

Justice: Do it.

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Let us put an end, if not to injustice itself, at least to the sophisms used to veil it.

--Immanuel Kant, *Perpetual Peace*

I'm on my vigilante shit again.

--Taylor Swift, *Midnights*

Democratic societies accord their citizens *substantive* rights – that is, rights to goods, protections, status, etc. Democratic societies also grant *procedural* rights to their citizens – that is, rights to participate in political processes. But what happens when the way in which some citizens exercise their procedural rights determines whether the substantive rights of other citizens will be satisfied or violated (Applbaum, 2010; Edmundson, 1998; Kolodny, 2014; Overland & Barry, 2011; Peter, 2020; Quong, 2011; Stilz, 2012; Valentini, 2012; Windeknecht, 2012; Wollner, 2019)? Say there is a substantive right to equal opportunity for education, but other citizens have a procedural right to vote on provisions necessary for bringing it about. Or, jury members – facing adverse epistemic circumstances – have apparently decisive evidence of guilt for an unlucky person who is, in fact, completely innocent (Estlund, 2007; Overland & Barry, 2011).

The prospect of a tension between substantive and procedural rights has long been appreciated by democratic theorists (Christiano, 2010; Langvatn, 2016; Quong, 2011; Rawls, 2005). The issue has lately taken on a more urgent political cast. In the last decade or so, political scientists have grown increasingly worried that negative partisan affect in America was eroding the shared commitment to honoring the outcomes of democratic procedures. While citizens say – in the abstract – that they support democratic norms, that commitment shatters at almost the first sign of having to forgo favored political outcomes (Carey et al., 2022; Frederiksen, 2022; Krishnarajan, 2022). Social scientists and

democratic theorists alike have reacted with alarm (Dryzek et al., 2019). Support for respecting procedures looks more fragile than ever (cf. Kalmoe & Mason, 2022).

How should we respond to tensions in rights? The *procedural priority* view favors procedural to substantive rights (with exceptions at the margins). More concretely: if the deliverance of a legitimate democratic procedure fails to satisfy some substantive rights, it is nevertheless permissible to enforce such outcomes, and impermissible to oppose them. A more recent, *balancing view* holds, roughly, that substantive and procedural claims must be weighed against each other on a case-by-case basis (Stemplowska & Swift, 2018).

This paper defends a third alternative: Substantive rights set the limits of procedural rights, such that there are no procedural rights on issues about which other citizens have substantive rights. More concretely: if the deliverance of a legitimate democratic procedure fails to satisfy some substantive rights, it is impermissible to enforce such outcomes, and permissible to oppose them. I call this view: *justice – do it!* But for the sake of rhetorical equanimity, I'll refer to it as *substantive priority*. However, the reader is welcome to regard my position as a *reductio*. In that case, this paper aims to clarify the space of options. Insisting on procedural rights *about* deciding substantive rights requires some revision to the concept <right>, at least as often deployed among political philosophers.

The paper is in five sections. Section 1 lays out the conflict space. Section 2 sketches the available options. Sections 3 and 4 criticize the conventional view and balancing views. Section 5 develops the positive view. The paper concludes with a commission: do justice.

1. The Procedural vs. Substantive Conflict

What does a conflict between procedural and substantive rights look like? Start with a famous case from David Estlund:

Jason the jailer has seen the convict's trial on television. The jury was fooled, and exonerating evidence was presented but ignored. They have made a grave mistake and the jailer knows it: this man is innocent. The trial was properly conducted, under fair and sound procedural rules duly protective of a defendant's interests. These rules were not broken by the participants. The jurors were of normal capacities and made a good-faith effort at a strong presumption of innocence. The jailer could look the other way, and allow the convicted man to escape his 20-year sentence, without anyone knowing it was intentional. Maybe the prisoner would be recaptured, maybe not. What should the jailer do? (Estlund, 2007, p. 213; cf. Overland & Barry, 2011)

Is it permissible for the jailer to enforce the procedurally determined outcome? On the one hand, the innocent defendant has a substantive right not to be imprisoned. At the same time, there is a sense in which a legitimate procedure has convicted the defendant without any obvious error (or, if there is an error, we can imagine variants of the case in which there at least appears to be no subjective error).¹

Procedural priority (which Estlund also affirms) holds that it is permissible for the defendant to be imprisoned, and it is impermissible for the jailer (or anybody else) to interfere in a way that frees the defendant. The *balancing view* counters that it depends on the details of the case. If the defendant is going to be put away for twenty years, that sounds pretty serious. If it's traffic court, then that's something else entirely. *Substantive priority* maintains it is impermissible for any agent to imprison the defendant, and it is permissible for any agent to interfere so as to free the defendant.

Next, consider a case of political participation:

Statute Recorder: A liberal state is about to vote—through an appropriately deliberative, appropriately democratic procedure—on a policy that is required by justice. The status quo does

¹ See (Muñoz & Spencer, 2021) about the authority of the objective ought.

not conform to the requirements of justice on the matter at hand, and there is no foreseeable electoral measure that will otherwise bring the society into compliance with justice. You must record the outcome. This is an important job, since the political institutions will coordinate around whatever you report. You know that the measure is required by justice. The vote returns show that the proposal has failed.

Here again the three views will diverge. *Procedural priority* says to record the result of the vote. On the *balancing view*, it depends on the case. *Substantive priority* advises recording the substantively just result.

