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Democratic Legitimacy and the Paradox of Persisting Opposition

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ABSTRACT *The paradox of persisting opposition raises a puzzle for normative accounts of democratic legitimacy. It involves an outvoted democrat who opposes a given policy (because she takes it to be unjust) while supporting it (because it is the upshot of majority rule). The article makes a threefold contribution to the existing literature. First, it considers pure proceduralist and pure instrumentalist alternatives to solve the paradox and finds them wanting — on normative, conceptual, and empirical grounds. Second, it presents a solution based on a two-level distinction between substantive and procedural legitimacy that shows that citizens are consistent in endorsing the upshot of democratic procedures while opposing it. Third, it unpacks three reasons to non-instrumentally endorse such procedures — namely, the presence of reasonable disagreement, non-paternalism, and the right to democratically do wrong. In so doing, the article shows that those accounts of democratic legitimacy that rely on reasonable disagreement as a necessary condition for democratic procedures being called for are flawed, or at least incomplete, and offers a more complete alternative.*

1. Introduction

An old concern in democratic theory is the puzzle of persisting opposition, as Robert Goodin has labelled it — the fact that citizens observe laws that they often regard as unjust.¹ The fact is not only philosophically puzzling. Given its centrality in democratic politics, it is also disturbing. In parliamentary systems with plurality voting, for instance, the party with an absolute parliamentary majority is often the preferred option of only a simple majority of the electorate. And in proportional systems, in which coalitions are the norm, political parties often compromise the policies for which they were voted in order to form a government coalition. In both cases, the preferred policies of a significant part of the electorate are outvoted.

Sometimes, outvoted citizens update their beliefs to those of the winning majority. At other times, they opt for civil disobedience to flag their disagreement, with serious consequences for the stability of the polity. In well-functioning democracies, however, these phenomena are marginal. More often, outvoted citizens wholeheartedly, i.e. non-instrumentally, observe the enacted policies — even if puzzlingly, for they still consider them unjust. In this article I contend that this puzzle is merely apparent, and advance three reasons why citizens are both consistent and justified in wholeheartedly observing the enacted policies while opposing them.

The alleged puzzle is formalised in political philosophy as Wollheim's paradox.² The paradox involves a citizen X who believes that:

(A1) Policy *A* ought to be enacted.

However, since *X* is a democrat, she also believes that:

(A2) The policy chosen by the majority ought to be enacted.

Now, assume that it is the case that:

(A3) The policy chosen by the majority is policy *B* (which is incompatible with *A*).

It then follows from (A2) and (A3) that *X* also believes — at first sight inconsistently with (A1) — that:

(A4) Policy *B* ought to be enacted.

The paradox has been much employed, yet poorly analysed, in the recent literature. With some exceptions,³ recent democratic theorists have taken its solution as given, and have applied it to debates about the authority of law, Bayesian updating, deliberative democracy, or political compromise.⁴

Unlike these contributions, the present article examines the paradox itself. It firstly discusses previously attempted solutions, which are divided into three general types. While the first two types acknowledge the paradox, and attempt to subsume either (A1) to (A4) or (A4) to (A1),⁵ a third type attempts to show that (A1) and (A4) need not be at odds.⁶ The article assesses the two first types as instances of pure proceduralist and pure instrumentalist accounts of democratic legitimacy, respectively, and finds them wanting. It then provides a solution of the third sort that shows that citizens are consistent in simultaneously endorsing (A1) and (A4) because such endorsements result from mutually consistent principles of substantive and procedural legitimacy.

Finally, the article advances three independently sufficient reasons for *X* to non-instrumentally endorse the democratic procedure included in (A2), and therefore (A4), while still holding (A1) — namely, the presence of reasonable disagreement, non-paternalism, and the right to do wrong. In so doing, the solution shows that those accounts — dominant in the recent literature — that rely on the presence of reasonable disagreement as a necessary condition for *X*'s endorsement of (A2) to be justified are flawed, or at least incomplete, and offers a more adequate account.

The two-level solution operates under three assumptions that need to be specified from the outset. The first is that *X* is morally motivated and reasonable. Although the solution may also apply if this assumption is relaxed, I do not explore this possibility here.⁷ The second assumption is that the scope of the decision-making procedure included in (A2) is limited to internal political affairs, i.e. to political decisions that only affect the members of the political community. Political decisions involving externalities (e.g. war declaration, fisheries policy, greenhouse emission control) are not considered here. The third assumption is that well-functioning democratic procedures are in place. This means that each citizen's political input is treated equally and that adequate channels to express dissent (e.g. the right to associate, to demonstrate, to submit initiatives to parliament) are available. When these assumptions do not obtain, the reasons to embrace (A4) may have less force, or not apply at all, and the conclusions of this article may not follow as a result.⁸

The task of the article is threefold — conceptual, normative, and explanatory. It is mainly aimed at showing why citizens are consistent and have good moral reasons to

stick to democratic procedures even when such procedures may produce outcomes that they render unjust. In so doing, however, it also tries to make sense of the fact that actual citizens often endorse such procedures while opposing their outcomes, thus shedding light on the alleged puzzle of democratic stability under persisting opposition.

The article proceeds in six further sections. Sections 2 and 3 critically assess pure instrumentalist and pure proceduralist attempts to solve the paradox. Section 4 develops the two-level solution. Sections 5 and 6 unpack three independently sufficient reasons why democratic procedures are non-instrumentally valuable, and why citizens are thus justified in endorsing such procedures whilst opposing their upshot. A summary of the main results closes.

2. The Pure Proceduralist Solution

Before considering the two-level solution, the two main attempts to solve the paradox are assessed in this section and the next one. The first attempted way out of the paradox includes two claims. First, there is a contradiction in X endorsing both (A1) and (A4). Second, when this happens, X can nevertheless update her beliefs. Once she realises that *B* is the majority policy, she can turn to believe that *B* rather than *A* ought to be enacted.

When this happens, it turns out that X is not truly committed to (A1). For when she firstly expressed her preference for *A*, such preference was conditional upon other people's beliefs. She rather believed that:

(A1*) *A* ought to be enacted provided that a majority is of the same opinion.

