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AUTHORITY, DEMOCRACY, AND LEGISLATIVE INTENT

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ABSTRACT. On one account, courts ought to enforce legislative intent only when the public meaning of the text of the statute is unclear, and on another account, they should enforce the intent even when the public meaning is clear. In this paper, I argue against both approaches. My argument rests on considerations related to the moral authority of the democratically made law. More specifically, I argue that those considerations which make democratic law morally authoritative entail that judges ought to enforce the public meaning, when this is clear, and that interpretation of the public meaning which is closest to the balance of moral reasons, when the public meaning is unclear.

I. INTRODUCTION

Consider a judge that needs to apply democratically enacted statutes. There are two distinct and partially conflicting theses that are sometimes claimed that should guide the judge in the application of the statutes:

> OVERRIDING INTENT: The judge ought to treat as binding the relevant intention behind the statute, even when this intention dictates an outcome that is distinct from that dictated by the clear public meaning of the text of the statute.[1]
> CABINED INTENT: The judge ought to treat as binding the public meaning of the text of the statute when this meaning is clear, but she ought to treat the intention behind the statute as binding, when the public meaning is unclear.[2]

[1] For arguments that support this kind of position, see Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Durham: Duke University Press, 2001), chap. 5; Larry Alexander, 'All or Nothing at All? The Intentions of Authorities and the Authority of Intentions', in Andrei Marmor (ed.), *Law and Interpretation*, pp. 357–404; Larry Alexander and Emily Sherwin, 'Interpreting Rules: The Nature and Limits of Inchoate Intentions', in Goldsworthy and Campbell (eds.), *Legal Interpretation in Democratic States*, pp. 3–28; David Tan, 'Objective Intentionalism and Disagreement', *Legal Theory*, 27 (2021), pp. 316–351.

[2] For this position, see John Manning, 'Justice Ginsburg and the New Legal Process', *Harvard Law Review* 127, 1 (2013): 455–460.

By 'the public meaning of the text', I mean the assertive content of the text of the statute, and by that I mean the communicative content that the author of the text can reasonably be inferred by the relevant audience to have intended to convey (regardless of whether this is the content that they actually intended to convey).[3] By 'intention behind the statute' I mean the intention of the democratic majority enacts the statute. I want to allow, however, that the phrase may refer either to an intention to convey a meaning by means of the text of the statute, or to an intention to change the legal content, or to an intention that such and such effects in the application of the law occur,[4] or to an intention to convey (by means of the text of the statute) a change in the legal content,[5] or to the intention to convey (by means of the text) that such and such effects in the application of the law should occur, or to all the intentions listed above, or to any combination of the intentions listed above.

In this paper, I want to argue against both OVERRIDING INTENT and CABINED INTENT. The grounds of my case against these two theses will not consist in conceptual considerations about the nature of the law or of the language used in the statute. Rather, it will consist in considerations related to the *moral authority* of the

[3] For this understanding of public meaning, see Jeffrey Goldsworthy, 'Moderate versus Strong Intentionalism', *San Diego Law Review* 42 (2005), pp. 669–683; Goldsworthy, 'The Case for Originalism', in Grant Huscroft and Bradley Miller (eds.), *The Challenge of Originalism. Theories of Constitutional Interpretation* (New York: Cambridge University Press, 2011), pp. 42–69; See also Hrafn Asgeirsson, *The Nature and Value of Vagueness in Law* (Oxford: Hart Publishing, 2020), p. 128; Scott Soames, 'Toward a Theory of Legal Interpretation', *New York University Journal of Law and Liberty*, 6 (2011), pp. 231–259; Scott Soames, 'Deferentialism: A Post-Originalist Theory of Legal Interpretation, *Fordham Law Review*, 82 (2013), pp. 597–617; Scott Soames, 'Deferentialism, Living Originalism, and the Constitution', in Brian Slocum (ed.), *The Nature of Legal Interpretation* (Chicago: University of Chicago Press, 2017), pp. 218–240.

[4] Mark Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication', in Andrei Marmor and Scott Soames (eds.), *Philosophical Foundations of Language in Law* (Oxford: Oxford University Press, 2011), pp. 217–256, suggests that the relevant intent should be taken to be an intent to change the content of the law, but the example used to support this (*Saadeh v Farouki*) illustrates another intention, namely an intention regarding the effects of the application of the law.

