RIGHT OR WRONG, IT'S DEMOCRACY. LEGITIMACY, JUSTIFICATION AND THE INDEPENDENT CRITERION

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"To find a form of association that may defend and protect with the whole force of the community the person and property of every associate, and by means of which each, joining together with all, may nevertheless obey only himself, and remain as free as before." Such is the fundamental problem of which the social contract provides the solution. (Rousseau 1763, 163)

ABSTRACT

Contemporary normative theories of democracy generally aim to show that democratic outcomes are legitimate and hence they ought to be obeyed. As it is known, the battlefield is split between two major approaches: instrumentalism and proceduralism. Yet, many philosophers of both approaches seem to overlook one distinction that ought to be crucial in their reasoning - or so I argue in this paper. First, I highlight this distinction between the justification of outcomes on one hand, and their legitimacy on the other. If the justification of outcomes is unachievable given circumstances of pluralism and disagreement, their legitimacy derives from the procedures that bring them about. Hence both accounts present a justification of democratic procedures by reference to a criterion that is independent from the procedures themselves. Second, I propose to distinguish between instrumentalism and proceduralism on the basis of the connection that these approaches draw between the justifying criterion and democratic procedures. While for instrumentalism this is contingent and indirect, for proceduralism it is direct and necessary. Finally, I take into account two well-known taxonomies in epistemic democracy, which are provided by David Estlund and Fabienne Peter, and I argue

that both blur the distinction between the justification of outcomes and their legitimacy and are thus unsatisfactory and misleading.

INTRODUCTION

We live under democratic regimes. We don't live too badly and we think this depends (in part) on the fact that we live under democratic regimes. Hence, we may find those regimes *good* in this respect. That is, we can reasonably think that we have good, even conclusive, reasons to take democracy as justified and thus to want to establish democratic institutions. But does this mean that we also ought to obey democratic outcomes? Are we to take these outcomes as legitimate even though we may sometimes find them plainly wrong? In my paper I want to tackle these two related issues that concern democracy[1], its justification and legitimacy, and inquire about their relation.

I have two aims in this paper. First of all, I intend to clarify a small confusion that happens to blur the debate: the one between particular outcomes and democratic procedures. This may seem a minor point, but it is relevant if we aim to account for the so-called circumstances of politics (Waldron 1999) and if we want to accommodate disagreement over what are the best decisions to take. In order to understand why the fact that we disagree over some specific outcomes does *not* immediately give us reasons to disobey, we need to bear in mind that justification and legitimacy of a single decision are different questions. If that is the case, the legitimacy of democratic outcomes depends on the kind of procedure that issued them[2].

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[1] In this paper, I take democracy canonically to stand for majority rule of decision-making and fundamental rights protection and to be constituted by deliberative and voting processes. Thus, my analysis concerns both aggregative and deliberative models of democracy.

[2] As Peter (2016) argues, there are at least three grounds for legitimacy: consent, beneficial effects and democratic procedure. While the former identifies legitimate authority with individuals' consenting to it (and thus conveys no normative force); the second revolves around authority's beneficial consequences and requires people to obey

Once we turn to the justification of democratic procedures, we are at a crossroads. There are two well-known broad approaches to the justification of democracy: instrumentalism and proceduralism. My second aim in this paper is to propose a new ground to draw a line between these two and to reframe such opposition as instrumentalism versus intrinsicalism. Insofar as both accounts distinguish between outcome legitimacy and outcome justification, they ought to provide a justification of democracy that can secure the legitimacy of its outcomes, especially when they are unjustifiable. Following David Estlund's criticism of fair proceduralism (2008), I argue that both do so with respect to a value or a set of value that works as procedure-independent criterion. While instrumentalism conceives the relationship between such criterion and democratic process as contingent, albeit sufficient, to produce on average substantively good outcomes; intrinsicalism takes democracy to be a necessary condition for the realization of the independent criterion that justifies democracy, according to each different account.

Therefore, I intend to argue that: (a) a proper justification requires to conceive an independent criterion that acts as justifier of democracy; (b) the connection between such criterion and democracy itself may be either necessary or contingent. Then, I aim to show how this distinction clarifies some confusion in the current debate on epistemic democracy. Whereas certain accounts are clearly instrumentalist (Goodin and List 2001, Goodin 2003, Landemore 2013), others qualify themselves as proceduralist (Estlund 2008, Peter 2008). If my argument is so far sound, then both the focus on the justification of procedures and the distinction between instrumentalism and intrinsicalism may help shed light to these last two approaches. On one hand, both Estlund and Peter propose taxonomies of current democratic accounts that end up concealing the distinction between instrumentalism and intrinsicalism. On the other, in Estlund's case, such confusion induces him to misunderstand his own standing in the debate, or so I try to argue.

