THE LIMITS OF INSTRUMENTAL PROCEDURALISM

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Acccording to proceduralism in political philosophy, political power is just, legitimate, or authoritative when it is the output of an appropriate procedure.[1] Even if one disagrees with the output of an appropriate political procedure, we must recognize its legitimacy because we endorse, or there is good reason to endorse, the procedure that generated it.[2] On this view, normative properties are transmitted from the procedure to its output. In this

1   I follow Buchanan's use of the term "legitimacy" in this paper, according to which legitimacy refers to the permission to exercise political power ("Political Legitimacy and Democracy," 689). I will also assume that individual political actions can be legitimate or illegitimate independent of a regime's legitimacy. On this usage, legitimacy does not imply duties of obedience. This is importantly different from other uses of the term. Simmons, for instance, distinguishes legitimacy from justification and holds a voluntaristic conception of legitimacy that implies duties to obey ("Justification and Legitimacy," 769). Justification, as Simmons uses the term, is similar to the conception of legitimacy employed by Buchanan. I follow Buchanan rather than Simmons simply because most proponents of the kind of proceduralism I focus on here have not taken on board Simmons's more fine-grained typology of political evaluation. As we will see, proponents of a view like Simmons's, according to which a state or procedure being reliably good or correct is morally independent of its being legitimate (since that requires a special historical relationship between states and subjects), will reject the family of proceduralist views I focus on here. Proceduralists intentionally collapse the distinction Simmons wants to make by inferring legitimacy from the goodness and reliability of political procedures. I will not attempt to adjudicate this dispute, and the modifications to proceduralism I defend are offered as an internal critique of the view.

2   The following philosophers are prominent proponents of proceduralism: Rawls, in particular his discussion of imperfect proceduralism (*A Theory of Justice*, 75), and his discussion of majority rule (*A Theory of Justice*, 313). Estlund's jury/democracy analogy makes clear the nature of his fallibilist proceduralism (*Democratic Authority*, 110). Finally, see Christiano, who distinguishes his view from pure proceduralist and instrumental justifications of democracy and endorses a dualist view that incorporates both elements ("The Authority of Democracy"). Others are concerned with the reliability of our formal decision-making procedures, but do not characterize their views in explicitly instrumental proceduralist terms. Guerrero ("Against Elections"), for example, motivates lottocratic alternatives to democracy on the basis of clear electoral pathologies.

paper I focus on the property of legitimacy, though I will be most concerned with the more general proceduralist form of justification and its relationship to erroneous outputs.

One way of distinguishing different kinds of justifications of the legitimacy of political decisions is what David Estlund has called "correctness" theories and fallibilist theories.[3] According to the former, a political decision is legitimate and authoritative if it "gets things right" as determined by a comprehensive moral theory. The correctness of a political outcome is sufficient for its legitimacy. We find perhaps the most striking example of this view in Plato's *Republic*, where the insights of the philosopher-king license all sorts of behavior, including taking children from their parents so that they can be raised communally.[4] Proceduralist approaches to legitimacy are often, though not always, fallibilist: they allow that so long as the procedure meets certain appropriateness conditions the outcome is legitimate even if it is substantively unjust or incorrect.[5]

My goal here is to articulate a richer account of the fallibilist, proceduralist justification of normative properties relevant to political institutions and their results, especially the legitimacy of political and legal decisions.[6] In particular, I focus on what I call "instrumental proceduralism," which takes one of the appropriateness conditions of a procedure to be that it has a tendency to produce the right result.[7] This is in contrast to both pure proceduralism and correctness justifications of political outcomes, neither of which are fallibilist. Moreover, I am concerned with the actual political procedures that constitute our political and

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3   Estlund, *Democratic Authority*, 8, 57. Pure proceduralism and Estlund's own epistemic proceduralism are contrasted with "dogmatic" correctness theories. Correctness theories are dogmatic because they ignore reasonable moral pluralism.

4   At least if we understand talk of sharing children "in common" to mean that children will be raised communally. See *Republic*, 423e6–24a2.

5   Pure proceduralist accounts are not fallibilist. See, for example, Peter, "Pure Epistemic Proceduralism" and *Democratic Legitimacy*. Pure proceduralists reject an external criterion of correctness with which we could evaluate the outcome of a procedure. So, pure and instrumental proceduralism are not dogmatic theories (assuming they respect moral pluralism), but only instrumental proceduralism is fallibilist.

6   Particular versions of proceduralism can set out to justify different normative properties. The details will depend on the conception of the property in question. The structure of justification is what I am interested in here, so it is again worth emphasizing that my discussion shall be concerned with proceduralism in general, using legitimacy typically as an illustration.

7   I owe this term to David Estlund in personal correspondence. Proponents of markets on the grounds that they allocate resources in an appropriate way, for example, also count as instrumental proceduralists.

legal institutions rather than decision procedures aimed at constructing theories or principles of justice.

The strategy is to examine the structural elements of how procedures are thought to confer normative properties on their outputs and then apply these lessons to particular legal and political procedures. I defend three appropriateness conditions for a procedure to confer legitimacy on particular outputs. Procedures must be *highly* reliable, outputs must not have been the result of *predictable* procedural failures, and the failures of a procedure must be *relatively uniformly distributed* in the population.

I begin by characterizing the type of proceduralism I am interested in (section 1). I then argue for a more demanding reliability requirement and introduce and defend the notion of "predictable failure" (section 2). This sets the stage for my argument that barely reliable procedures, predictable procedural failures, and unevenly distributed procedural failures undermine a criminal justice or democratic procedure's ability to confer legitimacy on its outcomes (sections 3 and 4). I conclude by describing how various procedural failures interact with one another and background structural injustices to give a sense of the scope of the problem (section 5). It is not, I suggest, a small or insignificant one, further motivating the requirements set out in what follows.