Adapting Rawls's taxonomy of proceduralism, we can refer to X as a 'pure proceduralist'. For she endorses the democratic procedure whatever the content of its substantive upshot, as if no process-independent criteria to evaluate such upshot existed.⁹ Three difficulties arise with this solution, though — conceptual, empirical, and normative ones.

Let us begin with the conceptual difficulty. Assume that voters systematically address Wollheim's paradox by updating their policy preferences to those of the majority. In politics, this is often the case due to strategic voting, bandwagon effects, or the preference-shaping effects of law, but also because of perfectly rational changes of mind under conditions of imperfect information about political issues that are often complex to tackle.¹⁰ When this is the case, X may update her policy preferences to what she perceives as the majority preferences. If *B* is eventually chosen by the majority, X will then admit, given that she is committed to (A2), that she was wrong in her calculus, turning to believe that *B* rather than *A* ought be enacted. If, on the contrary, *A* is eventually chosen, X will continue to believe that *A* rather than *B* ought to be enacted. Yet, only because a majority has chosen *A* over *B*, rather than because she believes that *A* ought to be enacted.

There is nothing individually inconsistent or irrational in how pure proceduralists behave. The problem arises when we generalise their voting pattern and apply it to all voters. To see why, assume that:

(B1) Every voter believes that *A* ought to be enacted provided that a majority is of the same opinion.

For simplicity, let us put aside marginal cases in which voters may vote for alternatives that they do not believe should be enacted.¹¹ If we only consider those who vote for the alternative that they wish to have enacted, then it follows that:

(B2) Every voter will cast their vote according to what they anticipate that a majority will vote for, rather than according to what they really believe.

But then it also follows that:

(B3) Since every vote is a function of everyone else's votes, the policy that the majority votes becomes indeterminate.

As an analogy, consider the case of someone — call her Mary — who distrusts her own ability to wisely order in a restaurant. When having to order a dish to share with friends, Mary usually votes for whatever the majority orders. Or, in order to keep the analogy accurate, she votes for whatever she believes that the majority *will* order. There is nothing irrational or inconsistent in so doing. However, her conduct makes sense only insofar as (at least some of) her friends trust their own criterion. If all of them were as hesitant as Mary, then none of them would be able to delegate their decision. Being the majority decision a function of individual decisions that are, in turn, a function of the majority decision, the majority decision would become indeterminate.¹²

The second problem is explanatory. Admittedly, the conceptual problem does not challenge the solution insofar as enough citizens refrain from delegating their decision, which seems to be the norm in democratic societies. However, when this happens, it turns out that the solution does not make sense precisely of voters that are not pure proceduralists, i.e. of those voters who wholeheartedly believe that *A* rather than *B* ought to be enacted. This is often the case both before and after going to the polls. And there is nothing irrational about it. In democratic politics, it is not infrequent to vote for *A* knowing how the voting will go and, often, knowing quite well that you will be outvoted.¹³

Further, many voters oppose the majority policy once it has been enacted — often speaking out against it in demonstrations or petitioning — without calling into question its legitimacy, i.e. while wholeheartedly observing it. As Waldron has pointed out, an adequate account of the law's authority must accommodate the fact that the law 'makes its demand *ex hypothesi* on someone who thinks he has good ground for believing that the legislature is mistaken.'¹⁴

The third problem is normative. Unlike the previous problem, it concerns pure proceduralist voters, i.e. those voters who update their policy preferences to those of the majority. The problem is that it is unclear why their votes should have as much moral weight as the votes of those who vote for what they wholeheartedly believe.¹⁵ After all, democracy is a procedure employed to reflect citizens' preferences about policies that pervasively affect *their* lives, that are coercively enforced against *them*, and that are funded through *their* taxes. Democratic procedures are morally appealing, and their directives are authoritative, because among other things they channel citizens' preferences about the policies that they take to be correct, and about issues on which their stakes are high.¹⁶ Going back to the above analogy, should Mary's vote and the votes casted by her less hesitant friends have the same weight? I take it that the correct answer is that they should not.

It might be objected that this infringes the common democratic principle of giving equal weight to all votes irrespective of their origin or supposed quality.¹⁷ I raise three points in response. First, the fact that some votes are of less quality than others does not imply that those who cast the former should not have the legal right to vote, not only for pragmatic reasons, but also because voters might have a legal right to do wrong.¹⁸ Second, bearing in mind the previous point, it is not uncommon to assume that not all votes are of equal value (being epistemic failures the clearest example of bad voting, and the reason why certain epistemic preconditions, such as literacy, are generally required for the adequate functioning of democracy).¹⁹ There is ground, thus, to claim that pure proceduralist votes may be less morally valuable. Third, that these votes have less moral weight is shown by the generalisation made in the presentation of the first concern above. To see why, assume that every single citizen voted the predicted majority decision, and that no one at all voted the option she takes to be correct. If that were the case, I take it that the justification of democracy would be in serious jeopardy.

In short, the three concerns raised here pose a dilemma to the pure proceduralist solution. The more citizens behave as pure proceduralists, thus updating their beliefs to those of the majority, the more indeterminate and the less morally valuable the upshot of the democratic procedure is. And, conversely, the less citizens behave as pure proceduralists, the more determinate and morally valuable the decision is, yet the less relevant the pure proceduralist solution turns out to be in making sense of how citizens behave under conditions of persisting opposition.

3. The Pure Instrumentalist Solution

Consider now a second possible way out of the paradox, according to which X's endorsement of (A2) is conditional on majority rule bringing about the just outcome, i.e. policy *A*. Accordingly, when policy *B* rather than policy *A* results from majority rule, X's endorsement of (A2) is merely prudential, i.e. she observes policy *B* not because she takes it to be legitimate, but rather because she would be worse-off otherwise. State coercion and social pressure are two obvious reasons for compliance under these circumstances. But additional and perhaps more subtle reasons may also apply, such as rule-consequentialist ones, as Donald Weiss contends.²⁰ For example, X can simultaneously believe that *A* ought to be enacted and that *B* ought to be observed because law-keeping has desirable consequences.