The paper is organized as follows. The first section regards the distinction between justification and legitimacy of outcomes. I criticize approaches to democracy that merge these two dimensions and I take Waldron's circumstances of politics to be a good reason to draw a line

authority insofar as it brings positive outcomes. My whole paper will stand within the third category and I won't discuss the other two.

between the two. I also argue that outcome legitimacy ought to depend entirely on the procedure that issues it.

Section two introduces a reformulation of the possible justifications of democracy and proposes to use an independent criterion whose connection to democracy serves as a qualifier of the justificatory approach. Finally, in section three I show that, based on the previous arguments, both Peter's and Estlund's taxonomies are unsatisfactory, and argue for focusing on the distinction between outcome legitimacy and outcome justification.

I

Both justification and legitimacy are multifaceted concepts that can regard different domains of normative political theory. First, we can say that a *decision* is justified or legitimate, and we mean different things by using one adjective or the other. But second, we can also question the justification or legitimacy of the political *authority* that issues such decisions or, we can wonder whether the exercise of *coercive power* in the society we live in is justified or legitimate[3]. Finally, we can ask whether a certain specific *procedure* for taking the decision is legitimate or justified. All these attributions are slightly but importantly different and make the distinction between these two concepts more confused for anyone who addresses it[4].

The first thing to notice is that justification and legitimacy convey different meanings. In a very general sense, when we claim that a certain decision is justified we mean that there are conclusive reasons in its

[3] As both Peter (2013) and Perry (2013) notice, there are at least two approaches to the problem of political legitimacy: the first is authority-based (Raz 1986, Christiano 2004, 2008, Perry 2013), while the second is coercion-based (Ripstein 2004, Rawls 2005, Estlund 2008). A proper inquire over the meaning and functioning of the concept of legitimacy is beyond the aims of this paper, as I will only tackle the issue of justification of democracy and hold that this is a necessary condition for the legitimacy of its outcomes.

[4] The last forty years of debate over the issue of public justification have also possibly made things more confused, as it has collapsed the two concepts. Following Rawls (2005), the use of coercive power has been defined as legitimate to the extent that it was able to appear justified to all reasonable people. For a criticism of Rawlsian approach see Simmons 1999. For a proceduralist interpretation of the requirement of public reason that makes it a pure proceduralist justification of democracy see Peter 2008, 95-100.

favor[5]. Conversely, the notion of legitimacy refers to a specific right to rule that any political authority has over those subjected to it[6]. When these two concepts are applied to political decisions and laws, they have two different implications. On one hand, a justified political decision is a decision for which there are conclusive reasons or that I can accept. On the other, a legitimate political decision is a decision that ought to be obeyed. Since Jean-Jacques Rousseau's forerunner account of democratic legitimacy, theories of democracy have confronted themselves with this problem and have tried to answer it by offering a decision-making procedure that yields collective decisions that are binding on all and that nonetheless respect individuals' freedom and will (Rousseau 1763, 163). There are two possible takes on this issue and both have been explored by democratic theorists. I will only mention the first and I will focus on the second.

The first attempt can be exemplified by Jürgen Habermas's and Joshua Cohen's accounts of deliberative democracy (Habermas 1996, Cohen 1997a, 1997b). According to their models, majority rule and equal right to participation do not constitute the only central features of democracy, but are rather completed by the idea of deliberation[7]. Here I cannot provide a proper account of the functions that deliberation is meant to fulfill, contrary to traditional aggregative approaches to democracy (Arrow 1963). It will suffice to say that since the "public discourse mediates between reason and will" (Habermas 1996, 475-476),

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[5] For the purposes of this article I need not to take stance on what counts as a normative reason (see Raz 2011) or on a specifically externalist or internalist account of justification (see Gaus 1996). So I will only refer to justification in the very general sense of 'conclusive considerations in favor of'.

[6] Concerning political legitimacy, not only there are different approaches to it, as mentioned in note 4, but the very concept of normative legitimacy has been taken to identify different kinds of 'right to rule'. On one reading, legitimacy consists in a justification-right to use coercion, without any political obligation on the part of those subject to political power (Ladenson 1980, Buchanan 2002, Estlund 2008, Kolodny 2014a, 2014b). On the other reading, instead, legitimacy is a claim-right to command, which entails a duty to obey (Simmons 1979, 1999, Christiano 2004, 2008, 2013, Lefkowitz 2005). In what follows I will refer to legitimacy as imposing a duty to obey, but my analysis remains neutral with respect to this distinction and maintains its validity also with the first interpretation of legitimacy.