1. INSTRUMENTAL PROCEDURALISM AS A KIND OF NORMATIVE PROCEDURALISM

I shall distinguish two forms of proceduralism: *political proceduralism* and *doxastic proceduralism*. Political proceduralism is a general theory of how political decisions earn certain normative properties. Doxastic proceduralism is a general theory of how beliefs earn certain normative properties. Despite their differences, they are normative at bottom: they are concerned with normative properties like legitimacy and authority, justification and knowledge. We can think of these types of proceduralism as versions of *normative proceduralism*. Thinking of the instrumental proceduralism that is endorsed by many contemporary political philosophers as a type of normative proceduralism shall make perspicuous some requirements for the procedure to justify its outcomes.

Political procedures include not only procedures for constructing principles of justice, but democratic decision-making and legal procedures as well. They can be distinguished using the familiar Rawlsian classification of procedural justice. Pure procedures cannot fail to achieve the correct outcome because there are no external, independently specific criteria for success. Perfect and imperfect procedures, both kinds of instrumental procedures, are evaluable in terms of ex-

ternal, independent success criteria. As the names suggest, perfect procedures never fail, whereas imperfect procedures sometimes do.[8]

Doxastic proceduralism is concerned with the extent to which our beliefs track the truth. There is an independently specified standard: reality. Doxastic procedures are evaluated according to how successful they are in generating beliefs that correspond to reality.[9]

Take, for example, Feldman's bird-watcher case.[10] When a bird lands in front of expert and novice bird-watchers, and both form a correct belief about what type of bird it is, only the expert's belief is justified. The reason is twofold: the process that results in the expert's belief is suited to "get it right," and tends to get it right. Our beliefs are not justified when they are the result of wishful thinking, bad reasoning, are luckily true, and the like; they are only justified when they are the output of a procedure that tracks the truth.[11]

The appropriateness conditions for political proceduralism tend to be founded on concerns about public justification. Because our political institutions coerce people, we must be able to justify institutions and their power to those reasonable individuals who are coerced by them.[12] To do otherwise is to disregard one's status as a moral person. Another closely related concern implies that our institutions must satisfy an equality requirement: they must aim to advance our interests equally.[13] These constraints are distinct, but they all aim at justifying

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8 The original position and freely consented to gambles are pure procedures; Rawls, *A Theory of Justice*, 74–75, and "Kantian Constructivism in Moral Theory," 523.

9 Nearly everyone agrees that two of the requirements for knowing *p* are that *p* is true and that *S* believes *p*. Gettier cases show that knowledge requires some sort of anti-luck requirement ("Is Justified True Belief Knowledge?"). If you believe *p*, but you just happen to luckily believe something true, it is unlikely that you know *p*. To explain this, some epistemologists have appealed to proceduralism for part of their analysis of knowledge and justification. These epistemologists, *process reliabilists*, claim in some form or another that our beliefs are only justified (and candidates for knowledge) when they are the output of a suitable process or procedure; see Feldman, *Epistemology* and "Reliability and Justification"; Nozick, *Philosophical Explanations*; Dretske, "Conclusive Reasons" and *Knowledge and the Flow of Information*; Goldman, *Epistemology and Cognition* and *Reliabilism and Contemporary Epistemology*.

10 Feldman, *Epistemology*.

11 There are proceduralist accounts of both justification and knowledge, and each has different requirements. Understanding process reliabilist accounts of knowledge and justification as types of normative proceduralism will be useful for understanding the appropriateness conditions for a normative procedure later on.

12 Vallier, "Against Public Reason Liberalism's Accessibility Requirement"; Larmore, "The Moral Basis of Political Liberalism," 607; Estlund, *Democratic Authority*, 40.

13 Christiano argues that only democratic institutions can satisfy this requirement ("The Authority of Democracy").

institutions to those living within them while avoiding the difficulties associated with evaluating the correctness of individual political decisions.

A key feature of instrumental proceduralism is its fallibilism.[14] Rawls thinks some unjust outcomes may be enforced and must be obeyed.[15] Christiano agrees, and argues that democratic institutions must be evaluated holistically, considering both pure procedural and instrumental evaluations.[16]

To defend fallibilism, Estlund draws an analogy between democratic political procedures and the decision of a jury:

> Recall the jury context: the legitimacy and authority of the verdict are not canceled just whenever the jury is mistaken. If they were, then jailers and police officers ought not to carry out the court's judgment, but should rely on their own judgment of the defendant's guilt or innocence. That conclusion would be the striking and heterodox one.[17]

Correctness theories of legitimacy and authority yield this heterodox implication. Instrumental proceduralism explains how just, or correct, outcomes are legitimate and authoritative, but this is not distinctive of the view. Correctness theories do this as well. Only instrumental proceduralism, in its various forms, can avoid the heterodox implication.

If procedures are good enough, they will tend to produce the right results. And if this obtains, all the results will be legitimate. Note that the outputs have the relevant normative properties *not because we maximize good consequences by going along with them*, but rather because of facts about the procedures themselves.[18] Consequentialist considerations may recommend obeying the output of an ineffective or unreliable procedure because that procedure is simply the best we have. This is not the kind of procedural justification that I am concerned with here.

Here is a more precise way to describe this feature: procedures *transmit* properties to their outcomes. Rawls attributes this feature to pure procedures:

> The fairness of the circumstances under which agreement is reached transfers to the principles of justice agreed to; since the original position

14 Estlund, *Democratic Authority*, 8; Rawls, *A Theory of Justice*, 371.

15 Rawls, *A Theory of Justice*, 308.

16 Christiano, "The Authority of Democracy," 280.

17 Estlund, *Democratic Authority*, 110.

18 Estlund, *Democratic Authority*, 164; Christiano, "The Authority of Democracy," 268.

situates free and equal moral persons fairly with respect to one another, any conception of justice they adopt is likewise fair.[19]

Something similar might hold for imperfect procedures where the procedure is appropriately formed such that it confers legitimacy on all of its results. Though Rawls uses the term "transfer," I shall use the term "transmit" because procedures sometimes generate a new property rather than transferring an existing one.[20] Instrumental proceduralism, as I understand it, thus relies on the Transmission Thesis:

> *Transmission Thesis* (TT): A procedure P with properties q will transmit normative property n to its outputs O.