Under either reading, the democratic procedure included in (A2) only has instrumental value, and X only has instrumental reasons to endorse it.²¹ Hence, when the procedure brings about an outcome that is at odds with what X takes to be all-things-considered just, as in the case of Wollheim's paradox, then X does not have any reason, other than prudential ones, to stick to the procedure.

Again, explanatory, normative, and conceptual problems arise with this solution. Consider the explanatory problem first. The pure instrumentalist solution implies that the only reason why X does not enact *A* is that she lacks the social and political resources required to do so, or that she so perceives to be the case. If X happened to enjoy such resources, she would enact *A* without batting an eyelash. Brian Barry expressed this view with his usual clarity:

If you adhere to any ideal or principle which does not include in it a reference to the opinion of others, then it is logically possible that you might be the only person holding it. There could be a situation, therefore, in which you say ‘So and so should be done’ and everyone except you says ‘So and so should not be done’. You are in effect setting yourself up as a dictator. Of course, you probably won’t have the power to get what you want done against everyone’s opposition, nevertheless you are saying that if you had the power you would.²²

However, when it comes to actual citizens, it is both plausible and empirically sound to think that they can, and indeed do, behave otherwise. It is certainly plausible to think that citizens may favour policy *A*, have the (actual and perceived) power to enact *A*, and yet hesitate to do so because they also believe that *A* ought not to be enacted by any possible means, but only by democratic ones.²³ This may be for the reasons that are listed in the next objection below and unfolded in Sections 5 and 6, or for some further reasons. Further, evidence from social psychology shows that, in deciding whether to comply with governmental policies, citizens do attach great value to the fairness of the procedures employed to produce them. Indeed, this dimension often exceeds their outcome evaluations.²⁴ As Tom Tyler concludes in a review of the relevant literature, ‘studies of the legitimacy of authority suggest that people decide how legitimate authorities are, and how much to defer to those authorities and to their decisions, primarily by assessing the fairness of their decision-making procedures.’²⁵

The second objection is normative. Many instrumentalists admit that actual citizens attach intrinsic value to democratic procedures.²⁶ However, they do not bother. They contend that this psychological fact should have no bearing in normative theorising, which should only consider whether there are moral reasons to attach non-instrumental value to such procedures. However, even if we assume this clear-cut separation between the descriptive and the normative, a problem for the instrumentalist solution is that such reasons are available.²⁷

In Sections 5 and 6, I unfold three reasons that citizens have to stick to the upshot of democratic procedures provided that such procedures are fair and regardless of whether they bring about just outcomes or not. For now, let me just list them. First, democratic procedures have non-instrumental value in the presence of thick reasonable disagreements about which outcomes are just. Second, they have non-instrumental value because they are necessary to avoid paternalising citizens. Third, they have non-instrumental value because they respect citizens’ right to democratically do wrong. If these or some further reasons were sound, then it would turn out that democratic procedures are not only instrumentally valuable. Of course, they would not imply that they do *not* have instrumental value at all. They could have both, as we shall see below.

Consider finally the conceptual problem. Assume that the instrumentalist solution is sound. Citizens should, and would, enact *A* if they happened to have the (actual or perceived) power to do so. This is the position endorsed by Richard Arneson: ‘If you happen to have the power to implement [the] correct assessment, you should do so, despite the fact that your assessment will not attract the unanimous assent of those affected.’²⁸

The conceptual problem faced by this solution is twofold. First, it is questionable whether pure instrumentalists, who are willing to enact their preferred policies regardless of their fellow citizens’ consent, can qualify as democrats at all. After all, being a

democrat implies, almost as a matter of definition, being morally committed (at least to some degree) to the decisions brought about by democratic means. This, however, is not a problem for most instrumentalists, who openly assume that they are democrats only contingently.²⁹ Second, letting aside the definitional issue, the instrumentalist solution does not solve the paradox. It only evades it. For the paradox consists in believing that two inconsistent pieces of legislation ought to be enacted. Accordingly, instrumentalist attempts to address the paradox, such as Weiss's, do not have a bearing on Wollheim's paradox. This is supposed to involve a democrat who says at the same time that *A* ought to be enacted and *B* ought to be enacted, being *A* and *B* incompatible with each other.³⁰

4. The Two-level Solution

After having shown the inadequacies of pure proceduralist and pure instrumentalist attempts to solve the paradox, the remainder of the article offers an alternative solution. This section unpacks the *two-level solution*, as I shall label it, which shows that citizens can consistently endorse the upshot of democratic procedures while opposing it when these endorsements result, respectively, from a first-order principle of substantive legitimacy and a second-order principle of procedural legitimacy.³¹ The section proceeds in three steps. First, it unpacks the nature of the two principles and the levels of substantive and procedural legitimacy to which they pertain. Second, it shows that, hence understood, the alleged paradox resulting from such principles dissolves. Finally, the two-level solution is illustrated with an example taken from the 2013 Egyptian military putsch.

We begin by showing why X's endorsements result from principles pertaining to two different normative levels — one substantive, the other procedural. To show this, let us assume, for refutation, that the paradox were a particular case of the contradiction that can arise from general moral principles pertaining to the same level, as Ross Harrison contends.³² If so, it might be argued that (A1) and (A2) would be incompatible under the circumstances specified by Wollheim. Yet, only as general principles like telling the truth and saving life can turn out to be in conflict under analogous circumstances (e.g. when saving someone's life requires lying) without such conflict creating a paradox in truth-telling as a result.