[7] Deliberative democratic theories, although declining, are one of the fundamental paradigms of democracy of the last thirty years. I will not provide an account of it or of its supporters' different, as here I focus on its epistemic version. For a general introduction see Bohman and Rehg 1997, Besson and Martí 2006.

it allows deliberative democracy to enjoy both legitimacy and justification. Indeed, the deliberative-democratic process, as long as it is conducted according to certain ideal procedural criteria, represents both a necessary and a sufficient condition to produce a rationally justified collective decision. According to Habermas, because the aim of deliberation as described by the ideal speech situation is to reach consensus, this decision will be justified to everyone's lights. According to Cohen, who heavily draws on Rawls's ideas of public justification and original position (Rawls 1971, 15-19), a properly constrained deliberative process will yield outcomes that all will find acceptable. In both cases, deliberative democratic procedures that respect their ideal counterpart will ensure both justification and legitimacy; that is, they will generate outcomes justified rationally and hence binding. As a consequence, these accounts put together the two concepts of justification and legitimacy by claiming that all and only justified decisions are decisions which we ought to obey[8].

There are two problems with such a position. Firstly, it depends on the role of consensus or public acceptability. Either deliberation ensures that all outcomes are justified to all or majority rule will intervene to cut discussion and finalize a decision irrespective of unanimity. But because in such a case the collective decision won't be justified to all, those who disagree will wonder why they should accept it and will hence question its legitimacy. But secondly, and more importantly, it blurs the distinction between actual procedures and ideal ones. If Habermas' and Cohen's point is that all actual democratic outcomes are legitimate because they are justified to all, this is simply not true. We happen to disagree a lot, and there are many democratic decisions that we find wrong. On the other hand, if they mean that actual democratic decisions are justified because they could have been the result of an ideal democratic procedure, then it is their conformity to the ideal procedure that makes them both justified and legitimate. But if that is the case, the ideal procedure ends up being a substantive criterion of evaluation, albeit procedurally constructed, that applies directly to outcomes and is

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[8] The project of public justification as well, in its substantive interpretation, can be taken exemplify such a position. See, among many, Rawls 2005, Quong 2011, Gaus 1996, 2011, D'Agostino 1996. However, it is important to notice that: (a) the consensus model refers only to *reasonable* acceptability and hence does not require unanimous consensus; (b) the public justification approach is not susceptible to the criticism I lay out further in the text against Habermas's and Cohen's accounts.

indifferent to their democratic pedigree[9]. For instance, an omniscient dictator who were able to reconstruct the ideal deliberative procedure in his head would be much more effective in producing justified, hence legitimate, results. But this means that we lose sight of the link between the outcomes of ideal democratic procedures and the outcomes of actual democratic ones. As a result, the fact that collective decisions have been made by actual democratic procedures is neither a necessary nor a sufficient reason to take them as legitimate, unless their content also conforms to the one that would have been issued by ideal procedures. In the end, we have either over-legitimation or under-legitimation (see Ottonelli 2012), because actual decisions are both unjustified and illegitimate or legitimate and justified.

The second solution pursues a different strategy, as it draws a clear-cut line between the justification of outcomes and their legitimacy. According to these stances, the fact of pluralism and disagreement make it impossible for each and every decision to get universal approval. As Jeremy Waldron reproaches to John Rawls, we do not only happen to have divergent comprehensive doctrines, but we also disagree over the very public conception of justice that reasonable citizens ought to share, according to Rawls[10]. Therefore, we cannot cling to it in order to justify collective decisions, as they inevitably won't appear so to all those citizens who in good faith disagree over what justice requires (Waldron 1999, 149-154). By modifying Rawls's circumstances of justice (Rawls 1971, 109-112), Waldron sets up what he calls the 'circumstances of politics', which specify the conditions that make politics both possible and necessary (Waldron 1999, 101-106). These are the fact of disagreement and the need of cooperation. As he says, disagreement matters because we need to take collectively binding decisions, as otherwise, if we did not need to cooperate, we would not care about disagreeing. On the other hand, if we all agreed on what to do on each and every instance, we would not experience the necessity for

[9] For this reason Peter includes Habermas' deliberative democratic model among perfectly proceduralist, rather than purely proceduralist accounts (Peter 2008, 71). For the distinction between pure, perfect and imperfect proceduralism see Rawls 1971, 85.

[10] Rawls posits a fundamental distinction between the political conception of justice, on which reasonable citizens in a Well-Ordered Society agree, and comprehensive doctrines characterized by the fact of reasonable pluralism under contemporary liberal-democratic regimes, as he states in *Political Liberalism*. See Rawls 2005.

collectively binding decisions because we would act according to our own judgment[11].