[5] For the notion of an intention to convey by means of the text of statute a certain change in the legal content, see Andrei Marmor, *The Language of Law* (Oxford: Oxford University Press, 2014), pp. 12–17. For the distinction between intentions to change the legal content and intentions to *convey* (by means of the text of the statute) a change in the legal content, see Dale Smith, 'What is Statutory Purpose?', in LB Crawford, P Emerton, and D Smith (eds), *Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Oxford: Hart, 2019), pp. 13–38, at p. 26.

democratic law.[6] More specifically, I want to argue that the fact that the law is democratically made gives the judge a reason to enforce the law, where this reason is protected by a special sort of pre-emptive reason (which I will call a *non-invalidating preemptive reason*). The argument for what makes the democratic law *morally* able to give such a preemptive reason to the judge will indicate that what the judge is bound to enforce is the assertive content (the public meaning) of the statute, and not the intentions behind the statute. More specifically, my argument for democratic authority will show that (i) when the assertive content is clear, the judge is morally bound to enforce it, and (ii) when it is unclear, the judge is bound to select and enforce that interpretation which is closest to the balance of moral reasons.

This paper proceeds as follows. In Section II, I clarify the concepts of preemptive reason and authority on which the subsequent argument will build. On this basis, in Section III, I give an extended argument for why the democratically made law has moral authority. This argument will be a fairly long one – but its details will have crucial significance for how judges ought to apply democratic statutes. On the basis of this argument, I then show in Section IV why OVERRIDING INTENT and CABINED INTENT are false, why judges should treat the assertive content as binding, and why they should decide on the basis of the balance of moral reasons when the assertive content is unclear.

II. AUTHORITY AND PREEMPTIVE REASONS: SETTING THE STAGE

In this section, I aim to make preliminary clarifications of some of the central concepts on which the argument in the rest of the paper will build. I will firstly analyse the concept of pre-emptive reason, and then that of authority.

[6] In this respect, my argument is in that tradition of inquiry which seeks to determine how judges ought to apply the law on the basis of an account of the moral authority of democratic law. See especially Jeremy Waldron, 'Legislators' Intentions and Unintentional Legislation', in his *Law and Disagreement* (Oxford University Press, 1999), pp. 119–146; Heidi Hurd, *Moral Combat: The Dilemma of Legal Perspectivalism* (Cambridge University Press, 1999), chap. 6. And, more broadly, it is in a tradition that seeks to determine how judges ought to apply statutes on the basis of an account of the moral authority of the law (whether democratic or not). See, e.g., Alexander, 'All or Nothing at All?'; Andrei Marmor, *Interpretation and Legal Theory* (Oxford: Hart, 2005), chap. 8.

A. Preemptive Reasons

By pre-emptive reason I mean a reason that either renders irrelevant, or prevents someone to act upon, some other reason. That some other reason will be called a first-order reason. A pre-emptive reason is then a second-order reason.[7]

There are plausibly more types of preemptive reasons than those considered here, but for our purposes we can distinguish between two types.

Invalidating Preemptive Reason. This is a second-order reason excluding some first-order reason as the basis of a given decision. To take an example, in a competition between several applicants for a job, fairness can be considered as an invalidating pre-emptive reason. Fairness requires the panel assessing the applicants to exclude some first-order reasons *as grounds of* the decision that might have otherwise been relevant, such as the need of the competitor. The need is rendered morally irrelevant. At the bar of fairness, it is not valid as a reason.[8]

Non-invalidating Preemptive Reason. Unlike an invalidating preemptive reason, which preempts a first-order reason by making it irrelevant or invalid as the grounds for a decision, a non-invalidating preemptive reason preempts the decision, and with it the first-order reasons for the decision, but it does not invalidate the first-order reasons as grounds for that decision.

As an example, consider that among the rules on the basis of which a panel needs to assess competitors for a job is one which prohibits from consideration any individual who is related to a member of the panel. This rule could be considered to be morally justified on the grounds not of fairness itself, but of the publicity of fairness. Now, let us assume that the panel finds out, while assessing A's application, that A is related to one of the members of the panel. The rule gives the panel a non-invalidating preemptive reason not to

[7] The idea of analysing preemptive reasons in terms of second-order and first-order reasons comes from Raz. See Joseph Raz, *Practical Reasons and Norms* (Princeton: Princeton University Press, 1990), pp. 39–47. Raz refers to them as exclusionary. In *The Morality of Freedom*, however, he refers to them as preemptive. See *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 59–60. What I refer to as the invalidating and the non-invalidating reasons, however, are not identical with what Raz calls exclusionary reasons (see *infra*, fn. 11). But they have in common the fact that they can be analysed as second-order reasons.

