically just. They are contingent causal side-effects of assignments of political rights. They are not intrinsic properties of democracy. Any assignment of legal rights might happen to augment self-respect. It might be true that giving everyone the legal right to practice as a medical doctor would improve everyone's self-esteem, but that does not entail that people have the moral right to practice medicine. Being chosen by one's gang to carry out a hit on a crusading politician might augment one's self-esteem, but that obviously does not show that one has a non-derivative right to murder. At best, things like social stigma and self-respect count in favour of the instrumental worth of democracy.

Conclusion

On one understanding of respect, the proposition that political inequality expresses disrespect is simply a way of restating that political inequality is wrong. The appeal to the notion of equal respect adds nothing to initial intuitions which may have been canvassed in favour of political equality. As I argued in Chapter 2, the intuitions, once carefully considered, count against the democratic right to do substantive injustice. However, it might be argued that the intuitions are different when people are reasonable. I discuss this kind of argument in Part III.

The argument from equal respect could be interpreted to be saying that people have moral rights to political power by virtue of the contingent social beliefs and attitudes which

have built up associating political power with status. However, these social beliefs and attitudes cannot ground the intrinsic justice of democracy. Any act, including preventing rape, could be associated with disrespect in the various ways suggested by proponents of the contingent version of the equal respect argument. Clearly, people do not have *pro tanto* rights to rape. Consequently, people cannot have political rights by virtue of the social beliefs which happen to have built up around political power.

4

Autonomy and Democracy

The second intrinsic proceduralist argument appeals to individual or group autonomy. If autonomous choice is intrinsically valuable, then we may have reason not to interfere with someone's choice regardless of the independent quality of the decision they make. It could be argued that we have reason to allow each person to choose the political rules which apply to them, even if they do not choose the best or most just outcome. Most critics of arguments from individual autonomy for democracy have focused on the point that autonomy seems to be relatively ill-served by democracy, compared to alternative forms of decision-making, such as markets or other forms of decentralised individual choice. In contrast, my chief target here is the basic premise that individual autonomy grounds a right to do injustice. Whatever our theory of autonomy, this premise is false. Arguments for group autonomy or self-determination also do not threaten the POS. They are instrumentalist, rely on controversial theories of value and/or are implausible for other reasons.

This chapter is structured as follows. In section 1, I outline the concept of autonomy. In section 2, I present various different autonomy-based arguments for democracy. In section 3, I briefly touch on the question of whether a right to autonomously choose one's political conditions entails that democracy is intrinsically just. In section 4, I set out two specific theories of autonomy – content-neutral and substantive – and argue that neither theory threatens the argument for the POS. In section 5, I look at two separate arguments for a non-derivative group right to democracy. The first is based on 'value individualism' and is usually instrumentalist. Intrinsic proceduralist versions of the argument are implausible. The second is based on 'value collectivism'. This is a very

controversial theory of value and even if it is true it cannot be part of a successful argument against the POS.

1. The concept of autonomy

I will now provide a brief sketch of the concept of autonomy. There is a great deal of disagreement about the necessary conditions for autonomy, but it is generally defined as self-rule. An autonomous person is author of her own life;[1] they are directed by considerations and desires that are determined by their authentic self. There are certain conditions external and internal to the agent which are required for autonomy. Coercive constraints are widely agreed to be autonomy-reducing.[2] If people coerce me to be a lawyer rather than a painter, then my autonomy is undermined. The choice is no longer mine and I can no longer identify with it on the basis of my authentic desires or preferences.

There are also internal conditions on autonomy. Manipulated agents are free but not autonomous. Unlike coercion, manipulation does not interfere with one's range of options.[3] Rather, it perverts the way an agent forms preferences and desires. Classic forms of manipulation include brainwashing and misinformation. If people choose on the basis of false information, then the choice they make is not one they would identify with after

[1] See for example Raz, *The Morality of Freedom*, 1986, chap. 14; Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), chap. 1.

[2] See Raz, *The Morality of Freedom*, 1986, 371; George Sher, *Beyond Neutrality : Perfectionism and Politics* (Cambridge: Cambridge University Press, 1997), 50; Joel Feinberg, "Autonomy," in *The Inner Citadel: Essays on Individual Autonomy*, ed. John Christman (New York ; Oxford: Oxford University Press, 1989).

[3] Raz, *The Morality of Freedom*, 1986, 377.

proper critical reflection.[4] If they are brainwashed, then in some sense, the desires and preferences they have are not their own.

There are also conditions on autonomy which are about the internal features of the individual herself. One must be rationally competent to some degree and capable of self-control.[5] Irrational preferences undermine autonomy. One is not autonomous if one makes choices on the basis of uncontrollable compulsion or addiction, with which one does not identify or which one rationally rejects. One may rationally desire not to take heroin, but be overcome by addictive compulsion when offered it. In this case, one's rational or authentic self is not in control and so one is not autonomous.

Individuals in liberal societies have autonomous control over a wide range of choices. People may autonomously choose which job to take, who to marry or which toothpaste to buy. People have *causal* control over these things. If they were to decide differently, the outcome would be different. For people to have autonomous control over an outcome, they must have causal control over it. This feature seems to a large extent to be lacking with regard to political decisions and, as I will mention below, many philosophers have thought this sufficient reason to completely reject the autonomy argument. As I will say below, I disagree.

[4] Dworkin, *The Theory and Practice of Autonomy*, 14.

[5] See Richard J. Arneson, "Autonomy and Preference Formation," in *In Harm's Way: Essays in Honor of Joel Feinberg*, ed. Jules L. Coleman and Allen Buchanan (Cambridge: Cambridge University Press, 1994), 47ff; Raz, *The Morality of Freedom*, 1986, 371; John Christman, "Autonomy and Personal History," *Canadian Journal of Philosophy* 21, no. 1 (March 1, 1991): 1–24; Steven Wall, *Liberalism, Perfectionism and Restraint* (Cambridge: Cambridge University Press, 1998), 132.

2. The right to autonomously control one's political conditions

A number of philosophers have endorsed the basic premise that each person has the right to autonomously control the political decisions to which they are subject. Consider this passage from Daniel Philpott's defence of political self-determination:

> "Our possibilities, opportunities, and obligations ought to be ones that we, autonomous citizens governing with other autonomous citizens, have determined." [6]

According to Philpott, this implies that we have reason to use democracy:

> "Democracy we may think of as the activity of governing oneself, of exercising one's autonomy in the political realm."[7]

In Philpott's view, 'autonomy entails steering one's fate, shaping one's political context'.[8] Since democracy enables one to shape one's political context, we have a reason to use democracy and to give each person equal political rights.

Similarly, Corey Brettschneider writes:

> "The value of political autonomy requires that actual persons have a role in deciding which laws will govern them and this value should be protected on democratic grounds, in part by striking down legislation that threatens the very rights that guarantee citizens the ability to make personal autonomous decisions. But the value of autonomy is also realized through political rights that allow individuals to participate in policy making. At minimum, there is an added value to a good democratic outcome when a majority actively affirms this outcome."[9]

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[6] Daniel Philpott, "In Defense of Self-Determination," *Ethics* 105, no. 2 (January 1, 1995): 357.

[7] Ibid.

[8] Ibid., 359.

[9] Corey Brettschneider, "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," *Political Studies* 53, no. 2 (2005): 427.

For Brettschneider, majority rule ensures that the majority at least have their putative right to autonomously control political decisions satisfied. Autonomous democratic choice adds value to a good outcome.

Consider finally Carol Gould's defence of democracy on the basis of 'freedom as self-development'. Gould argues that each person has equal rights to the exercise of agency and to the conditions necessary for its exercise.[10] According to Gould, this implies that each person has an equal right to control common activity, which includes political decisions and decisions about the division of the social product between and within firms.

> "[If] an individual were to take part in common activity without having any role in making decisions about it and under the direction of another, then this would not be an activity of self-development, since such self-development requires determining the course of one's activities... And since there is an equal right to the conditions of self-development, it follows that there is an equal right to make decisions about such common activity."[11]

According to Gould, to say that all engaged in common activity have an equal right to participate in decisions about it, is to say that each person should have the right to democratic participation in decision-making about common activity.[12] Democracy is required by equal rights to participation because under democracy, one is not under the direction of another.

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[10] Carol C. Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (Cambridge: Cambridge University Press, 1988), 60–71. Other proponents include Jurgen Habermas, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism," *The Journal of Philosophy* 92, no. 3 (March 1, 1995): 109–31; David Held, *Democracy and the Global Order : From the Modern State to Cosmopolitan Governance* (Cambridge: Polity, 1995), 145–157; Keith Graham, "Democracy and the Autonomous Moral Agent," in *Contemporary Political Philosophy: Radical Studies*, ed. Keith Graham (Cambridge: Cambridge University Press, 1982); Dahl, *Democracy and Its Critics*, 89–91.

[11] Gould, *Rethinking Democracy*, 85.

[12] Ibid.

These arguments all start with the basic proposition that people have rights grounded in autonomy to control over political decisions. These rights are non-derivative because people have them regardless of the quality of the decision they make; they have these right because they enable them to be autonomous in the political realm. In the same way, one might defend a right to free choice of occupation on the basis of autonomy. People have the right to autonomously choose their own career, regardless of how well they choose, perhaps within certain limits. In this way, both the right to free choice of occupation and the right influence political decisions are non-derivative.

The specific proposition I am interested in is that people have non-derivative democratic rights to do injustice by virtue of autonomy. Most of those who defend an autonomy-based right to democracy deny the democratic right to do injustice. I believe they are right to do so and will now explain why.

3. From autonomy to democracy

We need to be clear about how exactly the right to autonomously control one's political conditions entails that democracy is intrinsically just. In my view, no-one has yet adequately explained why equal political rights, however they might be justified, entail democracy. Nonetheless, I believe that they do imply that some form of democratic procedure, either majority rule or lottery voting, is intrinsically just.[13] Proponents of the autonomy argument sometimes make erroneous claims about the way in which democracy satisfies autonomy. Some of the authors mentioned above, for example, suggest that democracy satisfies the political rights of each voter. This is not true. Minority voters have no causal impact on political decisions, on any theory of causation. Others suggest that at least the maximal possible number of people – the majority – have causal control. This is

[13] See my Halstead, "Sharing Political Control: Intrinsic Proceduralism and Causation."

controversial because it is controversial whether majority voters have any influence in overdetermined elections.[14] On some theories of causation, if I am not the decisive voter, then I have no influence. At best, democracy gives people a slim *chance* of influence. On other theories of causation, overdetermining voters each have a small share of influence.[15]

In other areas of our life, we seem to have much greater autonomous control. If our choice of career were put to the public vote, we would certainly have less control over it. Critics of arguments from autonomy for democracy have often honed in on this feature of the argument.[16] There is something to these critiques because they do show that decentralised individual choice often offers greater autonomy than democracy. That said, the critique is limited because there are some decisions which are not appropriate for decentralised individual choice. For example, we cannot have each person choose what tax rate to pay. If each person has an equal claim to autonomously control the tax rate, then, in my view, democracy is an intrinsically just way to make that decision. This is fairly intuitive. If we had a small elite rather than the whole electorate make the decision, then many people have been denied influence or a chance of influence, despite the fact that they have equal claims to influence. This would be true for all political decision-procedures except democratic ones that give everyone in the electorate an equal vote. So, in this

[14] See Ibid.

[15] See Alvin I. Goldman, "Why Citizens Should Vote: A Causal Responsibility Approach," *Social Philosophy and Policy* 16, no. 02 (1999): 201–17.

[16] See Brennan, "Political Liberty"; Geoffrey Brennan and Loren Lomasky, "Against Reviving Republicanism," *Politics, Philosophy & Economics* 5, no. 2 (June 1, 2006): 221–52; Thomas Christiano, "Freedom, Consensus, and Equality in Collective Decision Making," *Ethics* 101, no. 1 (October 1, 1990): 151–81; Allen Buchanan, "Democracy and Secession," *National Self-Determination and Secession*, 1998, 14–33.

chapter I will try to refute the major premise of the argument from autonomy, which is that people have rights grounded in autonomy to produce substantive injustice.

1. Each person has an equal non-derivative claim right grounded in autonomy to use political influence to produce substantive injustice.
2. If each person has an equal non-derivative claim right to produce substantive injustice, then we may sacrifice the substantive justice of outcomes for the sake of the intrinsic procedural justice of democracy.
3. Therefore, we may sacrifice the substantive justice of outcomes for the sake of the intrinsic procedural justice of democracy.

My target here is premise 1.

4. The failure of the argument from individual autonomy

There are two ways in which one might defend the democratic right to do injustice on the basis of individual autonomy. Firstly, one might argue that autonomous choice is intrinsically valuable. If one chooses to do x autonomously, then it is at least *pro tanto* valuable and people have a corresponding *pro tanto* reason not to prevent people x-ing. Secondly, one might argue that even if autonomously chosen injustice is not intrinsically valuable, we nevertheless have reason not to prevent people doing injustice because if they choose the just option, their action will be more autonomous by virtue of the fact that they had the opportunity to choose the unjust option. I will argue that neither of these arguments succeeds.

Content-neutral and substantive theories

Different theories of autonomy imply different things about whether one can autonomously choose to do injustice. 'Content-neutral' theories of autonomy hold that an action is autonomous if it has been subject to an appropriate process of critical reflection.[17] They determine criteria by which an action can be said to be autonomous that do not depend on the intrinsic value of the action itself or the objective external reasons that an agent has to perform it. 'Substantive' theories of autonomy set more onerous requirements on autonomy. To be autonomous, agents must make choices which are independently worth making regardless of the agent's preferences and desires. Substantive theories place normative constraints on what agents may autonomously choose.

Some content-neutral theories are strongly internalist in the sense that they make autonomy depend on the internal relation between an agent's desires or preferences. What matters for autonomy is identification or rational coherence between the desires and preferences of an agent at a particular time. One of the most prominent internalist theories is the hierarchical theory of autonomy, which was initially defended by Harry Frankfurt and Gerald Dworkin, which holds that one is autonomous only if one's first-order desires are congruent with, identified with or are rationally criticised by, one's higher-order desires.[18] An agent's authentic self is constituted by her higher-order desires regarding which of her first-order desires move her to act. For instance, if one has a higher-order desire not to smoke, but a first-order addictive compulsive desire to smoke which moves

[17] For the distinction between content-neutral and substantive theories see Jane Dryden, "Autonomy," *Internet Encyclopedia of Philosophy*, 2010, http://www.iep.utm.edu/autonomy/#SSH2ai.

[18] Gerald Dworkin, "Autonomy and Behavior Control," *Hastings Center Report* 6, no. 1 (February 1, 1976): 23–28; Harry G. Frankfurt, *The Importance of What We Care about : Philosophical Essays* (Cambridge: Cambridge University Press, 1998). Michael Bratman proposes a rival internalist account in Michael Bratman, *Structures of Agency : Essays* (Oxford ; New York: Oxford University Press, 2007).

one to smoke, then one is not autonomous. One's higher-order desires must approve or identify with one's lower-order desires for one to be autonomous. These theories place no substantive constraints on what one may autonomously do. If someone has a higher-order desire which is congruent with a first-order desire to commit injustice, then one can autonomously commit injustice.

A prominent externalist but content-neutral rival to these theories has been defended by John Christman. Christman argues that in order to assess an agent's autonomy, we must ask '...if the person would have, or did resist the adoption of a value or desire, and for what reasons'.[19] An agent will fail to be autonomous if she is unable to resist adopting a certain motive, or if she is unable to judge the process by which she came to have the motive in a 'minimally rational',[20] and 'self-aware'[21] manner. For Christman, minimal rationality requires that one's judgemental deliberation must be consistent, and free from any other minimal logical failing, whilst being self-aware of the processes of one's belief formation requires that one does not deceive oneself about the nature of these processes. Even though this theory is externalist in the sense that autonomy does not depend entirely on the relation between one's present desires and preferences, it still allows people to autonomously choose to do injustice. If someone did not resist, or would not have resisted, being a murderer on the basis of a minimally rational assessment of the other desires or preferences they already have, then one autonomously chose to be a murderer.

Substantive theories of autonomy place normative constraints on what agents may autonomously choose. As George Sher, says, an autonomous choice originates in the

[19] Christman, "Autonomy and Personal History," 10. Mele defends a similar account Alfred R. Mele, *Autonomous Agents [electronic Resource] : From Self-Control to Autonomy.* (New York: Oxford University Press, 2001).

[20] Christman, "Autonomy and Personal History," 12.

[21] Ibid., 16–17.

agent's own will *on the basis of good reasons*.[22] People do not have good reasons to perpetrate unjust acts such as murder, rape, theft or minor physical assault. Therefore, they cannot autonomously perform these actions.

The value of autonomous choice

The first argument from autonomy holds that people have the democratic right to do injustice provided the injustice is autonomously chosen. The autonomous choice of injustice is intrinsically valuable. This grounds a non-derivative democratic right to do injustice. The theory of autonomy we accept will in part determine whether we think that autonomous choice in general is always valuable.[23] According to substantive theories, the argument cannot get off the ground. People cannot autonomously choose to do injustice because people have objective external reasons not to do injustice. So, the substantive theory cannot support this line of argument.

However, one version of the substantive theory says that people act autonomously if they act on the basis of what they have subjective epistemic reason to do. George Sher argues that if someone is unavoidably ignorant of the fact that they require surgery, then their choice not to undergo surgery is still autonomous because they had subjective epistemic reason to make that choice.[24] Since this brings epistemic complexity into the

[22] Sher, *Beyond Neutrality*, 48; Sarah Buss, "Autonomy Reconsidered," *Midwest Studies In Philosophy* 19, no. 1 (September 1, 1994): 95–121; Wall, *Liberalism, Perfectionism and Restraint*, chap. 6 and 7; Raz, *The Morality of Freedom*, 1986, chap. 14.

[23] Some philosophers have denied that personal autonomy on any conception is valuable. See Torbjörn Tännsjö, "Against Personal Autonomy:," *International Journal of Applied Philosophy* 4, no. 3 (1989): 45–56, doi:10.5840/ijap19894317.

[24] Sher, *Beyond Neutrality*, 53.

mix, I will discuss this argument in Chapter 5, which deals with epistemic complexity and reasonable disagreement about the requirements of justice.

The content-neutral theory says that people can autonomously choose to do injustice provided their desires and internal rationality are in order. The response to these theories is that, on this theory of autonomy, autonomous choice is not always valuable. Intuitively, it seems like the fact that someone has chosen to do something unjust autonomously, is, if anything, worse than if they had chosen to do it non-autonomously.[25] We usually think it worse that someone murders after reasoning and calculation on the basis of their authentic desires, than if they murder on the basis of a reckless momentary impulse. The same goes for more trivial injustices, such as minor physical assault and theft. Autonomous choice does not enhance the value of unjust acts. Therefore, the value of autonomously chosen injustices cannot provide us with reasons not to prevent people from committing injustices. The correct thing to say to someone with an authentic desire to immiserate others is: so much for your authentic desire. This is not to say that autonomous choice is never valuable. Rather, I am making the limited claim that autonomous choice of *injustice* is never valuable.

The importance of the opportunity to do injustice

It might appear that the substantive theory is a non-starter for the purposes of the proponent of the democratic right to do injustice. However, this might be too quick. Ori Herstein has defended the liberal right to do wrong on the basis that even though (autonomously) choosing a bad option is not valuable, there are nevertheless reasons of

[25] Raz, *The Morality of Freedom*, 1986, 380.

autonomy not to prevent people from choosing a bad option.[26] If someone does go on to autonomously choose the just option having had the opportunity to choose the unjust option, then they are more autonomous because the choice is more a product of their authentic desires or will. If they were coercively or forcibly prevented from choosing an unjust option, then their choice of the just option would be less a product of their authentic self. They would not control their own life, but rather the coercer or intervener would, to some extent, control it for them. It might still be granted that substantive rights can sometimes trump or outweigh these rights to do wrong, but people still have *pro tanto* rights to do injustice.

Herstein's argument can work with either theory of autonomy. However, the argument proves too much because it entails the right to do severe injustices such as rape and murder. If his argument is correct, then depriving someone of the opportunity to commit rape is detrimental to the autonomy of agents who would not have committed rape, and this loss of autonomy provide a *pro tanto* reason not to prevent rape even if the costs of prevention are low. Since we do not have *pro tanto* reason not to prevent rape when the costs are low, the argument cannot ground the right to do injustice.

Herstein's argument must, then, be in error. The explanation of this is that one of its premises is false. If I prevent someone from committing an injustice, but my prevention had no impact on what they chose to do, then my prevention does not undermine their autonomy. Suppose I threaten moral citizen Gary by saying that if he tries to rape Laura, then I will physically punish him. Gary has no desire to rape Laura, does not plan to do so and would not have raped her regardless of my threat. If so, then my threat does not coerce

[26] Herstein, "Defending the Right To Do Wrong." It is not clear whether Herstein means this to be a defence of the right to do *injustice*, as opposed to merely the right to do non-unjust wrongs.

him and does not undermine his autonomy.[27] For a threat to coerce Gary, the threat would have to have caused Gary to choose what he chose.[28]

The same goes for other possible means of prevention that do not involve threatening. For example, I might prevent others from taking the means of subsistence from Laura by taking her basket of food and temporarily driving off with it. This does not involve coercion or force, but it is a way to prevent a substantive injustice. For those who do not desire to steal Laura's food, my act does not undermine their autonomy. If my means of prevention is not the reason the agent chose not to do the injustice, then the agent's autonomy is not undermined by the prevention. Thus, Herstein's defence of the right to do wrong fails. It cannot be adapted to defend the democratic right to do injustice.

It may be noted that my argument has the implication that if someone is deprived of all options bar one and this has no impact on what they would have chosen anyway, then they are still autonomous. I am happy to bite this bullet. Many theories of autonomy argue that an autonomous agent must have an adequate range of options.[29] But this requirement is put forward as though it is an implication of the ideal of a life of uncoerced choices. Here is Raz for example:

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[27] I was first put on to this point by Richard J. Arneson, "Do Patriotic Ties Limit Global Justice Duties?," *The Journal of Ethics* 9, no. 1–2 (March 1, 2005): 146ff.

[28] See Nozick's classic account of coercion at Robert Nozick, "Coercion," in *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel*, ed. Sidney Morgenbesser, Patrick Suppes, and Morton White (New York: St Martin's Press, 1969), 440–72. See also for example Raz, *The Morality of Freedom*, 1986, 148ff; G. Lamond, "The Coerciveness of Law," *Oxford Journal of Legal Studies* 20, no. 1 (January 1, 2000): 43–44.

[29] See for example Raz, *The Morality of Freedom*, 1986, 373ff; Wall, *Liberalism, Perfectionism and Restraint*, 140.

> "[To] be autonomous a person must not only be given a choice but he must be given an adequate range of choices. A person whose every decision is extracted from him by coercion is not an autonomous person."[30]

The second sentence is a mild non-sequitur from the first. As we have seen, depriving someone of options need not coerce them. So, it is not true that depriving someone of options is autonomy-reducing on the basis that it is coercive. What it does do is deprive people of negative freedom. This might be valuable, but its value, in this case, is not to do with autonomy. Practically of course, depriving someone of all options bar one is *very likely* to reduce people's autonomy simply because it is difficult to know people's preferences and desires. If the state deprives me of the option of doing anything other than political theory and I, unbeknownst to them, autonomously desire to be a freehand tool grinder once I hand in my thesis, then they have coercively reduced my autonomy. But this is a contingent fact, not a necessary property of the fact that I was deprived of options. I see no reason from within the wider motivations of any theory of autonomy to accept that reducing options necessarily reduces autonomy.

5. Group autonomy and self-determination

The intrinsic proceduralist arguments I have considered thus far have been arguments for individual democratic rights. However, some people have tried to defend the IPJ of democracy on the basis of group rights. One might do this in two ways. The first relies on what Michael Hartney has called 'value individualism'.[31] This is the claim that only the lives of individual human beings have ultimate value and that group rights are justified by

[30] Raz, *The Morality of Freedom*, 1986, 373.

[31] Michael Hartney, "Some Confusions Concerning Collective Rights," *Canadian Journal of Law and Jurisprudence* 4 (1991): 297.

reference to the good of individuals.[32] On value individualism, individual interests can ground a group right to self-determination. Individuals might have interests in their group having the right to self-determination, but these interests by themselves do not generate individual rights. Thus, a group can have a right, without the individual members of that group having a right. The second way to defend the group right to self-determination is by appealing to what Hartney calls 'value collectivism'.[33] This is the view that a collective entity can have value independently of its contribution to the well-being, broadly construed, of individual human beings. On this view, groups can have rights and moral standing regardless of how well they serve the rights *or interests* of individual members of the group.

As I said in Chapter 1, I am interested primarily in nonconsequentialist defences of democracy. So, I want to allow that things other than value can determine the rights people have. Thus, I want to leave room for deontological analogues of Hartney's terms, which we might call 'deontic collectivism' and 'deontic individualism'.

I will now set out how these two arguments go in their most plausible form. I will argue that arguments from group autonomy and self-determination are unpromising.