This interpretation, however, is flawed. Wollheim's paradox is certainly a case of a broader conflict between general principles. Yet, the above interpretation does not capture the difference between the principles operating in that case (i.e. telling the truth and saving life) and the principles operating in Wollheim's paradox. In the above case, both principles are substantive. In Wollheim's paradox, by contrast, one of the principles is substantive, while the other is procedural. The belief that '*A* ought to be enacted' obtains from a substantive principle of legitimacy, a principle that is unconditional upon third parties' views and that X endorses, while the belief that '*B* ought to be enacted' obtains from X's general endorsement of what she regards as the legitimate source of authority, i.e. from her endorsement of a principle of procedural legitimacy.³³

Further note that the procedural principle from which X's commitment to (A4) results need not necessarily be democratic. In the version of the paradox presented by Wollheim, such principle (according to which the policy chosen by the majority ought to be enacted) is certainly democratic. However, and even though the reasons advanced below in Sections 5 and 6 would no doubt rule out some of the following, the paradox could also trigger under a diversity of procedural sources, such as the following ones:

- (A2) The policy chosen by the majority ought to be enacted.
- (A2*) The policy chosen by the Pope ought to be enacted.
- (A2**) The policy chosen by experts ought to be enacted.
- (A2***) The policy chosen by lottery ought to be enacted.

To clearly distinguish these two levels of substantive and procedural legitimacy, it is worth considering the questions to which the commitments in the above case and in Wollheim's paradox provide an answer. In the above case, both commitments (to tell the truth and to save life) provide an answer to the question of what ought to be done. In Wollheim's case, by contrast, '*A* ought to be enacted' provides an answer to the question of what ought to be done, while '*B* ought to be enacted' provides an answer to the question of what ought to be done provided that the commands of a common authority are followed.³⁴

Thus understood, the paradox dissolves. From the standpoint of the two-level solution, X's commitment to policy *B* results from a commitment to a principle of democratic legitimacy, according to which the majority policy ought to be enacted. By contrast, X's endorsement of policy *A* is a consequence of a commitment to a principle of substantive legitimacy, according to which policy *A* ought to be enacted because is just. In well-functioning democracies, in which adequate channels to express dissent are available, X can speak out against policy *B*, which she substantively opposes in favour of *A*, by attending demonstrations, petitioning, or submitting initiatives to parliament, while she respectfully observes *B*.³⁵

As illustration, consider an example taken from the military coup that deposed the democratically elected Egyptian President, Mohamed Morsi, in July 2013. Among those who stood up against the putsch, some may have certainly opposed it as a result of their substantive agreement to the policies enacted by Morsi and his government. Yet, some others may have opposed the coup as a result of their endorsement of the democratic procedure used to appoint Morsi and, importantly for present purposes, despite the fact that they might have nonetheless opposed his policies. The following statement by a demonstrator in Cairo in the aftermath of the coup, which clearly distinguishes between substantive and procedural reasons to support Morsi and oppose the coup, provides a case in point. According to him, the demonstrations 'have nothing to do with Morsi, the Muslim Brotherhood, or Islam. They have to do with the fact that they have carried out a coup, they have to do with the polls, and with democracy.'³⁶

While the coup opponents of the latter kind have some obvious differences from the democrat depicted in Wollheim's paradox, they nicely illustrate the point raised here. They may have substantively opposed Morsi due to fact that they disagreed with his policies. At the very same time, however, they may also have supported him against the coup due to their commitment to the democratic means employed to appoint him. In short, they could not be pure instrumentalists, for otherwise they would have supported the coup. Yet, they could not be pure proceduralists either, for otherwise they would have endorsed Morsi's policies during his term in office.

This plausible reaction to the coup shows that there is nothing paradoxical in Wollheim's purported paradox when we look into it from the standpoint of the two-level solution. Further, while this reaction might have been marginal in the aftermath of the Egyptian putsch, it need not be uncommon in well-established democracies, in which adequate channels to express dissent (e.g. the right to associate, to demonstrate, to

submit initiatives to parliament) are available and the willingness to submit to the directives of the democratic authority is widespread among citizens. Under such conditions, Wollheim's paradox dissolves.

5. The Argument from Reasonable Disagreement

The previous section has shown why, from the standpoint of the two-level solution, it is *consistent* for citizens to endorse the upshot of democratic procedures while opposing it at the same time. This says nothing, however, about whether such endorsement is justified or not. In this section and the following one I unpack three independently sufficient reasons that may justify it — namely, the presence of reasonable disagreement, non-paternalism, and the right to democratically do wrong. (For the reasons why these and not other reasons are selected, see Section 6 below.) In so doing, I show that those accounts of democratic legitimacy, such as Waldron's and Valentini's, that rely on one of such reasons — namely, the presence of reasonable disagreement — as a necessary condition for democratic procedures being called for are flawed, or at least incomplete.

Before turning to the limits of these accounts, let me briefly state the role of reasonable disagreement in the recent debates about democratic legitimacy.³⁷ When disagreement about which policies ought to be enacted obtains, X has sound reasons to endorse (A1) and (A4) at the same time — the former because it is the policy that she takes to be just and the latter because she acknowledges that her fellow citizens have opposing, yet reasonable, views on (A1) and a common course of action is nevertheless to be taken.³⁸ Under this interpretation, X is committed to policy *A* as a matter of substantive legitimacy, and endorses policy *B* as a matter of procedural legitimacy due to the presence of reasonable disagreement about whether policy *A* is just. As Waldron puts it,

A person who believes that *A* is the right decision but *B* the decision that should be implemented, is offering answers to two different, though complementary questions. That *B* should be implemented is his answer to the question, 'What are we to do, given that we disagree about whether *A* or *B* is just?' That *A* is the right decision is his own contribution to the disagreement that called forth that question.³⁹

This is a very plausible interpretation of X's endorsement of (A2) and (A1), one which, given the wealth of the literature examining it, I will not discuss in detail. What is crucial for present purposes is to point that the presence of reasonable disagreement is *not* the only plausible reason to justify X's endorsement of (A2), as we shall see in the next section.

Consider two reasons why the availability of further reasons is crucial. First, in the absence of further reasons, the presence of reasonable disagreement poorly captures widely held intuitions about why democratic procedures and their upshot deserve compliance. To see this, it is worth recalling that the possibility of reaching a consensus should not be ruled out. Disagreement is very context-sensitive. The same policies can trigger wide support in certain constituencies while giving raise to lively debate, to put it mildly, in some others. For example, linguistic policy is much more contested in Belgium than in France; healthcare provision is much more contested in the US than in Norway; and agrarian reform is much more contested in Colombia than in Japan.