While it's clear how the conflict arises in the jury case, the case of statute recorder adds a slight complication. Suppose the policy in question is universal health care. Say you have a right to vote on universal health care, and I have a right to being provided universal health care by the same political institution in which you're voting. For simplicity, I will imagine this as an idealized institution in which there are no mediating agents between the outcome of the vote and the review or implementation of the policy. Even in this stylized case, the conflict is nonobvious. Compare with paradigm cases of conflict in rights:

1. A has a right not to be imprisoned by B.
2. B has a right to imprison A.

Or:

3. C has a right that D not enter C's home.
4. D has a right to enter C's home.

In the case of 1 vs. 2, the conflict in right's is obvious. Given the intuitively tight conceptual relation between imprisoning and being imprisoned, the assertion of B's right looks simply like the denial of A's

right. There is little difference between the conflict in 1 and 2 and a simple contradiction. (A has a right not to be imprisoned; A does not have a right not to be imprisoned).

The sentences 3 vs. 4 make use of an implicit distinction between claim and liberty rights, but again the conflict feels obvious. If C has a (claim) right that D not enter C's home, then this must be inconsistent with D's (liberty) right to enter. In other words, it is hard to see in what C's right could consist, if not the imposition of a prohibition against D's liberty to enter.

Now consider:

5. E has a right to vote on the policy.

6. F has a right to the policy.

Here things are less clear. Is there something in which E's right to vote on the policy could consist, such that the specification of E's right is compatible with F's right? Even with the stipulation that the vote decides the outcome, there is an issue about how the rights of individual voters are aggregated.

Sketching a conflict in the voting case will take a few more steps.

(1) Citizen F has a right to the policy. (for contradiction)

(2) Citizens G, H, and R have a right to vote on the policy.

(3) If G, H, and R have a right to vote on the policy, then G, H, and R have a right to vote no.

(4) If G, H, and R vote no, then the policy will not be implemented. (by stipulation)

(5) If G, H, and R individually have a right to vote no, then {G, H, and R} collectively have a right to bring about that the policy not be implemented.

(6) If there is some agent or set of agents who have a right to a policy being implemented, and some agent or set of agents who have a right that the policy not be implemented, then there is a conflict in rights.

(7) So, F and {G, H, and R} have a conflict in rights.

Why think such a lengthy exposition of the apparent conflict is required in the case of democratic rights? If having a right to vote did not entail a right to voting either for or against, then the right to vote would involve no conflict with citizens having a right to a particular outcome. However, I will treat (3) as uncontroversial for present purposes, since a right to vote only in one direction is not even accepted in the very non-ideal world of comparative political science as sufficient for a democratic regime. Premise (5) also brings up a point of controversy. Because the outcome of the vote requires aggregation, there is a question about whether rights agglomerate from each voter to the voters overall. Premise (6) looks similar enough to the paradigm conflicts in rights (above) that I will be content to let it pass for present purposes. With these premises, procedural rights to voting appear to conflict, in principle, with substantive rights over the outcome of the vote.

2. Options for Resolving Rights Conflict

So there can be conflicts between procedural and substantive rights. When these conflicts occur, what is the best explanation for how to proceed? In this section I will add more detail to the *procedural priority* and *balancing* views. The informally derived contradiction from section 1 presents another option: Deny the agglomeration of rights. Although not usually explored, denying agglomeration would present another way of avoiding the apparent conflict. However, it would do little to strengthen the case for either procedural priority or balancing. To get to that point, I'll start with each view in turn.

2.1 Procedural Priority

Defenders of procedural priority hold that the outcomes of democratic procedures tend to preempt the reasons offered by substantive claims of justice, where pre-emption involves some form of silencing or undermining opposing reasons (Christiano, 2010, pp. 244–252). Specifying the exact reasons-relations isn't necessary for now; the central idea is that reasons given by the democratic output in some way defeat substantive claims without the need for direct weighing.

How could preemption occur? One reply begins with the claim that honoring democratic procedures is a requirement of social equality. According to this view, if some citizens fail to respect democratically reached decisions, then those citizens act as if they have greater higher standing than other citizens. Or to put the point slightly differently, those citizens who do not honor the decision exert greater control over political outcomes than other citizens. Perhaps setting aside some marginal cases, the state's enforcement of democratic outcomes preserves the equal distribution of political influence, and so maintains social equality – crucially, even when the outcome may be substantively unjust. Niko Kolodny explains the point this way:

Democratic decision-making is a publicly just and fair way of making collective decision in the light of conflicts of interests and disagreements about shared aspects of social life. Citizens who skirt democratically made law act contrary to the right of all citizens to have an equal say in making laws when there is substantial and informed disagreement. Those who refuse to pay taxes or who refuse to respect property laws on the grounds that are unjust are simply affirming a superior right to that of others in determining how the shared aspects of social life ought to be arranged. (Kolodny, 2014, p. 286)²

Although I don't think Kolodny is ultimately committed to procedural priority, this paragraph offers a reason to think substantive and procedural rights might not be simply weighed against each

² For discussion, see (Stemplowska & Swift, 2018).

other. The person who asserts a permission to act contrary to the state's enforcement of the legitimate procedural outcome is wrongfully "affirming a superior right" of their own to that of other people. It is ordinary to think that wrongdoing can involve forfeiting or at least silencing some of one's otherwise normatively relevant claims. Perhaps this is one such case.