Group rights to self-determination

Many philosophers have argued that groups can have a right to self-determination, even if the individual members of the group do not each have rights to self-determination. Joseph Raz's influential 'interest theory' of group rights holds that groups can have a right to x even if each individual member of that group on his own does not have the right to x.

[32] I think a more plausible form of value collectivism or value individualism makes would make reference to the fundamental importance of non-human animals as well.

[33] Hartney, "Some Confusions Concerning Collective Rights," 297.

Hence, showing that individuals do not have non-derivative rights to self-determination if it produces substantive injustice, is not sufficient to show that *groups* do not a non-derivative group right to cause injustice.

Raz's general definition of a right is as follows:

> "'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."[34]

Raz argues that the interest theory implies that groups can have rights. He says that the following conditions exist for a group to have a collective right:

> "First, it exists because an aspect of the interests of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are the interests of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group. Thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty."[35]

For Raz, it is possible for a group to have a right even if the interest of no single member of the group by itself is sufficient to ground a right. Thus, it might be the case that each individual has an interest in being part of a self-determining group, even though the interest of each individual is not sufficient to justify holding other persons subject to a duty. However, if there are a sufficient number of individuals in a group with an interest in self-determination that would be sufficient to justify a duty on the part of others towards

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[34] Raz, *The Morality of Freedom*, 1986, 166.

[35] Ibid., 208. This is not a universally accepted formulation of the interest theory's implications for group rights, but most of the main features are widely accepted by proponents of the interest theory of rights. See Denise Réaume, "Individuals, Groups, and Rights to Public Goods," *The University of Toronto Law Journal* 38, no. 1 (January 1, 1988): 1–27.

that group. For instance, Yasser Arafat, as a Palestinian, had an interest in self-determination for Palestinians. But his interest alone is not sufficient to ground a duty on the part of others to respect Palestine's self-determination because such duties impose large costs on others.[36] However, the interests of Palestinians taken collectively might be sufficient to justify the imposition of duties on the part of others. Despite the fact that Raz believes that groups can have rights, he still appeals to some form of value individualism.[37] He grounds the group right in the service it provides to individuals.

The first thing to point out about this argument is that it is not clear that a group right to self-determination requires that the group make decisions *democratically*. For example, David Miller argues that nations can be self-determining and held responsible for the actions of their government even if they are run by an autocratic elite drawn from within the nation.[38] The rulers may hold beliefs which are responsive to the beliefs of those in society, even if they are not formally accountable to the people at large.[39] Moreover, a unitary state may give a group within that state an equal say in how that state is run without that group being self-determining.[40] So, a group's right to self-determination might not be satisfied by democracy within a single state, but might instead require that the group be allowed to secede. Nevertheless, the group right to self-determination is intimately tied up with responsiveness to the wills of the members of that group, and democracy seems likely in most cases to maximise that responsiveness.

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[36] Raz, *The Morality of Freedom*, 1986, 207.

[37] See Ibid., 208.

[38] David Miller, "Holding Nations Responsible," *Ethics* 114, no. 2 (January 1, 2004): 259–263.

[39] Ibid., 261.

[40] David Miller, "Group Rights, Human Rights and Citizenship," *European Journal of Philosophy* 10, no. 2 (2002): 185.

Secondly, many if not most defences of a group right to self-determination on the basis of the interest theory of rights are instrumentalist arguments. In Chapter 1, I discussed and rejected Raz's stipulation that a right which is not grounded in another right is a non-derivative or 'core' right.[41] In Raz's terms, group rights to things such as self-determination can be non-derivative because they might not be grounded either in individual rights or other group rights. Whether they are non-derivative in the sense I am concerned with depends on whether they are justified by virtue of their contingent causal consequences. Many arguments for a group right to self-determination ground that right in its service of other morally worthwhile goals. For example, Margalit and Raz defend a group right to self-determination on the basis of the contribution the right makes to the wellbeing, options and opportunities of the members of the group.[42] Group sovereignty is justified because it enables the group to conduct its own affairs in a way conducive to its prosperity.[43] Thus, even though Margalit and Raz do not try to ground the group right in individual rights, their argument is still an instrumentalist one because the group right is justified by its service of important individual interests, which only bear on the substantive quality of outcomes.

Can the interest theory ground a non-derivative group right to self-determination? Yes, in principle. The argument would have to be that the members of the group have an interest in self-determination regardless of the causal consequences of self-determination.

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[41] Raz, *The Morality of Freedom*, 1986, 168.

[42] Avishai Margalit and Joseph Raz, "National Self-Determination," *The Journal of Philosophy* 87, no. 9 (September 1, 1990): 439–61. See also for example, Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989); Michael Freeman, "Are There Collective Human Rights?," *Political Studies* 43 (1995): 25–40.

[43] Margalit and Raz, "National Self-Determination."

The interest which grounds the right must be 'non-derivative' in the sense that people have this interest regardless of its contingent causal consequences.

The argument in Chapter 2 is sufficient to deal with the argument from the interest theory. People do not have non-derivative interests in doing substantive injustice, whether they be severe injustices such as rape, or relatively trivial ones, such as stealing money from the sufficiently well-off worst-off. It might be true in some cases that the performance of injustice is in someone's interest because they gain pleasure or material prosperity from it. But if this is true, it shows that people have a *derivative* interest in committing injustice.

Group rights to self-determination grounded in value collectivism

Some philosophers have argued that group autonomy is valuable or that groups have a right to autonomy, regardless of how well that right serves individual members or non-members of the group. This position is relatively unpopular. Michael McDonald accepts that democracy might embody individual self-determination or autonomy in some way but says there is more to the importance of democracy than that:

> "To be sure, meaningful participation in autonomous groups can be essential to individual autonomy, and so one might, as Kymlicka does, defend group rights as a good way of enhancing individual autonomy. This, however, should not lead one to think that collective autonomy is valuable only as a means of enhancing individual autonomy. On my view, collective autonomy like individual autonomy is valuable in its own right; hence, one should not be valued simply as a means to the other."[44]

[44] Michael McDonald, "Should Communities Have Rights--Reflections on Liberal Individualism," *Canadian Journal of Law and Jurisprudence* 4 (1991): 236. Others who have appealed to a form of value collectivism which might be used to ground group rights include Larry May, *The Morality of Groups : Collective Responsibility, Group-Based Harm, and Corporate Rights* (Notre Dame, Ind: University of Notre Dame

Again, it should be pointed out that it is not clear whether McDonald thinks that a group is collectively autonomous only if it is democratic. For instance, he allows that religious groups like the Amish are collectively autonomous. It is not clear that the Amish or other minority religious groups are democratic. Still, it seems he must at least believe that if a candidate right-holder group is democratic, then it is collectively autonomous. So, McDonald's argument could be taken as a value or deontic collectivist defence of democracy.[45] What McDonald calls 'collective autonomy' is, according to him, valuable regardless of its relation to individual autonomy, or indeed any other individual ends. If McDonald's argument is sound, showing that individuals do not have rights to commit injustices or interests in committing injustices is not sufficient to show that groups do not have the right to commit substantive injustices.

We should be clear that it is not the case that communitarians must accept value collectivism. In fact, most communitarians defend the value of communities on the basis of the contribution they make to the well-being of individual members of the community.[46] Value collectivism sets itself apart by saying that there can be something valuable or morally important about a group over and above the value or moral importance of the individual members of that group.

Press, 1987), chap. 5; Vernon Van Dyke, "The Individual, the State, and Ethnic Communities in Political Theory," *World Politics* 29, no. 3 (April 1, 1977): 343–69; Dwight G. Newman, "Collective Interests and Collective Rights," *The American Journal of Jurisprudence* 49, no. 1 (January 1, 2004): 127–63.

[45] Note however that McDonald in various places actually appeals to the freedom of individuals in defence of the autonomy of the group of which they are a part. See for example is discussion of the Amish at McDonald, "Should Communities Have Rights?," 230.

[46] See for example Kymlicka, *Liberalism, Community and Culture*; Chandran Kukathas, "Are There Any Cultural Rights?," *Political Theory* 20, no. 1 (February 1, 1992): 105–39; Michael J. Sandel, "The Procedural Republic and the Unencumbered Self," *Political Theory* 12, no. 1 (February 1, 1984): 81–96.

Arguments which rely on value or deontic collectivism are problematic. Value and deontic collectivism are very controversial in contemporary political philosophy; most contemporary political philosophers believe in some form of value or deontic individualism. The basic reason for this is that a morally relevant analogy between individuals and groups seems to be lacking. McDonald writes:

> "Individuals are regarded as valuable because they are choosers and have interests. But so also do communities make choices and have values. Why not then treat communities as fundamental units of value as well?"[47]

McDonald is right that we do say that groups make choices and have interests and we say this regardless of whether the members of those groups make choices or have interests. We might say that the rise of the Internet is 'bad for' community chess clubs without it being bad for the members of the club. But that is a conditional judgement; it does not mean we are attributing intrinsic value to the club.[48] We do not know whether the decline of the club is morally bad until we know how it affects the interests of the members of the club or those who might be members of the club.[49] If no individual interests are damaged by the decline in the chess club, intuitively, it is difficult to see what is morally bad about that decline. In the same way, an act might be a 'good way' to complete a heinous crime.[50] Such judgements carry no weight in moral deliberation until they are connected with judgements about intrinsic value or about deontic significance.

The same point seems to hold for group autonomy. As Beitz says:

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[47] McDonald, "Should Communities Have Rights?," 237.

[48] Hartney, "Some Confusions Concerning Collective Rights," 298.

[49] See Christopher Heath Wellman, "The Paradox of Group Autonomy," *Social Philosophy and Policy* 20, no. 02 (2003): 275.

[50] Hartney, "Some Confusions Concerning Collective Rights," 298.

> "[Given] that states, unlike persons, lack the unity of consciousness and the rational will that constitute the identity of persons . . . [and are not] organic wholes, with the unity and integrity that attaches to persons qua persons . . . [it] should come as no surprise that this lack of analogy leads to a lack of analogy on the matter of autonomy."[51]

Groups simply seem to lack certain features of individuals which render the choices of individuals morally significant. It is counterintuitive to say that group autonomy is good or morally important regardless of how it impacts on the autonomy or other interests of any of the members of the group. Thus, value individualism and deontic individualism seem, *prima facie*, to be much more appealing than their collectivist counterparts. There is a strong presumption against value collectivist defences of democracy

Secondly, even accepting that value collectivism is true, it cannot ground the democratic right to do injustice. Proponents of value collectivist defences of group rights typically appeal to group identity to ground the group right to self-determination. But the appeal to group identity clearly cannot ground a non-derivative group right to do injustice. The fact that the droogs all recognise one another as sharing a unique identity has no bearing whatsoever on whether they have non-derivative rights to kill Mildred. East End gangsters Ronnie and Reggie Kray probably recognised one another as having some kind of shared identity, but it is absurd to say that this gave them a non-derivative group right to kill people or to extort people who are above the level of sufficiency. In sum, arguments from group autonomy do not threaten the case for the primacy of substantive justice.

[51] Charles R. Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1999), 81. See also Jan Narveson, "Collective Rights," *Canadian Journal of Law and Jurisprudence* 4 (1991): 329–345.

Conclusion

Neither individual nor group autonomy can ground a non-derivative democratic right to cause substantive injustice. On substantive theories of autonomy, people cannot autonomously choose to do injustice because people do not have external reason to do injustice. On the content-neutral theory, one can autonomously choose to do injustice, but autonomous action, thus conceived, is not always valuable. People may well have an authentic and minimally rational desire to punch others, but the mere fact that the desire is an expression of their authentic self does not entail that we have any reason not to prevent them punching people. Moreover, it is false to say that a moral agent's autonomy is restricted by depriving them of the opportunity to do an unjust action. Threatening a just agent not to do injustice does not coerce that agent and does not undermine her autonomy.

Arguments for a group right to autonomy are also unpromising. Those that rely on value individualism are usually instrumentalist. They defend a group right to self-determination on the basis that it improves the well-being of individual members of the group. Intrinsic proceduralist versions of the argument are possible, but implausible. Arguments from value collectivism are even more doubtful. Value collectivism is rejected by the vast majority of philosophers. Even assuming that value collectivism is true, it is clearly wrong to say that groups have non-derivative rights to do injustice.

Part III

INTRINSIC PROCEDURALISM AND DISAGREEMENT

5

Intrinsic Proceduralism, Disagreement and Restricting the Truth

It is quite popular in democratic theory to argue that intrinsic proceduralism comes into its own when there is disagreement about what is the substantively correct outcome. I have not said much yet about disagreement. Indeed, many of my arguments have involved acts which no reasonable person could believe to be just. In this part of the thesis I will attempt to refute disagreement-based forms of intrinsic proceduralism, which I label 'Truth Restricting Intrinsic Proceduralism' (TRIP). TRIP is the only remaining way to defeat the POS. So, if TRIP fails, then substantive justice has primacy. In this chapter, I discuss and reject what I call the 'Reasonable View Theory' (RVT), which is a theory underlying many versions of TRIP. I then refute some prominent arguments for TRIP by Jeremy Waldron and Tom Christiano. I complete the case against TRIP in Chapter 6.

In section 1, I explain the basic structure of TRIP. In section 2, I define and reject RVT. In sections 3 and 4, I reject some arguments offered by Jeremy Waldron which attempt to refute instrumentalism by pointing to disagreement. In section 3, I examine and reject the argument that instrumentalism is self-defeating because it implies that we ought not to popularise it. In section 4, I argue that the mere fact of disagreement about substantive justice does not make it question-begging to appeal to the truth about substantive justice when justifying political procedures. In section 5, I discuss Tom Christiano's version of TRIP in depth and argue that his argument is in fact largely instrumentalist and does not restrict the extent to which we can appeal to the truth about substantive justice.

1. Truth Restricting Intrinsic Proceduralism

A number of philosophers have defended the view that when substantive justice is (reasonably) controversial we ought to retreat to the intrinsic justice of democracy. I will now set out some typical statements of that view.

Tom Christiano explains his version of TRIP in the following way:

> "Democratic decision-making is the unique way to publicly embody equality in collective decision-making under the circumstances of pervasive conscientious disagreement."[1]

For Christiano, democracy is intrinsically just when there is conscientious and informed disagreement about the substantive justice of outcomes.[2] There are some substantive outcomes – liberal rights and an economic minimum – on which we can achieve agreement and which may be used to justify political procedures. But provided these things are protected, democracy is an intrinsically just way to decide on matters of policy.

> "What I am going to argue is that the only standards on which we can achieve agreement in the egalitarian standpoint are the principles of democracy, liberal rights, and an economic minimum."[3]

In Christiano's view, all conscientious and informed people agree on the liberal rights and the economic minimum, but for other matters of substantive justice, there is a great deal of conscientious and informed disagreement. Democracy is an intrinsically just way to make political decisions about matters which are controversial in this way.

Christiano's appeal to the importance of disagreement sits outside the tradition of Public Justification Liberalism (PJL). According to proponents of public justification,

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[1] Christiano, *The Constitution of Equality*, 75. Other proponents not mentioned here include Gaus, *Justificatory Liberalism*; Griffin, "Democracy as a Non–Instrumentally Just Procedure," 2003; Buchanan, "Political Legitimacy and Democracy," July 1, 2002.

[2] Christiano, *The Constitution of Equality*, 76.

[3] Ibid., 72.

laws, coercive acts or decisions must be reasonably acceptable to those subject to those laws, coercive acts or decisions. Some philosophers have defended TRIP from within this framework. For example, Laura Valentini argues for the following principle:

> "Democracy is what equal respect (procedurally) requires when there is thick reasonable disagreement about what equal respect (substantively) requires."[4]

(I will discuss the meaning of 'thick' and 'thin' reasonable disagreement in more depth in Chapter 6.) Valentini argues that there are some rights which must receive constitutional protection 'thus removing them from the democratic process'.

> "Although what rights count as constitutional is to some extent controversial, we can plausibly assume that there are some core rights without which a society cannot claim to express equal respect for its citizens."[5]

However, beyond these constitutional essentials, democracy is an intrinsically just way to decide on law and policy because there is reasonable disagreement about these matters:

> "Indeed, beyond constitutional constraints, an appeal to equal respect *qua* mutual justifiability is insufficient conclusively to determine which laws and policies are just… When it comes to matters falling outside the scope of the constitution – such as the legitimate extent of redistributive taxation – citizens, as well as political theorists (cf. Rawls v. Dworkin v. Sen) disagree, and we have no guarantee that democratic majorities will always identify the right answer."[6]

For Valentini, on these contentious matters, democracy should hold sway.

Thus, TRIP may be defined as follows:

[4] Valentini, "Justice, Disagreement and Democracy," 193.

[5] Ibid., 180.

[6] Ibid.

> *Truth Restricting Intrinsic Proceduralism* (TRIP) – People have equal non-derivative democratic rights to decide on matters which are the subject of reasonable, conscientious or informed disagreement.

TRIP is inconsistent with the POS because in some cases it will be reasonably contentious whether a law is substantively just, even though it is in fact substantively unjust. Therefore, if TRIP is true, people have democratic rights to produce laws which are in fact substantively unjust.

2. The Primacy of Substance and reasonable disagreement

In my argument for the POS in Chapter 2, many of the examples I used involved obvious substantive injustices committed by capricious and immoral gangs. It might be argued that the intuitive phenomena are different when the gang members are in some way reasonable. Many versions of TRIP appeal to something like the following theory:

> *Reasonable Views Theory* (RVT) – if a person's view of justice is reasonable, then they have a non-derivative claim right to cause that view to be imposed.

Here, I understand reasonableness in a purely epistemic way, so that it is not associated with Public Justification Liberalism. A reasonable person does not make glaring epistemic errors and is sufficiently competent at forming moral and empirical beliefs. My conception of reasonableness has no substantive content built in. I do not stipulate that all reasonable people must accept the existence of rights, for example, because there are many epistemically reasonable consequentialists. Reasonable people can be wrong and so can impose false views and thereby cause injustice. Indeed, they can be *badly* wrong. There is

an enormous difference between utilitarianism and Frances Kamm's nonconsequentialism, for example, even though neither is the product of glaring epistemic errors and so both are epistemically reasonable. The basic thrust behind this point will become important in Chapter 6. People can be reasonable but wrong and so if RVT is true, they have the right to do injustice.

RVT is different to TRIP for two reasons. Firstly, TRIP allows that people have the right to impose their view about justice, even if they hold it for bad reasons, provided the view itself is reasonably contentious. Secondly, RVT implies TRIP only if all adults have reasonable views about politics.

There are two possible ways to defend RVT. As I argued in Chapter 3, saying that RVT is in some way a requirement of equal respect is simply to assert that RVT is true. It is a way to assert an intuitive judgement in favour of RVT. The other way to defend RVT would be to appeal to autonomy. I mentioned in Chapter 4 that on one variant of the substantive theory of autonomy, people are autonomous only if they act in accordance with what they have subjective epistemic reason to do. Later in this section, I discuss this as a possible defence of RVT, and as a theory in its own right.

I do not attribute RVT to any particular philosopher. Certain aspects of it are, however, shared by most forms of TRIP. So, most forms of TRIP are subject to the objections I make to RVT. It is important to point out that even if RVT is true, it cannot prove the right to democratic discretion over distributive justice defended by many philosophers. As I showed in Chapter 2, that discretionary right gives people the right to impose unreasonable and capricious views.

In this section, I shall argue that RVT is subject to a number of problems. In Chapter 6, I discuss a further problem with all forms of TRIP, which is that they imply the democratic right to do severe substantive injustice.

Reasonable empirical beliefs

People can have reasonable but false beliefs about empirical facts. On RVT, people have the right to impose such beliefs. This is very counterintuitive. Suppose that the majority support government funding for a small industrial project. They believe that the benefits of the project outweigh the costs. There is evidence showing that the project will produce pollution which, after a few years gives everyone in the town a headache for a month. This cost makes the project substantively unjust. However, due to an industry conspiracy, this evidence has been destroyed or manipulated. The project can be prevented from causing headaches by turning a filtration device on, which slightly increases the unit cost of production. The majority explicitly favour not turning the filter on as it would slightly increase costs and, so far as they know, produce no benefits. Because the manipulated evidence is so convincing, the majority's belief that they ought to fund the project is reasonable: the way they form the belief is not epistemically flawed. Suppose that I have privileged information and know the true costs of the project and can turn the filter on in secret and no-one would realise. Would I be permitted to turn the filter on? It seems clear that the answer is 'yes'.

If, however, RVT is true, then we have reasons owed to the majority not to turn the filter on, even if the costs are low. Doing so deprives them of influence which is rightfully theirs. This is not true. The point is not that the importance of influence is outweighed by the substantive rights at stake. The substantive rights are quite trivial, after all. Nevertheless, I am permitted to thwart the majority if the costs of prevention are low. So, people cannot have a claim right to impose their reasonable view.

In the above counterexample to RVT, agents are in different epistemic situations due to the availability of information. The majority was reasonable, but clearly wrong, given what I knew. However, if they were made aware of the information, they would have

agreed with me. But this need not always happen when the pertinent facts are available. The notion of reasonableness is in part relativised to the capacities of ordinary people as we find them today. People are not unreasonable because they fall short of superintelligence. Consider the industrial project again. This time all the information is available to everyone but it is extremely complex. The majority again explicitly and reasonably demand the filter not be turned on. Only Nick, who is extremely intelligent and is able to draw out the logical consequences of all the available evidence and available theories of chemistry and biology, knows that the filter ought to be turned on. Again, he can turn the filter on in secret, no-one notices and the other costs are minimal. It seems clear that he is permitted to turn the filter on and that he does not wrong the majority by doing so, even though they are reasonable. This is true even though the majority and Nick have the same information available to them. They have different beliefs simply because Nick is better at reasoning than them.

Intuitively, even though people hold reasonable false empirical beliefs, this does not provide a reason not to prevent them doing injustice. Even though they are not capricious, as the gangs in Chapter 2 were, they do not have a right that I not prevent a substantive injustice which they cause. It is true that we view the wrongdoers differently in this case, but this is because their reasonableness bears on their blameworthiness, not on their right to do injustice. I return to this point at the end of this section.

Reasonable moral beliefs

It might be argued that the problem here is that the beliefs are about empirical propositions rather than moral propositions. RVT can be revised to say that each person has the right to impose their reasonable moral beliefs, but not the right to impose their reasonable

empirical beliefs. Tom Christiano, for example, believes that there are no norms of IPJ precluding us from using experts to determine means to democratically chosen ends.[7]

Before we assess the merits of this proposal, it should be pointed out that it gives a very large scope to instrumentalist reasons. Empirical factors have an enormous impact on policy decisions. If we allow experts to subvert the expressed democratic will where the majority have mistaken empirical beliefs, we must let experts subvert the democratic will with regard to almost all laws. The public are systematically ill-informed about empirical matters which bear on important issues of policy. For example, 26% of British citizens believe that foreign aid is one of the top 2-3 items of British government expenditure, when it in fact makes up 1.1% of government expenditure.[8] Suppose the British want foreign aid to be 1.1% of the government budget but vote for it to be cut on the basis of their mistaken beliefs about the scale of foreign aid. On Christiano's view, we would be permitted to prevent this policy, given public ignorance. Similarly, the British public believe that 31% of the population are immigrants when in fact the figure is 13%.[9] Suppose that the public wishes the percentage of immigrants to be 13% but on the basis of their false empirical belief demands that immigration be drastically curtailed. Again, on Christiano's view, we would be permitted to prevent this policy. We would, for instance, be permitted to prevent the anti-immigration parties from imposing their view, even if the majority vote for them. Note that expert control of means to democratically preferred ends is only one solution to the problem of popular error on empirical facts. Robin Hanson has

[7] Christiano, *The Constitution of Equality*, 120. See also for example Valentini, "Justice, Disagreement and Democracy."

[8] https://www.ipsos-mori.com/researchpublications/researcharchive/3188/Perceptions-are-not-reality-the-top-10-we-get-wrong.aspx

[9] https://www.ipsos-mori.com/researchpublications/researcharchive/3188/Perceptions-are-not-reality-the-top-10-we-get-wrong.aspx#_edn8

recently argued that we should turn decisions about the means to democratically chosen ends over to prediction markets, where possible.[10]

Theories like Christiano's give an enormous scope to instrumentalist reasons, which could be used to justify political inequality. A theory which allows experts or markets to choose means to democratically preferred ends should be classed as strongly instrumentalist. This is another way in which proponents of the hybrid of intrinsic proceduralism and instrumentalism over-emphasise the intrinsic proceduralist part of their theory.

We can now turn to the possible justification for revising RVT so that it says that people may only impose their reasonable moral beliefs. One tempting justification for this position is that if the majority reasonably disagree with us, then we ought to reduce our credence in our moral view.[11] Or it might be argued that in the moral case, special knowledge, as possessed by myself and Nick in the industrial project example, is not possible.

Aside from whether these claims are true, they are not implied by RVT and RVT does not imply them. RVT says that we have *moral* reasons not to prevent reasonable people imposing their view even if we *know* that they are wrong and even if the costs are low. Therefore, RVT is about the moral, not the epistemic, reasons that apply to us with regard to reasonable people. RVT is not about moral scepticism, normative uncertainty or the epistemic response to peer disagreement.