[8] For this notion of pre-emptive reason, see N. P. Adams, 'In Defense of Exclusionary Reasons', *Philosophical Studies*, 178: 1 (2021), pp. 235–253, and Thomas Scanlon, *What We Owe To Each Other* (Cambridge, Mas.: Harvard University Press, 2000), pp. 51–52.

treat A on the basis of her merit. A's merit is a reason that still applies in the relevant sense – the value of fairness that is, *ex hypothesi*, the cardinal value guiding the panel's assessment does not exclude merit. Unlike need, for instance, merit is still a valid ground of any decision that the panel might take to select A. The 'no relatives' rule, however, prohibits the panel from taking this kind of decision, and thus, it preempts the reason for this decision that is given by A's merit. The rule, however, does not deny the validity of A's merit as a reason for this decision. A's merit would still be valid or relevant as a ground of the decision to select A, *if* the panel were to make such a (prohibited) decision.

It might be objected that the preemptive reason given by this rule is still an invalidating reason, because, it could be argued, it renders A's merit invalid as a reason for the possible decision to consider A's application in the first instance. But, even if A's merit is an invalid reason for *that* decision,[9] it is still true that, for all that the 'no relatives' rule says, A's merit is relevant or valid as a ground for another decision, namely the decision to select A for the job. And this aspect of the preemptive reason given by this rule – the fact that it does *not* render A's merit invalid *as the ground of* the decision to select A (if such a decision were to be made), while at the same time prohibiting this decision, and thus preempting a reason, namely A's merit, that (validly) supports this decision – is sufficient to distinguish it from that class of preemptive reasons which (like fairness) renders some reason (like need) invalid as a ground of the decision to select A.

Both the invalidating and the non-invalidating preemptive reasons are species of what Michael Moore would call 'justificatory' preemptive reasons: reasons that preempt the first-order reasons from determining 'the rightness of an action', where these preempted

[9] It is plausible that A's merit is not a valid reason for the decision to consider A in the first place, simply because – for reasons that are *in*dependent of the 'no relatives' rule – merit is not the right sort of reason for such a decision. What is relevant for such a decision is only whether the candidate has applied and whether his application conforms to the relevant procedures. Even if there were no 'no relatives' rule, merit would still not be the right sort of reason here.

reasons would have otherwise been relevant for determining the rightness of the action. (This notion is opposed to a 'motivational' one, on which preemptive reasons are concerned not with the rightness of actions as such, but rather with the motives it is morally appropriate for individuals to act – or rather, not act – upon.)[10,11]

An *invalidating* preemptive reason is a *justificatory* preemptive reason because it blocks a reason from determining the rightness of an action simply by rendering it irrelevant or invalid as a ground of engaging in that action.

By contrast, a *non-invalidating* preemptive reason is also a *justificatory* preemptive reason, but it is one of a different kind: it blocks a first-order reason from determining the rightness of an action not by rendering it invalid as a ground for that action, but by ignoring (rather than denying) its validity as a ground for that action – it makes the action impermissible, *despite* the fact that the first-order reason is a *valid ground for* that action.[12]

[10] Moore proposed the 'justificatory' and the 'motivational' notions as possible interpretations of Raz's notion of exclusionary reasons. See Michael Moore, 'Authority, Law, and Razian Reasons', in *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2000), pp. 150, 152–154. The distinction between justificatory and motivational preemptive reasons corresponds with Cullity's distinction between second-order determinative reasons and second-order response reasons. See Garrett Cullity, 'The Context-Undermining of Practical Reasons', *Ethics*, 124: 1 (2013), pp. 8–34, at pp. 12–13.

[11] By contrast, the exclusionary reasons on Raz's account (or, at least, under the account developed in the 'Postscript to the Second Edition' of *Practical Reasons and Norms*) are not justificatory, but rather *motivational*. On this account, exclusionary reasons are reasons not to act upon a first-order reason, or 'reasons for not being motivated in one's action by certain (valid) reasons'. They do not exclude the first-order reasons from one's deliberation as such, but merely dictate one not to take them as a basis for one's action. See Raz, *Practical Reasons and Norms*, p. 185. The plausibility of motivational exclusionary reasons is questioned by Daniel Whiting, 'Against Second-Order Reasons', *Noûs*, 51: 2 (2017), pp. 398–420.