Disagreement-based accounts sometimes carefully take these variations into account. Yet, they often reduce the non-instrumental value of decision-making procedures to a function of the existing degree of disagreement. Laura Valentini, for example, has recently argued that the intrinsic value of democratic procedures is conditional on how thick the presence of reasonable disagreement is.⁴⁰ The thicker the existing disagreement, the more intrinsically valuable democratic procedures are, and the thinner the existing disagreement, the less intrinsically valuable democratic procedures turn out to be.

A crucial implication of this is that, where disagreement is absent, non-instrumental reasons to endorse democratic procedures are absent, too, and the justification of such procedures is poorly established.⁴¹ This, of course, is not obviously problematic. It may be the case that, in the absence of disagreement, democracy only has instrumental value. However, this is misguided. For, as we shall see in the next section, there are further non-instrumental reasons to endorse (A2). A more robust justification of democratic procedures is thus possible, and disagreement-based accounts turn out to be flawed or at least incomplete as a result.

The second reason why the existence of further reasons is important is that they provide a way out of the regress of procedures triggered by the presence of disagreement as a means to justify the need for democratic procedures. It has often been argued that reasonable disagreement about substantive policies is also likely to pervade the procedures used to address such disagreement.⁴² When this happens, X is caught in a dilemma. She can, on the one hand, relax her commitment to (A2) due to the fact that (A2) is also pervaded by reasonable disagreement. In so doing, however, she falls into the instrumentalist solution. On the other hand, she can endorse a further procedural principle to address the existing disagreement on (A2), such as the following one:

(A5) The procedure chosen by the majority ought to be enacted.

However, reasonable disagreement is likely to pervade (A5) as much as it pervades (A2) and (A1). Accordingly, this second move is likely to lead to a regress of procedures.

The dilemma poses a serious problem for disagreement-based solutions to the paradox.⁴³ Yet, it is more tractable under the two-level solution presented here, given that, as we shall see immediately below, it is grounded on further independently sufficient reasons (other than the presence of reasonable disagreement) to endorse (A2). As such, the two-level solution is less affected by the regress of procedures faced by those accounts of democratic legitimacy, such as Waldron's and Valentini's, that rely on the presence of reasonable disagreement as a necessary condition to justify X's endorsement of the democratic procedure included in (A2).

6. The Argument from Non-Paternalism and the Right to Do Wrong

We now turn to further non-instrumental reasons, other than the presence of reasonable disagreement, for citizens to comply with the upshot of democratic procedures. Three well-known candidates are, first, honouring their fellow citizens' equal social status and their sense of self-respect, second, respecting the procedure that is most reliable in making good political decisions within the limits of what is generally acceptable by all qualified points of view and, third, enabling citizens' participation in the process of

social construction so that they can feel at home in the social world.⁴⁴ While these are important reasons, they have already been examined in great detail in the existing literature. In this section I thus focus on two less noticed reasons to endorse the upshot of democratic procedures — namely that in so doing they avoid paternalising their fellow citizens and respect their right to democratically do wrong. I first unpack these reasons, and examine their twofold rationale. I then consider their limitations as well as two important objections.

Before proceeding, a methodological clarification is in order. The right not to be paternalised and the right to wrongdoing are very different. While the former refers to decisions that only affect the right holder, the latter refers to decisions that affect not only the holder but also third parties. Here, however, I treat them jointly for two reasons. The first is that both rights are equally grounded on the value of personal autonomy. The second and more important reason is that their scope need not be different once we make two methodological stipulations. The first is that the right not to be paternalised is only considered here *collectively*, i.e. as a right of a democratic polity not to be interfered with by a third party — whether internal or external. The second stipulation is that, as established at the outset of the article, the scope of the right to do wrong is constrained to internal affairs, i.e. to political decisions by which citizens can democratically wrong some of the members of their community, and only them. Political decisions involving negative externalities (e.g. war declaration, fisheries policy, greenhouse emission control) are therefore not considered here. Thus constrained, the scope of the two rights coincides.

Let us now get started. Citizens often have morally dubious reasons to vote as they do. Yet, as Parfit has recently argued, even if *they* had no reasons at all, *we* would have one to respect their vote, namely to avoid imposing our will on them for their own good.⁴⁵ Consider tax reform. X may be certain of what a just distribution of fiscal burdens is, and may have the actual and perceived power to enact such reform. Still, she may defer to majority vote in order to avoid imposing what she takes to be just against the will of her fellow citizens, even if she may be convinced that they have no sound reason to vote against her preferred policy and that, in deferring to (A2), she will be outvoted.

What justifies the rights not to be paternalised and to do wrong is that they advance the value of personal autonomy. Individually, this right implies that individuals should have the ability to freely determine their lives and identity.⁴⁶ Collectively, autonomy implies that individuals should have, as part of a democratic polity, the ability to democratically determine their collective identity. Citizens, and their elected representatives, often make political choices that are constitutive of such identity. Of course, only some of these choices (e.g. the ratification of the state constitution or the decision whether to join the NATO or the EU) are big enough to shape by themselves who they are as a polity. Yet, the collective identity of citizens is also shaped, in the aggregate, by medium decisions, including decisions about criminal law, monetary policy, reproductive rights, territorial organisation, hate speech, or welfare provision.⁴⁷

This provides us with a twofold rationale for the rights not to be paternalised and to wrongdoing. The first is normative. As in the case of personal constitutive choices, such as whom to marry or whether to have a child, political constitutive choices — and to a lesser extent, medium choices — are more valuable if they are freely made than if they are made out of coercion or by a third party. There is, thus, some value in letting

citizens make their own political choices — and, accordingly, their own mistakes — that is based on the value of being able to shape one's own identity, i.e. on the value of self-constitution.⁴⁸

The second rationale is logical. When it comes to constitutive decisions, imposing upon citizens what is collectively best for them is not only paternalistic. It is also a nonstarter. This is not because of mere reactance, i.e. the adoption of a view or an attitude that is contrary to another view or attitude as a result exclusively of the latter being imposed on you. Rather, it is a nonstarter because what is best for someone with regard to constitutive decisions cannot be defined before the decision is made, on the one hand, and is to a great extent dependent, on the other hand, on who makes the decisions. When it comes to constitutive decisions, what is best cannot be neither defined nor fully achieved, if at all, by a third party, such as X.