[10] Robin Hanson, "Shall We Vote on Values, But Bet on Beliefs?," *Journal of Political Philosophy* 21, no. 2 (June 1, 2013): 151–78, doi:10.1111/jopp.12008.

[11] See David Enoch, "Not Just a Truthometer: Taking Oneself Seriously (but Not Too Seriously) in Cases of Peer Disagreement," *Mind* 119, no. 476 (October 1, 2010): 953–97, doi:10.1093/mind/fzq070.

One way to respond to the fact that someone reasonably believes that *p* is to consider *p* and their argument for it. RVT does not ask us to do this. It only asks us to give consideration to the fact that someone reasonably believes that *p*. This is crucially different to giving consideration to *p*, which they reasonably believe.[12] The following example explains the difference. Suppose that Anita reasonably believes that bullfighting ought to be illegal on the basis that animal welfare matters. One way to respond to this would be to consider Anita's argument for her conclusion and consider whether her conclusion is true or probable. We might agree with Anita and then we would acknowledge that we are under duties owed to bulls not to kill them for sport. This is one way to respond to the fact that intelligent people disagree with you. RVT, by contrast, says that we have duties *owed to Anita* to allow her to impose her view. Anita's belief is about bulls and not Anita, so RVT is not focused on her belief in the same way; it is focused on the fact that she believes something, not on the content of her belief. RVT demands that we give consideration to the fact that Anita reasonably believes that killing bulls for sport is wrong, not to the proposition that killing bulls for sport is wrong (which Anita reasonably believes).

This suggests that RVT has misunderstood the way we ought *morally* to respond to the fact that someone reasonably believes something. Suppose that Anita and other reasonable animal lovers comprise a majority. The animal lovers believe that we ought to ban bullfighting because it wrongs bulls. They believe that if Ernest carries on being a matador, he fails to fulfil the duties he has towards bulls. RVT, by contrast, says that by carrying on as a matador, Ernest fails to fulfil the duties he has towards the animal lovers. From the point of view of the animal lovers, RVT is a particularly strange form of speciesism which claims to respect their reasonableness whilst being totally indifferent to what they reasonably believe, which is that animals matter. In general, RVT gives people a

[12] See Raz, "Disagreement in Politics"; Enoch, "Not Just a Truthometer."

certain moral status by virtue of their reasonableness, whilst also being completely indifferent to the content of what people reasonably believe. If we have any obligations to reasonable people *qua* reasonable people, then we have an obligation to take seriously the content of what they reasonably believe about justice. We do not have an obligation to take seriously the fact that they have reasonable beliefs about justice.

This argument also implies that RVT cannot be used to defend a form of intrinsic proceduralism which says that we have reasons of IPJ to use democracy when substantive justice is not at stake.[13] The reason for this is that if the current argument succeeds, then RVT cannot ground people's claim rights to impose their reasonable *and correct* views about substantive justice. This does not show that pure instrumentalism is true. Rather, it shows that one possible argument against pure instrumentalism does not succeed: there might be other sound arguments, not based in RVT, against pure instrumentalism.

It might be thought that this puts some pressure on my acceptance of the right to do non-unjust wrongs. My thesis is supposed to be focused on whether people have democratic rights to violate substantive rights, but the above argument refutes one argument which could show that people have democratic rights to act as they wish, provided they do not violate substantive rights. But a theory like RVT is not used to defend the right to do non-unjust wrongs anyway. The non-unjust wrongs I considered in Chapter 2 included the failure to ever give blood and the failure to donate money to famine relief. No-one defends the proposition that people have the right to do these things because they reasonably believe that it is morally acceptable to fail to give to famine relief. People morally ought to give to famine relief and reasonable people ought to accept this. If people have a right to perform these omissive non-unjust wrongs, the right must be grounded in something other than the reasonableness of a belief in the rectitude of the wrong action.

[13] I said in Chapter 2 that I would remain neutral on this kind of intrinsic proceduralism.

Therefore, my criticism of RVT does not put me under pressure to deny the right to do non-unjust wrongs. Moreover, this again suggests that there might be some other argument which establishes that people have non-derivative democratic rights provided substantive justice is not at stake. Whatever arguments ground the right to do non-unjust wrongs might also ground equal political rights to do non-unjust wrongs.

We can now return to the question of how we might sustain the proposed revision to RVT which says that people have the right to impose reasonable but wrong *moral* beliefs but not reasonable but wrong empirical beliefs. It is very difficult to see how one can sustain this asymmetry if moral realism is true, which is accepted by intrinsic proceduralists and which I am entitled to assume in this thesis. As we have seen, RVT says that we have moral reasons not to interfere with the imposition of reasonable beliefs. The unrevised version of RVT said there was something special about the process of belief-formation which gives people the right to impose a belief produced by that process; as long as the belief is produced in a reasonable way, people are under duties not to prevent its imposition. Many of the processes of moral belief-formation are the same as the processes of empirical belief-formation. If propositions can be true, then the laws of logic apply between those propositions. If people misapply these laws or do not apply them at all, then they may be led to have false beliefs. This is true of both moral and empirical beliefs. As political philosophers, we are aware of this, as we constantly try to pick out logical errors in opponent's views. So, I do not see how one could discount false reasonable empirical beliefs which are the product of these kinds of errors, but not discount false moral beliefs which are the product of the same kinds of errors.

I argued above that superintelligent Nick is permitted to thwart the will of the majority who reasonably believe an empirical falsehood. The majority do not lack information in this case, they just fail to draw the correct but often subtle logical links

between propositions about the evidence and propositions about theories. This could be true with regard to empirical *and* moral propositions. It is hard to see why errors produced in exactly the same way would be treated differently from the point of view of a theory which gives a special role to belief-formation. Indeed, RVT treats *un*reasonable moral and empirical beliefs in exactly the same way. Unreasonable beliefs are ruled out by virtue of the quality of the process of belief-formation alone. This deepens the ad hoc nature of the revised version of RVT.

It is often said that there is less reasonable disagreement about empirical facts than there is about moral facts. This may be true within empirical inquiry itself. What many proponents of these kinds of arguments have not recognised is that many hotly disputed philosophical questions bear on empirical matters. For example, many philosophers deny the rationality of induction and so deny the rationality of believing in any scientific theory. Indeed, at one point in the 20th century, possibly a majority of philosophers denied the rationality of induction.[14] There is, then, reasonable disagreement about whether we have reason to believe scientific hypotheses such as that smoking increases the risk of lung cancer. There is also reasonable philosophical disagreement about what is the correct logic.[15] Since logical rules apply between scientific propositions, this debate has implications for which scientific theories are true. Indeed, the vast majority of philosophers working in vagueness do not believe classical logic, even though it is used *a priori* in science and mathematics.[16] There are a host of reasonable philosophical disagreements with a bearing on empirical matters.

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[14] D. C. Stove, *Scientific Irrationalism : Origins of a Postmodern Cult* (New Brunswick, NJ ; London: Transaction, 2001).

[15] Timothy Williamson, *Vagueness* (London: Routledge, 1994).

[16] Roy Sorensen, *Vagueness and Contradiction* (Oxford: Clarendon Press, 2001), 11.

One possible response is to say that all or nearly all philosophical beliefs which might produce empirical error are unreasonable. The problem with this is that the errors of reasoning of those who disagree about induction and about the correct logic are the same kinds of errors as would be debated in moral philosophy. The philosophical method in these cases is largely the same; it relies to a significant extent on logical criticism. The method in scientific inquiry itself is different to the philosophical method, but many philosophical disagreements have a direct bearing on scientific and empirical disputes. The point is that the proponent of the revised version of RVT will have a hard time explaining why we ought to rule out the myriad philosophical disagreements which bear on empirical matters, but not philosophical disagreements which bear on moral matters. In my view, we ought to move on in the face of widespread philosophical support for (in my opinion) false theories like inductive scepticism and deviant logic. This approach is not available to any theory which emphasises reasonable views in the way RVT does.

In the remainder of this chapter and the next, I look at various different defences of TRIP. None of them provide a good justification of why moral and empirical beliefs ought to be treated differently from the point of view of RVT or any version of TRIP.

If what I have said is true, then RVT is false and reasonable people do not have a claim right to impose false views. We can examine this by looking at examples of particular cases in which people have reasonable but false beliefs about justice which they try to impose. Suppose that a group of ten people is deciding how to distribute £100 between two people, Mary and Peter. Two reasonable moral theories differ about who is entitled to the £100. Six of the populace reasonably but wrongly believe that Mary is entitled to the £100 and vote for her to get it. On RVT, they all have the right to impose their view. Suppose Kevin knows that the majority is wrong and works in the department which distributes cheques. He can ensure that the cheque goes to Peter in secret and there

are no other costs of doing so. If I am right, then he is permitted to send the cheque to Peter.

RVT does not say that Kevin's act wrongs *Mary* in any way. Rather, it says that he wrongs *the six voters* by acting as he does. But intuitively, it is at least clear that he does not wrong the voters. When Kevin is deciding what to do, he ought to think about Peter and Mary, not the six voters. He ought to examine the best arguments for Mary's right to the money and the best arguments for Peter's right to it. Given that they are reasonable, this is also how the six voters approach the issue. They know that *their* rights are not at stake. RVT says that despite what they think, their rights are at stake. For this reason, RVT must be in error.

The best explanation for this mistake is given by my earlier argument about the confusion between *p* and people's reasonable belief that *p*. The voters' reasonable belief is not *about them* in any morally important way. But the same goes for those voters who reasonably *and correctly* believe that Peter *should* get the money. Their rights are not at stake in Kevin's decision. If so, this counts against RVT as an argument against pure instrumentalism. I grant that there might be other sound arguments against pure instrumentalism. Not all of my arguments against RVT imply that it cannot be used to attack pure instrumentalism. Part of my argument simply appeals to the intuition that we are permitted to prevent substantive injustice, even if people are reasonable. This is clear when the mistaken beliefs are empirical and, I have argued, it is difficult to see why the same would not be true when the beliefs are purely moral. Another argument, which I advance in Chapter 6, also does not rely on the argument advanced here.

The domain of democracy

It might be argued that the problem with the above example is that the six voters do not have skin in the game. They do not have the right to make the decision because it does not affect them. Many philosophers have suggested that people should have a democratic say only if a decision affects them, or will probably affect them, or will possibly affect them. As Robert Goodin says:

> "The democratic ideal ought ideally be to enfranchise "all affected interests." Understood in a suitably expansive "possibilistic" way, that would mean giving virtually everyone everywhere a vote on virtually everything decided anywhere."[17]

So, RVT should be revised so that it says that people have a right to impose their view only on matters which affect them. This does not allow RVT to avoid the case discussed above. The six voters are very likely to be affected by the decision about who gets the money. If Peter stuffs his money under his bed but Mary is a spendthrift, for example, then the money will move to different locations in the economy thereby affecting the six voters. For any of the democratically-endorsed injustices I have considered in this thesis, adding the feature that the decision could or will affect the majority makes no difference to the fact that people do not have the right to do those injustices. Goodin's ideal that everyone everywhere should have a vote on virtually anything decided anywhere, is extremely unappealing in the ideal and in practice.[18]

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[17] Robert E. Goodin, "Enfranchising All Affected Interests, and Its Alternatives," *Philosophy & Public Affairs* 35, no. 1 (January 1, 2007): 68, doi:10.1111/j.1088-4963.2007.00098.x. For a good overview of the issue (and a good defence of instrumentalism) see Ben Saunders, "Defining the Demos," *Politics, Philosophy & Economics* 11, no. 3 (August 1, 2012): 280–301.

[18] For instance, the principle entails each person's right to vote on when and with whom other people have sex.

One possible response to this is to suggest that people get a say when their *rights* are at stake in the decision.[19] This principle clearly cannot support RVT or any form of intrinsic proceduralism. In the aforementioned example, the rights of the six voters are not at stake. So, they would not get to vote even though they have a reasonable view. Moreover, even Mary wouldn't have a right to a say in the decision. After all, her rights are not at stake because she does not have a right to the money. Only Peter would have a right to decide what happens with the money because only he has a right to it.

A final possible version would say that each person has the right to impose their reasonable view when the decision concerns what they *reasonably believe* to be their rights. So, Kevin doesn't have duties to obey the majority because they cannot reasonably believe that their rights are at stake. This entails the non-existence of non-derivative democratic rights over a whole range of issues, including, most obviously, the treatment of moral patients such as the severely mentally disabled, children, animals and foetuses, and policies which affect future people. This drastically limits the scope of discretionary democratic rights.

But let's examine a case in which two sides reasonably believe their own rights are at stake. The red group reasonably believe that have right to £1000, but the blue group reasonably believe that they have a right to the £1000. The red group are wrong and the blue group are right and Christine knows this. The red group are in the majority and vote that they should receive the £1000. She can, at low cost, thwart the democratic will and ensure that the blue group get the money. In my view, she is permitted to ensure that the blue group get the money.

[19] Examples of this approach include Brighouse and Fleurbaey, "Democracy and Proportionality"; Saunders, "Defining the Demos."

The intuitions are necessarily more clouded in this case than they are in the Peter and Mary case. RVT says that Christine wrongs the red group because they have a right to influence over the outcome. She does not wrong them because she deprives them of money they are entitled to, even though they reasonably believe that they are entitled to it. This may explain any intuitions to the contrary about this example.

More importantly, it is unclear what the justification for this revised version of RVT is. Why should we accept that people have a right to impose their reasonable view provided they reasonably believe a decision affects their rights? The most obvious justification for a principle linking a person's substantive rights and their political power is that political power allows people to protect their substantive rights. This is not available to the proponent of RVT because it defends the right to political control on an instrumental basis. The intrinsic proceduralist thrust behind RVT is to do with people's agency, regardless of how well they choose. This concern is best satisfied by the unrevised version of RVT, but the unrevised RVT is, as I have argued, subject to numerous problems. I cannot think of any argument consistent with any plausible rationale for RVT which justifies the proposed proviso.

Autonomy and subjective epistemic reason

In Chapter 4 I outlined the substantive theory of autonomy, which says that an act is autonomous if and only if it is done on the basis of good objective external reasons. I argued that since people do not have objective external reasons to do injustice, people cannot autonomously do injustice on the substantive theory. However, I mentioned that one version of the substantive theory relativises external reasons to the epistemic position of the agent. For example, George Sher argues that if someone is unavoidably ignorant of the fact that they require surgery, then their choice not to undergo surgery is still

autonomous.[20] So, autonomy is not responding to the objective external reasons, it is responding to the subjective epistemic reasons that apply to one. One could perhaps appeal to this theory in order to defend RVT. Regardless of whether it can be used to defend RVT, as I shall now argue, it fails as an argument against the POS.

The argument from subjectivist substantive autonomy could go as follows. Voters have subjective epistemic reason to cause substantive injustice in some cases. If they do so autonomously, then this autonomy grounds their right to cause injustice. We at least have *pro tanto* duties owed to the voter not to prevent them doing the injustice.

The argument from subjectivist substantive autonomy cannot prove the right to do injustice. The reason for this is either that, on this conception, autonomy is not valuable or that the subjectivist substantive theory is the wrong conception of autonomy. Look at the industrial project again. It is clear that we have no reason grounded in the autonomy of the majority not to turn the filter on. So, autonomy, in this case is not intrinsically valuable. Some philosophers have argued that false empirical information undermines autonomy.[21] The majority do not have an authentic desire to cause harmful pollution, so that aspect of their act is not an expression of their autonomous self. So, preventing them doing injustice does not undermine their autonomy.

It might be argued that things are different for false moral beliefs. Suzy Killmister has argued that false empirical beliefs undermine autonomy but that false moral beliefs, or more precisely the desire to act on false moral beliefs, does not.[22] However, her theory is a content-neutral one which allows people to authentically desire to commit murder. I argued

[20] Sher, *Beyond Neutrality*, 53.

[21] See Suzy Killmister, "Autonomy and False Beliefs," *Philosophical Studies* 164, no. 2 (June 1, 2013): 513–31; Mele, *Autonomous Agents [electronic Resource]*. Killmister's paper provides a good overview of the issue.

[22] Killmister, "Autonomy and False Beliefs."

in Chapter 4 that this theory cannot ground the right to do substantive injustice. A revised version of the subjectivist substantive theory might do better on this front. It could say that people have rights grounded in autonomy to cause substantive injustice when they have subjective epistemic reason to have false moral beliefs. Before we assess this proposition, we need to ask: how can people have subjective epistemic reason to believe a moral falsehood? People can have subjective epistemic reason to believe empirical falsehoods because the empirical information is not all available in some cases. On many meta-ethical theories, all the moral information is in principle available to us *a priori*. According to most, nearly all of it is available *a priori*. If so, we can only come to believe moral falsehoods by reasoning improperly, not for want of information.

If this is true, then people cannot have subjective epistemic reason to have false moral beliefs. If so, the subjectivist substantive theory cannot ground the democratic right to do injustice. Against this, it might be argued that people can have subjective epistemic reason to have false moral beliefs by virtue of their cognitive limits, their time constraints, their incentives to learn about morality and things like that. It is not clear to me that any of these things could make it true that people have subjective *epistemic* reason to believe a moral falsehood. It might be instrumentally rational for people not to philosophise about population ethics, but I do not see how this entails that they have subjective epistemic reason to have false beliefs on that subject. We can be wrong without being (instrumentally) irrational even though we do not have subjective epistemic reason to believe what we do.

Moreover, if these kinds of things – time constraints, lack of incentives etc – can make people have subjective epistemic reason to hold false moral beliefs, then the proposition that autonomy, on the subjectivist substantive conception, can ground the right to do injustice is implausible. For example, suppose that Lily lives in a third world country

and has to labour hard to keep her family from starving. She has no experience in moral argument and has almost no time to think about it. It is instrumentally rational for her not to waste time thinking about population ethics. Consequently, she uses rough and ready moral reasoning to get to the conclusion that human extinction does not matter if it occurs after 2050. This is clearly wrong and she does not have the right to impose her view merely because she faced numerous constraints.

It could also be argued that people can have subjective epistemic reason to believe moral falsehoods because of the state of play in moral argument at that time. For example, before Derek Parfit presented the non-identity problem, people had more reason to believe in purely person-affecting moral theories.[23] But after that argument became available, it would be subjectively epistemically irrational to believe in purely person-affecting moral theories. There is a disanalogy to the empirical case here. The non-identity problem was always available to moral reasoners before Parfit made the argument. Parfit's argument merely made people aware of the logical implications of their theories. The fact that discovering these implications requires careful rational thought and imagination does not make it subjectively epistemically rational to neglect those logical implications. The fact that people were not aware of the non-identity problem before 1984 tells us that people were less epistemically rational than they are now, not that they were epistemically rational.

Perhaps I am wrong and there is some argument showing that subjective epistemic rationality depends on the state of play in moral argument at the time. If this is true, similar considerations tell against it implying the democratic right to do injustice. The state of play in moral theory could be extremely primitive. In lots of places hundreds of years ago, arguments for the moral equality of the races had not been made. If this, as the current

[23] Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984).

argument implies, makes racism subjectively rational, then it is absurd to say that subjectivist substantive autonomy can ground the right to do injustice. People were permitted to prevent racial subjugation, even at this time. So, on this conception, autonomy does not always matter. Therefore, the subjectivist substantive theory of autonomy cannot ground the right to do injustice.

Reasonable elitism and self-application

Even if RVT is true, it is likely to imply that we ought not to use democracy. RVT says that each person has a claim right to cause the imposition of their reasonable view of justice. It does not say that each person has a claim right to cause the imposition of their reasonable view of *substantive* justice. On the conception of reasonableness I am using, reasonable people can disagree about who counts as reasonable. This is an intuitive feature of reasonableness, epistemically understood. If so, some people have a right to prevent the imposition of reasonable views provided that they reasonably believe that the reasonable views are unreasonable. Suppose that all of the populace hold reasonable substantive views, but that group A believe that group B hold unreasonable views and so ought not to be allowed to impose their view. In this case, we ought all-things-considered not to have political equality. We have reasons owed to group A to prevent group B from causing the imposition of their substantive views. We also have reasons owed to group B not to prevent them imposing *their* view, but these reasons must be weighed against the reasons to prevent them. This entails that they should all-things-considered have less power than group A.

In general, if any person reasonably believes that we ought to have political inequality or that not all people are reasonable, then they have a *pro tanto* claim to institute political inequality. Lots of intelligent people have defended forms of political inequality,

including judicial review, restricted suffrage or districting. If RVT is true, this implies that we have *pro tanto* reason not to have political equality. RVT might entail that we have non-instrumental reason to use a political procedure even if it produces substantive injustice. But if enough people reasonably reject political equality, then RVT does not entail that we have non-instrumental reason to use *democracy* even if it produces substantive injustice.

One possible response to this is to argue that reasonable people cannot deny political equality or to argue that RVT only applies for the imposition of views about substantive justice. The tenability of this response depends upon the rationale given for RVT. If the response is inconsistent with the rationale, then it is *ad hoc* and ought to be rejected. On any plausible rationale for RVT, these responses are unavailable. I cannot think of a good reason why people have a right to cause the imposition of their reasonable view about substantive justice, but do not have the right to cause the imposition of their reasonable view about who has the right to impose their substantive view. RVT must hold that there is something special about a reasonable view which makes it important that the person who holds that view can cause its imposition. The fact that a view is about *substantive* justice in particular seems to be irrelevant from the point of view of RVT.

A similar feature of RVT is that people might reasonably deny RVT. I have presented what are in my view some pretty strong arguments against it and many intelligent philosophers deny it. If so and RVT is true, then I have a right to prevent the imposition of someone's false view, even if I know it is reasonable, because in my reasonable view, RVT is false. This is another reason that RVT is incompatible with political equality in a significant number of possible worlds.

Reasonable voters and real voters

If RVT is true, for it to be true that each sane adult person has equal political rights, it must be true that each sane adult person holds reasonable views about politics. There is a lot of evidence that this is not the case.[24] It is highly probable that at least a significant chunk of voters are epistemically incompetent – ignorant, irrational and immoral – on many issues. If this is true, then RVT does not imply that this set of people have political rights. If there are no other arguments for their political rights, then we have no intrinsic proceduralist reasons not to move towards restricted suffrage.

It might be argued that RVT operates in ideal theory. In the ideal, where people are reasonable, we have non-instrumental reasons to use democracy.[25] This might be true, though it does not refute my point that RVT does not entail that people have equal political rights in the real world. Proponents of RVT or variants of RVT usually put it forward as the only intrinsic proceduralist argument. If so, then no intrinsic proceduralist argument has shown that all people have equal political rights. This is a major drawback of those theories, on their own terms.

It might be argued that since the ideal is an ideal, we ought to move towards it. Therefore, we ought to solve the problem by making or encouraging people to be reasonable, not by disenfranchising them. This line of thought is mistaken. Consider this analogous argument.

[24] For some evidence of voter ignorance and irrationality see Brennan, "The Right to a Competent Electorate," 2011; Ilya Somin, "Deliberative Democracy and Political Ignorance," *Critical Review* 22, no. 2–3 (2010): 253–79, doi:10.1080/08913811.2010.508635.

[25] Valentini, "Justice, Disagreement and Democracy," 197.

1. In an ideal world, people are perfectly just and do not commit crime, and so we have no need for a police force.

2. We ought to move towards ideals.

3. So, we ought to dismantle the police force.

This conclusion is false. Therefore, it is not always true that we ought to move towards ideals. What we ought to do depends on the costs and benefits (in terms of justice, I am assuming) of moving in that direction, not by how close in one particular respect it is to a morally improved world. It might be argued that the problem here is that the idealisation is too significant. This fails to acknowledge the foregoing point and is subject to counterexamples. It is not much of an idealisation to imagine a world in which people are motivated not to evade tax, but this does not mean we have any reason in the real world to abolish the part of Her Majesty's Revenue and Customs which deals with tax evasion.

Even if it is not the case that we necessarily ought to move towards ideals, it still might be true that we ought to move towards a world in which everyone is reasonable and so, if RVT is true, has equal political rights. The question is, should we devote resources to making people reasonable or should we disenfranchise unreasonable people or use markets? RVT cannot settle this question. RVT tells us how we ought to treat people on the condition that they are reasonable; it tells us nothing about how we ought to treat unreasonable people. Some subsidiary doctrine would have to be brought in which shows that we ought to make people reasonable regardless of the instrumental benefits. Proponents of hybrids of intrinsic proceduralism and instrumentalism do not defend such doctrines in an unqualified way. They accept, to give one example, that we may use judicial review to prevent severe rights violations: they accept that we should limit political decisions to an elite rather than try to educate people not to violate fundamental rights. So,

they would need to explain why we should aim to produce reasonable people in one case but not others.