Anna Stilz develops a similar argument, likewise based on the moral equality of persons. To be morally equal is, *inter alia*, to be an equally authoritative interpreter of justice. If two persons are equal in their authority to interpret what justice demands, then neither has any obligation to defer to the other's interpretation. Stilz holds:

If each person is an equally authoritative interpreter of justice, then whenever one person does not share another person's belief about justice, his belief imposes no duties on the other person. To attempt to override another's judgments about justice is to claim authority over that person, and the premise of moral equality dictates that no individual has that kind of authority. Instead, only a publicly authorized institution can claim the authority to impose a particular interpretation of what justice requires, while still preserving the moral equality of those subject to it. (Stilz, 2012, p. 250)

For Stilz, the state is the only way to achieve socially important coordination without denying the status of each citizen as one of justice's equally authoritative interpreters. Acting justly without the "public authorization" enjoyed by the state risks offending against the equal status of other citizens. Once again, the argument supports a procedural resolution without direct weighing between competing substantive and procedural claims.

2.2 Balancing

The balancing view denies there is a general answer to the question of whether procedural or substantive rights should take precedence. Instead, the reasons given by both remain in force in cases of

conflict. It may not be precisely correct to say that the reasons must be weighed against each other, as there might be other models of considering competing reasons in which all reasons retain relevance. But broadly speaking, the claims of competing rights must be compared against each other directly.

The balancing view is developed explicitly by Stemplowska and Swift (Stemplowska & Swift, 2018). They deny that “full justice is necessary for permissible enforceability,” and they assert that “the avoidance of (more) grave injustice is necessary and sufficient for permissible enforceability.” The former departs from the substantive priority, while the latter differs from the procedural priority. That is, they insist that sometimes, substantive justice can outweigh procedural legitimacy, so the deliverances of a procedure that is legitimate may sometimes be impermissible to enforce. (They don’t take a further view about what is then permissible for individual agents.)

Stemplowska and Swift’s view is anticipated by Overland and Barry (Overland & Barry, 2011). They dispute Estlund’s jailer case on the basis of weighing the competing claims. A “20-year sentence” seems a steep price to impose on an innocent person for the sake of honoring the jury’s verdict, especially if (as in the case) the innocent convict could be freed with no adverse consequence. They reason that when the “magnitude of the threatened wrongdoing is quite significant,” then violating the procedurally legitimate outcome might well be permissible (Overland & Barry, 2011, p. 116).

2.3 Non-Agglomeration

I leave a statement of the substantive priority view aside for section 5. But there is another possibility. What about denying that procedural rights and substantive rights conflict by way of denying the agglomeration of rights? If rights do not agglomerate, then it may be that each individual voter has a right to vote “yes” or “no” on a policy, and that some other set of citizens have a right to the policy being put in place. However, on this alternative, there is no lurking tension between the voters’ right to bring

about that the policy fails, and the citizen's that the policy passes. This is because, while each citizen has a right to vote no, the citizens together have no right to stop the policy from being put in place.

Is denying agglomeration coherent? For a moment, imagine the voters' procedural rights in terms of a permission. Considered this way, it might be that procedural rights do not agglomerate, given that permissions do not agglomerate (Beddor, 2017; Kirkpatrick, 2018). Intrapersonally, it may be permissible for me to agree to any of three committee assignments, but impermissible to agree to all of them (if I'll thereby fail to adequately help). Interpersonally, it may be permissible for A to give C a shot (if C needs insulin), and permissible for B to give C a shot, but not permissible for both A and B to give C a shot (if two shots will send C into hypoglycemic shock).³ In the same way, perhaps it is sometimes permissible for A to vote "no" and for B to vote "no", but not permissible for A and B (and a majority of fellow voters) to vote "no" – for example, when doing so would violate C's rights.

Denying agglomeration offers one way of avoiding the conflict between substantive and procedural rights. However, this option has not been developed by any prominent defenders of democratic legitimacy. It may be instructive to consider why not.⁴ Although this is conjecture, it may be that denying agglomeration would also undermine the values supporting the procedural right in the first place. In the medical case: A is permitted to give C the shot because C needs insulin. If C is harmed (such as when A and B both give the shot), then there is no agglomerated permission.

Now compare with the political case. If A's right to vote is based on the value of equal influence over political outcomes, and B's right is based on the same value, but the joint exercise of those rights in some cases denies C's rights, then – at least *ex hypothesi* – the denial of C's rights seems like a potential problem for political equality. Just as A and B's permission to administer the shot didn't agglomerate when the agglomeration undermined rather than promoted the relevant value, A and B's voting rights

³ This case is from (Kirkpatrick, 2018, p. 112).

⁴ I'm grateful to XXX for discussion on this point.

might not agglomerate when doing so undermines rather than promotes the equal protection of individual rights. In short, it may not help the defender of procedural rights to deny agglomeration, because cases in which agglomeration fails might also be cases in which the value motivating procedural rights to begin with is undermined by the joint exercise of those rights. Denying the agglomeration premise, at least provisionally, does not seem like a productive reply to the tension.

3. Against Procedural Priority

Procedural priority holds that in cases where the two conflict, procedural rights preempt or otherwise generally defeat substantive rights, without looking at the details of the case. This section opposes procedural priority.