In a way, it seems plausible to wonder whether we could still talk of legitimacy without disagreement over what to do. If we were to agree with every single collective decision, either because we take it to be intrinsically just or correct, or because we find it instrumentally useful to realize our aims and ends, we would never face circumstances where we ought to obey to decision we strongly disagree with[12]. A little thought-experiment may be of help here. If we lived in a very bizarre social world where we all agreed on every single issue and we knew that we so agreed, it seems reasonable to think that we would be able to harmonize spontaneously and act according to our common knowledge. We would live in the realization of Thomas Hobbes's wild dream of ants and bees, whose communities are immune to disagreement and which are able to coordinate following a natural hierarchy (Hobbes 1651, 113)[13]. To be sure, we would still have to take collective decisions in order to coordinate and hence would need a decision-making procedure of some kind. But, by hypothesis, almost any decision-making procedure would do, since we would know that we would agree on each and every decision. We could take decisions democratically or autocratically; we could vote or we could select by lot one of us taking decisions always or only for a certain amount of time. Certainly not any decision-making procedure would treat all of us in the same way, as for instance the autocrat would get to decide everything on her own. However, it seems difficult to think that this would be a problem, because the final decision would be one on which we all agreed and none of us would feel to have it imposed upon him and he would know that. The demand for legitimacy arises when a decision, which we deemed unjustified, is imposed on us. If we

[11] One possible objection to this kind of argument regards akrasia, that is, the fact that people violate their own judgment of what is the best thing to do (on which by hypothesis they agree with all others). As I said earlier in the article, in this case we would still need political authority, but with the considerably weakened function to handle akrasia. Another objection concerns coordination problems, like on what side of the road to drive. Here, there is no better decision, as both sides are fine as long as we coordinate on one of them. Here a decision-making procedure would still be necessary, but since we would be indifferent with respect to the specific decision taken, it seems hard to believe that a proper issue of legitimacy would arise.

[12] In a relevant way, we could not be said to *obey* to anything, since we would respect the law willingly and spontaneously, even though this depends on what we take obedience to consist of, and it is true only if we take it to require some sort of disagreement with the reasons behind the law.

[13] A similar thought is expressed by David Estlund. See Estlund 2008, 71.

were to agree (and know that all of us agree) on all collective decisions, the only problem of political authority would be to ensure compliance with these decisions by akratic citizens. And since the main function of political authority would be to handle akrasia, we would perhaps be able to forsake democracy[14].

In another closer, but still quite bizarre world, we could agree on every decision as well, without knowing that we do so agree. In such a world, we would have greater need for a decision-making procedure, because we would not be sure that we really agree on what to do. Decision-making procedures would deploy only an epistemic and detective function, as they would just make clear to all what the agreed-upon decisions were. However, in such a world we would not share these decisions as common knowledge, hence the need for a detective procedure, and we would not be sure of our agreement. In fact, from this world inhabitants' point of view, there would be no way to distinguish between a world where such unanimous consent is near at hand and one where it is not. Therefore, decision-making procedures would have to be justified *irrespective* of whether unanimity is available or not, because people who followed them would be uncertain about their capacity to reach generally justifiable decisions. Under these conditions, the issue of legitimacy would arise and take form and substance, since there would be the actual possibility that we ought to obey to decisions we disagreed about.

Waldron's intuition seems to be that fairness and justice are on different levels. While the latter concerns our different worldviews, life plans, moral and religious conceptions, which happen to differ, pace Rawls, the former defines what are the *fair* conditions to handle disagreement over justice (Waldron 1999, 195-198). In particular, under conditions of pluralism and disagreement, fairness requires that decisions everyone ought to abide by be produced in a way that respects the fact that people may disagree over those decisions. Therefore, the legitimacy of laws and policies does not depend on their substantive value, but by the fact that they have been generated according to a fair

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[14] Given the problem of akrasia and in general the possibility of people acting to pursue their self-interest rather than the justified decision (on which they would still agree, though), there would still be the need of a political authority that exercised coercive power. What I contend is that such authority would not need to be democratic and, if it were, the reasons for this would be very different from our actual justifications of democracy, given disagreement.

procedure, which respects each citizen's own judgment on the issue at hand. But since only democracy attributes an equal right to a say to every citizen, democracy is the only fair, hence legitimate procedure.

This switch from the justification of particular decisions to a focus on decision-making procedures that yield them is behind most current theories of democratic legitimacy (Waldron 1999, Estlund 2008, Christiano 2008, 2013, Peter 2008, 2016). These theories offer a procedural account of the legitimacy of collective decisions by claiming that said legitimacy depends on the way these decisions have been made. Since they are made democratically, this provides them with a particular right to rule, irrespective of their substantive justification. Since the specific content of particular decisions does not play a role in their being legitimate, the problem of justification of each decision is foregone and replaced with the problem of its legitimacy. For this reason, proceduralist accounts of democratic legitimacy can better answer the problem of disagreement. In fact, they do not ask citizens to take all collectively binding decisions as justified, but only to recognize their legitimacy in virtue of the procedures that lent them.