Whether we ought to educate or incentivise people to be reasonable depends on the chance that we will produce reasonable people and the importance of having reasonable people. There is good reason to believe that there are certain structural features of democracy which make the chance of creating reasonable people very low. So, the second half of the function – the importance of having reasonable people – would have to be extremely important. The chance is low because individuals have incentives to be ignorant and irrational in large political societies.[26] The chance that someone will influence a large election is exceedingly small, so the incentive to become more informed or to rationally examine one's beliefs is small as long as the only reason for doing so is to cast a better informed vote. This is true for both moral and empirical beliefs. It has been shown that people often make basic logical errors.[27] These errors can lead to mistaken moral beliefs. If factors like these are robust, then the expected gain of trying to make people reasonable is likely to be very low. There are, then, strong reasons to think that, in the real world, proponents of RVT ought to support political inequality rather than agitate for political education.[28]

Rights, blameworthiness and subjectivism

My thesis is about the rights people have. It is not about whether people are blameworthy. Reasonableness, in some form, is a key factor in determining blameworthiness, but it is

[26] See Somin, "Deliberative Democracy and Political Ignorance."

[27] Ibid., 259.

[28] See Ilya Somin, "Resolving the Democratic Dilemma?," *Yale Journal on Regulation* 16, no. 2 (Summer 1999): 401.

not, as I have argued, a key factor in determining whether one has a right to impose one's view. If someone has done the best that could be expected of them when reasoning about climate change, then that is a reason not to hold them blameworthy for causing the imposition of their view. But it is not a reason not to prevent them causing the imposition of their view if their view is wrong and unjustly endangers people's lives.

This contention about the separability of claim rights and culpability is accepted by both objectivists and subjectivists about rightness. Objectivists believe that an agent's moral obligations are not a function of her epistemic situation, whereas subjectivists believe that an agent's moral obligations are entirely a function of her epistemic situation.[29] For objectivists, I morally ought not to give my sister the poisoned apple, even though I could not have known that the apple was poisoned, whereas for subjectivists, I ought to give her the poisoned apple. So, subjectivists believe that a person's *privilege* rights are determined by her own epistemic position. I have no subjective duty not to give my sister the poisoned apple and so have a subjectivist privilege right to give her the apple.

This, however, does not imply what RVT maintains, which is that an agent's *claim rights* depend on her epistemic position.[30] A's claim right to x entails the duties of *other agents* not to prevent A from x-ing or to enable her to x. Therefore, from the subjectivist point of view, A's epistemic position is irrelevant for her claim rights because her epistemic position is irrelevant for the duties of other agents. For the industrial filter case, the subjectivist says that the majority have a privilege right to command that the filter be turned off but that they lack a claim right to cause the imposition of their view. If they had

[29] For a defence of objectivism see Peter Graham, "In Defense of Objectivism about Moral Obligation," *Ethics* 121, no. 1 (October 1, 2010): 88–115. For a defence of subjectivism see Michael J. Zimmerman, "Is Moral Obligation Objective or Subjective?," *Utilitas* 18, no. 04 (2006): 329–61.

[30] See Zimmerman, *Ignorance and Moral Obligation*, chap. 5.

such a claim right, then I would be under a duty not to prevent them imposing their view. But this is not true because I know that leaving the filter off is unjust. Therefore, RVT is different from subjectivism because RVT says that an agent's epistemic position determines her claim rights. One cannot appeal to subjectivism in order to defend RVT.

3. Decision-rules and theories of legitimacy

Disagreement is often a practical obstacle to justice. If everyone accepts instrumentalism and acts on the basis of their conception of substantive justice, then there may very well be practical problems. Some philosophers have thought that this renders instrumentalism incoherent. Call this the 'Practical Argument'. I will argue that while it may be true that widespread belief in instrumentalism poses practical problems, this does not show that instrumentalism is false or incoherent. Instrumentalism sets down a criterion of rightness, not a decision-rule to be promulgated and popularised in society.

Disagreement, practical conflict and legitimacy

Jeremy Waldron is the most prominent proponent of the Practical Argument in democratic theory.[31] According to Waldron, the need for a theory of legitimacy and authority is a response to the problem of moral disagreement.[32] Just as for Rawls the circumstances of justice create the need for a theory of justice, for Waldron the 'circumstances of politics' create the need for a theory of legitimacy.

[31] This argument has received insufficient attention in the extensive commentary on Waldron. One exception is Thomas Christiano, "Waldron on Law and Disagreement," *Law and Philosophy* 19, no. 4 (July 1, 2000): 513–43. I believe it is the main and perhaps the only disagreement-based intrinsic proceduralist argument he offers. I return to this point in chapter 6.

[32] Waldron, "The Core of the Case against Judicial Review," 1371.

> "[The] felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are *the circumstances of politics*."[33]

According to Waldron, the circumstances of politics leave us with a decision problem which we would not face acting on our own:

> "The problem defined by [the circumstances of politics] is the problem of selecting a substantive principle of justice to act on (together) when we disagree about which principles are true or reasonable and which are not."[34]

This is not a point about public justification; it is a point about the practical benefits of coordination. The problem we face is that we need a common basis for action 'forged in the heat of our disagreements'.[35]

As a result of these facts, the popularisation of instrumentalism will have bad causal consequences. If people decide to obey on the basis of what they take to be the truth about substantive justice, then the decision made will not command sufficient *de facto* allegiance or obedience and the decision-problem we face will not be solved. Consequently, political action on that issue will be very hard or impossible.

> "Of course, it may not be easy to identify outcome-related reasons that people on opposing sides of rights-disagreements can agree upon. As I said earlier, the design of a decision-procedure must be independent of the particular disagreement it is supposed to settle; it is no good if it simply reignites it. So we must avoid outcome-related reasons that aim specifically at particular controversial outcomes - e.g., favoring a decision-procedure because it is more likely to generate a pro-choice than a pro-life outcome. A decision procedure chosen on this basis will hardly command the allegiance of the pro life

[33] Waldron, *Law and Disagreement*, 102.

[34] Ibid., 161.

[35] Ibid., 106.

> advocates. Given the disagreement, the whole point here is to set up a procedure for generating settlements in a way that can be recognized as legitimate on both sides."[36]

When we are deciding what to do about abortion we cannot say simply that the policy that ought to be implemented is the one required by substantive justice. If everyone adopts this norm and there is disagreement about what substantive justice requires, then there will not be sufficient compliance or obedience. Waldron argues that on many issues, the *lack* of a joint decision will be worse or more unjust than any positive joint decision.[37] That is why there is a 'felt need' for a shared decision in the circumstances of politics.[38] The need for a decision-making authority in the circumstances of politics, says Waldron, is the basic Hobbesian insight about politics.[39]

It is important to point out that it does not matter for the Practical Argument whether disagreement is reasonable or unreasonable. Waldron says that a lot of disagreement about substantive justice as we find it today is reasonable.[40] But the Practical Argument points to problems of *de facto* allegiance, not reasonable acceptance. Even if the disagreement is unreasonable, popularising instrumentalism would still produce a practical problem. The problem with appealing to instrumentalism is that it is 'hopeless', not that

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[36] Waldron, "The Core of the Case against Judicial Review," 1373. See also Waldron, *Law and Disagreement*, 107, 205, 245.

[37] Waldron sets this out in a game-theoretic way as a partial conflict coordination problem at Waldron, *Law and Disagreement*, 103–105.

[38] Waldron says that there will be cases in which there is not a felt need for a common decision and in those cases, the people who do not have this felt need will not have allegiance to majoritarianism. See Ibid., 207.

[39] Waldron, "The Core of the Case against Judicial Review," 1371.

[40] Waldron, *Law and Disagreement*, 111–113; Waldron, "The Core of the Case against Judicial Review," 1368.

particular claims about substantive justice fail to meet the demands of public justification.[41]

Decision rules and theories of legitimacy

For the sake of argument, I accept that if people act on what they believe to be the truth about substantive justice, there will be practical problems. The Practical Argument infers from this that instrumentalism is not the true theory of legitimacy. Here is Waldron again:

> "[A] theory of substantive rights is not itself the theory of authority that is needed in the face of disagreement about rights. An adequate answer to the question of authority must really settle the issue. It is no good saying that when people disagree about rights, the view which should prevail is *the truth about rights* or *the best account of the rights we have*... So this way of settling on social choice in the face of disagreement would reproduce exactly the disagreement that called for an authority-rule in the first place. The theory of authority must identify some view as the one to prevail on criteria other than those which are the source of the original disagreement. This is one of Thomas Hobbes's contributions to political philosophy: any theory that makes authority depend on the goodness of political outcomes is self-defeating, for it is precisely because people *disagree* about the goodness of outcomes that they need to set up and recognize an authority."[42]

Waldron says that instrumentalism as a theory of legitimacy is self-defeating and cannot be the true theory of legitimacy. I will now refute that claim.[43]

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[41] Waldron, *Law and Disagreement*, 198.

[42] Ibid., 245.

[43] The Practical Argument attacks instrumentalist theories of legitimacy, but not all *elitist* theories of legitimacy. There are, as Waldron acknowledges, many ways to make decisions in the face of disagreement which are not subject to these supposed practical problems. These include the use of a Hobbesian sovereign whose rule is not justified by the quality of his decisions. See Ibid., 113, 245; Waldron, "The Core of the Case against Judicial Review," 1371. The sovereign is recommended on the basis that everyone can agree

The Practical Argument confuses theories of legitimacy with decision-rules for society and consequently confuses self-effacingness, which is not problematic, with self-defeat, which is. A normative theory is self-effacing if and only if it says that some or all people *morally* ought not to believe it. Many versions of utilitarianism are self-effacing. If widespread belief in utilitarianism does not maximise utility, then, from the utilitarian point of view, there morally ought not to be widespread belief in utilitarianism. A utilitarian government might have to promulgate and popularise non-utilitarian norms – never steal, never harvest someone's organs without their consent etc. – so as to maximise overall utility. Instrumentalism might be self-effacing in this way. For the reasons given by Waldron, the widespread propagation and acceptance of instrumentalism might produce worse outcomes than if most people accept majoritarian democracy.

However, self-effacingness does not imply self-defeat and self-effacingness cannot entail that a theory is false or in any way incoherent. As Derek Parfit says:

> "But to be self-effacing is not to be self-defeating. It is not the aim of a theory to be believed. If we personify theories, and pretend that they have aims, the aim of a theory is not to be believed, but to be true, or to be the best theory. That a theory is self-effacing does not show that it is not the best theory."[44]

The aim of instrumentalism is to be the true theory of legitimacy; it is to say who has the right to do what in a particular case. Instrumentalism sets down a criterion of rightness, not

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what counts as a decision of the sovereign. Therefore, if everyone believed 'the decision of the sovereign is legitimate', then the causal consequence would be widespread obedience and the avoidance of practical conflict. Waldron appeals to equal respect to defend a uniquely intrinsic proceduralist theory of legitimacy. See Waldron, *Law and Disagreement*, 113ff.

[44] Parfit, *Reasons and Persons*, 24.

a decision-rule to be popularised.[45] Instrumentalism might indirectly justify the propagation of intrinsic proceduralist decision-rules, but that does not make instrumentalism as a theory of legitimacy false and it doesn't make intrinsic proceduralism as a theory of legitimacy true.

The following argument proves that self-effacingness is not a flaw in a moral theory. 'In a choice between acting in your self-interest and committing gross injustice, you ought not to commit gross injustice' is true. However, it is possible that the widespread acceptance of this principle could in certain circumstances produce bad outcomes.[46] It could be the case that some Nazi group strongly believes that not killing Jews is a gross injustice. However, they know that the government will punish them if they try to kill or subjugate Jews in any way. So, they have strong self-interested incentives not to subjugate Jews, but the adoption of the principle causes them to put their self-interest to one side for what they take to be overriding moral demands to subjugate Jews. Therefore, it might be the case that we ought all-things-considered to promulgate a decision-rule such as 'you morally ought to pursue your own self-interest rather than the requirements of morality' to the Nazis. This might produce the best or most just outcome.

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[45] See David O. Brink, "Utilitarian Morality and the Personal Point of View," *The Journal of Philosophy* 83, no. 8 (August 1, 1986): 417–38. I call 'decision-rules' what Brink calls 'decision-procedures' to avoid confusion with political decision-procedures.

[46] A real-life but possibly contentious example: many people believe that buying clothes from sweatshops is unjust. They feel the morally right thing to do is boycott them. However, it is at least possible that boycotting sweatshops could make sweatshop workers much worse-off. Boycotting sweatshops reduces demand for sweatshop labour and so might reduce wages. Therefore, popularising the permissibility of self-interested shopping might have better moral results than popularising moralised shopping. This is not always the case, of course. Don't buy ivory. Unintended consequences are a recurrent real world counterexample to all versions of the Practical Argument.

For *reductio*, suppose the conditional 'if we ought not to promulgate a principle P, then P is false' is true. If so, then the principle 'in a choice between acting in your self-interest and committing gross injustice, you ought not to commit gross injustice' is false in the Nazi context. But it is clear that the principle is not false in any context. Therefore, by *modus tollens*, 'if we ought not to promulgate a principle P, then P is false' must be false. In general, self-effacingness does not imply the falsity of a moral theory or principle. By virtue of quirks of human psychology or culture, the popularisation of *any* principle could possibly produce bad outcomes. But since it is not the case that it is possible that all moral principles could be false, it cannot be true that the fact that popularising a principle produces bad results makes that principle false. Therefore, the fact (if it is one) that instrumentalism is self-effacing does not imply that it is false. The Practical Argument fails. All of this is compatible with it being true that we ought, for instrumentalist reasons, to promulgate and popularise intrinsic proceduralist decision-rules.[47]

It is also worth saying that if the Practical Argument succeeds, then it succeeds against a hybrid of instrumentalism and intrinsic proceduralism as well. The Practical Argument pushes us towards an unpalatable pure intrinsic proceduralism according to which people have democratic rights to do severe substantive injustice.

4. Substantive justice and begging the question

Many people have the sense that there is something epistemologically unsatisfactory about appealing to the truth about substantive justice when justifying political procedures. When there is disagreement about whether the Tories or Labour are best, it is incoherent to say

[47] See Steven Wall, "Democracy and Restraint," *Law and Philosophy* 26, no. 3 (May 1, 2007): 307–42.

'we ought to use this voting system because it favours Labour'. Again, Waldron has pursued this line of argument. Call this the 'Question Begging Argument'.[48]

The Question Begging Argument

Waldron says that appealing to the truth about substantive justice in conditions of disagreement is question-begging:

> "The problem defined by [the circumstances of politics] is the problem of selecting a substantive principle of justice to act on (together) when we disagree about which principles are true or reasonable and which are not. To say that in such a case [substantive] *justice* is being subordinated to procedural values in political decision-making would be to beg the question of which of the positions competing for political support is to be counted as just."[49]

And later:

> "If we say, in a situation in which people disagree about rights, that rights may 'trump' a majority decision, it is incumbent on us to announce which of the competing conceptions of rights is to do the trumping, and how that it is to be determined. But to make such an announcement in the name of the whole society is of course to beg the very question at issue."[50]

The Question Begging Argument holds that in the circumstances of politics, asserting the proposition 'outcome O is substantively unjust' is question-begging because people

[48] Waldron uses the Practical Argument and the Question Begging Argument to defend the very strong claim that substantive justice and IPJ cannot conflict. Since neither the Practical Argument nor the Question Begging Argument is sound, Waldron does not establish this claim. See Waldron, *Law and Disagreement*, 195–208 and 243–254. Waldron also says some things which are inconsistent with it. See for example Ibid., 199.

[49] Waldron, *Law and Disagreement*, 161.

[50] Ibid., 246. See also Waldron, "The Core of the Case against Judicial Review," 1373.

disagree about that proposition. I am not completely sure whether Waldron believes that it is question-begging in the technical sense that it assumes the conclusion in the premises. But he certainly believes that it is in some way logically incoherent to assert claims about substantive justice when there is disagreement.

The problems with the Question Begging Argument

The argument is subject to a number of problems. Contra Waldron, disagreement does not render appealing to the truth about substantive justice logically incoherent. Suppose I think legal abortion to be just and, as an instrumentalist, I say that we should use some elite decision-making body to stop majorities from forbidding abortion. Merely pointing to the fact that there is disagreement about my view does not expose me to the charge of logical incoherence. I might be *wrong*, but that is different. In the same way, if I assert that Canberra is the capital of Australia and some people disagree with me, then the mere fact that people disagree with me does not show that my claim is in some way logically incoherent.

Waldron is right to say that if different people accept instrumentalism but have different beliefs about what counts as a substantively just outcome, then they will favour different political procedures. But this does not render instrumentalism incoherent. Instrumentalism says that we ought to use the procedure which produces the best results; it does not say that we ought to use the procedure which *people believe* produces the best results. If it said the latter, then disagreement *would* render instrumentalism incoherent. But since instrumentalism is not fundamentally about belief in this way, disagreement does not render instrumentalism or, more generally, appeals to the truth about substantive justice, incoherent. Waldron says that an instrumentalist cannot make a claim about the truth about substantive justice 'in the name of society' when there is disagreement about

substantive justice.[51] This is trivially true if 'in the name of society' means that the claim about substantive justice is agreed to by everyone in the society. In any other sense of that phrase I can think of, it is false.

Waldron might respond in the following way:

> "No matter how often or emphatically we deploy words like 'objective', a claim about what justice *objectively* requires never appears in politics except as someone's view – someone's view which of course, in the sort of situation we are considering, is directly contradicted by the view of someone else. Although there may *be* an objective truth about justice, such truth never manifests itself to us in any self-certifying manner; it inevitably comes among us as one contestant opinion amongst others."[52]

Waldron makes three claims here: a view about what justice requires (i) only appears as someone's view, (ii) is the subject of disagreement, and (iii) never manifests itself to us in a self-certifying manner. All of these claims are true about many beliefs, including for instance 'Canberra is the capital of Australia'. None of (i)-(iii) bear on the truth of that claim and they do not bear on the truth of claims about substantive justice.

Indeed, claims about the IPJ of democracy also have the features (i)-(iii). The Question Begging Argument can succeed neither as part of an argument against instrumentalism nor as part of an argument for intrinsic proceduralism.[53]

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[51] See for example Waldron, *Law and Disagreement*, 196–197.

[52] Ibid., 199. He expands on this point in chapter 8.

[53] Waldron shows signs of acknowledging this in 'The core of the case against judicial review'. There, he expressly considers outcome considerations, which suggests that he does not take assertions about them to be question-begging. Waldron, "The Core of the Case against Judicial Review," 1375–1376. See also Waldron, "Disagreement and Response," 63ff. Having said that, he presents what seems to be a statement of the Question Begging Argument at Waldron, "The Core of the Case against Judicial Review," 1373.

The analogy to scientific dispute

There is another possible version of the Question Begging Argument.[54] Suppose there is a dispute about whether abortion is unjust. Suppose I believe it is not and that the majority disagree. As an instrumentalist, I say that we ought to use the procedure which legalises abortion, and so, knowing that the Supreme Court will legalise abortion, I say that we ought to use the Supreme Court. It might be argued that this is equivalent to the following proposed resolution of a scientific dispute. I believe that smoking causes lung cancer. How ought we to test this hypothesis? As a believer in the hypothesis, I say we ought to use whatever scientific test produces the result that smoking causes lung cancer, because it produces this answer. This is clearly unsatisfactory. The test must provide a standard independent of the hypothesis itself. Perhaps, it might be argued, my argument for the Supreme Court is subject to an analogous problem.

This argument does not succeed. There is a disanalogy between the political case and the scientific one. The equivalent propositions are 'abortion is not unjust' and 'smoking causes lung cancer'. In the scientific case, the test is supposed to provide others with epistemic warrant to believe that smoking causes lung cancer. However, this is not true of the political case. The procedure is not supposed to provide people with epistemic warrant to believe that abortion is not unjust. Rather, I propose the procedure as a means to ensure that justice is done. Independent arguments for the proposition that abortion is not unjust provide people with epistemic warrant to believe that proposition. In no way is my claim that we ought to use the Supreme Court an independent argument for the truth of the proposition that abortion is not unjust. But then, it was never meant to provide people with epistemic warrant anyway. It is simply an implication drawn from a proposition about substantive justice and the POS.

[54] I am thankful to Dan McDermott for suggesting this.

5. Intrinsic proceduralism and publicity

I showed in section 1 that Tom Christiano endorses a form of TRIP. I will now show that Christiano's arguments do not imply TRIP. Thus far, I have said nothing about the importance of *publicity*. Many people believe that justice not only must be done, but must be seen to be done. It might be argued that by virtue of disagreement about substantive justice, institutions cannot be publicly seen to be instrumentally just, even if they are in fact instrumentally just. If democracy *can* be publicly seen to be just, regardless of its outcomes then we have reasons of IPJ to use democracy. Christiano is the most prominent proponent of a disagreement and publicity-based argument for the IPJ of democracy.[55] I will now show that Christiano's argument is for the most part an instrumentalist one and does not restrict the extent to which we can appeal to the truth about substantive justice. No-one has yet shown how publicity could count in favour of intrinsic proceduralism.

An overview of the argument

As I showed in Chapter 2, Christiano believes that people have non-derivative democratic rights to cause mild substantive injustice. Here is how he sets up his argument:

> "What I am going to argue is that the only standards on which we can achieve agreement in the egalitarian standpoint are the principles of democracy, liberal rights, and an economic minimum. There are no other states whose value we can agree on that can serve as end states that justify democracy or liberal rights. In particular we disagree on the justice of the outcomes of democratic decision-making and the goodness of the results of our exercises of liberal rights. Pervasive disagreement is the norm on these other states. Therefore, if we

[55] Christiano, *The Constitution of Equality*. Christopher Griffin and Buchanan also defend the IPJ of democracy on the basis of publicity. See Griffin, "Democracy as a Non–Instrumentally Just Procedure," 2003; Buchanan, "Political Legitimacy and Democracy," July 1, 2002.

> look at the matter only from our own public standpoint, we will see that democracy and liberal rights are intrinsically justified."[56]

At the end of the argument, Christiano says:

> "But it is clear that these proposals can be objectively right or wrong, so some citizens' proposals for substantive law and policy will be mistaken and perhaps some proposals will be good ones."[57]

He goes on:

> "What I have argued is that even in [cases in which democracy produces mildly substantively unjust legislation], resolving the matter democratically is intrinsically important."[58]

And here he explains his position:

> "[Democracy] is a realization of public equality while the issues within its legitimate reach do not lend themselves to publicly clear solutions. There is conscientious and informed disagreement on these issues. Democracy is a realization of public equality because the interests that ground democracy are preeminent political interests that publicly stand out when the facts of judgment hold."[59]

This and other passages suggest that Christiano believes that he is using the idea of publicity to restrict the appeal to the truth about substantive justice. It seems that he believes that we must retreat to the IPJ of democracy when true principles of substantive justice fail to be public. His argument goes as follows:

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[56] Christiano, *The Constitution of Equality*, 72–73.

[57] Ibid., 97.

[58] Ibid.

[59] Ibid., 98.

1. Institutions must be just and it is desirable for them to be publicly just.[60]

2. Political inequality must fail to realise public equality, given the Facts of Judgment, except when it protects basic liberal rights or an economic minimum.[61]

3. Democracy is the only system which realises public equality,[62] except when it violates liberal rights or does not provide an economic minimum.[63]

4. Since democracy is justified from 'the egalitarian standpoint' and is not justified by any end state it realises, it is consequently intrinsically just.[64]

Here, I will attack parts 2 and 4. With regard to Part 2, I will argue that Christiano apparently confuses two different ways in which institutions might fail to realise public equality. Only one of these ways is related to restricting the truth about substantive justice, but Christiano does not pursue it. Part 4 is incorrect because three of Christiano's four arguments are instrumentalist. The only argument Christiano presents which implies the conclusion he wants to prove is the appeal to equal respect. This, essentially, is an appeal to intuitions about the requirements of political morality. I have already made my case about the requirements of political morality with regard to democracy.

Before I come to my critique, I will clarify what Christiano means by calling some principles 'principles of public equality'.[65] Unfortunately, Christiano gives two conflicting

[60] Ibid., chap. 2. Christiano frequently says that publicity is a requirement, as though it is a necessary condition on the use of any principles of justice that they be public. See for example Ibid., 47, 51–53. However, his account of the moral value of publicity (at Ibid., 51–52.) implies that it is merely *pro tanto* and occasionally desirable. We ought to prefer non-public justice to injustice, whether it is public or not.

[61] Christiano, *The Constitution of Equality*, 56–67, chap. 3.

[62] Ibid., chap. 3.

[63] Ibid., chap. 4 and 7.

[64] Ibid., chap. 2 and 3.

definitions of 'principles of public equality'. Principles of public equality are to be distinguished from 'weakly public principles'. Christiano defines weak publicity as follows:

> *Weak publicity* – Principles of social justice are weakly public if and only if they can be seen to be implemented in the basic institutions of society by ordinary people after a reasonably conscientious effort.[66]

On this definition, weak publicity requires only transparency of implementation.

Christiano says inconsistent things about the definition of a *principle of public equality*. In some places, he suggests that a principle is a principle of public equality if and only if it is true and weakly public, while in others he suggests that the principle must be *reasonably agreed* to be true and be weakly public. In his initial cashing out of the idea of publicity, he says:

> "[Weak] publicity requires only that people be able to see that they are treated in accordance with what are *in fact* the correct principles of justice."[67]

Christiano cannot mean what he says here. Principles of social justice are weakly public if and only if their implementation is transparent. False principles of justice – e.g. enslave most chimps – can be weakly public.[68] He must mean to refer to 'public equality' instead of 'weak publicity' in the above passage. On this definition, agreement from ordinary people after a conscientious effort on the *truth* of a principle is neither necessary nor

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[65] Ibid., 70.