3.1 Substantive Rights Retain Force

The first objection to procedural priority is that it is unclear why substantive rights should not at least be considered. Sometimes substantive rights seem intuitively weightier. This point is familiar already. As Overland and Barry point out, twenty years in prison seems a steep price to pay for honoring a jury's incorrect (but epistemically faultless) verdict (Overland & Barry, 2011, p. 126). Consider a contractualist pairwise comparison between the claim of the innocent convict, in comparison to the equal-influence based claim of some member of the jury or democratic society. The result seems obvious, and even more so for a background consequentialist theory.

Holding that the substantive right is silenced or preempted seems conceptually awkward. In paradigm cases, the preempted or silenced reason is not attached to a person's justice-based right. For example, a promise to help you might silence my reasons to go to the movies, such that even if I should discover I have stronger reason to go to the movies than I had previously supposed, it will not defeat my promise. However, political rights paradigmatically resist silencing. Moreover, it is likely among the platitudes of the concept <right> that the attendant normative considerations are especially urgent,

important, or deliberatively significant. Procedural priority needs, at the least, a special explanation for why a class of rights can be silenced or preempted *while still being requirements of political justice*.

3.2 Enforcing Substantive Rights Is Compatible with Political Equality

A second objection to procedural priority is to deny that enforcing substantive rights infringes on the value of political equality. For Kolodny and Stilz, a central problem with insisting on substantive rights against legitimately reached procedural outcomes was that doing so involved an objectionable assertion of one's own status as superior to other citizens. For Kolodny, those who refuse to comply with laws merely because they are unjust are "simply affirming a superior right to that of others in determining how the shared aspects of social life" are decided (Kolodny, 2014, p. 286). For Stilz, "to attempt to override another's judgments about justice is to claim authority over that person," which wrongfully denies the terms of equality (Stilz, 2012, p. 250). In both cases, the complaint with someone who acts justly, but contrary to legitimate procedural outcomes, is that they are claiming a greater entitlement to make decisions than that enjoyed by others.

To assess this objection, consider a nonpolitical case. For instance, imagine that a stranger charges at you, swinging a baseball bat. You demand that the stranger desist, but he announces his intention to injure you. You then threaten to shoot him with your stun gun, which will incapacitate him temporarily. He ignores your warning and comes very close to hitting you with his bat. You then shoot him with the stun gun, and he drops the bat and falls down. From the ground, your assailant demands to know what justified your decision. "You acted unilaterally!" he protests. "According to my own interpretation of justice, my hitting you with a bat did not justify you in shooting me with the stun gun!"

In a sense, the first part of your assailant's protest is correct. You did not regard his interpretation of justice as equally authoritative with your own. So there is a sense of equality in which you do not grant him equal status. This is the sense of equality according to which each interpretation of

justice should be regarded as equally authoritative (call this interpretive equality). However, the assailant's complaint is still morally misguided. You were justified in using a stun gun as a last resort against a menacing assailant. The reason is that it is, in fact, morally permissible to use defensive force under these conditions. That your view is correct, while the assailant's is false, makes all the difference. Another sense of moral equality is compatible with these claims. This is the sense in which each person is equally entitled to have their rights respected through the compliance by others with their duties of justice. And this, I believe, is a more appealing kind of equal status than that ensured by interpretive equality.

Now return to the political case. As I read them, Stilz and Kolodny are willing to grant that there are real violations of substantive justice. That is, they grant that the person who acts contrary to a procedural outcome really has had their rights violated, and that their action does bring about the satisfaction of those substantive rights. What Stilz and Kolodny object to, however, is that by so intervening, one places one's own judgement above that of other citizens. However, for Stilz, "belief imposes no duties on the other person." But here it seems important to distinguish the grounds of the putative duty. Certainly it would be wrong for me to hold you to an obligation which I imposed on you with my belief. I could not impose a duty on you to help me next week by forming and expressing the belief that you were under such a duty. However, this is quite dissimilar from the assailant case. In that case, I do not hold that the assailant's duties are grounded in *my beliefs* that attacking me is wrong, but instead in the fact that *attacking me is wrong*.⁵ In the political case, the defender of substantive rights could likewise hold that their permission to defend the right was grounded in the facts of justice themselves (which, again, all parties have granted obtain), rather than the agent's beliefs.

⁵ Enoch has forcefully made a related point against public reason liberalism (Enoch, 2015). But this point has not been applied to discussions of political legitimacy generally.

The defender of substantive rights could likewise grant that for any fellow citizen, that citizen was entitled to act so as to realize substantive rights, even when those rights were not democratically recognized. So it seems that equality could be left intact, after all. Kolodny had in mind that the citizen must be making a kind of exception for themselves, flouting the law that others had legitimately made. My point here, however, is that one could consistently hold that all citizens may avail themselves of their substantive rights. In short, there are two ways one could avoid the objectionable elevation of one's own status: by withholding from acting to secure substantive justice, or by holding that substantive justice affords all an equal entitlement to so act. From an egalitarian perspective, it's a draw.

3.3 Substantive Rights as an Undercutting Defeater

Perhaps the procedural priority theorist will argue that I haven't charitably understood the values supporting procedural rights. Daniel Viehoff, for example, has influentially utilized an analogy with personal relationships like friendship or, paradigmatically, marriage (Viehoff, 2014). In personal relationships, we regard it as very important that each party to the relationship have an equal say. These "egalitarian relationships" help us see how "the egalitarian ideal should also have a grip on us in our relationship as fellow citizens" (Viehoff, 2014, p. 353).