Nevertheless, while I think that this sort of argument convincingly shows why to draw a line between justification and legitimacy of collective decisions, it does not *directly* support democracy. That is, democracy as a decision-making procedure need not be justified given the fact of disagreement, as there could be perfectly convincing reasons that defend democracy even when we all agree[15]. The problem is that any political regime that claims to lend legitimate outcomes has to take disagreement into account. Despite current justifications of democracy (e.g. Waldron 1999, Christiano 2008), the former example illustrates how disagreement is morally significant only to the extent that we have to abide by decisions that we might find wrong. Therefore, it is not the distinctive working of democracy that depends on the fact of disagreement; rather, it is the question of legitimacy, which arises only conditionally on it. Democracy is but one, albeit purportedly the best, way to account for the procedural legitimacy of collective decisions.

However, contrary to what Waldron seems to hold, this does not settle all disputes. In fact, two objections can be moved towards his account.

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[15] For instance, if we think that a procedure ought to treat people as equals, this can be true and worthwhile irrespective of the fact that those equals agree on the final decision to make. However, in this case we could assess the justice of the said procedure and we would not deal with its legitimacy, as people would still end up complying with outcomes because they agree with them and not despite they think they are wrong.

First, if it is undoubtedly true that matters of justice are controversial, as Waldron reproaches to Rawls, it is indeed also true that matters of procedure and of procedural fairness are controversial as well (e.g. Christiano 2000, Enoch 2007). Perhaps we can safely say that democracy is at least morally permissible, if not plainly the fairest possible decision-making procedure. But, even if we can hope to reach such unanimous consensus, which is unlikely if we confront ourselves with all human societies in all times, still there would be room to argue over which kind of democracy would be the best or most suited to us. The simple fact that democracy is fair would not help us to adjudicate between a more populist, more 'epistocratic', more liberal or more majoritarian democracy, *if all these versions of democracy crucially hinge on the conception of fairness we embrace.* Given that disagreement touches also on what is the best and fairest decision-making procedure, even within a more or less democratic framework, we need a clear justification of democracy that ought to provide us with reasons to infer from the specific value of democracy the legitimacy of its outcomes. Moreover, it is not as clear as Waldron thinks that fairness and justice are at two different levels, where the former is prior and trumping with respect to the latter. Since what is really fair is also controversial, why should we do without justice for the sake of fairness?

Second, Waldron's account falls prey of the same weakness that affects all other fairness-based justifications of democracy and that has been phrased by David Estlund. Not only is there not one unique fair way to take decisions, but also procedural fairness does not seem to suffice to provide a convincing justification of democracy. If we take fairness in its most basic interpretation as 'full anonymity', we can see how the fact that a procedure is blind to personal features is not enough to take it as justified. Or at least, when we try to justify democracy, procedural fairness is not all that matters, for otherwise we would be contented with a decision-making procedure by lottery or by the renown coin flip (Estlund 2008, 72-84). Therefore, in order to make sense of both deliberation and voting, we ought to make reference to substantive values, as procedural fairness won't get us far enough[16]. Epistemic

[16] I make explicit reference to deliberation and voting because these are the main features of current justifications of democracy, especially in its epistemic version. However, Estlund's argument also works with aggregative conception of democracy, insofar as they take decision-making procedures to be sensitive to people's beliefs and preferences. Insofar as these procedures ought to be responsive to individuals'

accounts of democracy have recently flourished with this precise aim to complete or replace fairness-based justification of democratic legitimacy by appealing to its epistemic quality (Cohen 1986, Goodin and List 2001, Estlund 2008, Peter 2008, Landemore 2013). Among them, Estlund's epistemic proceduralism is one of the most influential and the one that explicitly states the distinction between the outcome justification and outcome legitimacy. But why should we take the fact that collective decisions have been made democratically to be a sufficient reason to obey them even if they are wrong?

II

Once the distinction between outcome justification and outcome legitimacy is fixed, the focus switches to democratic procedures, and a proper theory of democracy ought to offer a workable and convincing justification of these procedures. To claim that democracy is fair, in the sense of being fully anonymous, would not do, because this would not grasp the distinctiveness of democracy with respect to lot or coin flip and because mere fairness does not appear as a good reason to obliterate outcome justification, especially when we are dealing with very wrong decisions[17]. There is something more to democracy, and the problem of its justification consists in giving good reasons to abide by democratic decisions, despite some of them might turn out to be wrong[18].

Let us take a step back, though. Once the focus is perspicuously set on the justification of procedures, to talk of proceduralism and procedural values can become quite confusing. As it is well known, normative theories that justify democracy are usually divided in two broad categories: instrumentalism and proceduralism. However, since both of them deal with procedures, as it is manifest so far, both accounts cannot but be 'procedural' in a way, as these are the objects they set up to

preference rankings, aggregative accounts make reference to procedure-independent standards for outcomes as well. See Estlund 2008, 72-76.

[17] Although I won't deal with such an issue, it is important to observe how this distinction between outcome legitimacy and outcome justification leaves open the problem of how to react when outcomes are too unjust. Different accounts of the justifying value of democratic procedures will propose different, albeit similar, accounts of the limits of democratic legitimacy and ought to be completed by theories that explain when and to what extent democratic decisions are not legitimate anymore and civil disobedience is justified.