[66] Ibid., 47–48.

[67] Ibid., 52.

[68] On the previous page, Christiano discusses the difference publicity makes to unjust acts. This question would be incomprehensible if we accepted the definition implicit in the quoted passage from page 52.

sufficient for that principle to be a principle of public equality. For instance, if resource egalitarianism is true and weakly public, then it is a principle of public equality, regardless of whether all people can reasonably accept that resource egalitarianism is true.

However, in other places, he suggests that reasonable agreement on the truth of the principle itself is required for a principle to be weakly public. He argues that principles of substantive egalitarian justice, such as resource egalitarianism and equal opportunity for welfare, cannot be principles of public equality even if they are true and weakly public, because not all reasonable people can accept that those principles are true.[69] Even if we could provide publicly clear measures of opportunity sets, some people would reasonably deny that goods should be distributed in accordance with equal opportunity for welfare. Thus, Christiano gives us two inconsistent definitions of public equality, which are:

> *Public Equality 1* – A principle is a principle of public equality if and only if it is true and weakly public.

> *Public Equality 2* – A principle is a principle of public equality if and only if it is reasonably agreed to be true and is weakly public.

Whichever definition is correct, as I will now show, Christiano misunderstands and overstates the role of publicity in his argument.

Christiano's instrumentalism

Christiano defends democracy on the basis that when the Facts of Judgment obtain, democracy serves the Interests in Judgment. However, three of these interests can at best

[69] Christiano, *The Constitution of Equality*, 84–85.

ground equal *derivative* rights to political influence. This is surprising. Despite being thought of as one of the most prominent intrinsic proceduralists, Christiano is in large part an instrumentalist about democracy.[70]

Having defended the view that justice requires equal advancement of each person's interests, Christiano goes on to argue that this has particular implications when the Facts of Judgement obtain.[71] The Facts of Judgment are as follows. Firstly, given the diversity of experience in any moderately complex society, the conditions required for each person to have well-being and each person's capacity for well-being will be diverse. Secondly, people are very fallible when making judgements about justice. Making such judgements requires comparing the interests of people who are quite different to oneself. Discerning whether someone's interests are likely to be authentic or autonomous is likely to be a hazardous enterprise. Thirdly, this is likely to lead to serious disagreement about justice and what it requires of our institutions. Fourthly, against this background, people's judgments about justice and conceptions of justice are likely to be biased in favour of their own interests. People's judgments reflect their own experiences, sensibilities and abilities.

When these Facts of Judgement obtain, people have interests in being treated in a certain way by agents and institutions. These are what Christiano calls the 'Interests in Judgment'. I will now show that three of Christiano's four arguments from these interests are instrumentalist arguments. This is true even if we accept his controversial account of what makes things intrinsically just or valuable.

[70] Wall and Estlund both accuse Christiano of instrumentalism. See Steven Wall, "Debate: Democracy, Authority and Publicity," *Journal of Political Philosophy* 14, no. 1 (2006): 85–100; David Estlund, "Debate: On Christiano's The Constitution of Equality," *Journal of Political Philosophy* 17, no. 2 (2009): 241–52.

[71] Christiano, *The Constitution of Equality*, 56–63.

(i) Cognitive Bias

The first interest protected by democracy, according to Christiano, is the interest in correcting for cognitive bias.[72] Christiano asserts that each person's judgment is cognitively biased towards their own interests.

> "[Each] person can see that any attempt to impose a particular view of justice unilaterally in law and policy by a group of persons is likely to fail to take into account and properly reflect the interests of those who are imposed upon. Her interests are likely to be neglected because they are ill understood and because they are likely not to be given due weight by others who do not share those interests."[73]

He continues:

> "As a consequence, a decision-procedure that accorded no weight to a person's judgment or significantly less weight to that judgment than to those of others, and more worryingly to the judgment of all the members of whole groups of persons, can be expected, given the normal functioning of human cognitive systems, to give short shrift to the interests of those persons."[74]

This is an instrumentalist argument. His claim is that if someone unilaterally imposes their view of justice on others, then the interests of those people will be set back because of the cognitive biases of the imposers. Consequently, if some people systematically have less political power than others, then their interests will be set back. The argument rejects political inequality on the basis of its causal consequences.[75] Indeed, he goes on to discuss the disenfranchisement of groups like black people, workers and women and says 'the

[72] Ibid., 88–90.

[73] Ibid., 89.

[74] Ibid.

[75] Christiano also argues that these factors can also be problematic for democracy if there are permanent minorities at Ibid., 288–299.

results have always been the same' (my emphasis).[76] Throughout the argument, Christiano refers to the other *interests* set back by cognitive bias. He does not specifically say what these interests are, but they must be the interests which make cognitive bias matter. If these other interests were not at stake, then cognitive bias would not matter. The argument from cognitive bias is clearly an instrumentalist one.

(ii) Being at home in the world

The second interest he appeals to is the supposed interest in 'being at home in the world'. He says:

> "Each person has a fundamental need to have a sense of fit with the world around him, a sense of connection with that world, a sense that this world makes sense to him."[77]

He says that individual's judgements often reflect the modes of life to which they feel accustomed.[78] So, unilateral imposition of one person's view deprives those imposed upon of a sense of fit, connection and meaning in the world and this is detrimental to well-being.[79] This also shows that political inequality fails to realise public equality:

> "Given this fundamental interest in being at home in the world, if a person or a group of persons has no say in the world they live in, it is *highly likely* that their interests will be set back and this will be for the sake of the interests of those who rule. The ruling class will be able to form a world in which they experience a sense of fit, connection and meaningfulness. They deprive those who have no say of such a sense of being at home in the world."[80] (My emphasis)

[76] Ibid., 89.

[77] Ibid., 90.

[78] Ibid., 61.

[79] Ibid.

[80] Ibid., 92.

Again, this is an instrumentalist argument. It attacks political inequality on the basis that it will produce undesirable psychological side-effects: people will be unlikely to have a sense of fit with the world around them. Indeed, as the italicised words in the above passage show, there is only a *probable* connection between political equality and the feeling of at-homeness: political equality does not necessarily have these effects. Therefore, the feeling of at-homeness cannot be an intrinsic property of political equality. What is intrinsically valuable here is the sense of at-homeness, not the causal responsiveness of the world to one's views about justice. If people were entirely untroubled by the world not matching their views about justice, then having the world match one's views about justice would not matter. Indeed, for their interest in at-homeness to be satisfied, a person need not have any control over political decisions. One could feel a sense of fit with the world because someone else has unilaterally imposed the conception of justice one favours. Thus, the interest could be satisfied by elite rule and therefore cannot count in favour of the intrinsic justice of democracy.

(iii) Learning about justice

The third supposedly fundamental interest promoted by democracy is the interest people have in learning the truth about justice.[81] Again, this is a (supposed) contingent causal consequence of democracy.

(iv) Equal moral standing

The fourth and final interest Christiano appeals to is the interest in equal standing. This is Christiano's version of the equal respect argument and I will show below why it poses no threat to my argument.

[81] Ibid., 92–93. Christiano presents no evidence for any of these empirical claims.

Argument (iv) is intrinsic proceduralist and the rest are not.[82] Therefore, only the last argument could threaten the POS.

The egalitarian standpoint and intrinsic justice

Christiano appears to recognise the instrumentalist flavour of some of his arguments. He argues that they are not instrumentalist because the intrinsic justice of institutions or states of affairs is relative to the power and epistemic position of agents:

> "[It] appears that we are pursuing public equality not for its own sake but only as a guarantee against bias and subordination of interest."[83]

He goes on:

> "In a sense, from a god's eye point of view, public equality does not have intrinsic value. And by implication democracy and liberal rights do not have intrinsic value since they are public realisations of equality. The idea is that a god can determine without error exactly what equal advancement of interests really requires in every instance. Perfect knowledge and power, at least according to the arguments [from the Interests in Judgement], can sidestep the requirement of publicity in trying to implement equality. This is because none of the imperfections of fallibility, disagreement, and cognitive bias are attributable to such a god, by hypothesis."[84]

The passage is hard to follow because Christiano elides two different claims: first, the claim that intrinsic value or justice is relative to a person's knowledge, and second the claim that only a god could successfully implement justice. The former claim has some relevance to whether democracy is intrinsically just, but the latter does not. For instance, I

[82] The same goes for Christiano's similar argument in his earlier work, which does not rely on the appeal to publicity. See Christiano, *The Rule of the Many*, chap. 2.

[83] Christiano, *The Constitution of Equality*, 71.

[84] Ibid., 71–72.

have said that Christiano's cognitive bias argument defends democracy on the basis that the cognitive bias of men will produce substantive injustice. Pointing out that a god would not be cognitively biased does not in any way show my claim to be false.[85]

Most plausibly then, Christiano means to defend the claim that intrinsic value and justice are relative to people's knowledge and power. He argues that an institution or state of affairs is only intrinsically just or valuable from the point of view of 'the egalitarian standpoint', rather than from one in which we have perfect knowledge or power. The egalitarian standpoint is 'what everyone would agree to were they properly informed and conscientiously trying to figure out what equality implies for society'.[86] He says:

> "[The] only way that an instrumental argument for a particular political standard can work is if we have agreement from the egalitarian standpoint on the value of the end state it is supposed to produce."[87]

I think that when Christiano says 'standard' here, he means to say 'institution'. It is institutions and states of affairs which are intrinsically just, not *standards*, which are most naturally understood to be moral theories.[88] Standards can be instrumentalist or intrinsic proceduralist; they cannot be, in any relevant sense, instrumentally or intrinsically just. With that clarified, Christiano is arguing that from a position of perfect knowledge, we can see that democracy is justified only because it serves some valuable end states. But from the egalitarian standpoint, there is no agreement on the value of such end states. Since democracy is just and is not instrumentally just, it must be intrinsically just.

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[85] I think this confusion plausibly explains why Christiano misunderstands the role of publicity in his argument.

[86] Christiano, *The Constitution of Equality*, 69.

[87] Ibid., 72.

[88] On this see John Halstead, "Democracy and the Lottery Reductio" (unpublished manuscript, 2013).

Even if we accept Christiano's claim that intrinsic justice and value are relative to knowledge and power (and I do not think we should), the arguments are still instrumentalist.[89] His claim about intrinsic value casts no doubt on my claim that three of his arguments are instrumentalist. His arguments are meant to prove that all reasonable people can accept that there is agreement from the egalitarian standpoint that political inequality will produce substantively unjust outcomes.[90] As a matter of contingent fact, political inequality produces substantive injustice because of cognitive bias, because it violates people's supposed interest in being at home in the world and because it happens to not be conducive to people's political education. All of the arguments say that democracy is just by virtue of the causal consequences it happens to have.

The egalitarian standpoint, publicity and restricting the truth

Christiano seems to believe that he is arguing for a theory which says that publicity forbids us from appealing to the truth about substantive justice to justify political institutions, apart from the truth about basic rights and the economic minimum. In fact, Christiano does not make this argument. He elides two ways in which a political institution might fail to realise public equality:

> (i) A political institution perfectly realises true justice, but not all reasonable people can agree that it has done so after a conscientious effort.

[89] At the end of what Christiano has told is an intrinsic proceduralist argument, he appeals to Amartya Sen's claim that democracy prevents famine at Christiano, *The Constitution of Equality*, 100 n13. This is clearly an instrumentalist consideration.

[90] Christiano, *The Constitution of Equality*, 90.

(ii) A political institution realises injustice and can be reasonably seen to do so by everyone who has made a conscientious effort.

Christiano's arguments only establish (ii) and not (i). But (ii) does not show that the extent to which we can appeal to the truth about justice is limited. It is the kind of thing which, if true, can be accepted by instrumentalists who believe that we should appeal to the whole truth and nothing but the truth. Christiano's argument entails that political inequality is unjust; it does not entail 'even if political inequality is just, it cannot be publicly just and therefore may not be implemented'. If his argument is sound, then even someone who completely rejects the importance of publicity would have to reject political inequality.

Another way to see the point is by considering the role played by 'the egalitarian standpoint' in Christiano's argument. Despite what he appears to believe, the egalitarian standpoint has no significant role in his argument. If we assess the arguments from the interests in judgement from a god's eye point of view, as opposed to the egalitarian standpoint, his conclusion is entirely unaffected. If his arguments from the interests in judgement are sound, then from the god's eye point of view – the point of view of perfect knowledge and power – we would be able to see that political inequality is unjust and so fails to realise public equality.

Equal respect again

We have already seen that three of Christiano's arguments are instrumentalist. The only intrinsic proceduralist argument he gives is his appeal to equal respect and status. However, his appeal to equal respect gives no role to informed and conscientious disagreement about substantive justice. Here he is setting up the equal respect argument:

> "The interest in having one's equal standing among one's fellow citizens recognized and affirmed is, given the [the interests in judgement and the facts of judgement], greatly set back by disenfranchisement."[91]

But disagreement has no bearing on the version of the equal respect argument he goes on to set out.

> "The reason for this is that each person has an interest in having her moral personality acknowledged and respected by her fellow citizens... To exclude a person from participating in the process by which the choice of how society is to be regulated is to fail to acknowledge that person's capacity for moral judgment and to treat her like a child or an animal. This is a serious loss of status."[92]

At no point does Christiano explain how equal status comes into play because of disagreement, publicity or any other feature of his theory which might have some bearing on restricting the truth about justice. The argument as set out implies that the equal standing embodied in democracy is important regardless of whether there is disagreement about substantive justice.[93] For Christiano, even if the Facts of Judgement did not obtain

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[91] Ibid., 93.

[92] Ibid. See also Ibid., 63. This passage overstates Christiano's position. As I argued in section 2 of this chapter and in Chapter 2, on Christiano's hybrid theory, the scope of trumping or primary instrumentalist reasons is very broad. On his theory, it is permissible for people to be excluded from the political process if they would use their power to violate liberal rights or deprive others of an economic minimum or if they are ignorant of empirical facts. Christiano must accept that we are permitted to use an elite procedure to prevent these rights violations. Would we be within our rights to say that Christiano proposes to treat the disenfranchised rights-violators like children, animals or madmen? One need not see one's opponents as madmen or children to think that they lack the significant moral and political competence required to make political decisions.

[93] Christiano's argument could be accused of being schizophrenic. Christiano asks us to respect each person's capacity for moral judgement, even though everyone's judgement is biased in favour of their own interests.

and we were assessing political inequality from a god's eye point of view, political inequality is unjust because it is disrespectful to those with less power.[94] Therefore, this is not a version of the equal respect argument which restricts the truth. Consequently, I need add nothing to the arguments I have already made in Chapter 3 against the ordinary equal respect argument. Moreover, if we interpret it as a form of RVT, this, as I argued in section 2, cannot help Christiano.

Summary

Christiano's theory is not a form of Truth Restricting Intrinsic Proceduralism for two different reasons. Firstly, his argument is in large part instrumentalist and secondly his argument does not restrict the extent to which we can appeal to the truth about substantive justice in justifying political institutions. Thus, Christiano does not establish the central claim of *The Constitution of Equality* that people have non-derivative democratic rights to do substantive injustice, provided liberal rights and the economic minimum are not threatened.

Conclusion

Substance has primacy even when the requirements of substantive justice are reasonably contentious. People do not have claim rights to impose their reasonable view if the imposition is substantively unjust. This is true whether their mistake stems from a false

[94] After the equal respect argument, Christiano adds that given the other three interests in judgement, disenfranchisement will also set back the standing of those imposed upon. Having one's interests treated as less important is a 'terrible loss of status and therefore a serious setback to the interests of a person'. Even though it appeals to the idea of equal status, this is not an intrinsic proceduralist argument. Since it depends on the other three arguments from the interests in judgement, the standing referred to here is part of the outcomes of democratic procedures.

empirical or moral belief. Empirical errors and moral errors are often produced by the same kinds of epistemic errors. There is no good reason that the belief-forming process itself would generate obligations in one case but not the other. RVT goes wrong because it tries to give a person a certain moral status by virtue of the fact that they reasonably believe something. What we ought to do is pay attention to the content of their belief, not to the fact that they reasonably believe it. Moreover, since there is reasonable disagreement about who is reasonable and reasonable disagreement about RVT, and since a large proportion of citizens are not reasonable, it is difficult to see how RVT could be used to defend the IPJ of democracy, as opposed to a highly politically inegalitarian procedure.

Tom Christiano and Jeremy Waldron are the two leading intrinsic proceduralists in contemporary political philosophy. I have argued that their arguments do not threaten the POS. The fact (if it is one) that the widespread belief in instrumentalism produces bad results does not show that instrumentalism is false. Instrumentalism sets down a criterion of right, not a decision-rule to be popularised in society. Moreover, in no way is it question-begging to assert the truth about substantive justice merely because there is reasonable disagreement about substantive justice. Christiano's defence of TRIP fails on two counts: it is, for the most part, instrumentalist, and not truth-restricting.

6

Intrinsic Proceduralism, Disagreement and Stakes

Few proponents of Intrinsic Proceduralism wish to accept that people have democratic rights to do severe substantive injustice. Any theory which says that we are not permitted to prevent democratic tyranny must be in error. What most proponents of Truth Restricting Intrinsic Proceduralism (TRIP) have failed to acknowledge is that severe substantive injustice need not be obvious. It is simply not the case that everyone reasonably agrees on the fundamentals. If this is true, then, despite what its proponents say, TRIP implies the democratic right to do severe substantive injustice. This, I argue, is sufficient reason to reject TRIP. Since TRIP is the only remaining way to attack the POS, this proves that substantive justice has primacy.

The chapter is structured as follows. In section 1, I argue that TRIP implies the democratic right to do severe substantive injustice. In the remainder of the chapter, I consider whether forms of TRIP grounded in Public Justification Liberalism (PJL) are able to avoid this critique. In section 2, I spend some time setting out the apparatus of PJL because it is not always easy to get a grip on the nature of that theory. In section 3, I consider an argument, which some have (arguably erroneously) attributed to Jeremy Waldron, that we have reasons of intrinsic procedural justice to use democracy to impose proposals which have no substantive public justification. This implies the democratic right to do genocide, and is therefore false. In sections 4 and 5, I consider two arguments, first by Laura Valentini and second by Gerald Gaus, which have held that we have reasons of IPJ to use democracy to impose 'inconclusively justified' proposals. Neither argument implies their desired conclusion. In section 6, I suggest how a more profitable PJL-based TRIP might look and argue that it implies the democratic right to do severe injustice.

1. Truth Restricting Intrinsic Proceduralism and high stakes

All versions of TRIP are subject to the general problem that they entail the democratic right to do severe injustice.

Truth Restricting Intrinsic Proceduralism

Different forms of TRIP have been defended in the literature but they are all subject to the problem I highlight here. It is worth looking again at the statements of TRIP by Christiano and Valentini I considered in Chapter 5. Both of them are implicitly or explicitly committed to the premise that there is no or very little reasonable disagreement about high stakes matters. This premise is actually false, but it must be true if TRIP is to be plausible.

As we saw in Chapter 5, Tom Christiano accepts TRIP, and as we saw in Chapter 2, he denies the democratic right to do severe substantive injustice. Consequently, he is committed to the premise that there is no conscientious or informed disagreement about high stakes matters.

> "What I am going to argue is that the only standards on which we can achieve agreement in the egalitarian standpoint are the principles of democracy, liberal rights, and an economic minimum."[1]

In Christiano's view, all conscientious and informed people agree on the liberal rights and the economic minimum, but for lower stakes matters of substantive justice, there is a great deal of conscientious and informed disagreement. So, democracy ought to hold sway for the lower stakes matters.

Valentini also defends TRIP and denies the democratic right to do severe injustice. She equates obvious injustice with severe injustice. For Valentini, 'the most fundamental

[1] Christiano, *The Constitution of Equality*, 72.

requirements of justice' should have the status of constitutional rights 'thus removing them from the democratic process'.

> "Although what rights count as constitutional is to some extent controversial, we can plausibly assume that there are some core rights without which a society cannot claim to express equal respect for its citizens."[2]

Thus, Valentini says that the fundamental requirements of justice are to a large extent uncontroversial. She later says:

> "Apart from ruling out obviously unjust social systems, the standard of equal respect *qua* mutual justifiability remains inconclusive about many aspects of social organization, including redistributive taxation, school curricula, abortion laws and much else."[3]

For Valentini, democracy must decide on reasonably contentious matters but we may use undemocratic procedures to decide on high stakes matters, which are not reasonably contentious.

A fatal problem for Truth-Restricting Intrinsic Proceduralism

In Chapter 2, I pointed out that TRIP does not entail that people have the democratic right to do all mild substantive injustices. Some mildly unjust acts, such as punching someone in the arm, pointlessly deflating bike tyres and stealing money from the sufficiently well-off worst-off are *obviously* unjust. Therefore, at best, TRIP can defend the democratic right to do *some* but not all mild substantive injustices. TRIP is not compatible with the hybrid of intrinsic proceduralism and instrumentalism defended by many philosophers.

Moreover, just as proponents of TRIP have misunderstood the implications of their theory for the democratic right to do mild substantive injustice, they have also misunderstood the implications of their theory for the democratic right to do severe

[2] Valentini, "Justice, Disagreement and Democracy," 180.

[3] Ibid., 192.

substantive injustice. This in turn shows that TRIP is open to a *reductio ad absurdum*. Recall the definition of TRIP:

> *Truth Restricting Intrinsic Proceduralism* (TRIP) – People have equal non-derivative democratic rights to decide on matters which are the subject of reasonable, conscientious or informed disagreement.

TRIP, in conjunction with:

> 1. There is reasonable, conscientious and informed disagreement about very many high stakes matters.

Implies:

> C. People have equal non-derivative democratic rights to decide on high stakes matters.

If people have democratic rights to decide on high stakes matters, then they have the right to make high stakes errors. That is to say, they have the right to produce severe substantive injustice. So, proponents of TRIP are on the horns of a dilemma: they must either renounce TRIP or accept the democratic right to do severe injustice. I shall argue that they ought to renounce TRIP. I will prove the truth of premise 1 by considering a few examples of issues which are both high stakes and the subject of reasonable disagreement. At this stage it suffices to say that by 'reasonable' disagreement, I mean to refer to a kind of disagreement

that is, at least in part, a product of epistemic complexity. I return to the matter of how we ought to understand reasonableness below.

(i) Abortion

One issue which is widely agreed to be both high stakes and the subject of reasonable disagreement is abortion. According to one side, legal abortion is legal mass murder and according to the other, illegal abortion is a severe all-things-considered injustice against women. Let's be more specific and say that there is reasonable disagreement about the moral status of a foetus in the second trimester.[4] Since abortion is the subject of reasonable disagreement, TRIP says that people have equal democratic rights to decide on the issue: they have the democratic right to decide whether to prohibit or legalise abortion in the second trimester. Therefore, TRIP must accept either that people have democratic rights to legalise mass murder or that they have democratic rights to treat women severely unjustly, all-things-considered. Since both of these things are severe injustices, TRIP entails that people have democratic rights to do severe injustice.

(ii) Global justice

Today, billions of people across the world die early and suffer poor quality lives by virtue of where they are born. Theories of global justice tell us the obligations that rich individuals and rich world governments have to these people. If we make even a small mistake in our theories of global justice, billions of people could die earlier or suffer

[4] Rawls discusses abortion at Rawls, *Political Liberalism*, 243; John Rawls, *Justice as Fairness : A Restatement* (Cambridge, Mass; London: Harvard University Press, 2001), 117. For criticism see Robert P. George, "Public Reason and Political Conflict: Abortion and Homosexuality," *The Yale Law Journal* 106, no. 8 (June 1, 1997): 2475–2504.

considerably worse lives than they should from the point of view of justice. If our immigration policy, our foreign aid policy or our climate policy is formulated on the basis of an incorrect, though not obviously wrong, theory of global justice, there could be great injustice. It is clear that there is reasonable disagreement about global justice and that the stakes of that issue are very high. TRIP implies that the majority ought to decide on these matters, even if they make massively unjust decisions.

(iii) Future people

When deciding what we ought to do today, we have to decide how much we ought to weight the welfare of future people, or in other words we have to determine what the correct 'discount rate' is. Our climate policy, for example, will determine how benefits and burdens are distributed to literally billions of people who could exist. If we act on the basis of the incorrect discount rate, billions of possible people will be deprived of welfare or resources which they ought to receive. The stakes of our choice of discount rate, then, are very very high. The discount rate is partially determined by empirical factors about the likely return on investment and the likely future state of the planet. But it is also partially determined by purely ethical considerations. There is, at present, a great deal of purely ethical disagreement amongst philosophers (and economists) about what the correct discount rate is. It seems undeniable that some of these competing positions are reasonable, on any account of reasonableness. Therefore, TRIP implies the democratic right to decide on issues which affect future people, such as climate change, even if the majority chooses a morally catastrophic policy.