TT applies to both political and doxastic instrumental procedures. But not just any procedure transmits properties. A bribed judge's decision is not legitimate. An unreliable doxastic procedure does not transmit justification. Instrumental proceduralists must offer an account of which properties make up q. If q, however we ultimately understand it, is not met, then the transmission of properties fails.

Some philosophers take q to be made up of entirely instrumental concerns.[21] Others disagree, as discussed above. But for instrumental proceduralists, q must include some instrumental requirements. What are they?

In discussing one type of political procedure, majority-rule voting, Rawls takes its justification to depend on it being the "most feasible way to realize certain ends antecedently defined by the principles of justice."[22] Rawls is not explicit on how reliable a procedure must be in order for it to successfully transmit normative properties, but his comparison to ideal political procedure indicates a concern for reliability and an allowance for some fallibility. If a political procedure always yielded results quite different from what we imagine the ideal procedure would result, we are entitled to think that a particular result is unjust.[23] Christiano's holistic evaluation of democratic procedures explicitly takes on board an instrumental element, thus indicating a concern for reliability. Only Estlund offers a specific standard of reliability: he requires only that a political

19   Rawls, "Kantian Constructivism in Moral Theory," 522.
20   Thanks to David Estlund for this terminology as well.
21   Arneson, "Defending the Purely Instrumental Account of Democratic Legitimacy"; Brennan, *Against Democracy*.
22   Rawls, *A Theory of Justice*, 318.
23   Rawls, *A Theory of Justice*, 314–15.

procedure is "better than random."[24] If the procedure is generally reliable, then the failures of the procedure are "honest mistakes," and honest mistakes do not undermine legitimacy and authority.[25] In the remainder of the paper I argue that these instrumental requirements are insufficient.

2. DOXASTIC PROCEDURES

First, let us consider an analogy between doxastic and political proceduralism. If they are both forms of normative proceduralism, then presumably their failure conditions have similarities. I will argue that, since doxastic procedures fail to transmit normative properties in cases of barely reliable procedures and in circumstances of predictable failure, we should take this to be true of political procedures as well.

2.1. Barely Reliable Procedures

Estlund's Epistemic Proceduralism has only one instrumental appropriateness condition: the procedure must get the right result more than 50 percent of the time or perform better than chance. In contrast, doxastic proceduralists (process reliabilists) usually take the bar to be much higher for knowledge. And though justification might be conferred by a barely reliable procedure, the belief that is the result of such a process will similarly be barely justified.

Consider a scenario in which a barista is trying to determine whether the customers in line want a cappuccino or a latte. Unbeknownst to him, every single customer in the line would like a latte. He decides to employ the following procedure to reach his belief. He will select a customer and flip a coin. If it comes up heads he will believe the customer to want a cappuccino, and if tails he will believe the customer to want a latte. Also unbeknownst to him, the coin is weighted such that 50.01 percent of the time it will land on tails. In this scenario, the barista will likely form the correct belief more than half the time. The process reliabilist does not require that one understand that or why their belief is justified or constitutes knowledge for it to be justified or knowledge. So if the requirement were merely better than random, the barista would be justified, if at all, to a small degree in believing in accordance with the coin flip.[26]

The structural similarities between doxastic and political proceduralism al-

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24 Estlund, *Democratic Authority*, 116.

25 Estlund, "On Following Orders in an Unjust War," 221.

26 Reliabilism is a form of externalism. See Huemer, "Phenomenal Conservatism and the Internalist Intuition" for one helpful discussion of the difference between internalists and externalists on this matter.

low us to infer something about the latter from this. Doxastic procedures confer either epistemic justification or knowledge. Legitimacy will be like one of these in the sense that it either comes in degrees or is a threshold concept. If legitimacy is like epistemic justification, then barely reliable political procedures will transmit barely any legitimacy. This would mean that even weak countervailing reasons could override the legitimacy of the political decision. Certainly not everyone understands legitimacy to come in degrees, though this strikes me as a natural thought.[27]

For those who take legitimacy to be a threshold concept, they ought to accept an analogy between legitimacy and knowledge. If like knowledge, then barely reliable procedures will confer no legitimacy; some significantly higher level of reliability will be needed for that. Either option requires that the political proceduralist not settle for simply better than random reliability. Given the stakes of political decisions—they can cost lives rather than coffee preferences—we need something more than merely better than random. I return to this point below.

Rejecting this argument would require one to explain why structurally similar forms of justification have different reliability requirements. One might think that, since we need political procedures for our social coordination, the reliability requirements for legitimacy are less demanding. But this would be to abandon the distinctively proceduralist form of justification formalized in TT in favor of a consequentialist justification.