The analogy between marriage and political relationships has ongoing philosophical popularity (Kolodny, 2014; Scheffler, 2015; Viehoff, 2014). If we would object to inequality in a marriage (or close friendship), we should also object to it in political relations.

Granting its normative insight for a moment, the analogy may also help think about what delimits the value of political equality. It's now a philosophical commonplace that friendship can be a source of moral danger (Cocking & Kennett, 2000). Commitments among friends can rub up against our commitment or morality. What should we say about the value of friendship in these cases? A

controversial but plausible reply is that while friendship is morally valuable, friendships are not valuable if and when they lead us to violate others' rights. Consider the case:

Highway Robbery. You are traveling on a lonely road with no one else in sight, miles from the nearest town. As you turn a corner, you see a group of thieves holding up a group of travelers at gunpoint. However, neither he nor his victims notice you. After collecting the valuables, the thieves throw their bag of loot into the brush along the side of the road to collect it after everyone is out of sight. You realize that you can safely grab the bag and return its contents to your fellow travelers after the highwaymen have left the scene.

My view is that it is permissible to take the money and return it to the victims. A simple, slightly theorized explanation is that the travelers (by stipulation) have a right to their money and the highwaymen (by stipulation) do not. (Here I realize I am departing from the premise of *competing* rights, but my current purpose is just to investigate the values underwriting a particular story for political equality. I will return to case of competing rights in the next section.)

Now, add to the case that the highwaymen are friends. While it's very plausible that friendship is a great moral good, it is substantially less plausible that the moral goods of friendship weigh against the rights of others in a case like this. It would be wrong to say that the goods of friendship outweigh the goods of rights-protection in this case. Whatever the explanation is for why friendship is morally valuable, that explanation does not obtain in present case. In effect, this reprises a cautionary point from the section on non-agglomeration. When weighing conflicting reasons, we must be sure that the reasons both apply in the case at hand.

Return again to the political case. If political relationships really are like marriage or friendship, I now assert that this does not strengthen the value of procedural rights against substantive rights. Rather, if we take the analogy seriously, it suggests that if a cabal of civic friends join together to violate

someone's substantive right, it hardly matters that they share a fastidiously equal equality of influence. Enriching the social relations in question is morally inert. Suppose we learned that the highwaymen "ordinarily will have some identification" with their "political society and its way of life" (Cohen, 2004, p. 211). Or that the highwaymen regard their clan as their "single greatest achievement" as a "self-determining people" (Reidy, 2005, p. 377).⁶ Such facts are neither here nor there in our assessment of the case. Contrary to the procedural priority theorist, I propose we say the same thing, *mutatis mutandis*, for the unjust outputs of democratic procedures.

3.4 Equal Political Influence is Not Valuable

It may sound like I am implicitly disputing the value of political equality, simpliciter. Everything in this section so far is compatible with thinking that equal political influence is a great social good. However, I do, in fact, deny it. My view is that there is no such value.

Does this denial contravene standard intuitive moral judgements? Certainly people *report* that they value democratic procedures, but there is a further question about how to interpret such reports. Political psychologists would certainly caution against taking them at face value. It's highly socially desirable to report caring about democratic equality and representation (Frederiksen, 2022; Harms et al., 2021). But such caring is a pretense (Krishnarajan, 2022). Faced with a tradeoff, individuals care more about getting their own favored outcome than satisfying any representative or democratic value (Barber et al., n.d.; cf. Dassonneville et al., 2021). People care intrinsically for procedural rights exactly up until they have to make a choice.

The same goes for the supposed analogy between marriage and political relationships. Although individuals do express a preference for equal relations, they care dramatically less about equal influence

⁶ The passages from Reidy and Cohen are not describing highwaymen, but Rawlsian reasonable societies that nevertheless don't fully satisfy justice. My claim is that if we don't accept the enriching of social relations as normatively significant for the highway robbers, we shouldn't accept it for political societies.

in impersonal relationships than in marriages, and less still in political relationships (Davis and Preece 2022; Barber, Davis, and Dynes, n.d.).⁷ Unsurprisingly, they care relatively more about getting the outcome right than about maintaining equal power once an issue comes up about which there seems to be a substantively correct answer. These results show both why the marriage analogy was appealing, and why it is false (at least to real citizens' judgments). It is appealing because affirming democratic equality abstractly is socially desirable, but it is false because – unlike in marriage – this judgement does not hold up when other values are at stake. And this makes sense, because in fact people have none of the attitudes toward the strangers with whom they share political power that they have toward their friends or loved ones. They don't share an identity; they don't experience positive feelings or affect; and greater empathy exacerbates, rather than resolves, negative feeling (Finkel et al., 2020; Kane et al., 2021; Simas et al., 2020). Marriage is, in short, an extraordinarily poor model for the structure of political associations.

The democratic theorist is welcome to resist these findings. They may either identify the analogy with some other observable feature of political life, or they may insist that the judgements of citizens are simply wrong. If the former, I hope to have now done enough to put the ball back in the other court. The egalitarian needs to say how the analogy *should* be tested. If the latter, the democratic theorist needs to explain the disconnect between the value of equality and citizens' real-life attitudes.⁸ Such explanations may face complications of their own. For example, my own view is that the Moorean non-naturalist should worry about how to identify very simple states of affairs as valuable, let alone such complex ones as those associated with equal political influence.

4. Against Balancing

⁷ These findings were from experiments designed to investigate Viehoff's claim. The results are as close as possible to a test of Viehoff's intuition reports.