(iv) The technological singularity

Most accounts of reasonableness allow there to be reasonable disagreement about empirical facts.[5] For Rawls, for instance, one of the burdens of judgement which explains reasonable disagreement is complex and conflicting empirical evidence.[6] The problem is that some empirical disagreements have very high stakes. For example, suppose that policy A will bring about the technological singularity which will destroy of life on Earth this century, but that there is reasonable disagreement about whether it will or not.[7] If so, then TRIP entails that people have equal non-derivative claim rights to implement policy A. So, even if Nick *knows* the consequences of policy A and has the power to stop it by perverting the democratic process, he is not permitted to do so. He is not permitted to prevent human extinction because there is reasonable disagreement about what will bring it about.

There is a great deal of reasonable disagreement about many high stakes moral and empirical matters. Intergenerational justice, how we ought to deal with existential risk, global justice, animal ethics, bioethics etc, all have enormous stakes and yet are the subject of a great deal of reasonable disagreement. So, premise 1 is true. Therefore, either TRIP is false or people have non-derivative democratic rights to perform severely unjust acts. People do not have such rights, so TRIP is false.

[5] Christiano's TRIP is not subject to this objection because he allows expert control of means to democratically chosen ends Christiano, *The Constitution of Equality*, 120.

[6] Rawls, *Political Liberalism*, 56.

[7] See Nick Bostrom, "Existential Risks - Analyzing Human Extinction Scenarios and Related Hazards," *Journal of Evolution and Technology* 9 (2002).

Responses

There are two possible responses to this. Firstly, we could accept the democratic right to do severe injustice. This is clearly unacceptable. Moral theories ought to deny that people have democratic rights to do things which are as unjust as legalising mass baby murder or depriving billions of people of the means of subsistence which are rightfully theirs. The fact that TRIP does not accept this is a very clear *reductio* of TRIP.

The other possible response is to challenge the somewhat loose understanding of reasonableness I have used. This response is not available to Christiano. He argues that democracy is an intrinsically just way to decide on matters about which there is informed or conscientious disagreement, in the ordinary senses of these terms. This leaves him open to the *reductio* I have made. Public Justification Liberals use quite technical definitions of reasonableness. In the remainder of the chapter, I will discuss whether this understanding of reasonableness allows any PJL-based version of TRIP is able to avoid implying the democratic right to do severe substantive injustice. I argue that the answer is 'no'.

2. The apparatus of Public Justification Liberalism

There are many moving parts to public justification. I will now clarify these moving parts and bring out points of disagreement amongst different proponents of PJL.

A defining feature of PJL is its endorsement of a principle of legitimacy which in some way makes the legitimacy of political action (or possibly inaction) depend on whether the doctrines grounding the action are reasonably acceptable to those who are imposed upon, coerced or affected in some way by the action. Proponents of PJL are sometimes not as clear as they might be on key parts of this principle. The following is a good place to start:

Public Justification Principle – political action (or inaction) is legitimate only if we can expect all reasonable people to accept the doctrines which ground that political action (or inaction).[8]

There is a lot going on here that needs to be explained.

(i) What is legitimacy?

I use the definition of *legitimacy* that I gave in Chapter 1:

Legitimacy – the moral claim and/or privilege right to issue and enforce commands.

Many public justification liberals have a sense of legitimacy in mind which entails a permission to use political power as well as the moral power to create political obligations. For the reasons given in Chapter 1, I am interested specifically in whether people have

[8] See for example, Cohen, *Philosophy, Politics, Democracy*, 23, 234–234; David Estlund, "The Insularity of the Reasonable: Why Political Liberalism Must Admit the Truth," *Ethics* 108, no. 2 (1998): 252–75; Thomas Nagel, "Moral Conflict and Political Legitimacy," *Philosophy & Public Affairs* 16, no. 3 (July 1, 1987): 215–40; Charles Larmore, "The Moral Basis of Political Liberalism," *The Journal of Philosophy* 96, no. 12 (December 1, 1999): 599–625. Some versions of the public justification principle are about reasonable rejection, rather than what we can expect all reasonable people to accept. See Brian Barry, "John Rawls and the Search for Stability," *Ethics* 105, no. 4 (July 1, 1995): 874–915; George Klosko, "Reasonable Rejection and Neutrality of Justification," in *Perfectionism and Neutrality: Essays in Liberal Theory*, ed. Steven Wall and George Klosko (Oxford: Oxford University Press, 2003), 167–89. My version of the public justification principle makes political action the focus of public justification, whereas Rawls' makes constitutions the focus of public justifications. My version is more popular and it seems to me more in-keeping with the rationales for public justification. None of my fundamental points turn on this distinction.

claim rights to do injustice. My goal here is to find out whether PJL as a theory of legitimacy entails that people have these rights.

(ii) Reasonableness

Different versions of PJL differ on what makes a person or conception of justice reasonable.[9] I will now explain the Rawlsian view and will mention any dissenting views in the critical discussion to follow. On the Rawlsian account, to be reasonable one must have certain motivations, certain substantive moral views and one's beliefs must be the product of the 'burdens of judgement'. The motivational and substantive moral element is, in short, that persons are reasonable when they are willing to propose fair terms of cooperation that others might reasonably accept and they are ready to discuss these fair terms with others.[10]

Reasonable people hold *reasonable liberal political* conceptions of justice. Reasonable liberal political conceptions of justice are to be distinguished from comprehensive doctrines. A doctrine is comprehensive if it applies to a wide range of subjects and includes conceptions of what is of value in human and animal life as well as ideals of personal virtue and character that are to inform much of our nonpolitical conduct.[11] Many religious doctrines and philosophical doctrines, like utilitarianism, are comprehensive. We cannot expect all reasonable people to accept a comprehensive

[9] I assume for simplicity that reasonable people have only reasonable beliefs and that unreasonable people have only unreasonable beliefs. For my argument, nothing rides on the possibility that reasonable people might have some unreasonable beliefs and that unreasonable might have some reasonable beliefs.

[10] Rawls, *Political Liberalism*, 49–50.

[11] Ibid., 175. Rawls refers only to the value of human life in the referenced passage, but he means to include animals as well. See Ibid., 21.

doctrine in conditions of reasonable pluralism, but we can expect all reasonable people to accept reasonable liberal political conceptions of justice.

Political conceptions are *political* because they apply only to the basic structure of society; they are freestanding from any wider comprehensive doctrine; and they are elaborated in terms of ideas implicit in the public political culture.[12] Conceptions are *liberal* if they have the following three features:

> First, a list of certain basic rights, liberties, and opportunities;
>
> Second, an assignment of special priority to those rights, liberties, and opportunities, especially with respect to the claims of the general good and perfectionist values;
>
> Third, measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms.[13]

All liberal political conceptions endorse these basic principles, but since they can be interpreted and ordered in different ways, there is a family of reasonable liberal political conceptions of justice which go beyond Rawls' own justice as fairness.[14] *Political values* are drawn from, ordered and explicated by these conceptions. When constitutional essentials or matters of basic justice are at stake, citizens must appeal only to a reasonable balance of political values that are reasonably acceptable to all and do not presuppose any fully or partially comprehensive doctrine.[15]

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[12] Rawls, *Political Liberalism*, 223, 11–14.

[13] John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review* 64, no. 3 (July 1, 1997): 774; Rawls, *Political Liberalism*, 223.

[14] Rawls, "The Idea of Public Reason Revisited," 774.

[15] Rawls, *Political Liberalism*, 175–176.

The second aspect of reasonableness is the willingness to recognise the burdens of judgment and to accept their implications for the legitimate use of political power.[16] This is Rawls' somewhat elliptical way of saying that if a view is produced by the burdens of judgment, then it counts as reasonable, provided that it also meets the first condition on reasonableness. Reasonable disagreement is not explained by stupidity, logical errors or ignorance, but by the burdens of judgment, which are the many hazards involved in the correct exercise of reason in the ordinary course of political life. These burdens are (a) complex and conflicting empirical evidence; (b) disagreement about the weight of different moral considerations; (c) the vagueness of our concepts; (d) the way we assess evidence and the weight of values is determined by our total experience, which varies significantly between people; (e) it is difficult to make an overall assessment when there are different moral considerations on both sides; (f) we face hard choices between different values. Burdens (b), (d), (e) and (f) seem to me to basically reiterate the same point, which is that it is epistemically hard to balance competing moral considerations in some cases.[17] Anyway, these are the burdens of judgment which are supposed to explain reasonable disagreement in a well-ordered society.

As I have said, not all proponents of PJL accept the Rawlsian account of reasonableness. However, one thing they all accept is that reasonable people are not perfect. There are some false claims we can expect all reasonable people to accept and there are some true claims we cannot expect all reasonable people to accept. Thus, PJL accepts true injustice for the sake of reasonable acceptability. For example, Rawls says that sufficientarianism, which he believes to be false, can be reasonably accepted by everyone

[16] Ibid., 54–58.

[17] I also do not think that vagueness can explain reasonable disagreement. See Sorensen, *Vagueness and Contradiction*, 21–29.

and so is admissible in the justification of coercion.[18] It is this truth-restricting feature which makes PJL seem a good basis for TRIP.

(iii) The scope of public justification

My version of the Public Justification Principle applies to all political action (or inaction). So, on my account, public justification has 'broad scope'.[19] Rawls and others adopt the 'narrow view' of the scope of public justification and say that it applies only to the exercise of political power concerning constitutional essentials and matters of basic justice.[20] Nothing of importance turns on my assumption of the broad scope view. I adopt that view because I think it is more in-keeping with the overall aims of PJL.

(iv) Action and inaction

Any plausible version of PJL must say that the reasonable acceptability requirement applies at least in some cases to state *inaction* as well as to state action. As it is often stated, the Public Justification Principle says that state coercion or the exercise of political power is legitimate only if we can expect all reasonable people to accept the reasons supporting that action. By this definition, PJL says nothing about the legitimacy of state inaction and this is obviously not what political liberals want. Political liberals say, for instance, that it would be illegitimate for the state not to prohibit murder. So, PJL must say that state inaction must sometimes be subject to the Public Justification Principle. In some cases, if we cannot expect all reasonable people to accept the reasons for state inaction,

[18] Rawls, *Political Liberalism*, xlix.

[19] See Jonathan Quong, "The Scope of Public Reason," *Political Studies* 52, no. 2 (2004): 233–50.

[20] Rawls, *Political Liberalism*, 137. For an account of the constitutional essentials and matters of basic justice see Ibid., 227.

then state inaction is illegitimate.[21] I remain neutral here on whether PJL ought to hold that there is a presumption against coercion and I do not attempt to set down criteria determining which particular tokens of inaction must be subject to the Public Justification Principle. All I am saying is that the requirements of liberal legitimacy and public reason must sometimes apply to state inaction, regardless of whether there is a presumption against coercion or not.

(v) Public reason

I have not yet referred to public reason, despite the fact that many philosophers, including Rawls, refer more often to public reason than they do to public justification.[22] This emphasis on public reason seems to me a mild error given the definition of those ideas given by Rawls.[23] The Public Justification Principle is the more fundamental notion and

[21] On this see Colin Bird, "Coercion and Public Justification," *Politics, Philosophy & Economics*, July 26, 2013, 1–26; Andrew Lister, "Public Justification and the Limits of State Action," *Politics, Philosophy & Economics* 9, no. 2 (May 1, 2010): 151–75; Jonathan Quong, "On the Idea of Public Reason," in *Blackwell Companions to Philosophy: A Companion to Rawls*, ed. Jon Mandle and David A. Reidy (Oxford: Wiley, 2013), 265–80; Nicholas Wolterstorff, "The Paradoxical Role of Coercion in the Theory of Political Liberalism," *Journal of Law, Philosophy and Culture* 1 (2007): 135–58; Steven Wall, "On Justificatory Liberalism," *Politics, Philosophy & Economics* 9, no. 2 (May 1, 2010): 123–49.

[22] See for example Quong, "On the Idea of Public Reason"; David A. Reidy, "Rawls's Wide View of Public Reason: Not Wide Enough," *Res Publica* 6, no. 1 (January 1, 2000): 49–72; Andrew Williams, "The Alleged Incompleteness of Public Reason," *Res Publica* 6, no. 2 (May 1, 2000): 199–211; Micah Lott, "Restraint on Reasons and Reasons for Restraint: A Problem for Rawls' Ideal of Public Reason," *Pacific Philosophical Quarterly* 87, no. 1 (2006): 75–95.

[23] Many proponents of PJL place great emphasis on sincerity or *trying* to find public reasons. This seems to me to greatly overstate the moral importance of trying. In morality as in football, *success* is what matters. See Roy Sorensen, "Unknowable Obligations," *Utilitas* 7, no. 02 (1995): 256ff.

the ideal of public reason is a duty of civility which is a corollary to it. The ideal of public reason is a duty to explain one's vote to others in terms they can reasonably accept.[24] A policy could be legitimate because it is grounded in doctrines which we can expect reasonable people to accept, even if those who enacted the policy violated the constraints of public reason by appealing to reasons which we cannot expect people to reasonably accept.[25] For example, someone might defend banning murder on the basis that Allah commands it. The policy is legitimate – because doctrines grounding the policy can be reasonably accepted by all imposed upon – but those enacting it still violated public reason. My focus will primarily be on the Public Justification Principle and not on public reason, thus understood.

(vi) Victorious, inconclusive and defeated justification

The difference between victorious, inconclusive and defeated justifications will become important in my discussion. A justification is *defeated* if we cannot expect all reasonable people to accept it.[26] On the Rawlsian account, we cannot expect all reasonable people to accept a comprehensive doctrine like Christianity. Therefore, any justification which appeals to Christianity is defeated and may not be used to justify state action.

A political act is *conclusively* or *victoriously* justified if and only if all reasonable people can be expected to endorse a justification for that action. For example, we can expect all reasonable people to accept a justification for a law against murder. People might do so on the basis of different balances of political values and so might accept different reasons for the law, but the law is still justified to them, as reasonable people.

[24] Rawls, *Political Liberalism*, 217.

[25] See Estlund, "The Insularity of the Reasonable," 254 n7.

[26] Gaus, *Justificatory Liberalism*, 146–147.

Some political acts have undefeated but not victorious justifications: they are *inconclusively* justified.[27] Gaus argues that inconclusive justification is to do with the burden of proof required for justification.[28] Because our belief systems are so complex and there are many different considerations at stake, it is often difficult to achieve victory. Inconclusive justifications reside in the gap between the proof required for acceptance of a proposition and the proof required for certainty in that proposition. Three different kinds of inconclusive justification have been raised in the literature, but no-one to my knowledge has acknowledged the distinction between nested inconclusiveness and what I call 'weight inconclusiveness'. Firstly, a *nested* inconclusive justification appeals to a victoriously justified principle for which no victoriously justified interpretation is to be found.[29] Abortion could also be interpreted as a case of nested inconclusiveness. The principle 'murder ought to be illegal' is conclusively justified, but no single interpretation of that principle is conclusively justified because some reasonable people will interpret it to entail that abortion ought to be illegal and some will not.

Secondly, what Gaus calls a *merely* inconclusive justification is an inconclusive justification that appeals to a principle which is not put forward as an interpretation of a victoriously justified principle.

Thirdly, a law could be inconclusively justified because it is not the case that all reasonable people can be expected to accept the same weighting of reasonable political values and so are led to endorse different policies. Call this a '*weight* inconclusive'

[27] Ibid., 151–154.

[28] Ibid., 147–151.

[29] Ibid., 180. Gaus gives an apparently different definition of nested inconclusiveness at Ibid., 156–158. This difference does not affect my critique. For criticism see David Enoch, "The Disorder of Public Reason," *Ethics* 124, no. 1 (October 1, 2013): 153–155; Lister, "Public Justification and the Limits of State Action."

justification.[30] For example, two reasonable people, Tony and Sara, might disagree about whether the state should force the Catholic Church to allow female priests.[31] Tony argues that the state should not take this action, on the basis of an appeal to the political value of religious liberty. Sara argues that the state should take this action, on the basis of an appeal to the political value of non-discrimination in employment. Tony and Sara both appeal to reasonable liberal political values, but they disagree about their weight. A reasonable disagreement about the interpretation of a principle need not be a reasonable disagreement about the weight of different political values. For example, Michelle and Colin might disagree about whether a foetus is a person and so disagree about the correct interpretation of the right to life, but agree on the *weight* of the value of the right to life (if it is sensible to talk about the weight of a right) or agree on its deontic strength. They could both agree that if something has a right to life, then people are not permitted to kill it merely because they do not wish to look after it. Not all cases of nested inconclusiveness are cases of weight inconclusiveness.

This should have helped clarify the basic features of all versions of PJL. We can now look at various different PJL-based defences of TRIP.

3. Defeated public justifications and intrinsic proceduralism

PJL is truth-restricting in two ways. It rules out defeated justifications even if they are sound and it lets in inconclusive or conclusive justifications, even if they are unsound. In this section, I will discuss a form of intrinsic proceduralism which holds that we must retreat to the IPJ of democracy when substantive justifications for state action are defeated.

[30] The terminology is novel.

[31] See Quong, "Disagreement, Asymmetry, and Liberal Legitimacy," 315.

I will argue that the theory fails because it cannot place plausible substantive constraints on democracy.

Defeated substantive justifications

Some philosophers have appeared to defend the view that we can retreat to the intrinsic justice of democracy when there are no publicly justified substantive justifications of particular laws or procedures. Many commentators have taken Jeremy Waldron to be defending this kind of intrinsic proceduralist argument.[32] For various reasons, I am not completely sure that this is a correct interpretation of Waldron.[33] However, my main focus here is not Waldron exegesis, it is proving my thesis, so I put that discussion to one side. There are two passages in *Law and Disagreement* which many have taken to be Waldron's argument for a public justification-based defence of TRIP. The first passage criticises Mill's proposal for plural voting:

[32] See for example Eisgruber, "Democracy and Disagreement"; David Enoch, "Taking Disagreement Seriously: On Jeremy Waldron's Law and Disagreement," *Israel Law Review* 39 (2006): 22–35; David Estlund, "Jeremy Waldron on Law and Disagreement," *Philosophical Studies* 99, no. 1 (May 1, 2000): 111–28; Aileen Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron," *Law and Philosophy* 22, no. 5 (September 1, 2003): 451–86.

[33] In brief, my reasons are as follows. First, two passages in chapter 5 of *Law and Disagreement* are the only places he could be taken to be making the argument. In the rest of that book and in all of his other work on democracy in *The Dignity of Legislation* and in 'The core of the case against judicial review', the Practical Argument is the sole argument he advances. Second, in responding to David Enoch's critique of his argument, Waldron says 'maybe I did not need to talk specifically about *reasonable* disagreement' (emphasis in original), at Waldron, "Disagreement and Response," 56. This is a strange thing to say if Waldron is advancing a public justification-based argument. Third, the passages which are supposed to be part of a PJL-based argument can also be interpreted as avowals of the argument from equal respect, which has nothing necessarily to do with public justification.

> "If the mark of wisdom is having come up with just decisions in the past, and people disagree about what counts as a just decision, then it is not clear how we can determine who is wise and who is not without failing in respect for persons in the first of the senses set out above."[34]

'The sense set out above' is respecting people's beliefs about justice where none is self-certifying. That is, we respect people by treating their views as reasonable.[35] The second passage criticises Beitz's argument for using a substantive notion of respect to justify political procedures:

> "It is because we disagree about what counts as a substantively respectful outcome that we need a decision-procedure; in this context, folding substance back into procedure will necessarily privilege one controversial view about what respect entails and accordingly fail to respect others. Thus in the circumstances of politics, all one *can* work with is the 'implausibly narrow understanding' of equal respect; and I suspect (though, again, I doubt that one can prove) that majority-decision is the only decision-procedure consistent with equal respect in this necessarily impoverished sense."[36]

In these passages, Waldron can be taken to be arguing that appeals to substantive justice are ruled out when justifying political procedures because appealing to them is disrespectful.

If we impose a proposal on the basis of a doctrine about which there is reasonable disagreement, we disrespect those who reasonably disagree. As Waldron himself says in an earlier essay:

> "[Liberals] are committed to a conception of freedom and of respect for the capacities and the agency of individual men and women, and that those commitments generate a

[34] Waldron, *Law and Disagreement*, 115.

[35] Ibid., 111–112.

[36] Ibid., 116.

> requirement that all aspects of the social world should be either acceptable or be capable of being made acceptable to every last individual."[37]

Public justification reconciles state action and respect for persons. This is a widely shared view amongst proponents of PJL. It is often stated as a more specific claim about reconciling *coercion* and respect.[38] The version of PJL endorsed by Waldron and others is not coercion-focused in this way.[39] For Waldron, all aspects of the social world must be acceptable to all reasonable people.

Waldron's conception of reasonableness is less substantive than Rawls', as it relies entirely on the burdens of judgement. [40] Provided disagreement is caused by the burdens of judgement, it counts as reasonable. Waldron argues that Rawls fails to realise that the burdens of judgement apply as much to disagreements about substantive justice as they do disagreements about the good life.[41] Thus, Waldron is led to endorse Deep Reasonable Disagreement and Rawls is not:[42]

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[37] Jeremy Waldron, "Theoretical Foundations of Liberalism," in *Liberal Rights: Collected Papers, 1981-1991* (Cambridge: Cambridge University Press, 1993), 36–37.

[38] See Quong, "On the Idea of Public Reason," 271–273; Larmore, "The Moral Basis of Political Liberalism," 608; Nagel, "Moral Conflict and Political Legitimacy," 238; Gerald F. Gaus, *The Order of Public Reason : A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge: Cambridge University Press, 2011), 17; Cohen, *Philosophy, Politics, Democracy*, 165.

[39] See also for example Quong, "On the Idea of Public Reason"; Bird, "Coercion and Public Justification"; Lister, "Public Justification and the Limits of State Action."

[40] Waldron, *Law and Disagreement*, 112–113.

[41] Ibid., 152.

[42] Quong questions Waldron's interpretation in Quong, "Disagreement, Asymmetry, and Liberal Legitimacy."

> *Deep Reasonable Disagreement* – in the circumstances of politics, we cannot expect all reasonable people to agree on any claims about the substantive justice of different state actions.[43]

We should be clear that Waldron, unlike Rawls, is working in non-ideal theory. Waldron is arguing that there is deep reasonable disagreement in the world we find ourselves in today; we do not have to appeal to bad faith, ignorance or self-interest to explain disagreement in our world.[44] Rawls, in contrast, is saying that the burdens of judgment (partly) explain reasonable disagreement in the ideal theory he investigates in *Political Liberalism*, which, as I understand it, is halfway between our world and a very ideal one in which people are perfectly rational and have perfect information.[45] If there is deep reasonable disagreement, then in our non-ideal world it is disrespectful to appeal to claims about substantive justice when justifying political institutions or actions.[46] Any justification which appeals to a claim about substantive justice is defeated and so may not be used in political justification. When these substantive justifications are unavailable, all that we can retreat to is the equal respect embodied, in a non-instrumental way, by democracy.[47]

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[43] See Waldron, *Law and Disagreement*, 111–113; Waldron, "The Core of the Case against Judicial Review," 1368. See Estlund, "Jeremy Waldron on Law and Disagreement," 113.

[44] Waldron, *Law and Disagreement*, 112–113.

[45] Rawls, *Political Liberalism*, 55.

[46] It does not matter to my critique whether Waldron uses the reasonable rejection public justification principle, rather than the one I use.

[47] Waldron himself says that this argument is not reasonably acceptable at Waldron, "Disagreement and Response," 61–62. Again, this is difficult to square with interpreting him to be advancing an argument from public justification.

The substantive focus of public justification

I think this argument is subject to numerous problems, though I will only focus on one: the argument neglects the substantive focus of public justification. Proposals with defeated substantive justifications cannot be imposed by any procedure, democratic or otherwise. So, PJL cannot sustain the idea that we can retreat to the equal respect embodied by democracy when there is only defeated substantive justification for a law.

PJL has been taken by most of its proponents to justify a certain set of substantive limits on what governments, democratic or otherwise, may do. The fact that we cannot expect all reasonable people to accept a particular comprehensive doctrine entails that that comprehensive doctrine may not be imposed, whether it is chosen democratically or not. For instance, we cannot expect all reasonable people to accept Christianity. Therefore, state imposition of Christian theocracy is not permitted because some of those imposed upon cannot be expected to reasonably accept Christianity. For most proponents of PJL, state imposition of a doctrine which we cannot expect all reasonable people to accept is ruled out, *no matter the procedural origin of the imposition*.[48]

In contrast, according to Waldron when there is reasonable disagreement about the substantive quality of different outcomes, we must use a democratic procedure to decide which outcome to implement. This is not to say that Waldron has given up on public justification. Rather, he thinks that the intrinsic justice of democracy is victoriously justified when all substantive justifications for policies are defeated. The law has been justified to those imposed upon by virtue of its procedural origins, but not by virtue its substantive quality. Therefore, Waldron allows majorities to enforce comprehensive doctrines such as Christianity, Islam, utilitarianism and Millian liberalism.

[48] Quong, "Disagreement, Asymmetry, and Liberal Legitimacy," 316–317.