2.2. Predictable Failures

Procedures can be deficient not only in terms of general reliability, but also in

27 And some proceduralists do endorse this way of thinking about authority, at least. Est-
    lund writes, "Epistemic proceduralism generates *more* legitimacy and authority with less
    demanding epistemic claims" (*Democratic Authority*, 106; emphasis added). On the other
    hand, some have objected to me that the notion of "degrees of authority" or legitimacy just
    does not make sense. It seems to me, however, that other popular approaches to authority
    at least help us make sense of this notion, even if philosophers rarely speak of degrees of
    authority. For instance, since reasons come in degrees of strength, any view of authority in
    which it is a power to give reasons will be in principle compatible with degrees of authority.
    This is because one might have the power to give only weak reasons, whereas another has
    the power to give very strong reasons. Enoch defends a reasons-giving account of authority,
    though does not explicitly endorse the view that authority comes in degrees like Estlund
    does ("Authority and Reason-Giving"). Of course, for those (like Simmons, discussed in
    note 1) who take legitimacy to be voluntarist, the externalist reasons that are produced by
    reliable procedures will be immaterial to legitimacy. A view like this may have a harder time
    accommodating, or may even be incompatible with, a notion of "degrees of authority." Pro-
    ponents of a voluntarist conception of legitimacy will have parted ways with the instrumen-
    tal proceduralists much earlier in the dialectic, so I think this incompatibility is not a serious
    problem. Thanks to a referee for comments on this point.

terms of how reliable they are in certain circumstances. Not all failures are equal. Some justified beliefs will be false, and some unjust political outcomes will be legitimate. That, after all, is one of the goals of political proceduralism. But some failures are *predictable*, either because the design is ill suited to a particular application or because the procedure's input is inappropriate. When these occur, failure is to be expected. Predictable failures, I will argue, undermine the transmission of properties to the output of a procedure.

This should already be familiar enough. The bribed judge example cited above is an instance of a predictable procedural failure. And even if a procedure is well designed, it needs to be "fed" the appropriate material. Meteorological models require accurate data as an input; no matter how well designed the model-construction procedure is, it will not work if it is not fed accurate data. In part because certain sources of data (e.g., buoys in the ocean) often fail to collect accurate data, and because computer models have known weaknesses, the National Hurricane Center employs forecasters instead of issuing guidance based on computer modeling alone. The political proceduralist is already in position to accept this revision. According to Rawls, we "may think of the political process as a machine which makes social decisions when the views of representatives and their constituents are fed into it."[28]

I want to highlight a more subtle kind of predictable failure. Take as our example one possible procedure for acquiring justified beliefs and knowledge about geography. Suppose you have a desire to have these sorts of beliefs. In particular, you are curious about the relative sizes of Germany and Belgium. To satisfy your desire, you consult a world map of the common Mercator projection variety. As you look at the map, it is clear that Germany is much larger than Belgium, for Germany takes up significantly more space on the map than does Belgium.

Because a major cartography company made your map, and because this map and ones very much like it have successfully guided navigation for some time, you are justified in believing that Germany is indeed much larger than Belgium. Your belief is the result of a reliable process, and therefore the procedure transmits justification to its output. And because in this instance the procedure is highly reliable, and your belief is true, it also counts as knowledge.

Suppose, however, you were curious about the relative sizes of Greenland and Africa. You consult the same map, and you form the belief that Greenland is comparable in size to Africa. If you were familiar with the way in which the Mercator projection distorts landmasses far from the equator, you would know that the process used was far from reliable *in this circumstance*, and you would refrain

28   Rawls, *A Theory of Justice*, 171–72.

from forming the belief. But even if you did not know this, and you did form this belief, you would have no or very little justification.

This illustration shows that a procedure can be reliable in some respects but fail predictably in others. We can ignore the specific features of the Mercator projection that make it useful and reliable in some respects and not in others here, and note simply that it does not allow for reliable comparisons of the size of two areas, one of which is close to the equator and one that is not. We should not, however, throw our Mercator projections away. Rather, we should recognize that, as a tool, it is suited for some purposes and not for others, and confers justification or knowledge on some beliefs but not others.[29]

Doxastic procedures can be highly reliable in most circumstances but fail to confer justification or knowledge in circumstances of *predictable* failure. This, it seems, is a feature of normative proceduralism in general. Highly reliable political procedures too can fail to transmit normative properties in circumstances of predictable failure. Indeed, some argue that electoral mechanisms predictably fail to produce representative government.[30] On these grounds, one might reject an election's ability to legitimate its results.

3. CRIMINAL PROCEDURES

Two lessons emerged from the last section: the appropriateness conditions of TT for instrumental normative procedures include high reliability and an anti-predictable failure requirement. We will see that this yields plausible results in the context of criminal justice procedures. An analysis of these procedures demonstrates that there is one more element we must attend to: the distribution of failure.

3.1. Guilt by Coin Flip

Instrumental proceduralism attempts to explain why the outputs of criminal justice procedures are legitimate. As Estlund notes, corrections officers should not help prisoners escape even if they suspect that they were wrongly convicted, and they do not act wrongly in detaining them.

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29 These cases are not rare. Consider the procedure one might use to acquire reliable beliefs about which way north is. A compass is part of a reliable procedure. But it fails predictably in certain circumstances—in close proximity to magnets, for instance. For more high-powered doxastic procedures, one could look to the various kinds of models that go into hurricane forecasts. Some are better suited to predicting wind strength, others for storm tracking. Forecasters avoid procedural failure by using them as part of distinct doxastic procedures.

30 Guerrero, "Against Elections."

But consider a barely reliable criminal trial procedure: a flip of a coin determines guilt. If the coin comes up heads, the defendant is found guilty. If the coin comes up tails, the verdict is innocent. The coin is weighted and the composition of the pool of defendants is such that 50.01 percent of the time it gets the right result. This procedure succeeds at a rate better than chance. I suspect that not only would no one take the verdicts to be legitimate or authoritative, people would find this procedure deeply unjust. People were rightly outraged at footage showing police officers use a coin flip to determine whether to arrest a speeding motorist.[31] Like doxastic procedures, then, trial procedures must be highly reliable.

Actual trial procedures are not coin flips. Yet they are quite a bit like the doxastic procedure involving maps discussed above in that they can fail in predictable ways. I turn to that now.