⁸ Democratic theorists (Dryzek et al., 2019) are inclined to see democratic realists (Brennan, 2016) as pessimistic. But we might also just say they really care about substantive justice.

Thinking about the values supporting procedural rights failed to show that they uniformly defeat substantive rights. More than that, the last section tried to turn the tables. Violating substantive rights might well undercut the grounds for the procedural right in the case at hand. Making that point involved allowing that one right might defeat the other (e.g., that both rights might not obtain in the case at hand.) Although I favor this kind of specificationist solution to putative rights conflict, I'll now set it aside. Now let's turn to the more modest, balancing proposal, which grants explicitly that there is a conflict in rights in the *case at hand*.

4.1 Balancing Rights as a Conceptual Puzzle

The specificationist about rights says that if there is a substantive right in the case at hand, then there is no procedural right. Against the specificationist, the generalist proposes that there are real conflicts among rights, and that two competing rights may both be in force in the case at hand.⁹ Some cases of putative rights conflict look more appealing for a generalist answer than others. For example, consider a version of the simplest kind of conflict:

1. A has a right that other agents not take her apple.
2. B has a right to take A's apple.

In this kind of case, B's Hohfeldian liberty seems to involve a simple retraction of A's Hohfeldian claim. At some level, whether we elect to call this a case in rights is a conceptual choice, but it is hard to see what A's right could amount to in the presence of B's right. We might simply say that A's and B's rights must be weighed against each other (who is hungrier? Who labored to acquire the apple? Who had access to doing the labor? Etc.) But in that case, it seems that the language of rights does more to mislead than illuminate. It would be easier to characterize the conflict as one of competing claims or interest, without attributing full-blown rights to either party.

⁹ For discussion, see (Mullins, 2020).

Other cases are more favorable to a generalist solution. One example is when there are different *kinds of values* supporting different rights (Liberto, 2014; Mullins, 2020, pp. 647–648). Perhaps procedural and substantive rights are grounded differently and so may conflict in any given case at hand. Taking this by supposition, I want to consider what conceptual commitments the balancing theorist would thereby acquire.

Defenders of the balancing view hold that there is some class of substantive rights that resist defeat by procedural rights. The jury's verdict cannot require that an innocent man refuse an externality free escape rather than spend twenty years confined in a cell. A democratic majority cannot deny freedom of association to a disfavored religious group etc. Then there is another class of substantive rights that may be defeated when in conflict with procedural outcomes. For example, Wollner suggests that "moderately unjust" institutions might still fail to satisfy distributive fairness or justice (Wollner, 2019, p. 52). Perhaps another case involves unjust tax regimes (cf. Kolodny, 2014; Wollner, 2019, p. 53). In these cases, substantive rights are not satisfied. Still, there is no permission to not comply with procedural outcomes, even if noncompliance would not have any further, negative externalities. And there is a permission for the state to enforce these moderately unjust outcomes.

There is no in-principle reason to preclude a solution along these lines. But it does raise a few questions about conceptual explication.¹⁰ First, the balancing view insists on a division between two classes of rights: those that *can* be defeated (in the ways just described) by procedural rights, and those that *cannot*. Why describe rights that can be defeated as rights at all, rather than as morally relevant interests or claims? After all, we already think that much political activity is relevant to a society's common good, but does not implicate justice directly (Beerbohm and Davis, 2017). Why insist that the defeasible class of rights are nevertheless constituents of justice, itself? In Rawls's (early) imagining,

¹⁰ As Nado points out, there are a variety of Carnapian reasons to prefer some conceptual choices to others. (cf. Nado, 2021)

justice's characteristic feature was that it could not be overridden by the good of the entire society (Rawls, 2009). Rights are still often invoked as attendant to a person's status as inviolable. That is, a right cannot be defeated, even for the realization of a greater number of comparable rights.¹¹ So, the first question for the balancing theorist is: Why explicate the concept <right> so as to include both the strong and moderate rights within the same conceptual category?

Second, if there is some functional difference among rights that can be specified, why think that the functional difference tracks natural break points in the entitlements enjoyed by persons in a democratic society? After all, much of the intellectual development of moral claims distinguishes between juridical or enforceable moral claims, and those features of morality that are not enforceable. The balancing theorist introduces a taxonomy eliding that traditional distinction.

4.2 Two Balancing Stories

Balancing requires some conceptual revision. The final issue is whether such revision offers the best explanation of the phenomenon. I will briefly offer an abductive argument that it does not.

Consider two stories of rights conflict:

Story 1: Procedural rights and substantive rights appear to conflict in some cases. There is no *ex ante* way to determine whether the procedural or substantive right should prevail, so we must simply look at the details of the case. The reason why it appears that procedural and substantive rights conflict is that they actually do conflict, and their conflict is best understood in terms of the differing values grounding the rights.

Story 2: Procedural and substantive rights appear to conflict in some cases. When they do, this is either because one or the other does not obtain in the case at hand. The reason rights appear to

¹¹ That is, it is sometimes taken to a conceptual feature of rights that they resist a kind of rights-consequentialism (cf. Kamm, 2008).

conflict is that in the actual world, awarding procedural rights to members of a democratic society is often, in practice, the best available institution for deciding how to allocate substantive rights. Moreover, given pervasive bias and epistemic limitations, it is very important to maintain norms of honoring democratic procedures, even when they *appear* to be in the breach of justice.