[18] John A. Simmons would argue that any justification of democracy would not suffice to lend legitimacy to its outcomes, because said legitimacy can only rest on consent. He might have a point in holding that to say that that a political regime is just does not necessarily entail that it has a right to rule. However, this in turn does not mean that consent is the only ground of legitimacy either. See Simmons 1979, 1999.

justify. This must have been the thought behind Estlund's proposed taxonomy of different accounts of democracy, which basically consists in an opposition between 'impartial proceduralism', on the one hand, and 'epistemic theories', on the other (Estlund 2008, 102). But let us proceed with order. How can proceduralism be a meaningful account of justification for a procedure? Hoping to shed some light, I will now reframe the traditional distinction in a distinction between instrumentalism and '*intrinsicalism*'.

If Estlund's criticism of procedural fairness is sound, any acceptable justification of democracy ought to present a procedure-independent value or a set of values according to which democracy itself is justifiable as a morally permissible or best decision-making procedure in the market. Call this the procedure-independent criterion of justification. Instrumentalists do so by taking democracy to be a means to something else, which is the 'real value' they are after. It can be equality, as it is with Richard Arneson (2003), or it can be some moral virtue, which the democratic process allows citizens to realize through participation, with John Stuart Mill (1861). Be it its direct outcome or its by-product, still democratic procedure is taken to be the best way to achieve such result. However, democracy does so only in a contingent way: it is not the only possible way to achieve such result, although it can be the most effective one under nowadays contingent conditions. It is not that such justification is piecemeal, as Thomas Christiano claims[19], because we can consistently take it to be valid for all subjects and for all outcomes. In fact, any instrumentalist account, so long as it proposes a justification of democratic *procedures,* will confer legitimacy to all democratic outcomes. The point is that outcome legitimacy depends on the justification of democratic procedure according to an independent criterion that applies contingently and indirectly to the said procedure.

Let us take the famous Condorcet Jury Theorem as an example (Condorcet 1785)[20]. It says that if three conditions obtain, then the more people there will be for a certain option, the likelier it will be that the

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[19] Thomas Christiano proposes to draw a distinction between piecemeal and holistic justifications and states that instrumentalist justification will depend on the subject and on the class of decisions taken, thus being piecemeal, while proceduralist accounts are holistic, because they ground democratic authority in the same way for all citizens (Christiano 2006).

[20] For arguments in favor of and against the CJT as a good epistemic justification of democracy see: Grofman and Feld 1988, Estlund, et al. 1989, Goodin and List 2001, Goodin 2003, Estlund 2008.

option is right. The three conditions are: (1) that there is a binary choice, where one option is right and the other wrong; (2) that the average competence of voting population is better than random; (3) that people cast their vote independently from one another. If the second condition is not satisfied, then the mechanism reverses and the more people want option A, the likelier it will be that A is wrong. Although such a theorem is an instrumentalist justification of democracy, that draws its value from the substantive quality of its outcomes, it still qualifies democracy as *necessarily* getting the right results. What about the contingency? The point is that the Condorcet Jury Theorem takes democratic procedures to be justified only contingently, insofar as the underlying three conditions hold, and only as one possible way, among others, to get the right result.

Therefore, according to instrumentalism, it is not because the procedure has some quality in itself that its outcomes ought to be obeyed. Rather, the procedure is justified because it tends to produce *on average* outcomes that respect the procedure-independent criterion of justification. Given the distinction between outcome legitimacy and outcome justification, it is easy to see how instrumentalists can easily account for wrong decisions. In fact, it is both perfectly plausible and possible that certain democratic outcomes will be wrong. However, they will still retain their legitimacy, if democracy can be shown to produce on average correct results.

On the contrary, intrinsicalism conceives the relation between the independent criterion and democracy in a quite different way. In fact, the kind of values that justify democracy is achieved *necessarily* through that process. Hence, democratic procedures play a determinant role, as they represent a necessary condition for the realization of the justifying value, whose fulfillment cannot be obtained without democracy. It is still a procedure-independent criterion, because it is logically distinct from *actual* democratic procedures to which it refers. However, there are no other ways to realize the independent criterion without democracy being realized (e.g. Christiano 2008, Peter 2008). In a way, democracy may be said to embody such value and thus cannot be left aside if we want that value to become real. In this sense, intrinsicalist accounts are all those which take democratic procedures to be "constitutive of legitimacy" (Peter 2008, 64) in a way alien to instrumentalism. However, this does not depend on the fact that intrinsicalism avoids relying on a procedure-independent criterion (Peter 2008, 64), but only on the kind of necessary and direct connection that intrinsicalism devises between said criterion

and democracy itself[21]. On both accounts, democratic outcomes are legitimate even if they might be wrong. On intrinsicalist account, however, these outcomes retain their legitimacy although they might be *all* wrong, because the reason for democracy itself to be justified is independent from the kind of decisions it makes on average.