3.2. *Hungry Judges and Biased Juries*

Social scientists have investigated whether, and what sort of, irrelevant factors influence sentencing in criminal cases. This body of scholarship provides us with empirical evidence of predictable failures of trial procedures. These procedures are aimed at achieving justice by presenting evidence and arguments to judges and juries. These individuals are supposed to be as close to the "ideal observer" as possible. That is, they should not have a bias in favor of guilt, or in favor of one party or another, and they should be competent at evaluating evidence and arguments. Indeed, these individuals are professionally trained to approximate the ideal, and that they come close to achieving the ideal is a large part of the foundation of the institution's legitimacy.

There are many ways in which one can deviate from the ideal. Legal realists sometimes disparagingly say that "justice is what the judge ate for breakfast."[32] Clearly what a judge ate for breakfast is irrelevant when it comes to what the outcome of a procedure *should* be, and if hunger leads to bad decisions, then this is nonideal. Although there may be no way to determine the exact correct sentencing, if it turns out that judges give harsher sentences when they are further from their most recent meal, then presumably this is a result of a deviation from the ideal state. This notion underlies the procedure of "comparative sentence review" or "proportionality review" that some courts undergo to determine whether a sentence is appropriate. Many states legally require the state supreme court to perform these reviews in cases where defendants receive the death pen-

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31 Amiri, Sacks, and Sanders, "Georgia Officers on Leave after Coin-Toss App Used before Decision to Make Arrest."

32 Danziger, Levav, and Avnaim-Pesso, "Extraneous Factors in Judicial Decisions."

alty. Some empirical research supports the realist's concern: "the likelihood of a favorable ruling is greater at the very beginning of the workday or after a food break than later in the sequence of cases."[33] Though there may be good reason to be skeptical about this empirical claim, it demonstrates a clear possible example of predictable failure in criminal justice procedures.

We might also expect judges and juries to be influenced by various psychological biases when reaching their decisions. A study of over seventy-seven thousand sentences found that while white offenders had an average sentence of thirty-two months, Black offenders had an average sentence of sixty-four months. Further, the study concluded that ethnicity accounted for over half of the variance.[34] Another study had different results, finding that seriousness of offense accounted for the majority of variations in sentence length. What they did find, however, was that Black defendants with more "Afrocentric" facial features received longer sentences than Black defendants with less "Afrocentric" facial features.[35] Other studies produce broadly similar results for sentencing and bail setting.[36] When a murder victim is white, in death penalty jurisdictions, the defendant is more likely to receive the death penalty.[37] This is even more likely when the defendant is Black.[38] Empirical research provides evidence that racial biases play a role in this: people tend to seek retribution more strongly when the victim is white.[39]

It is possible that there are explanations of these data that do not rely upon race. Social psychologist Neil Vidmar presents as possible alternatives the defendant's demeanor, manner of speaking, reports prepared by probation officers, or bail conditions set by magistrates.[40] These possibilities just push the problem of

33   Danziger, Levav, and Avnaim-Pesso, "Extraneous Factors in Judicial Decisions," 6890.

34   Mustard, "Racial, Ethnic, and Gender Disparities in Sentencing."

35   Blair, Judd, and Chapleau, "The Influence of Afrocentric Facial Features in Criminal Sentencing"; Vidmar, "The Psychology of Trial Judging."

36   Rachlinski et al., "Does Unconscious Racial Bias Affect Trial Judges?"; Ayres and Waldfogel, "A Market Test for Race Discrimination in Bail Setting"; Monaghan, Van Holm, and Surprenant, "Get Jailed, Jump Bail?"

37   Baldus, Pulaski, and Woodworth, "Comparative Review of Death Sentences."

38   Baldus et al., "Evidence of Racial Discrimination in the Use of the Death Penalty"; Eberhardt et al., "Looking Deathworthy." Though Pierce and Radelet find that the race of the defendant is not a predictor of receiving the death penalty in Baton Rouge, Louisiana, the race of the victim is (Pierce and Radelet, "Death Sentencing in East Baton Rouge Parish, 1990–2008"; Radelet and Pierce, "Race and Death Sentencing in North Carolina, 1980–2007"). Here their results are in agreement with Baldus et al.

39   Levinson, Smith, and Young, "Devaluing Death."

40   Vidmar, "The Psychology of Trial Judging," 59.

bias back a step. Further, none of these alternatives serve as justification of the sentencing disparities. It remains the case that Black defendants tend to receive longer sentences than white defendants for comparable offenses. Unless we can point to reasons other than the defendant's race to explain this disparity, this is another predictable procedural failure (predictable in light of our knowledge of the serious problems of racism).

Predictable failures can arise in a variety of ways. In adversarial trial systems, the hope is that by having both parties battle it out the truth will prevail. But even if all the other components of the procedure are functioning ideally, if one legal team is less skilled than the other, it becomes possible for the truth not to prevail. Perhaps the skill differential needs to be substantial before the procedure will fail. This remains, however, a clear possible input problem for adversarial legal procedures.[41]

The courts themselves recognize something like this. Defendants have a right to competent legal defense, and individuals can argue before judges that their conviction was the result of incompetent legal representation. If the defendant can show that the legal advice or defense they received was indeed incompetent, and that this caused the conviction, the conviction can be overturned. Because our actual legal procedures recognize that what I call predictable failures undermine the legitimacy of their decisions, and for this reason have ways of rectifying the failure, proceduralist justifications of political legitimacy must recognize this as a constraint on justification as well. This is especially true for proceduralists who appeal to legal procedures as part of their case for a fallibilist theory of legitimacy and authority.

Some might object at this point that the examples described above are not instances of the same procedure. Perhaps there are really two separate judicial procedures, one for white defendants and one for Black defendants. And since only the former procedure meets the reliability bar we do not need the notion of predictable failure to explain why even the courts have recognized that their decisions are illegitimate and non-authoritative in certain cases. The problem with the suggestion is not only that it is ad hoc, but it also does not capture the way that proceduralists typically think about procedures. It threatens to make every political or legal decision the singular output of a one-time procedure. Each relevant difference in the reliability of a procedure would generate a new procedure, and this gives each procedure a perfect reliability or a perfect anti-reliability. But then we would be back to a correctness theory of legitimacy.