On this understanding of Waldron's argument, PJL cannot justify the substantive limits on democracy which he accepts in his work after *Law and Disagreement* and which any plausible theory must accept.[49] The usual way for a proponent of PJL to rule out the imposition of severely unjust policies would be to say that the justification for those policies is defeated. We cannot expect all reasonable people to accept any substantive justification for genocide. Consequently, genocide is disrespectful to those who reasonably reject genocide and so may not be carried out, democratically or otherwise.[50] This move is unavailable to Waldron. Waldron holds that when all justifications based on substantive justice are defeated, we must decide democratically. But this would allow the majority to enact genocide. Therefore, Waldron cannot use the idea of defeated substantive justification to place substantive limits on democracy.

Is there any way he could place substantive limits on democracy? Barring giving up on the idea of public justification altogether, I do not think so. The obvious way for Waldron to alter his argument would be to say that people lack democratic rights to implement policies for which there are only defeated substantive justifications, but have democratic rights to implement policies which have conclusive or inconclusive substantive justification. This is the path taken by Valentini and Gaus. I argue against it below. As Waldron's position stands, it is unable to justify substantive constraints on democracy. As a result, it is subject to a *reductio ad absurdum*: it implies that each person has the

[49] To say that there are substantive limits on permissible state action is not to say that there is any alternative feasible institution which would not transgress these limits. The limits just tell us when democracies have a right to act and when they do not. For acceptance of the substantive limits see Waldron, "The Core of the Case against Judicial Review"; Waldron, "Disagreement and Response."

[50] This is a bizarre account of why genocide is illegitimate. I think this hints towards a big problem for PJL, but I will not expand on that here.

democratic right to commit genocide. Therefore, the Waldronian argument for TRIP must be unsound.

It might be argued in response that intrinsic proceduralist concerns place constraints on the kind of policies the majority has the right to produce. Waldron could say that genocide is illegitimate because it deprives those slaughtered of the chance to participate. There are two problems with this. Firstly, it is a very implausible account of the reason that genocide is illegitimate. The fact that Jews in Nazi Germany were not able to politically participate is at best a consideration of miniscule significance bearing on the legitimacy of exterminating them. Secondly, some severe injustices do not involve depriving people of the chance to politically participate. For example, it is not true that waterboarding or other forms of torture must necessarily impinge on anyone's opportunity for political influence.[51] Switch torture for genocide and the *reductio* still works and so the argument fails.

All of this said, it is important to bear in mind that there is good reason to believe that Waldron did not make this argument. Anyway, I have shown that this argument cannot succeed. Defeated justifications impose substantive constraints on democratic rights; they do not imply that we should allow a procedure to produce laws with defeated justification.

4. Maximising reasonable acceptability

Waldron's argument is implausible because it entails the democratic right to impose proposals with only defeated justifications. Other PJL-based forms of TRIP hold that we ought to have democracy to decide on the range of *inconclusively* justified proposals, as opposed to having it decide on proposals with defeated justifications. In the next two sections, I will reject specific arguments for the proposition that democracy is an

[51] John McCain was tortured and went on to be a presidential candidate.

intrinsically just way to decide on inconclusively justified proposals. In section 6, I construct a more profitable PJL-based argument and argue that it implies the democratic right to do severe substantive injustice.

Many proponents of PJL have argued that *inconclusive* substantive justification, unlike defeated substantive justification, opens the door to proceduralism of some sort. Not all agree that it opens the door to democracy only, or they do not explicitly defend the use of democracy on an intrinsic proceduralist basis.[52] Valentini and Gaus have explicitly defended versions of TRIP which say that democracy is an intrinsically just way to decide between inconclusively justified policies. I will first consider Valentini's argument that democracy is intrinsically just because it maximises the substantive reasonable acceptability of laws. I argue that this argument is not intrinsic proceduralist.

Public justification and disagreement

Valentini associates justice, equal respect for persons and mutual justifiability. She endorses the following Public Justification Principle:

> *Public Justification Principle* – A society expresses equal respect for persons if the rules governing it are in principle acceptable to all reasonable citizens.[53]

For many proponents of Public Justification Liberalism, the Public Justification Principle is a requirement of legitimacy, which is separate from justice. An unjust government can be

[52] See Quong, "Disagreement, Asymmetry, and Liberal Legitimacy"; Micah Schwartzman, "The Completeness of Public Reason," *Politics, Philosophy & Economics* 3, no. 2 (May 1, 2004): 191–220; Williams, "The Alleged Incompleteness of Public Reason."

[53] Valentini, "Justice, Disagreement and Democracy," 178.

legitimate so long as it can justify its rules to all reasonable citizens. By contrast, for Valentini the public justification principle is a requirement of justice. If social rules are not acceptable to all reasonable citizens, then they are unjust.

Valentini goes on to distinguish four different types of disagreement: thin, thick, reasonable and unreasonable.

> *Thin Disagreement about Justice* (td) – Citizens advance conflicting claims about justice, but agree about the truth conditions of those claims.[54]

When there is thin disagreement about justice, people disagree about the policies required by justice but agree on the particular conditions which must be satisfied for policies to count as just. For example, Jack and Jill might agree that justice requires that we maximise utility but disagree about which particular policies realise this goal. As they agree that justice requires that we maximise utility, they agree on the conditions in which a claim about justice is true. But they disagree about which particular claims about justice are true, perhaps because they disagree about the empirical facts. Valentini contends that under td, we can identify experts about justice, namely those who are more familiar with the relevant facts.[55] In the same way, we consult native speakers to find out which utterance is grammatical and we consult doctors to find out what illness we have.[56]

Thin disagreement is different to thick disagreement:

[54] Ibid., 182.

[55] Ibid., 183.

[56] Ibid., 182–183.

> *Thick Disagreement about Justice* (TD) – Citizens advance conflicting claims about justice and disagree about the truth conditions of those claims.[57]

For example, Rawlsians and utilitarians advance incompatible claims about which policies are just and disagree about the conditions in which policies are just. For Rawlsians, justice is satisfied when the basic structure of society maximises the position of the least well-off group, whereas for utilitarians we ought to maximise utility, regardless of its distribution. These people disagree about which policies are just because they disagree about what it is that makes a policy just. Valentini argues that under TD, the identification of experts is impossible:

> "For Catholic believers, priests and bishops are much more familiar with the relevant facts than philosophers; for Buddhist believers, monks are probably the experts, and so forth."[58]

If different people have different understandings of what counts as a just outcome, then there is no generally acceptable view of expertise.

Valentini goes on to distinguish reasonable and unreasonable disagreement, which she defines in the following way:

> *Reasonable Disagreement about Justice* (RD) – Citizens disagree about justice, but none of them is obviously right or wrong.[59]

> *Unreasonable Disagreement about Justice* (UD) – Citizens disagree about justice, but some are obviously wrong.[60]

[57] Ibid., 183.

[58] Ibid., 184.

[59] Ibid.

[60] Ibid., 185.

Valentini's conception of reasonableness has both epistemic and substantive aspects. Reasonable people must accept a broadly liberal perspective and must be committed to equal respect. For instance, there is reasonable disagreement about whether a flat or progressive income tax is just, but neither position is obviously wrong. Similarly, people can reasonably differ about what equal respect requires with regard to abortion. In addition, there can be reasonable disagreement about empirical facts as well as moral claims. Scientists might, for example, disagree because the available evidence is conflicting, complex and inconclusive.[61]

Some beliefs about political morality are unreasonable. For example, it is unreasonable to believe that we ought to torture the innocent or institute slavery. Disagreement about empirical matters can also be unreasonable. The belief that the earth is flat is unreasonable, for instance.[62]

Reasonable acceptability and instrumentalism

Valentini argues that there are some proposals which no one has the right to impose. Things like slavery and denial of the means of subsistence are ruled out because no reasonable person can accept them.[63]

However, she argues that democracy is an intrinsically just way to decide on inconclusively justified proposals. The justification which political procedures have

[61] Ibid.

[62] Ibid. It is worth saying that Valentini says that such beliefs are only unreasonable 'from the scientific perspective' which she adopts. Hence, she must think that if someone rejects the scientific perspective, then beliefs in the flatness of the earth stop being unreasonable, regardless of the available evidence. This is a very strong form of epistemological relativism.

[63] Ibid., 180, 192. She leaves a fuller discussion of the implications of unreasonable disagreement for future work. See Ibid., 197.

depends on the kind of disagreement there is in society. When there is thin reasonable disagreement about substantive justice (trd), our political procedures must be justified instrumentally.[64] However, when there is thick reasonable disagreement (TRD) about substantive justice – when people disagree about the truth conditions of assertions about substantive justice and none is obviously wrong – majoritarian democracy is intrinsically just.[65]

There are two parts to Valentini's argument. The first aims to show that majoritarian democracy is a requirement of justice in certain circumstances. This goes as follows:

1. Justice demands that the maximum feasible number of reasonable people accept that the social rules are substantively just.
2. If there is TRD in circumstances C, then majority rule is the only decision-procedure in C which ensures that the maximum feasible number of reasonable people accept that the social rules are substantively just.

[From 1 and 2]:

3. Therefore, if there is TRD in C, then justice demands that we use majority rule in C.

Valentini defends majority rule on the basis that it maximises the substantive reasonable acceptability of social rules. As she says, majority rule is a 'less-than-perfect solution' to the problem of TRD because it inevitably results in proposals which the minority cannot

[64] Valentini, "Justice, Disagreement and Democracy," 187–190.

[65] Ibid., 190–197.

reasonably accept.[66] The ideal would be complete reasonable unanimity. However, given that people are bound to disagree and waiting for unanimity would be rejected by all reasonable people, 'the best we can hope for is to *approximate* this ideal as much as possible, and no feasible decision procedure seems to be as well-placed to do this as majority rule'.[67]

> "Majority rule ensures that reasonable political outcomes are accepted by as large a number of the populace as possible. In so doing, majority rule offers the best *approximation* of mutual justifiability under TRD. A minority outvoted in an election has reason to abide by the majority decision not because that decision is most likely to be correct, but because it is the most widely justified."[68]

In short, majority rule is a requirement of justice because it maximises the substantive reasonable acceptability of social rules.

Valentini could be clearer on two questions. Firstly, is majority rule justified to the minority who have substantive views they reasonably reject imposed upon them? Secondly and related to the first question, is reasonable unanimity required for the legitimate enforcement of a social rule? In some places, she seems to suggest that majority rule is *not* justified to the minority, but *in spite of that*, majority-supported social rules may permissibly be imposed because they are the best we can do when there is TRD. But in other places, she suggests that *by virtue of the fact* that majority rule is the best we can do in TRD, majority rule *is* justified to the minority and consequently, since majority rule secures reasonable unanimity, majority-endorsed social rules may permissibly be enforced.

[66] Ibid., 194.

[67] Ibid., 195.

[68] Ibid., 195–196. Emphasis in original.

I will remain neutral on how we ought to interpret Valentini, as the interpretation does not bear on my critique of her intrinsic proceduralist argument.[69]

Valentini aims to show that democracy is not merely just, but intrinsically just. She states her central principle as follows:

> "Democracy is what equal respect (procedurally) requires when there is thick reasonable disagreement about what equal respect (substantively) requires."[70]

Here, Valentini is saying that democracy is intrinsically just when there is TRD about substantive justice. This part of her argument goes as follows:

> 4. If there is TRD in C, then majority rule is the only decision-procedure demanded by justice in C, regardless of the substantive quality of the outcomes it produces.
>
> 5. If a decision-procedure is demanded by justice regardless of the substantive quality of the outcomes it produces, then it is intrinsically just.
>
> [From 4 and 5]:
>
> 6. If there is TRD in C, then democracy is intrinsically just in C.

I shall now argue that premise 4 is false because Valentini's argument is actually an instrumentalist one.

Valentini argues that we ought to use the procedure which maximises the substantive reasonable acceptability of social rules. This is a standard by which to judge the substantive quality of outcomes. It does not necessarily require causal control over political decisions by the majority. Suppose, for instance, that forcing the Catholic Church

[69] Support for either interpretation can be found in the passages I have quoted in this section and other passages in Valentini's intrinsic proceduralist argument in Ibid., 192–197.

[70] Ibid., 193.

to accept female priests is acceptable to 70% of the reasonable population and not forcing them to do so is acceptable to 30% of the reasonable population. [71] Valentini's theory entails that forcing the Church to accept female priests is the just thing to do. This tells us something about what the substantively just outcome is. The outcome could be realised by an undemocratic procedure. Suppose it is true that both elite rule and democracy would force the church to accept female priests. Valentini has no grounds from within her theory to say that we ought to use democracy and not elite rule to make this decision. The only criterion she has to appeal to is that the outcome must be reasonably acceptable to as many people as possible. Elite rule meets this condition. The majority of reasonable people must agree with the outcome, but this does not entail that they must have any *causal control* over the outcome chosen. Therefore, Valentini's argument is an instrumentalist one.

Her argument goes wrong in an analogous way to arguments from social choice theory for the intrinsic justice of democracy. Social choice theory is a theory about the substantive quality of outcomes in terms of how well they bring about the socially preferred outcome. It dictates that the best outcome is the one that satisfies an appropriately aggregated social preference. Procedures are justified in terms of how well they do at realising this outcome. Many social choice theorists have used votes as a proxy for preferences. But elite rule could produce the outcome that is preferred by a majority of people. Therefore, social choice theory is not an intrinsic proceduralist theory.[72] Valentini's theory is the same as social choice theory, except that she seeks to maximise aggregated reasonable acceptance of outcomes, as opposed to aggregated brute individual preferences. She uses the actual votes of reasonable people as a proxy for the acceptance of

[71] I am assuming, as Valentini does, that there can be reasonable disagreement about this issue.

[72] See Thomas Christiano, "Social Choice and Democracy," in *The Idea of Democracy*, ed. David Copp, Jean Hampton, and John E. Roemer (Cambridge: Cambridge University Press, 1993).

reasonable people, but her theory does not require causal control by the majority. Thus, premise 4 is false. Therefore, Valentini's argument does not show that democracy is non-instrumentally just.[73]

5. The liberal authority and the Principle of Equality

Gerald Gaus has advanced a different PJL-based argument for TRIP, which holds that political procedures are subject to a strong principle of equality. Gaus' argument has two stages, one which tries to establish the moral need for a liberal authority and one which shows that there are reasons of IPJ for the authority to be a politically equal one. The way in which Gaus' argument fails is illustrative for the shape a potentially successful PJL-based TRIP must take.

The framework of Gaus' argument

Gaus works with a conception of reasonableness which is entirely epistemological. There are no substantive commitments built into the content of reasonableness. For Gaus, a law is publicly justified when each citizen is openly justified in accepting the doctrines which ground the law. Someone has an openly justified belief if it is stable in the face of acute

[73] Moreover, her argument seems to count in favour of an epistocracy of the reasonable in our world. If the best way to maximise the substantive acceptability of a set of rules to a set of people is to put those people in charge, then the reasonable should be put in charge and the unreasonable should be disenfranchised. Valentini is working in ideal theory and it might be true that in the ideal world, we ought to use democracy. In our world, this is not the case. A comparison to Jason Brennan's argument in 'The Right to a Competent Electorate' is instructive. He argued that lawmakers must be reasonable and that in our world, this counts in favour of disenfranchisement on a large scale. I do not see how Valentini can resist this conclusion. Brennan, "The Right to a Competent Electorate," 2011.

and sustained criticism by others and in the face of new information.[74] To find out whether a belief is openly justified to Alf, we ask 'if Alf's beliefs were subject to extensive criticism and additional information, does *his viewpoint commit him* to revise his beliefs?'[75] Gaus endorses a relativism or internalism about reasons, which implies that a proposition that is openly justified to Alf might not be openly justified to Betty, who has a different set of initial beliefs and inferential norms.[76] For example, Alf might have an openly justified belief in egalitarianism, but this belief might not be openly justified in Betty's system because Betty does not accept the initial beliefs and norms accepted by Alf. Thus, a belief which is openly justified for one person might not be publicly justified and so would not be able to justify coercion.[77]

For Gaus, if all of the justifications for a proposal are defeated, then that proposal may not be coercively enforced, whether it is chosen democratically or not.[78] Conclusively publicly justified parts of political morality set the bounds of legislative authority.[79] However, for the most part, the stuff of liberal politics is the conflict of competing inconclusive claims about the demands of liberal morality.[80]

Gaus' argument

Gaus argues that there are reasons of IPJ to use democracy to decide between the range of policies with nested inconclusive justifications. There are two main parts to his argument.

[74] Gaus, *Justificatory Liberalism*, 31.

[75] Ibid., 32.

[76] Ibid., 38ff.

[77] Ibid., chap. 9.

[78] Ibid., 283. See also Ibid., 204–205.

[79] Gaus, *Justificatory Liberalism*, 204–207.

[80] Ibid., 283.

First, he tries to make the case for the legitimacy of a liberal authority.[81] Second, he tries to show that the liberal authority must be a politically equal one. The reason for this is that if a system of political power provides unequal benefits and burdens, then it must be conclusively justified, whereas if it provides equal benefits and burdens, then it need only be inconclusively justified.[82] Both parts of this argument are flawed.

The case for a liberal authority

Gaus argues that we ought to use a liberal authority to adjudicate disputes about which inconclusively justified proposals ought to be implemented. But he also believes that individuals and gangs do not have non-derivative rights to impose inconclusively justified proposals. As we will see, he goes on to argue that the liberal authority must be politically equal. This appears to be in tension with the Gangland Democracy Argument. It held that if gangs lack the right to do x, then they do not gain the right to do it merely because they happen to be in the majority. I will now argue that Gaus' argument does not succeed.

Gaus considers two ways of dealing with inconclusively justified policies: refraining from imposition and unilateral imposition.[83] Gaus argues that we ought not to refrain from imposing a proposal with only a nested inconclusive justification. He acknowledges that 'in a fairly obvious sense', if Alf imposes a proposal with nested inconclusive justification on Betty, he has not shown her that she has reason to adopt his

[81] Ibid., 179–191.

[82] Ibid., 197–199 and 251–253.

[83] I do not understand how, on Gaus' argument, a single proposal could come to be victoriously justified, where before it was not. Either a proposal is openly justified in another person's set of beliefs or it is not, regardless of our knowledge of that fact. Victorious justification is a function only of the logical properties of different people's beliefs, which obtain regardless of our knowledge of them. Gaus confuses our degree of certainty or knowledge in the justification of a proposal, with the justification of that proposal itself.

view and so he has not publicly justified his demand.[84] However, he argues that refraining from action is nevertheless unacceptable:

> "In this case, Alf's ultimate appeal is to a principle that Betty has been shown she has reason to accept. For Alf and Betty to do nothing at all in this case would be, for practical purposes at any rate, to embrace the *defeated* option that *P* is not justified or is irrelevant to practice."[85]

This argument does not succeed. I have two criticisms. Firstly, Gaus claims that waiting for victory is *for practical purposes* to embrace the defeated option that *P* is not justified. This 'for practical purposes' qualification renders Gaus' argument impotent. Presumably, Gaus takes himself to be advancing a *reductio* against refraining from imposing. But it is not a *reductio*: *P* is, *ex hypothesi,* victoriously justified, but if we refrain from imposing an interpretation of *P*, then *P* is defeated for practical purposes. There is no inconsistency between the claim that *P* is victoriously justified and the claim that *P* is defeated *for practical purposes*. Therefore, Gaus highlights no logical problem with refraining from imposing. The only tenable sense that can be given to the qualification is that it means that a principle does not have an interpretation which is victoriously justified. But this is just to restate our predicament, which is that the proposal only has a nested inconclusive justification. Therefore, Gaus' argument against refraining from imposing proposals with nested inconclusive justifications does not succeed. This is surprising. As Gaus himself acknowledges, this is the only bulwark he has against something approaching anarchism.

Secondly, his argument here is inconsistent with the argument he makes *against* unilaterally imposing inconclusively justified proposals. Gaus makes two arguments against unilateral imposition. The first is an argument about the public justifiability of

[84] Gaus, *Justificatory Liberalism*, 180.

[85] Ibid., 181.

unilateral imposition. He is quite explicit that imposing a proposal with an undefeated and unvictorious justification 'manifests disrespect and is unjust'; it is an act of 'subjugation'.[86]

> "The moral flaw of the state of nature ruled by individual judgment is that we act without justification. As I have already argued, to impose an undefeated but unvictorious public justification on another fails to meet the demands of public justification."[87]

This is part of Gaus' argument for the erection of a liberal authority to impose inconclusively justified proposals. The first sentence is consistent with that overall aim, but the second is not. Gaus' argument implies that imposition *simpliciter*, i.e. by *anyone*, fails to meet the demands of public justification. But if imposition by anyone of an inconclusively justified proposal is not publicly justified, then imposition by a liberal authority is not publicly justified and so is not legitimate.

Gaus' second argument is 'practical'. He says that if everyone tries to impose, or act from, their own inconclusively justified proposals, there will be uncertainty and conflict. Consequently, according to Gaus, we must erect a liberal authority who will implement one of the inconclusively justified proposals. As well as being epistemically good in this way, the liberal authority is also a *practical authority*. The authority determines the proposal which disagreeing parties must accept and so solves the practical problem of conflict and uncertainty.[88] Therefore, we have conclusive reason to accept the inconclusively justified judgements of a liberal authority.[89]

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[86] Ibid., 182–183.

[87] Ibid., 182.

[88] Ibid., 188–191.

[89] Ibid., 190–191; Gerald F. Gaus, "Reasonable Pluralism and the Domain of the Political: How the Weaknesses of John Rawls's Political Liberalism Can Be Overcome by a Justificatory Liberalism," *Inquiry* 42, no. 2 (1999): 280.

This argument is flawed. It might be true that a liberal authority solves a practical problem by reducing uncertainty and conflict, but his moral argument implies that the liberal authority may not legitimately impose inconclusively justified proposals. The reasons that it was unjust and forbidden for an individual or gang to impose inconclusively justified policies also apply to the liberal authority. Inconclusive justification, he says, is not public justification; it is disrespectful and unjust; it is an act of subjugation. The fact that the liberal authority provides additional practical benefits does not change this fact. To defend intrinsic proceduralism, one needs to show that unilateral imposition is wrong, not because it wrongs those subject to the imposition, but because it wrongs those who might themselves have imposed their view. One must show that each person has a *pro tanto* non-derivative claim right to impose their view. Gaus' argument is inconsistent with the existence of such rights.

Nonetheless, perhaps Gaus could change his argument and accept that individuals, gangs and everyone else have the right to impose inconclusively justified proposals. He could then recommend the liberal authority on the basis that it solves a practical problem without violating public justification. This brings me to his intrinsic proceduralist argument for the claim that the liberal authority must be democratic.

The principle of equality

The second part of Gaus' argument tries to show that the liberal authority must, for reasons of IPJ, be politically equal. Most of Gaus' arguments for political institutions are instrumentalist ones.[90] He defends institutions on the basis of their ability not to stray beyond the range of inconclusively justified policies. However, he also believes that a fully instrumentalist account of political procedures is unsatisfactory and that there are

[90] Gaus, *Justificatory Liberalism*, chap. 13.

constraints of IPJ on the procedures we may use. According to Gaus, political equality and inequality are inconclusively justified. But since political equality does not provide differential benefits and burdens and political inequality does, the latter must be conclusively justified and the former need not be. Therefore, there are reasons to accept political equality regardless of the quality of the outcomes.

His argument for this depends on the principle of equality and his defence of that principle does not succeed. He argues that public officials *qua* public officials are subject to the principle of equality, but private citizens are not:

> *Principle of Equality for the Liberal Authority* – Any action by a public official that provides differential benefits and burdens must be conclusively publicly justified.[91]

Gaus says:

> "Public officials must be able to provide publicly accessible reasons justifying what they do in their official capacity; if they cannot do so, they lose their status of impersonal umpires who adjudicate conflicting demands in the light of public principles... Citizens are to be treated equally unless relevant grounds can be demonstrated for unequal treatment."[92]

This argument is subject to two problems. Firstly, Gaus simply cannot endorse the Principle of Equality. He says that liberal authorities may impose inconclusively justified laws. Most laws, inconclusively justified or not, will provide differential benefits and burdens. For example, a law legalising abortion is inconclusively justified, but will provide greater benefits to women who want abortions than women who do not. But if the Principle

[91] Ibid., 199. For a statement of the simple Principle of Equality which applies to all agents, which Gaus rejects, see Ibid., 162–166.

[92] Gaus, *Justificatory Liberalism*, 199.

of Equality is true, this law would have to be conclusively justified. We have reasoned our way to a contradiction. Gaus must give up the principle as stated.

Gaus goes on to say that only fundamental laws or adjudicative procedures themselves, rather than the individual policies they produce, are subject to the principle of equality.[93] So, we now have a revised version of the Principle of Equality:

> *Principle of Equality for the Liberal Authority 2* – Proposals which provide citizens with differential levels of authority must be conclusively publicly justified.

The problem with this revised principle is that Gaus does not argue for it. Gaus' argument for the original Principle of Equality is the familiar one that laws must be in some sense impartial between those subject to them. This is impossible because Gaus defines 'impartial' as 'provides equal levels of benefits and burdens' and almost all laws provide differential benefits and burdens.[94]

Secondly, other parts of Public Justification Liberalism are in tension with the revised Principle of Equality. According to Gaus, a liberal authority is conclusively justified because it meets two conditions: firstly, it chooses amongst the range of inconclusively justified policies; and secondly, it must provide a practical resolution of disagreements which tells the disagreeing parties what to do. Political inequality could meet these two conditions. If so, then political inequality could be conclusively justified, which renders the principle of equality irrelevant.