Story 1 makes sense of apparently conflicts through the balancing view. Story 2 makes sense of conflicts through appealing both to the instrumental value of democratic procedures, and to the well-known limitations of participants within those procedures. But, importantly, story 2 explains why democratic procedures and norms are valuable, not why there are genuine procedural rights that defeat substantive rights.

Which of these stories is the better explanation for the phenomenon? The clearest case distinguishing them is one in which we usually accept some putative procedural right, but then discover we could do better without the procedure. Consider:

Eschatological Judge. At a future time, a divine being appears in the world. The divine being perfectly knows all legally actionable offenses committed, the identity of those persons who committed them, and is capable of providing publicly observable, decisive evidence of their guilt. The legal system can either defer to the divine being, and henceforth all its verdicts will be correct, or it can retain the old, jury-by-peers system. Jury-by-peers predictably makes intermittent errors.

AI Policymaker. At a future time, a philosophically trained AI becomes sophisticated enough to produce legislative agendas that correspond precisely to the requirements of all substantive political rights. The society must decide whether to utilize the AI, or to retain its existing, moderately just democratic procedures. If the AI is adopted, there may still be robust procedural voting rights, albeit not on questions about which there are substantive rights.

Suppose that the society switches to the Eschatological Judge and the AI Policymaker, dispensing with the old procedural rights to serve on a jury or vote on matters of justice. Would citizens denied jury service or voting rights have a justified complaint?

My answer is no: Such improvements would be a cause for unqualified moral celebration. The balancing theorist's answer is yes: Such changes threaten fundamental democratic rights. How can we distinguish between these conflicting answers? I offer three considerations. First, it no longer appears that the currently prevailing justification for procedural rights can be deployed in support of the imagined complaint. This is because the Eschatological Judge and the AI Policymaker do not elevate the judgements of any member of society over any other, so they seem serenely compatible with equal political influence. (If you're worried over domination by the divine being, imagine the being offers to provide an evidence-gathering device that can play the same function, and then leave the scene.) This doesn't mean the balancing theorist is wrong, but it does require a different or more developed explanation of procedural rights.

Second, how could one articulate a complaint on behalf of the excluded citizen? Consider how the virtuous citizen would be motivated today, when asked to vote or serve on a jury. The virtuous citizen would not vote for a self-interested legislative program, but would try to get it right by the lights of the moral reasons (Brennan, 2012). The virtuous jury member would be motivated to carefully consider the evidence to get the right outcome. If there was some procedure that would work better, and yet the citizen wanted to issue a complaint against that procedure, it seems to suggest that they were not motivated by the virtuous way of inhabiting their role as citizen. Maybe they wanted to exercise power, or acquire greater status, or validate their political identity. For any of a variety of alternatives, if we must attribute to the citizen a motivation other than justice in order to shore up that citizen's complaint, then the psychology of the imagined citizen seems to undermine the complaint's moral force. And for what it's worth, this is exactly what we find empirically. Once given the option of an algorithm that (we

imagine) correctly generates the social good, citizens flip from overwhelmingly favoring democratic procedures to overwhelmingly favoring the algorithm (Harms et al., 2021).

Third, there is already a host of substantive rights that have been depoliticized. Academic philosophers are largely unworried over the democratic pedigree of a host of important rights – rights to expression, freedom of movement, bodily integrity, abortion, education, etc. Democratic states make a host of other decisions without direct citizen participation or voting: complex administrative and regulatory decisions, monetary policy, foreign policy, etc. But there are still enough participatory rights to satisfy the values associated with political equality. Likewise, Eschatological Judge and the AI Policymaker would leave a great deal open to participatory deliberation and voting. If participatory rights can be adequately satisfied in a democratic regime where many decisions are, for various reasons, off the table, why think they could not be satisfied when all matters of substantive justice were off the table? Explaining current participatory rights as necessary when so many possible such rights are not necessary seems to place arbitrary moral significance on the actual allocation of participatory rights. This explanation's arbitrariness renders it worse than the alternative. I conclude the better explanation is to deny any in-principle participatory rights over matters of substantive justice.

5. Substantive Priority

Substantive priority holds that it is always permissible to bring about the realization of substantive rights (provided one can do so with no externalities), and it is never permissible to violate substantive rights for the sake of satisfying putative procedural rights. With respect to the first conjunct, it is important to underscore that the asserted claim is made in principle. In the highly non-ideal conditions of real-life politics, there will likely be a variety of unfortunate cases in which agents ought not act to realize rights. Epistemic limitations, concerns over the maintenance of functional institutions and norms across time, systemic effects on compliance, etc. – all combine to complicate real-world choices.

What, then, are the consequences of substantive priority? First, agents are not required, as such, to comply with or defer to the unjust judgments issued by institutions (however legitimate, well-credentialed, representative, or democratically upstanding those institutions might be). Should a Justice on the Supreme Court follow precedent, or should they satisfy the substantive rights of citizens? Should the sheriff enforce the law, even when that law is unjust? Should people on Twitter direct negative reactive attitudes toward someone who knowingly broke a law with some morally permissible action? The advice is the same: There may be instrumental considerations to defer to the precedent, law, or enforcement, but there is no intrinsic moral reason to do so. That is, if it is possible to withhold deference without incurring any sufficiently large externalities, then it is permissible to do so.