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41 In fact, empirical research shows that this is a problem. See Frederique, Joseph, and Hild, "What Is the State of Empirical Research on Indigent Defense Nationwide?"; Abrams and Yoon, "The Luck of the Draw."

3.3. *The Distribution of Failure*

There is a long history of a presumption in favor of innocence. To paraphrase a famous remark from William Blackstone (and many others), it is better that ten guilty escape than one innocent suffers.[42] This commitment to lenience does not, by itself, tell us how often a trial system can yield a false verdict of guilty before losing legitimacy, but the numbers suggest that it must be *considerably* more reliable than better than random. Because this presumption of innocence is widely endorsed, most should think that the "better than random" standard is not sufficient for a legal procedure to transmit normative properties to their outputs. We cannot look simply at the failure *rate*. We must also consider the failure *distribution*.

The distribution of failure is especially important for political procedures. Legal and political decisions can be seriously harmful, and in exercising political power they threaten to undermine political equality. For this reason, they must be justifiable to whom they affect. But the predictable failures discussed above highlight an important requirement for the success of proceduralist justifications of legal and political decisions. Some procedures can be highly reliable, meeting the first requirement. They might fail in predictable ways only on rare occasions. But, *for whom* they fail is significant, and there are relevant groups beyond the innocent. If a minority group in a political community experiences the vast majority of the procedural failures, then the procedure cannot be justified to them. They are within their rights to ask, "Why should I obey the output of this procedure? It clearly does not work *for us*." They can rightly deny that these failures are honest mistakes, even if the failure does not stem from intentional malfeasance.

Let us suppose that the criminal legal system is 90 percent reliable, thereby meeting the general reliability criterion. If the 10 percent failure rate falls entirely or mostly on certain portions of the population, we have a situation in which the system delivers justice for most people, but no justice for some. This highlights the need for a more sophisticated assessment of the reliability of a procedure. We cannot expect or demand that people obey the outcome of a procedure on the grounds that it tends to be reliable if they shoulder most of the burden of the unreliability. Some proceduralists accept this point. Rawls claims that the duty to obey the law is difficult to establish for minority groups who regularly bear a disproportionate amount of the burdens of procedural failure.[43]

So to recap, even if the legal procedure is highly reliable, the transmission

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42   See Laudan, *Truth, Error, and Criminal Law*, 63.

43   Rawls, *A Theory of Justice*, 312.

of relevant normative properties to political decisions is blocked in cases of predictable failure. This is true for doxastic procedures, and intuitively for legal procedures like a criminal trial as well. Even if the procedure does not fail predictably, and even if highly reliable, certain distributions of failure can render it inappropriate and block the transmission of legitimacy.

4. DEMOCRATIC PROCEDURES

Criminal legal procedures are a kind of political procedure. So we should extend these considerations to other political procedures as well. That is the task of this section.

We have seen that Estlund offers an analogical argument between criminal trials and democratic procedures as a component of his overall case for the legitimacy and authority of democratic decisions. Rawls similarly takes the imperfect procedures to be authoritative even when they go wrong, but not always. This is made most clear in his discussion of civil disobedience. Civil disobedience is permitted, says Rawls, when injustices are clear and substantial, where "injustice" is understood as a state of affairs that violates the principles of equal liberty and fair equality of opportunity.[44] Christiano takes democratic decisions usually to be authoritative so long as they do not violate their fundamental commitment to equality of citizens (e.g., by disenfranchising some of the population). But were democratic institutions to nearly always generate seriously unjust outcomes, they would lack authority, for there "is no good reason for thinking that matters of distributive justice, individual rights and the common good are less normatively important than democratic principles."[45]

4.1. The Democracy/Jury Analogy

Since jailers should enforce sentences even when they are unjust because the legitimacy and authority of the decision is not canceled whenever it is wrong, the decision of a democratic institution is still authoritative even when it is wrong (unjust). The argument gets its force from the fact that no one endorses the heterodox implication that jailers should release prisoners if the jury or judge made an honest mistake.

If my argument is correct that the output of a trial procedure (culminating in the decision of a judge or jury) is not legitimate or authoritative in cases where the three appropriateness conditions are not met, then the analogical argument

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44 Rawls, *A Theory of Justice*, 326.

45 Christiano, "The Authority of Democracy," 269.

justifies a more restrictive view of legitimacy or authority. The heterodox conclusion is compatible with—indeed, follows from—proceduralist considerations, rather than a rejection that the conclusion is actually heterodox.[46] When democratic procedures are not highly reliable, when they fail in predictable ways, or when they distribute burdens in an objectionable way, they too fail to transmit legitimacy.

Perhaps the proceduralist will want to reject the argument on the grounds that the democratic procedures are unique in a way that insulates them from this problem. But it would be surprising if democratic procedures were unlike trial procedures in this regard. Furthermore, the proceduralist must then take on the task of identifying how democratic procedures are like trial procedures such that the analogical argument establishes the authority of democratic decisions, but different in a way that undermines my modification of the view.

4.2. Political Procedural Failures

Determining whether various political procedures meet the reliability standard is a difficult task that I shall not take up here. Instead, it is worth focusing on the problems of predictable failure and the inappropriate distribution of failure. I want to raise the possibility that democratic procedures can fail in ways that undermine the transmission of the relevant normative property according to the instrumental proceduralist approach.