Before turning to potential objections, it is worth bearing in mind two caveats of the right not to be paternalised and to wrongdoing for the issue at hand. The first is that the above reasons may be easily overridden or not apply whatsoever when the upshot of (A2) results from misinformed or not-fully voluntary choices. Other things equal, enacting policy *A* against the majority decision out of *soft* paternalism may be justified. However, enacting policy *A* is hardly justifiable when it implies *hard* paternalism, i.e. when (A4) results from fully informed and fully voluntary votes of a majority of citizens.⁴⁹ Further, it should be recalled that we are assuming that citizens vote from moral and reasonable convictions. This satisfies an important requirement of the right to do wrong, namely that the wrongs are made in good faith. As Waldron suggests, it cannot be the case that choice is so important that needs to be protected yet so unimportant that guidance is out of the question.⁵⁰

The second caveat is that the aforementioned reasons are not always decisive in justifying X's endorsement of (A2), as democratic procedures can sometimes lead to collective mistakes that are morally too gross or that affect individuals that do not have an input in the decision (e.g. minors). Here I am only claiming that there is *some* value, for the citizens of a polity, in being able to make their own mistakes, which is very different from the (highly implausible) claim that there is *nothing else* valuable or that this ability overrides any other moral consideration. However, if we believe that it is morally valuable for citizens of a polity to have a right to make their own decisions and to shape their own collective identity, then X has a *pro tanto* reason to endorse (A2), and therefore (A4), at least when her fellow citizens act in good faith. If she imposed her own criterion against their will to advance what she takes to be collectively good for them, X would set herself as a benevolent dictator, thus violating their right to do wrong and paternalising them.

Consider now two potential concerns. Gerhard Øverland and Christian Barry, who oppose the democratic right to do wrong, advance the first concern.⁵¹ They admit that when citizens vote from sincere and reasonable convictions, the range of means that it would be permissible to use to prevent them from doing wrong are much more reduced than when they vote from self-interest. Yet, this is different from having a democratic right to do wrong, they reckon. It puts constraints on the means that are permissible to prevent wrongdoing, but does not justify such a right.

Now, according to them, to adequately assess the means that are morally permissible, we must consider their costs. Sometimes, they contend, the costs of thwarting the wrong may exceed the benefits, in which case such means will not be permissible. But, if X is completely certain that policy *B* should not be enacted because it is unjust, then I take

it that this implies that the costs of *B*, including the costs of *B* being prevented, exceed its benefits. If so, however, which could be the further costs to which Øverland and Barry refer? Two apt candidates come to mind. The first is compliance costs arising from morally motivated disagreement with the enacted policies. (It should be noted that, in raising their concern, Øverland and Barry assume that citizens act exclusively from moral reasons, which rules out compliance costs arising from self-interested motivations.) The second candidate is the costs arising from trumping citizens' autonomy and their ability to make their own decisions if policy *A* instead of policy *B* is enacted. However, these are precisely the values that ground the democratic right to do wrong, as well as the right not to be paternalised. Since, as I have argued above, these two rights can be overridden when they lead to serious wrongdoing, it seems more consistent to say that citizens have a right to wrongdoing and a right not to be paternalised and that these rights are merely *pro tanto* — rather than saying that they do not have such rights, on the one hand, and that the costs of thwarting their wrongdoing may often justify letting them do wrong, on the other.

A second worry is that the very idea of paternalising someone may only hold in the presence of disagreement, i.e. when a majority of voters oppose the policy that *X* takes to be collectively good for them and *X* has to decide whether to observe the majority policy or not. If this were the case, it could be further objected that the argument from non-paternalism adds little to the argument from disagreement, and that disagreement-based accounts of democratic legitimacy are neither flawed nor incomplete as a result.

I raise two points in response. The first is that the conditions under which the argument holds (i.e. when disagreement obtains) should not be confused with the reasons why it holds (which are different from the acknowledgment of reasonable disagreement). One thing is to submit to democratic procedures because you acknowledge that your fellow citizens have different, yet reasonable, views and that a common course of action is nevertheless to be taken. Another thing is to do it because you think that, when a majority of your citizens disagree with you, you should not impose your will if you could because, in so doing, you would be undermining their personal autonomy and their capacity for self-constitution.

The second response is that it is nonetheless possible to paternalise someone in the absence of disagreement. This goes against the common belief that you can paternalise someone only if you act *against her will*.⁵² However, this is not necessarily true. To see why, consider the following case:⁵³

Julie. You and your group of friends make plans together every now and then. You are all open to a plurality of options except Julie, who detests hiking, as everybody knows well. When you win a free group weekend to hike in the Rocky Mountains, you phone each of them to invite them. But you do not phone Julie, since you know that she dislikes hiking. However, when she learns that you have invited all others except her, she takes offense. She would no doubt have declined the offer had you invited her. Yet, she finds it presumptuous that you did not ask her. She believes that by assuming her preferences instead of actually asking her you have paternalised her.

Julie is hardly the typical case of paternalism, which usually requires the paternaliser to act against the will of the paternalisee. Yet, it allows us to see that neither the presence of disagreement nor acting against the will of the paternalisee are strictly necessary for

paternalism. It is possible to paternalise someone when you do what she would have nonetheless done (as when, in Julie, you did not phone her because you were certain that she would have declined the offer, which she would have done had you phoned her). What is relevant is whether the potential paternaliser acts from what the potential paternalisee *has chosen to do*.⁵⁴ *Mutatis mutandis*, it would be possible for X to paternalise her fellow citizens if the upshot of (A2) did not differ from her preferred policy *A*. X would do this if she enacted policy *A* because *A* is the policy that she takes to be collectively good for her fellow citizens rather than because *A* is the policy that *has been chosen* by (a majority of) them. In acting from the former reason, X paternalises them.