III

I think that the distinction between intrinsicalism and instrumentalism can help shed light on some confusions that happen to affect two main accounts of the so-called epistemic proceduralism and their related taxonomies: Fabienne Peter's and David Estlund's. I intend to argue, on the one hand, that while Estlund's account rightly distinguishes between justification and legitimacy of democratic decisions, it ends up misconceiving the opposition of intrinsicalism and instrumentalism. As a consequence, he disguises himself as a pure proceduralist when he in fact holds a mixed account. On the other hand, I argue that Peter neglects the distinction between outcome legitimacy and outcome justification, with the result of putting properly proceduralist accounts of democracy under the same category, as Estlund's[22], and accounts like Pettit's or Habermas's, which make outcome legitimacy rest (also) on outcome justification, rather than only on procedures.

According to Peter, while pure proceduralism draws on political equality[23], rational proceduralism makes reference to *both* political equality *and* the quality of democratic outcomes (Peter 2008, 67). Following Christiano (2004), Peter qualifies this latter account as dualistic, because it takes two dimensions of evaluation into consideration when justifying democracy: the process itself and the quality of its outcomes. This might seem very similar to the way I drew

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[21] As a consequence, any criticism against instrumentalism that pinpoints to its lack of respect for pluralism and disagreement because it fails to acknowledge such constitutive relation between democracy and legitimacy misfires. It is true that instrumentalism recognizes only an indirect and contingent connection between any justifying criterion and democracy, but once democracy is taken to be justified, then all its outcomes will be legitimate.

[22] I define Estlud's account properly proceduralist because he takes legitimacy to rest on the justification of procedures. However, since said justification happens to be both intrinsicalist and instrumental, his account qualifies as mixed or dualistic and not has purely procedural or simply intrinsicalist.

[23] Peter refers to political fairness and political equality as synonyms. Since Estlund's criticism of fairness, I take Peter to identify political fairness with a less procedural and more substantive account of political equality. See Peter 2008, 81-86.

the distinction between instrumentalism and intrinsicalism earlier on. However, Peter's category of rational proceduralism, in its aggregative, deliberative and epistemic forms, fails to acknowledge a very relevant distinction. Peter puts accounts that are mixed forms of intrinsicalism and instrumentalism under the same category, as Estlund's rational epistemic proceduralism, as she dubs it, and other accounts that are intrinsicalist with a specific requirement of rationality that applies to *every and each* outcomes (Pettit 2001)[24]. While Estlund preserves the distinction between outcome legitimacy and outcome justification, by making reference only to the justification of procedures (that lends in turn outcome legitimacy), Pettit intrinsically justifies democracy, but adds to it the justification of every democratic outcome in order to achieve their legitimacy. However, if we ought to obey to democratic decisions only when they are also justified, we end up pursuing the same mistaken strategy that we ruled out at the beginning.

A similar taxonomical problem affects Estlund's epistemic proceduralism, because of an even more blurred account of the distinction between outcomes and procedures. This happens despite the fact that Estlund manifestly recognizes the distinction between legitimacy and justification concerning outcomes. As he says, the question with legitimacy is to provide "moral reasons to comply, not epistemic reasons to believe" (Estlund 2008, 106) and any convincing justification of democracy ought to account for such a distinction if it wants to avoid the problem of deference (Estlund 2008, 102-104). This problem concerns all those epistemic theories that identify justification with legitimacy.

As we have seen, according to accounts supporting this identification, democratic decisions ought to be obeyed only insofar as they are justified. However, while Habermas's and Cohen's accounts refer to justification in the sense of consensus or public justifiability and refrain from truth or correctness, epistemic accounts take legitimacy to rely on correctness or truth. Thus, when deliberativists like Habermas and Cohen hold all and only justified decisions to be legitimate, they do not incur in the deference problem, because they do not claim that democracy tracks any truth of the matter and demands of us to change

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[24] While Habermas's and Cohen's accounts of justification are substantive, Pettit's is formal, as he takes justified outcomes to be ones that are consistent with the premises to which citizens have previously consented. To the extent that I employ justification in its very general meaning of conclusive reasons in favor, this distinction does not affect my argument.

our convictions according to its outcomes. However, if legitimacy of outcomes hinges on their being *correct*, there emerges the deference problem. When decisions are the product of actual democratic process and this is taken to produce only justified results, we not only ought to obey these decisions, but we also ought to take them as true. This means that we ought to acknowledge both justification and legitimacy of particular outcome and "surrender our moral judgment" to the superior epistemic capacity of democracy (Estlund 2008, 105).