During close us presidential elections the electoral college is the subject of much discussion. This is a design problem: Is the electoral college a legitimacy-conducive feature or not? Here is one reason for thinking it is not. The electoral college has the effect of making votes in swing states count for more than votes in other states. This means that the votes of citizens are not equal. They are unequal in terms of their effect on the outcome, but in another important way as well. The disproportionate impact can motivate politicians to elevate their interests over the interests of their "safe vote" constituents, producing unjust electoral outcomes. This design problem threatens the appropriateness of the procedure.[47]

Consider now an input problem. If voters lack robust policy preferences and an ability to assess politicians holistically, they are susceptible to exploitation,

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46   Cf. Brennan, *When All Else Fails*, 143.

47   This might seem like a pure procedural element, but it need not be. If we think that equalizing political power is important for high-performing political institutions producing high-quality governance, then design elements that create political inequality will degrade performance.

and the system subject to capture.[48] Voters, the empirical evidence suggests, form their policy preferences based on their self-identity and loyalty to groups.[49] If one has a partisan loyalty, they are likely to come to prefer the policies defended by that group. Voters are unlikely to form partisan loyalties based on prior policy preferences. Furthermore, voters are more likely to support the incumbent party when there is an economic uptick during the quarter leading up to the election. There is evidence that politicians exploit this by generating short-term economic bumps to coincide with elections. Political scientists have called this the "economic-electoral cycle."[50] This is only one instance of the myopia of voters. If such exploitation leads to the procedure getting things wrong, then this could be a case of predictable failure.

There are other ways in which the input to or design of democratic political procedures is problematic that do not rely upon claiming that the average citizen has inappropriate or wrongheaded policy preferences. Gerrymandering of districts to influence electoral outcomes is a well-known and blunt (though effective) design manipulation. The arbitrary or prejudicial restriction of suffrage is another example. Contemporary voter ID laws are candidates for a pernicious input problem. Felony disenfranchisement is another. Exacerbating this problem is the practice of counting, for the purpose of apportioning political representation, inmates in the districts where their prisons are located. Not only are racially biased prison populations deprived of their right to vote, but they also increase the political power of largely white, rural districts. When gerrymandering or disenfranchisement leads to unjust results we have another case of predictable failure.

Let us move to the distribution of failures. Suppose that the typical citizen has sensible policy preferences, and that gerrymandering and suffrage restriction do not constitute procedural failures sufficient to call into question the authority of the procedure's outputs. Still, it turns out that the majority sometimes has little influence on policy decisions. Here is how Martin Gilens and Benjamin I. Page characterize their findings:

> When the preferences of economic elites and the stands of organized interest groups are controlled for, the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy.[51]

48 Guerrero, "Against Elections."

49 Achen and Bartels, *Democracy for Realists*.

50 Tufte, *Political Control of the Economy*; Achen and Bartels, *Democracy for Realists*.

51   Gilens and Page, "Testing Theories of American Politics," 575.

Instead, economic elites and organized groups representing business interests have far more influence on public policy. Regulatory capture and the existence of legislation written by lobbyists make this an unsurprising result. And when we know that democratic procedures are susceptible to the possibly pernicious influence of interest groups, and that this often leads to non-economic elites bearing much of the burden of the unjust political outcomes, public justification becomes significantly more difficult. There are no instrumental proceduralist grounds for insisting that groups of citizens obey a political decision when the procedure usually fails that group. The mechanism here, we might think, involves predictable failure, but the distributional concern raises an additional legitimacy problem.

As a disclaimer, I should emphasize that the success of these arguments does not rest entirely on the strength of these examples. One might reject the Gilens and Page account of the power of organized groups seeking concentrated benefits, or the hungry judges phenomenon, but I offer them as plausible illustrations of the kinds of failures instrumental proceduralists must take seriously. Just like legal procedures, our democratic procedures can fail to satisfy the appropriateness conditions needed to transmit relevant normative properties to their outputs. We have *proceduralist reasons* for restricting the scope of incorrect outputs that we regard as legitimate, authoritative, or just.

5. THE INTERACTION AND AMPLIFICATION OF PROCEDURAL FAILURES

One might object that, in at least some of these failure cases, the fault does not lie with the procedure. When Black defendants get harsher outcomes, it is not necessarily the procedure that causes this, but rather the background social facts the procedure is embedded in.[52] Surely there will be cases where procedural failures are not purely internal to the procedure. The conclusions I have defended are, however, compatible with this. Consider, for example, the Mercator projection example discussed above. There, the problem is not that the procedure is internally flawed. Rather, it is used in inappropriate circumstances. That is what explains the predictable nature of its occasional failures. Pairing the arguments so far with a structural injustice framework can illuminate the full scope of procedural failures along these lines and contribute to a response to this objection.

Structural injustices are distinct, according to Iris Marion Young, from "two other forms of harm or wrong, namely, that which comes about through individual interaction, and that which is attributable to the specific actions and

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52   Thanks to a referee for raising this objection.

policies of states or other powerful institutions."[53] They are *emergent* injustices not directly attributable to particular culpable actions. Structural injustices can create inappropriate backgrounds that render our political procedures prone to predictable failures or inappropriate failure distributions. Overpolicing of certain areas that funnels a racially disproportionate set of offenders into the trial system, combined with racism or bias in the population, sets a background in which a procedure that includes prosecutors involved in the selection of jurors predictably results in the procedure failing (by, e.g., making it such that Black defendants predictably get unjustly harsh sentences).

Structural injustices can also contribute to the inappropriate distribution of procedural failures. The failures of misdemeanor systems, for example, include being detained for months for an offense that might deserve only a fine or a short jail term. These failures largely burden impoverished people precisely because they cannot afford bail. This exacerbates problematic distributions along other dimensions (e.g., race, since it is correlated with poverty). The predictable failure (here too a disproportionate punishment) is caused not only by features internal to the misdemeanor process, but also background structural injustices that play a causal role in the inappropriate failure distribution.[54]

Structural injustice, therefore, helps draw our attention to the causes, scope, and significance of these kinds of failures. It also draws our attention to the kind of changes that we must make to rectify various procedural failures (simply increasing funding for public defenders in an effort to improve the procedure itself is likely to be insufficient). Further, structural injustices can themselves be explained by procedural failures.[55] It is for this reason crucial to recognize the relationships between the imperfect procedures that constitute the institutions we live in. Procedural failures in one domain can lead to failures in others. Failures of judicial procedures fall disproportionately on certain groups of the population. These interact to generate failures for our democratic procedures, in turn risking the creation of vicious feedback loops.