8. Conclusion

The article has firstly considered pure proceduralist and pure instrumentalist solutions to the paradox of persisting opposition and has found them wanting — on normative, conceptual, and empirical grounds. It has then advanced a two-level solution to the paradox, and has advanced three independently sufficient reasons to non-instrumentally endorse the upshot of democratic procedures — namely, the presence of reasonable disagreement, non-paternalism, and the right to democratically do wrong. In so doing, it has shown that those accounts — dominant in the recent literature — that rely on the presence of reasonable disagreement as a necessary condition for democratic procedures being called for are flawed, or at least incomplete, and has provided a more complete alternative to them.

The two-level solution operates under the three methodological assumptions that have been set out at the outset of the article. In addition, the solution is grounded on reasons that are merely *pro tanto*. Further work is thus required, first, to see how the solution is affected when we relax the aforementioned assumptions and, second, to establish the conditions under which the reasons examined here may be overridden.⁵⁵

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NOTES

- 1 Robert E. Goodin, 'The paradox of persisting opposition', *Politics, Philosophy & Economics* 1,1 (2002): 109–146.
- 2 Richard Wollheim, 'A paradox in the theory of democracy' in P. Laslett & W. G. Runciman (eds) *Philosophy, Politics and Society* (Oxford: Basil Blackwell, 1962).
- 3 Sven Ove Hansson, 'A resolution of Wollheim's paradox', *Dialogue* 32,4 (1993): 681–688; Kris McDaniel & Ben Bradley, 'Desires', *Mind* 117, 466 (2008): 267–302.
- 4 See, respectively, Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Goodin op. cit.; Raf Geenens, 'The deliberative model of democracy: Two critical remarks', *Ratio Juris* 20,3 (2007): 355–371; and Richard Bellamy, 'Democracy, compromise and the representation paradox', *Government and Opposition* 47,3 (2012): 441–465.
- 5 Among the former, see Ted Honderich, 'A difficulty with democracy', *Philosophy & Public Affairs* 3,2 (1974): 221–226. Among the latter, see Brian Barry, *Political Argument* (London: Routledge & Kegan Paul, 1965); Donald D. Weiss, 'Wollheim's paradox: Survey and solution', *Political Theory* 1,2 (1973): 154–70; and J. Roland Pennock, 'Democracy is not paradoxical: Comment', *Political Theory* 2,1 (1974): 88–93.

- 6 See Wollheim, op. cit.; Ross Harrison, 'No paradox in democracy', *Political Studies* 18,4 (1970): 514–17; Vinit Haksar, 'The alleged paradox of democracy', *Analysis* 37,1 (1976): 10–1; Waldron op. cit.; and Bellamy op. cit.
- 7 For a solution to the paradox that considers self-interest, see Hansson op. cit.
- 8 This, however, need not imply that X does not any longer have a duty to obey the law. For one thing, reasons other than the ones advanced here may still apply. For another, a content-independent duty to obey the law may exist. For the relationship between democratic legitimacy and political obligation, see Allen Buchanan, 'Political legitimacy and democracy', *Ethics* 112,4 (2002): 689–719; and John A. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001).
- 9 According to Rawls, 'pure procedural justice obtains when there is no independent criterion for the right result: instead 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 properly followed.' John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 75.
- 10 Goodin op. cit., p. 110.
- 11 I am grateful to Sven Ove Hansson for pressing me to introduce this caveat.
- 12 For a similar point, see Keith Graham, 'Democracy, paradox, and the real world', *Proceedings of the Aristotelian Society* 76 (1976): 227–245, at p. 229.
- 13 On this, see Goodin op. cit. p. 135; Wollheim op. cit., p. 80.
- 14 Waldron op. cit., p. 101.
- 15 See Wollheim op. cit., p. 81; Graham op. cit., p. 229.
- 16 Some have accordingly argued that power should be distributed in proportion to people's stakes in the policy under consideration. See Harry Brighouse & Marc Fleurbaey, 'Democracy and proportionality', *Journal of Political Philosophy* 18,2 (2010): 137–155. Here, however, I put this possibility aside, assuming that stakes are homogeneously distributed across the relevant constituency.
- 17 I am grateful to Sven Ove Hansson for raising this objection.
- 18 More on the right to do wrong below in Section 5.
- 19 I discuss the implications of this in Iñigo González-Ricoy, 'Depoliticising the polls: Voting abstention and moral disagreement', *Politics* 32,1 (2012): 46–51.
- 20 For this argument, see Weiss op. cit.
- 21 For the most forceful account of pure instrumentalism, see Richard Arneson, 'Democracy' in K. Dowding, R. E. Goodin & C. Pateman (eds) *Democracy and Justice* (Cambridge: Cambridge University Press, 2004), p. 43.
- 22 Barry op. cit., p. 259.
- 23 See Haksar op. cit., p. 12.
- 24 The *locus classicus* is John Thibaut & Laurens Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1975). See, more recently, Russell J. Dalton, Doh C. Shin & Willy Jou, 'Understanding democracy: Data from unlikely places', *Journal of Democracy* 18,4 (2007): 142–156; Christopher Carman, 'The process is the reality: Perceptions of procedural fairness and participatory democracy', *Political Studies* 58, (2010): 731–751; and Alois Stutzer & Bruno S. Frey, 'Political participation and procedural utility: An empirical study', *European Journal of Political Research* 45, (2006): 391–418.
- 25 Tom R. Tyler, 'Social justice: Outcome and procedure', *International Journal of Psychology* 35,2 (2000): 117–125, at p. 120.
- 26 Jason Brennan, 'Political liberty: Who needs it?', *Social Philosophy & Policy* 29,1 (2012): 1–27, at pp. 6–10.
- 27 For a criticism of the separation that targets Arneson's instrumentalism, see Robert Sugden, 'Justified to whom?' in D. Copp, J. Hampton & J. E. Roemer (eds) *The Idea of Democracy* (Cambridge: Cambridge University Press, 1993), p. 152.
- 28 Arneson op. cit., p. 43.
- 29 See, for example, Arneson op. cit., and Philippe Van Parijs, 'Justice and democracy: Are they incompatible?', *Journal of Political Philosophy* 4,2 (1996): 101–117.
- 30 For a similar argument, see Brian Barry, 'Wollheim's paradox: Comment', *Political Theory* 1,3 (1973): 317–322, p. 318.
- 31 That these two principles are depicted as pertaining to two different levels does not imply any moral hierarchy of one of them over the other. This terminology is used exclusively to express that one of the principles is a first-order principle while the other is a second-order one. It does not have moral connotations.