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[93] Ibid., 252–253. For a definition of fundamental law see Ibid., 204–207.

[94] Gaus' argument is similar to David Estlund's instrumentalist one for political equality. Estlund argues that political equality faces a lesser burden of justification than political inequality. See Estlund, *Democratic Authority*, chap. 11; Jonathan Quong, "The Distribution of Authority," *Representation* 46, no. 1 (2010): 35–52; David Estlund, "Replies to Saunders, Lister and Quong," *Representation* 46, no. 1 (2010): 53–67.

Moreover, like many public justification liberals, Gaus is concerned fundamentally with people as *subjects of coercion*.[95] But his intrinsic proceduralist argument starts to be concerned with people as *authors of coercion*. Not only that, he demands that we conclusively justify proposals to people as authors of coercion, whereas he only demands that we inconclusively justify proposals to people as subjects of coercion. That is, he says that political inequality must be conclusively justified to people *qua* coercers, but all other proposals must be inconclusively justified to people *qua* subjects of coercion. If one makes people as subjects of coercion the locus of moral concern, this asymmetry is *ad hoc* and indefensible. If such theories accept that all inconclusively justified policies may be imposed, then they must accept that inconclusively justified distributions of power are legitimate. But since political inequality is inconclusively justified, the theory now has no intrinsic proceduralist reasons to reject political inequality.

6. Inconclusive public justification and severe injustice

The three PJL-based defences of TRIP I have considered have not succeeded. The first fails because it entails the democratic right to produce severe substantive injustice. Some proposals with only defeated justifications might be grossly *and blatantly* unjust. The second two may appear to be better able to avoid this problem, for they hold that people do not have the democratic right to impose proposals with defeated justifications. But people *do* have non-derivative democratic rights to impose inconclusively justified proposals, even if they are unjust according to the true standard of justice. I have argued that Gaus' and Valentini's arguments do not entail this conclusion. However, it seems possible that there is an argument which entails that people have non-derivative democratic rights to

[95] Gaus, "Reasonable Pluralism and the Domain of the Political," 277.

impose inconclusively justified laws. I will now argue that this theory, like all other versions of TRIP, entails the democratic right to do severe substantive injustice.

How the argument could go

I will now set out how the best PJL-based argument for TRIP should go. The discussion in this chapter is suggestive for the way argument could go. In this domain, PJL must make people as *authors* of coercion, as opposed to subjects of coercion, at least in part the locus of moral concern. It must say that each person has a claim right to cause the imposition of inconclusively justified proposals. If each person has this right, then political inequality wrongs those who are given no influence or no chance of influence over decisions concerning inconclusively justified proposals.

One could defend the proposition that everyone has a non-derivative claim right to cause the imposition of inconclusively justified proposals in two ways. Firstly, one might appeal simply to the intuition that people do have such rights. I have argued against a general intuition in favour of the democratic right to do injustice by looking at injustices committed by gangs. However, it might be argued that the intuitive picture is different if one accepts the arguments PJL gives for the legitimacy of inconclusively justified laws. If a law is inconclusively justified, then that changes the moral quality of imposing that law, even if the law is in fact unjust. Therefore, gang members *do* have the right to impose inconclusively justified but unjust laws. I criticised Gaus' stance on inconclusively justified proposals above, but there might be other arguments which show that such proposals may legitimately be imposed. I certainly have not conclusively proved that inconclusively justified proposals may not legitimately be imposed.

Secondly, one might appeal to the autonomy argument and argue that people have rights grounded in autonomy to impose inconclusively justified laws. I rejected arguments

from a variety of different theories of autonomy in Chapters 4 and 5. Firstly, I argued that on substantive theories of autonomy, people cannot autonomously choose to do injustice. The proponent of PJL might dispute this and argue that people have objective external reason to believe that inconclusively justified proposals are just, even if the proposals are in fact unjust. This cannot be right. External reasons are determined by the pertinent facts about justice, regardless of whether anyone knows these facts or whether they are difficult to discover. If people believe what they have external reason to believe, then there would be no disagreement. This is inconsistent with PJL's assumption of reasonable disagreement.

The subjectivist substantive theory of autonomy looks more compatible with PJL. It might be argued that reasonable people believe what they have subjective epistemic reason to believe and consequently if they impose their reasonable political view, this augments their autonomy. So, we have reasons grounded in autonomy not to prevent them imposing their reasonable political view. I do not think this argument can be sustained. Subjective epistemic rationality is quite a demanding standard which most people do not realise with respect to their political views. PJL does not hold that each reasonable person has subjective epistemic reason to believe what they do about justice: it does not say that reasonable Catholics and reasonable agnostics both have subjective epistemic reason to believe what they do. Rather, it says that we have *moral* reasons to secure their acceptance, even if they have made rational errors. Some proponents of PJL might deny this and so hold on to the autonomy argument. I accept this for the sake of argument.

One might also defend the autonomy argument by appealing to content-neutral theories of autonomy. People can autonomously choose inconclusively justified proposals on this theory of autonomy. I argued against the argument from content-neutral theories by saying that autonomously-chosen injustices are not more valuable by virtue of being

autonomously-chosen. Again, one might argue that this intuition does not hold here once one accepts PJL. Perhaps it is valuable to impose inconclusively justified proposals which one endorses on the basis of one's authentic higher-order desires.

These intrinsic proceduralist arguments must themselves be reasonably acceptable to play a part in a PJL-based TRIP. If they were not, then they would not be admissible in the justification of political institutions. It is difficult to assess claims about what counts as reasonable, as public justification liberals differ and many of the main accounts are somewhat unspecific. Still, many people might argue that we can expect all reasonable people to accept one of these arguments.

Proponents of PJL usually distinguish legitimacy and justice. So, the intrinsic proceduralist form of PJL could hold that the democratic rights are legitimacy rights, rather than justice rights. The argument for democratic rights is part of a theory of legitimacy, rather than of justice. This is a non-correctness theory of legitimacy. It holds that majorities have legitimacy rights to do substantive injustice.

These arguments are all inconsistent with the POS because they hold that each person has equal non-derivative democratic rights to impose inconclusively justified but unjust proposals. This version of the argument from PJL is very similar to the Reasonable Views Theory (RVT) I discussed and rejected in Chapter 5. Many, if not all, of the problems afflicting RVT also afflict this PJL-based argument.

Inconclusive justification and severe injustice

This version of PJL is, I shall now argue, subject to the critique I made in section 1. The theory entails the democratic right to do severe substantive injustice. The reason for this is that *public justifiability does not co-vary with stakes*. There are some areas of policy which

have very high stakes, but about which we can only get a range of inconclusively justified proposals. Consequently, I argue, we ought to reject PJL-based forms of TRIP.

Public Justification Liberals seem to believe that PJL entails that the state may not legitimately violate basic rights or the most fundamental requirements of justice. Rawls says that there must be protection for the constitutional essentials and matters of basic justice.[96] He argues that the practicable aim of PJL is 'to narrow disagreement at least regarding the more divisive controversies, and in particular those that involve the constitutional essentials [and matters of basic justice]'.[97] Rawls and other proponents of PJL seem to believe that we can get more reasonable agreement on the most important things.

This is not true. As a result, all forms of PJL entail, and given their rationale *ought to* entail, that the state is permitted to violate basic rights on an industrial scale. All conceptions of reasonableness are at least partly epistemic and since many high stakes matters are extremely morally (and empirically) complex, there are a *range* of state actions which we can expect reasonable people to agree on, some of which are very unjust. I will prove this chiefly by examining the example of abortion, which is an issue that many public justification liberals discuss, but fail to grasp the import of.

There might be some positions on abortion which are unreasonable: perhaps extreme pro-life positions which say that the foetus is a person at conception and extreme pro-choice positions, which say that a very late-stage foetus which is able to survive without the support of the mother, may still be aborted, are both unreasonable. But there are some pro-life and pro-choice positions which are only inconclusively justified. For

[96] Rawls, *Political Liberalism*, 227–240. See also Quong, "Disagreement, Asymmetry, and Liberal Legitimacy," 309; Gaus, *Justificatory Liberalism*, 204–214.

[97] Rawls, *Justice as Fairness*, 28.

instance, it seems plausible that there can be reasonable disagreement about whether abortion is permissible late in the second trimester. We cannot get away from the issue by casting the only pro-life position as Catholic and therefore not admissible in political justification. There are secular pro-life arguments. It is not *obviou*s what morally distinguishes killing a late stage foetus from killing a one day old child. Thus, there is a range of reasonably acceptable, inconclusively justified abortion laws.

The fundamental dispute about the morality of abortion is in large part a function of the dispute about whether the foetus has a right to life and consequently whether abortion constitutes murder. For pro-life advocates, legal abortion is as unjust as legal grand scale mass murder, but for pro-choice advocates, abortion is not murder and prohibiting abortion is a severe violation of women's rights. From the point of view of either side, the policy they oppose is severely substantively unjust. The form of PJL I have considered holds that people have democratic rights to discretion to implement the range of inconclusively justified proposals. Consequently, PJL implies the existence of democratic rights both to forbid and legalise abortion at a certain stage in the second trimester. Since either forbidding or legalising is severely substantively unjust, one of these laws must be severely substantively unjust. Therefore, this form of PJL implies that people have democratic rights to do severe injustice.

Possible responses

As I have described it, abortion is a case of nested inconclusiveness. There is a victoriously justified principle 'murder ought to be illegal', but only inconclusively justified interpretations of that principle because people reasonably disagree about whether killing a foetus is murder. Many proponents of PJL say that abortion is a case of *weight* inconclusiveness. Rawls says there are three political values at stake: the due respect for

human life, the ordered reproduction of political society over time and the equal status of women.[98] Any policy supported by a 'reasonable balance' of these values is legitimate. So, it might be said that the dispute I have described is not about the weight of values and is not a product of the burdens of judgement. Therefore, it is not a reasonable dispute. So, I have not shown that PJL entails the democratic right to do severe injustice.

I have three comments on this. Firstly, even if we view the debate as a case of weight inconclusiveness, it could still be high stakes. For a case in which it is epistemically difficult to determine the weight of different values, people can be wrong about their weight and the consequences could be severely unjust. Someone might reasonably be wrong about the respect due to human life and so recommend a policy which is severely substantively unjust.

Secondly, many would argue that the debate involves a paradigm case of vagueness.[99] The predicate 'is a person' has borderline cases and people disagree about where this borderline is. If vagueness is to be one of the burdens of judgement,[100] then this ought to be classed as a reasonable dispute. The stakes are no less high by virtue of that.

Thirdly and most importantly, all this response suggests is that the Rawlsian account of which disagreements are reasonable ought to be rejected. Reasonableness is supposed to be, in part, a function of epistemic complexity. Rawls says that PJL is entirely a response to the supposed fact that 'a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the

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[98] Rawls, *Political Liberalism*, 243. See also Quong, "Disagreement, Asymmetry, and Liberal Legitimacy," 319.

[99] See for example Roy A. Sorensen, "Vagueness Implies Cognitivism," *American Philosophical Quarterly* 27, no. 1 (January 1, 1990): 1–14.

[100] As I have said, I do not believe that it should.

framework of free institutions of a constitutional democratic regime'.[101] It seems clear that the free exercise of human reason can produce disagreement about at what stage foetuses gain the right to life. This is a disagreement about the correct interpretation of the right to life; it is not a disagreement about the weight of a right or value.[102] Thus, the burdens of judgement do not explain the disagreements which might be produced by epistemic complexity.

I have tried to prove my point by focusing on abortion, but the point can also be made, as I argued in section 1, about a whole range of moral issues, including global justice, intergenerational justice, bioethics, existential risk and animal ethics. These are very high stakes issues about which we can expect a great deal of reasonable disagreement and about which there will be a range of inconclusively justified proposals some of which are massively unjust. A mistake in intergenerational ethics could deprive billions of people of basic goods they ought to receive: the outcome could be as unjust as genocide. If we allow, to the slightest degree, epistemic complexity to determine reasonableness, then we must accept the democratic right to do severe injustice. Even if we accept that all reasonable persons must accept a basic list of liberal rights with priority over perfectionist values,[103] it is clear that there is reasonable debate about whether all global citizens have these rights, about whether future persons have these rights, about the priority which should be given to these rights and so on.

I have thus far only talked about high stakes moral disagreements, but empirical disagreements can also have very high stakes. As we have seen, for Rawls, one of the burdens of judgement is complex and conflicting empirical evidence. As I argued in

[101] Rawls, *Political Liberalism*, xviii.

[102] See George, "Public Reason and Political Conflict," 2486ff.

[103] According to PJL, there are no reasonable perfectionists,.

section 1, this implies the majority has a legitimacy right to impose a policy which will bring about human extinction by the technological singularity. Even if we know the policy will do this and can stop its implementation at low cost, we are not permitted to do so.

To avoid these implications, a proponent of PJL could argue that there cannot be reasonable disagreement about these high stakes matters. Consequently, epistemic complexity, whether produced by the burdens of judgement or anything else, must not bear on who counts as reasonable. Reasonable people, on the new account, cannot make high stakes moral errors. The question then is: why do we owe justifications to reasonable people, thus defined? PJL can stipulate, in the face of criticism, about who the reasonable are, but then the Public Justification Principle loses plausibility; the account of reasonableness loses contact with the initial rationale offered for that principle.[104]

Three main rationales have been offered for public justification: equal respect, autonomy and the practical aim of securing justice in a well-ordered society.[105] Joshua Cohen defends the autonomy rationale:

> "[By] requiring justification on terms acceptable to others, deliberative democracy provides for a form of political autonomy: that all who are governed by collective decisions… must find the bases of those decisions acceptable."[106]

Proponents of the respect rationale argue that imposing reasonably unacceptable proposals violates the Kantian requirement to treat people as means rather than ends. As Charles Larmore says:

> "Thus, to respect another person as an end is to require that coercive or political principles be as justifiable to that person as they presumably are to us."[107]

[104] See Enoch, "The Disorder of Public Reason."

[105] For a very good survey of the rationales see Quong, "On the Idea of Public Reason," 270–275.

[106] Cohen, *Philosophy, Politics, Democracy*, 163.

Similarly, Thomas Nagel says:

> "[When] we force people to serve an end that they cannot share, and that we cannot justify to them in objective terms, it is a particularly serious violation of the Kantian requirement that we treat humanity not merely as a means, but also as an end."[108]

Others, such as Krasnoff, Freeman, Quong and (arguably) Rawls defend public justification on the basis that it serves the practical goal of securing justice in a well-ordered society.[109] If people act on the basis of what they believe to be the requirements of correctness theories of legitimacy, then the practical consequences will be worse than if everyone acts on the basis of the public justification principle.[110]

Without going into how successful these rationales are on their own terms, it can be shown that it is unacceptable to remove epistemic complexity from the account of reasonableness in order to avoid implying the democratic right to do severe substantive injustice. PJL is a very popular position in contemporary political philosophy and *all* accounts of PJL developed thus far have held that epistemic factors in part determine reasonableness. This must be because, in the eyes of proponents of PJL, it would be wrong

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[107] Larmore, "The Moral Basis of Political Liberalism," 608. Larmore has misspoken here. Principles are not coercive.

[108] Nagel, "Moral Conflict and Political Legitimacy," 238. See also Gaus, *The Order of Public Reason*, 17; Cohen, *Philosophy, Politics, Democracy*, 165. My argument in Chapter 3 casts doubt on whether the appeal to respect counts as an argument for public justification.

[109] Samuel Richard Freeman, *Rawls* (London; New York: Routledge, 2007), 376–381; Larry Krasnoff, "Consensus, Stability, and Normativity in Rawls' Political Liberalism," *The Journal of Philosophy* 95, no. 6 (June 1, 1998): 269–92; Quong, "On the Idea of Public Reason," 273–275; Quong, *Liberalism without Perfection*, 131–135. Quong and Freeman both argue that Rawls also endorses this view. I remain neutral on Rawls interpretation here. Quong also endorses the argument from equal respect. See Quong, "On the Idea of Public Reason," 273–274; Quong, *Liberalism without Perfection*, 134–135.

[110] This is a form of the Practical Argument I rejected in Chapter 5.

– whether because of respect, autonomy or pragmatic reasons – to impose proposals on people who disagree with those proposals, where that disagreement can be explained in part by epistemic factors. Evidently, proponents of PJL have thought that epistemic factors were of crucial importance when determining the set of people who are owed justifications. Therefore, they clearly cannot drop epistemic complexity when it has an implication they do not like. Any attempt to do this must be *ad hoc*: it must be incompatible with the rationale offered for public justification in the first place.

Furthermore, putting to one side the question of whether this PJL-based TRIP is true, I do not see how anyone could claim to have provided reason to believe it. On the current argument, no high stakes issues are reasonably contentious and all reasonable people accept exactly the same account of all high stakes issues. But public justification liberals make a point of not engaging with the substantive debates about these high stakes issues. So, we are being asked to believe a theory about high stakes moral issues even though, as a point of principle, its proponents do not engage with the best extant philosophical literature on those issues. This is not like saying 'this conclusion is conditional on utilitarianism, which I cannot, for reasons of space, defend here'. Some philosophers have actually tried to defend utilitarianism at some length. No one has defended the proposition that PJL has the true account of all high stakes moral matters and public justification liberals are philosophically committed to never making that defence. Thus, even if this version of PJL is true, I do not see how it could be said that we have been given, or could ever be given, reason to believe it.

Conclusion

Proponents of TRIP are on the horns of dilemma. They must either accept the democratic right to do severe substantive injustice or deny TRIP. They ought to deny the democratic

right to do severe substantive injustice, so they ought to deny TRIP. All possible PJL-based versions of TRIP are subject to this critique. Imposing policies with only defeated justifications opens the way to gross and obvious injustice, such as genocide. But some inconclusively justified policies are severely substantively unjust as well. If one lets epistemic complexity partially determine reasonableness, as all accounts of reasonableness thus far proposed have done, then one allows reasonable people to make very high stakes moral errors.

It is worth saying that there is good reason to believe that this also refutes PJL *simpliciter*. All proponents of PJL accept that states may legitimately impose inconclusively justified proposals, whether through democratic means, through a lottery or some other procedure. If PJL-based forms of TRIP are false for the reasons I have given, then so is PJL.[111]

[111] For different forms of this moral cost critique of PJL see Michael J. Sandel, "Review of Political Liberalism by John Rawls," *Harvard Law Review* 107, no. 7 (May 1, 1994): 1765–94; George, "Public Reason and Political Conflict"; Richard J. Arneson, "Rawls Versus Utilitarianism in the Light of Political Liberalism," in *The Idea of a Political Liberalism: Essays on Rawls*, ed. Victoria Davion and Clark Wolf (Lanham; Oxford: Rowman and Littlefield, 2000); Simon Caney, "Liberal Legitimacy, Reasonable Disagreement and Justice," *Critical Review of International Social and Political Philosophy* 1, no. 3 (1998): 19–36.

Conclusion

It is popularly believed that adults have a right to an equal say in the political decisions to which they are subject. People have these rights, not because they will be able to protect their own interests or because other elite systems are unlikely to a good job, but simply because they are autonomous persons with the capacity to reason about justice. On close inspection, this is a surprising belief. It is not immediately obvious why it is any more sensible than the view that everyone should have an equal right to practice surgery, drive a car or own a bazooka merely by virtue of being an adult. If anyone were arguing against an egalitarian about driving licenses, they would doubtless say that the proposal ought to be rejected because incompetent drivers will cause death and destruction. The same can be said for political rights. People's right to use political power stops at the rights of others.

To assess questions about the intrinsic justice of democracy, we need to think about what people will do with political power and what is involved in a democratic right to do injustice. If people have democratic rights to do substantive injustice, then this right would provide us with reason not to prevent the substantive injustice, regardless of the costs of prevention. However, it is clear that if the costs of prevention are low, we are permitted to prevent injustice. This is true even if the injustice is voted for by the majority, even if the injustice is trivial and even if victims are given the vote and allowed to deliberate. The popular democratic right to discretion over distributive justice entails a host of rights which do not exist, such as the right to burn money belonging to the worst-off, provided they are above the level of sufficiency. People do not have non-derivative democratic rights to do such things.

Many philosophers have had this instrumentalist intuition, but most have not successfully defended it. Propositions about the intrinsic justice of democracy are reducible

to propositions about people's democratic rights. Propositions about democratic rights to do injustice can be dealt with by the Hohfeldian framework, which has been applied to the question of whether people have the right to do wrong. An agent A's claim right to do an unjust act x places others under duties owed to A and correlative to her right, not to prevent A doing x. Thus, the Hohfeldian framework provides the following test of democratic rights to do injustice: if we could at low cost to the putative right-holder and to third parties prevent the injustice, would we be permitted to do so? This question is the nub of the dispute between instrumentalists and intrinsic proceduralists. Once we get clear on the necessary conditions of democratic rights to do injustice, the case for the POS becomes clear.

Claiming that disenfranchising someone expresses disrespect is either question-begging or does not entail that people have democratic rights to do injustice. On one understanding of equal respect, instrumentalism is a theory about what equal respect requires of us. Therefore, asserting that preventing democratic injustice expresses disrespect is question-begging against instrumentalism. It might be true that disenfranchisement has often been motivated by disrespectful attitudes and that political power has symbolic meaning which is important for people's self-respect. But these things could be true, not only of disenfranchisement, but also of preventing rape, dangerous driving or assault. Since people do not have rights to do these things, appeals to the social beliefs that happen to be related to political power cannot ground democratic rights to do injustice.

Arguments from autonomy are similarly unpromising. On substantive theories of autonomy one cannot autonomously do injustice. On these theories, one cannot defend the democratic right to do injustice on the basis that autonomously chosen injustice are valuable by virtue of being autonomously chosen. Moreover, depriving people of the

opportunity to do injustice does not constrain people's autonomy if the prevention is not what caused the agent to act justly. Content-neutral theories allow people to autonomously act unjustly, but on this conception of autonomy, autonomous choice is not always valuable. It is absurd to say that people have rights to do injustice because they have an authentic higher-order desire to do injustice. The fact that their desire is an expression of their authentic self is neither here nor there from the point of view of justice.

Truth Restricting Intrinsic Proceduralism (TRIP) is false. Most forms of TRIP hold something like the Reasonable Views Theory (RVT), which says that each person has an equal claim right to cause the imposition of their reasonable view, even if it is wrong. RVT is subject to a number of problems. Even if we see someone as reasonable, that does not imply that we are under duties not to prevent them causing the imposition of their view, if that imposition would be unjust. This is true regardless of whether the error derives from an empirical or moral mistake. There is no good reason that people would have the right to impose their reasonable moral views but not their reasonable empirical views. If there is something special about the belief-forming process, then it is special when it produces empirical beliefs as well. RVT goes wrong because it gives reasonable people a certain moral status by virtue of the fact that they are reasonable, while being completely indifferent to the content of the beliefs they hold. Reasonableness bears on how blameworthy people are. It does not bear on the claim rights they have to impose their view.

Even if RVT is true, it does not imply that we ought to have political equality in the real world because there is reasonable disagreement about who is reasonable, about whether we ought to have political equality and about whether RVT is true.

Almost all proponents of TRIP have thought that it entails the popular hybrid between instrumentalism and intrinsic proceduralism: instrumentalism when the stakes are

high, intrinsic proceduralism when the stakes are low. This is not the case. All versions of TRIP imply the democratic right to do severe substantive injustice. This is a fatal flaw of all versions of TRIP.

I am sure that we sometimes have good reason not to prevent democratically-approved injustice. There might be social strife if incompetent voters are disenfranchised; it might be costly to find out who the competent voters are; or it might be difficult to place appropriate checks on any politically inegalitarian procedure. All of these costs of prevention and so none of them are reasons *owed to* wrongdoers and *correlative to* wrongdoer's rights to do injustice.

Aside from the disputed philosophical question of whether people have the democratic right to do mild substantive injustice, it is important to reiterate that proponents of hybrids of intrinsic proceduralism and instrumentalism overemphasise the intrinsic proceduralist part of their theories. They have no intrinsic proceduralist resources with which to resist Jason Brennan's recent conclusion that since most government decisions have high stakes, we ought to disenfranchise incompetent voters, which, in his view, is a very large number of voters. Some theories hold that we may use whatever procedure finds the best means to democratically chosen ends. For our world of widespread ignorance about empirical facts with a bearing on politics, this entails that we have no intrinsic proceduralist reasons not to use experts or markets in all areas of policy.

If I am right and substantive justice has primacy, then we must take our defence of political institutions into difficult empirical questions about which institutions will produce the most substantively just outcomes. It is a genuinely open empirical question whether this entails that we ought to use democratic institutions to decide on all areas of policy. Many countries already use elite institutions, such as independent central banks and judicial review. It is plausible to me that we could produce more just outcomes by handing

decisions over to experts for specific areas of policy or by using markets instead of political institutions. I hope to have shown that proposals of this kind cannot be resisted on the basis that they would violate people's equal democratic rights.

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