The example Estlund offers for correctness theory is Rousseau's theory of the general will. Estlund reads Rousseau's general will as providing a procedure-independent criterion for the justification of democratic outcomes: "outcomes are legitimate when and because they are correct and not for any procedural reason" (Estlund 2008, 103). However, such reading simply collapses the distinction between the justification and the legitimacy of outcomes, while paying no heed to democratic procedure itself. In particular, it obliterates Rousseau's more complex account of the general will, as both procedural and substantive. If it is true that democratic decisions ought to be just, according to Rousseau, it is also true that they are not legitimate unless they are also the product of democratic process. In fact, neither correctly issued decisions that fail to respect the substantive criteria of the general will, i.e. Rousseau's famous 'will of all' (Rousseau 1763, 230), nor substantively correct decisions that fail to pass through people's "free votes" are legitimate (Rousseau 1763, 182). Hence, Rousseau's account of the justification of democracy can be thought of as both intrinsicalist and outcome-based, because it requires democratic decisions to be the issue of a justified procedure *and* also as substantively correct, quite similarly to Pettit's (see Peter 2008, 72).

On the other hand, Estlund's own epistemic proceduralism takes democratic procedures to be justified insofar as they are generally acceptable to the qualified and produce 'better-than-randomly' justified or correct outcomes. If it is true that he does not make reference to the epistemic quality of each and every outcome, as Pettit and Rousseau do, it is also true that his account is not purely intrinsicalist, for the epistemic capacity of democracy to produce better-than-random decisions matters to its justification. Thus, Estlund's account qualifies as dualistic, as it justifies democracy because of its intrinsic value, that is its qualified acceptability (Estlund 2008, 40-64), and because of its instrumental value in achieving on average correct results.

To conclude, it seems to me that the distinction proposed in this paper is not merely reconstructive, but fulfills a conceptually analytic role, as it helps to reformulate the opposition of instrumentalism and proceduralism while holding the focus over the justification of procedures. To be sure, it does not change the categorization of available accounts for the justification of democracy. Still, it offers four advantages.

First, it elucidates the difference, which is sometimes blurred, between the justification of particular outcomes and the justification of democracy. While the former is necessarily piecemeal if conducted irrespective of procedures that issued said outcomes, the latter is necessarily holistic, as it applies to the whole decision-making process. Moreover, even though instrumentalists still make reference to the quality of outcomes, they have to follow a similar scheme as the one of intrinsicalist accounts. Both of them take outcomes to be legitimate (although they can sometimes be unjustified) in virtue of democratic procedures that produce them. Where they differ is over the reasons to take these democratic procedures as justified and whether these hold contingently or necessarily.

Second, this paper means to reassess the goal that any justification of democratic procedures ought to set up for itself, by making reference to some independent, justifying criterion. Following Estlund, it is not neutrality over substantive values that qualifies democratic outcomes as legitimate. Rather, we ought to abide by these outcomes because there are conclusive reasons to take democracy itself as the decision-making process that realizes certain important values. The idea is that in case of conflict, these are to be preferred, *as long as actual democratic procedures really realize them*. While instrumentalism states that clearly, by justifying democracy only indirectly through the results it produces on average; intrinsicalism appears to focus only on procedures irrespective of the quality of outcomes. However, since democracy is intrinsically justified as long as it is necessary for the realization of a certain independent value, the possibility that some outcome of actual procedures is so contrary to that value to make it illegitimate is always open. In this way I read the constraints that are generally put over democracy not to undermine itself (e.g. Christiano 2008, Estlund 2008, Pettit 2012).

Third, I think that the distinction between the justification of outcomes and the justification of procedures also helps clarifying the relationship between legitimacy and justice. While some have taken

legitimacy to rely on justice (e.g. Christiano 2008), others have claimed that it is independent from justice (e.g. Pettit 2012). If we consider outcomes, certainly legitimacy does not hinge on their being right or just, as we have seen throughout this article. However, when procedures are at hand, justice might be a perfectly sound independent value through which to justify democracy. Thus, this analysis shows how democratic legitimacy has a complex relation to justice, which does not pertain to democratic decisions, but to the reasons that justify the democratic process.

Finally, once we shift the focus from outcomes to procedures, we see how Rousseau's problem of obeying political authority while "remaining free as before" has no proper solution (Estlund 2008, 111-112). If freedom amounts to a form of self-rule and requires us to do only what we see to be justified, the whole idea of political legitimacy seems problematic (Wolff 1970). To the extent that legitimacy tells us to do things we disagree with because of the way they have been decided, it inevitably conflicts with freedom as self-rule or autonomy[25]. However, to the extent that a proper justification, either instrumentalist or intrinsicalist, provides us with reasons to prefer the realization of its justifying value with respect to some wrongs democracy might produce, democratic decisions retain their legitimacy. In the end, it seems, it is up to each of us to strike the balance between democracy's capacity to realize a certain value, as political equality or epistemic quality, and its failures in such endeavor.

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[25] For an inquiry over the paradoxes of authority with respect to autonomy and rationality, see Shapiro 2012.

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