Second, if a law – however well-credentialed, democratically legitimate, etc. – is unjust, then it is not morally permissible to enforce the law. There are no procedures which are such as to make otherwise unjust laws permissible to enforce.

This second claim is resisted directly by Stemplowska and Swift in their sophisticated defense of the balancing view. It will be illuminating to think through their objection. They imagine a democratic procedure that reaches an unjust result, but one which is nevertheless reasonable. Perhaps the injustice is “fact-relative” but not “evidence-relative” (Stemplowska & Swift, 2018, p. 23). Or perhaps “the demos had so little time to reach the decision that the injustice is evident only to those who had a longer time to consider the issue” (Stemplowska & Swift, 2018, p. 23). In cases like this – wherein we can imagine the procedure operating well but getting the wrong answer due to ordinary epistemic or institutional constraints – they hold that we should regard the unjust outcome as permissible to enforce. They write, “although the decision is unjust the demos did not fall short in any of its duties when reaching it” (Stemplowska & Swift, 2018, p. 23). It may then turn out that the loss in legitimacy of not enforcing it outweighs the loss to justice by enforcing it.

Here is an alternative explanation of the case, on behalf of procedural priority. It may well be that there are times when democratic institutions reach unjust decisions, but with no apparent defect in reasoning, evidence assessment, compliance with fair procedures, and the like. In these cases, we can say that the decision is ‘legitimate,’ but we should hear this as a collective, political analog to ‘blameless’ in the case of first-personal wrongdoing. That is, just as an individual who violates another’s rights through no fault of their own is blameless, we might say that an institution that acts in the way Stemplowska and Swift describe is blameless. And just as being blamelessness insulates a wrongdoer against various kinds of criticism, we can imagine that this form of legitimacy could have a distinctive functional significance for institutions. Perhaps, for instance, institutions that act legitimately – so understood – are deserving of public trust, should be protected against calls for reform or dissolution, etc. However, just as we don’t infer that blameless wrongdoing is permissible, we should not infer that blameless institutional outputs may be permissibly enforced.

Of course, the defender of the balancing view may insist that I haven’t given any reason to prefer my concept <legitimate> over theirs. And in fact, it is conceptually thorny matter to distinguish justifications from excuses. As Greco helpfully points out, this is a general problem that appears locally in epistemology, law, and ethics (Greco, 2021). Greco also offers strategies for thinking about when to say an action was *wrong but excused*, and when to say an action was *justified*. If an action is justified, then it would be right for third parties to offer assistance or to hope for its success. However, in wrong-but-excused cases, third parties would not assist. For example, Greco imagines breaking a glass window to save a baby trapped in a car. Although ordinarily impermissible, the action is justified by the moral urgency of saving the child. If you saw me trying to break a window to save a baby, you would be right to help. On the other hand, if I were trying to break the glass window due to a “violent psychotic episode,” my state might well excuse me, but you would not hope for my success or help. It would be permissible to restrain me, though without blaming (Greco, 2021, p. 11).

Now let's apply this lesson to political cases. Recall again Estlund's jailer. I've already described how substantive priority favors helping an innocent convict escape. We can also think about whether to help *the jury*. Suppose the jurors in the case are about to reach the decision to convict – a decision you know is wrong. The foreman says, "We'll be confident enough to convict once we look back at some of the transcripts read in as evidence." You can either help the jury secure the transcripts, which you know will lead to an incorrect conviction, or you can withhold from helping. (Suppose, if they don't have another look at the misleading evidence, they may fail to agree on conviction.) Here it seems that you should withhold from helping, given that helping will lead to an unjust outcome. The fact that everyone is following the legitimate procedure in good faith may get them off the hook for blame, but it doesn't mean you should *facilitate* a wrongful conviction. So it looks like we better understand the procedures in terms of excuse than in terms of justification.

Next consider the democratic legitimacy. A legislature is about to pass an unjust bill. They are pressed for time, which may partly explain how they arrived at the decision to pass it. As it happens, they will only succeed at passing the bill if you hurry between a series of meetings between senators, coordinating last minute logistics on the vote. Assume that the decision to pass the bill has been reached following the most legitimate procedures; the demos has not "fallen short" in any of its duties. The evidence apparently supports the bill, though the facts do not. You must decide whether to help the bill pass (by hurrying to coordinate before the legislative session ends), or to withhold from hurrying. Here again, there seems to be no reason at all to help the bill pass. You know that passing the bill would be unjust, which is a strong reason not to do it. The fact that the legislature would still pass the bill when following best democratic practices is a good reason to not blame them, and perhaps to sustain trust in the legislature, but it is not any reason at all to help them.

I take this to be good evidence that we should understand compliance with procedural legitimacy in terms of an excusing condition, rather than in terms of justification. If so, legitimacy does

not count in favor of permissible enforceability even slightly. Consider: at no point does a sufficient level of blamelessness in blameless wrongdoing render an action permissible. Likewise, no amount of legitimacy makes an unjust output permissible to enforce.

Conclusion

Holding that substantive rights take priority to procedural legitimacy sounds a bit abstract. But it does contain a piece of practical advice. It is common for those individuals who control the organs of political power to insist that their power comes with an entitlement to coerce others, sometimes unjustly—so long as they stay within certain limits. All too often, there is little we can do to stop them. And even when we can stop them, the costs of doing so are often unbearable. We may not be able to put an end to injustice itself, but we should at least be clear about calling it what it is. And when we have the chance to do justice, we should do it.

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