Felony disenfranchisement serves as an obvious example. In many states in the US, felons are unable to vote. In other states felons are re-enfranchised upon

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53 Young, *Responsibility for Justice*, 45.

54 For a thorough look at the many problems in the misdemeanor system, see Natapoff, *Punishment Without Crime*.

55 Housing policies that prevent the construction of new housing, leading to price increases and gentrification, are plausibly a manifestation of procedural failure (they exclude those who would benefit from new housing from the political procedure to determine whether a new development will be permitted). Unaffordable housing was, of course, a component of Young's major example (*Responsibility for Justice*, 43). For discussion, see Sankaran, "Structural Injustice as an Analytical Tool."

release, and in others upon completion of parole (and paying off sometimes prohibitively expensive fines). Some states require felons to apply for the right to vote, and their application can be denied. When our criminal legal procedures fail such that certain groups are more likely to make their way into the criminal justice system and receive felony convictions, this leads to the failure of political procedures.

Millions of us citizens are disenfranchised because they have been convicted of a felony. In some states the number is large enough to have a causal influence on political elections at state and national levels. This issue rose to prominence in the Bush versus Gore election of 2000, in which the election likely would have gone to Gore had some of the disenfranchised population been permitted to vote.[56] Here we have an example of procedural failure in judicial and political procedures changing the outcome of actual elections. If the procedure is responsible for transmitting legitimacy to the output, the procedural failure might make this outcome illegitimate.

This is not unique to the 2000 election. In 2016, Florida had 1.5 million citizens disenfranchised due to felony convictions.[57] During the presidential election that year, Donald Trump received 4,617,886 votes and Hilary Clinton received 4,504,975.[58] So in an election decided by 112,911 votes there were 1.5 million who were not permitted to vote. Further, one study estimates that 35 percent of felony disenfranchised citizens would vote in presidential elections—525,000 in Florida's 2016 election.[59] If we combine these observations with information about how some of the disenfranchised population would likely vote, then we can reasonably conclude that in some elections procedural failures could change the outcome of the election. And again, if procedural failures block the transmission of legitimacy, then we can conclude that these outcomes lack legitimacy.

In addition to felony disenfranchisement, mere contact with the criminal justice system has been shown to decrease political participation.[60] If unjust laws that are the result of procedural failure and unjust enforcement of those laws fall disproportionately on certain groups, then those groups are also less likely to

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56 Uggen and Manza, "Democratic Contraction?"

57 Uggen, Larson, and Shannon, "6 Million Lost Voters."

58 Division of Elections, Florida Department of State, https://results.elections.myflorida. com/index.asp?electiondate=11/8/2016.

59 Uggen and Manza, "Democratic Contraction?" 786.

60 Being "arrested reduced the likelihood of voting by 7%; being convicted reduced the odds of turning out by 10%; being sentenced to jail or prison reduced it further by 17%, and serving more than 1 year reduced the likelihood of voting by nearly one third" (Weaver and Lerman, "Political Consequences of the Carceral State," 828).

be politically active. This has the further effect of politically marginalizing these groups and making it less likely that their interests will be taken into account when political groups determine whether to overturn or change the enforcement of existing laws. This is how various procedural failures generate vicious circles of failure.

What is important about this sort of example is that is does not rely on the view (which instrumental proceduralists would reject) that only optimific procedures transmit legitimacy or authority. The problem is not that the outcome of some presidential elections is not optimal or ideal, but rather that it is different from what it would be without predictable, nonuniformly distributed procedural failures.

There are plenty of procedures that fail silently, rather than loudly. In other words, the failures are not so egregious that we immediately notice them, or that proceduralists are happy to deny are legitimate. What I have suggested is that we need to refine our evaluation of imperfect procedures to look for instances of less obvious failure. One implication of the wide scope of procedural failure is that more work on proceduralism needs to be done in the realm of nonideal theory. When we idealize away these problems we are left with no real answer to questions about the legitimacy or authority of actual political institutions.

Unevenly distributed procedural failures are dangerous because they interact with other procedures, tending to generate and amplify additional failures. This can be self-reinforcing and amplifying in many contexts. For this reason in particular, instrumental proceduralists cannot rely on a reliability rate alone. We must attend also to the possibility of predictable and unevenly distributed failure.

The instrumental proceduralist, by offering a fallibilist account of legitimacy, encourages us to draw a distinction between what we can call *culpable mistakes* from *honest mistakes*. A bribed judge produces a culpable mistake that blocks legitimacy, but a mistake from a properly functioning procedure is an honest mistake involving no culpable wrongdoing and therefore preserves legitimacy. But the structural injustice literature demonstrates that looking only at culpably unjust actions is overly narrow and deprives us of an important evaluative tool. Similarly, the revised set of appropriateness conditions argued for here demonstrates the importance of another kind of mistake. These are non-culpable but seriously unjust procedural errors (arising from insufficiently reliable, predictably failing, or inappropriately distributing procedures). They are a kind of disqualifying mistake that is not dishonest in the sense of being a result of individual culpability, but neither are they exactly honest in the way that a fallibilist sensibility would lead us to begrudgingly accept as legitimate. When we

reflect on the nature of instrumental proceduralist justification we see that the view provides us with the resources to diagnose these problems. Proceduralists should embrace those resources and take on board more stringent success conditions for instrumental proceduralist justification.[61]

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