- 32 Harrison op. cit.
- 33 The solution originally sketched by Wollheim correctly captures this difference of levels. However, Wollheim does not elaborate on the alleged different properties of each level. See Weiss op. cit.
- 34 For a careful analysis of the procedural and substantive dimensions of democratic legitimacy, see José Luis Martí, 'The Sources of Legitimacy of Political Decisions: Between Procedure and Substance' in L. Wintgens (ed.) *The Theory and Practice of Legislation* (London: Ashgate, 2005), pp. 259–281.
- 35 For a criticism of the idea that proceduralism implies a 'deaf and blind' acceptance of whatever outcome follows from fair procedures, see Emanuela Ceva, 'Just procedures with controversial outcomes: On the grounds for substantive disputation within a procedural theory of justice', *Res Publica* 15,3 (2009): 219–235.
- 36 'Una multitud islamista pide en El Cairo la restauración de Morsi', *El País* 12 July 2013. Available at: http://internacional.elpais.com/internacional/2013/07/12/actualidad/1373623216_142722.html
- 37 The classic disagreement-based justification of democratic procedures is Waldron op. cit. See also Thomas Christiano, *The Rule of the Many* (Boulder, CO: Westview Press, 1996).
- 38 For the distinction between reasonable and unreasonable disagreement, see John Rawls, *Political Liberalism*, 2nd edn. (New York: Columbia University Press, 1996). In this article I assume that the distinction can be traced, yet I remain silent about how to define it. Leif Wenar carefully analyses the concept in his 'Political Liberalism: An internal critique', *Ethics* 106, (1995): 32–62, at pp. 34–35.
- 39 Waldron op. cit., pp. 247–248.
- 40 Laura Valentini, 'Justice, disagreement and democracy', *British Journal of Political Science* 43,1 (2013): 177–199.
- 41 This conclusion can be found, for example, in Valentini op. cit. pp. 187–189. See also Adam Przeworski, 'Self-enforcing democracy' in D. Wittman & B. Weingast (eds) *Oxford Handbook of Political Economy* (New York: Oxford University Press, 2006), p. 312.
- 42 See Thomas Christiano, 'Waldron on law and disagreement', *Law & Philosophy* 19,4 (2000): 513–543; Joshua Kassner, 'Is really everything up for grabs?', *Journal of Political Philosophy* 14,4 (2006): 482–494; Adam Rieger, 'Voting on voting systems, or the limits of democracy', *Analysis* 71,4 (2011): 641–642.
- 43 For a possible way out, see Jeremy Waldron, 'The core of the case against judicial review', *Yale Law Journal* 115 (2006): 1346–1406, at pp. 1371–1372.
- 44 For the first reason, see Rawls op. cit., pp. 318–319. See also Meena Krishnamurthy, 'Reconceiving Rawls's arguments for political liberty and its fair value', *Social Theory & Practice* 38,2 (2012): 258–278; Niko Kolodny, 'Rule over none II: Social equality and the justification of democracy', *Philosophy and Public Affairs* 42,4 (2014): 287–336; and Iñigo González-Ricoy & Jahel Queralto Lange, 'Political liberties and equal social status', unpublished. For the second reason, see David Estlund, *Democratic Authority. A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008). For the third reason, see Thomas Christiano, *The Constitution of Equality* (New York: Oxford University Press, 2008). The first and third reasons are critically assessed by Brennan op. cit., pp. 6–10 and 12–17.
- 45 Derek Parfit, *On What Matters*, vol. 1 (Oxford: Oxford University Press, 2011), p. 66.
- 46 See Ori J. Herstein, 'Defending the right to do wrong', *Law & Philosophy* 31,3 (2012): 343–365, at pp. 249–351 and 357–361.
- 47 For the distinction between big (i.e. constitutive) and medium decisions, see Edna Ullman-Margalit, 'Big decisions: Opting, converting, drifting', *Royal Institute of Philosophy Supplements* 58 (2006): 157–172.
- 48 Notice that self-constitution does not imply self-realization. As Raz puts it, '[t]he autonomous person is the one who makes his own life, and he may choose the path of self-realization or reject it.' Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 376.
- 49 For the distinction between soft and hard paternalism, see Joel Feinberg, *Harm to Self* (Oxford: Oxford University Press, 1986), chapter 4.
- 50 Jeremy Waldron, 'A right to do wrong', *Ethics* 92,1 (1981): 21–39, at p. 37.
- 51 Gerhard Øverland & Christian Barry, 'Do democratic societies have a right to do wrong?', *Journal of Social Philosophy* 42,2 (2011): 111–131, at pp. 114–116.
- 52 This belief is widely assumed in the literature. Gerald Dworkin, for example, defines paternalism as follows: 'the interference of a state or an individual with another person, against their will.' Gerald Dworkin, 'Paternalism' in E.N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Stanford, CA: Stanford University Press, 2010). Available at: <http://plato.stanford.edu/entries/paternalism/>

- 53 For alternative attempts to challenge this condition, see Seana V. Shiffrin, 'Paternalism, unconscionability doctrine, and accommodation', *Philosophy & Public Affairs* 29,3 (2000): 205–250; and Daniel Groll, 'Paternalism, respect, and the will', *Ethics* 122,4 (2012): 692–720.
- 54 For an argument along these lines, see Estlund op. cit., pp. 76–78.
- 55 This article draws heavily upon chapter 4 of Iñigo González-Ricoy, *Constitutionalism, the Workplace, and the Scope of Democracy*, unpublished PhD dissertation, Universitat de Barcelona, 2012. For comments and discussions, I am grateful to José Manuel Bermudo, Axel Gosseries, Oscar Horta, José Luis Martí, Sven Ove Hansson, Jahel Queral, João Rosas, Joan Vergés and the anonymous reviewers. The usual caveat applies.