[12] Ruth Chang, 'Comparativsm: The Grounds of Rational Choice', in Errol Lord and Barry Maguire, eds., *Weighing Reasons* (Oxford: Oxford University Press, 2016), pp. 213–240, at pp. 223–227, argues that what Raz takes as exclusionary reasons can be better explained as ordinary reasons not to be in a certain choice situation. The reasons that one has *in* a choice situation (*if* one were to be in that situation) are not preempted by the reasons that one has not to *be* in that choice situation, and that is simply because they represent reasons belonging to different circumstances. This seems plausible for some cases, but it is unclear how far it can be extended. In many cases, even if the preemptive reason is a reason not to be in a certain choice situation, it still seems to have a (preemptive) force *once* one is in that situation. For instance, the reason not to consider relatives could be represented as a reason not to be in a choice situation (e.g., the situation in which one assesses candidates) in which A's merit is a reason for selecting A. But once one is in that choice situation, it still makes sense to say that A being a relative is a reason that preempts selecting A, and consequently it is a reason that preempts A's merit as a reason for selecting A (even if it does not render A's merit invalid as a ground of selecting A).

B. Authority

Judges and law-enforcers have a legal obligation to apply the law. However, in the absence of further premises about the moral authority of the law, we cannot infer from their legal obligations anything about what they have moral reasons to do, or anything about the moral status that the law should have for them – why should they, for instance, treat an imperfectly just law as binding if they can simply enforce what justice requires? The task of this paper will be (in part) to see whether the law has moral authority over judges and law-enforcers, and thus whether they are bound to enforce an imperfectly just statute rather than what full justice itself requires.

In this paper, I will use the notion of the (moral) *authority* of the law to refer to the moral standing or status that the law has when it provides to judges and law-enforcers a first-order reason to apply the law that is protected by a non-invalidating preemptive reason. I will call this a *non-invalidating protected reason*.[13] A non-invalidating protected reason is a first-order reason to apply the law which is coupled with a non-invalidating preemptive reason that makes it morally inappropriate for the judge to act on the basis of reasons that conflict with the requirements of the first-order reason (the law), where these conflicting reasons remain nonetheless morally relevant. In the following section, I will argue that law gives non-invalidating protected reasons – and thereby qualifies as morally authoritative – in virtue of its being (if it is) *democratically* made.

Before that, however, a clarification is in order. The claim that the law gives a non-invalidating protected reason does not presuppose the claim that there is some relevant *moral power*, which, by giving the law, thereby gives a non-invalidating protected reason, in a way that would be analogous with exercises of moral powers in

[13] In the Razian framework, a protected reason is a first-order reason that is coupled with an exclusionary reason that excludes acting upon reasons that conflict with the first-order reason. See Raz, *Practical Reasons and Norms*, p. 77; *The Morality of Freedom*, p. 60; John Gardner and Timothy Macklem, 'Reasons', in Jules Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), pp. 440–475, at p. 465.

promising, where the promisor, by the very act of promising, *intentionally* creates new moral facts (such as obligations and rights).[14] We do not need to claim that the relevant law-makers intentionally seek to give non-invalidating protected reasons (or have the right sort of intentions that are necessary for them to qualify as exercising a moral power) *as a prerequisite of* being able to claim that the law gives (if it gives) non-invalidating protected reasons. My argument below that the democratic character of the law gives the judge (or any other law-enforcer) a non-invalidating protected reason works regardless of whether the lawmakers have the sort of intentions that would qualify their law-making as an exercise of a moral power.[15]

Relatedly, note that the thesis that law gives non-invalidating protected reasons does not presuppose or entail (even if it is compatible with) the thesis that the law, as a conceptual matter, claims for itself the fact that it gives non-invalidating protected reasons (as is the case, by analogy, with Raz's account, on which the demonstration that law gives preemptive reason – albeit of an arguably different kind than those we are concerned with in this paper – involves a stage where it is shown that, conceptually, law *claims* to give preemptive reasons, and then a stage where it is shown that such a claim is actually satisfied in some conditions).[16] Regardless of whether law, as a conceptual matter, makes the claim that it gives non-invalidating protected reasons, the thesis that the law gives non-invalidating protected reasons – which is a claim about what is morally the case – is still independently intelligible.

[14] For views that identify authority with moral power, see David Enoch, 'Authority and Reason-Giving', *Philosophy and Phenomenological Research*, 39: 2 (2014), pp. 296–332; William Edmundson, 'Political Authority, Moral Powers, and the Intrinsic Value of Obedience', *Oxford Journal of Legal Studies*, 30: 1 (2010), pp. 179–191; Stephen Perry, 'Political Authority and Political Obligation', in John Gardner, Leslie Green, and Brian Leiter (eds.), *Oxford Studies in Philosophy of Law*, vol. 2 (New York: Oxford University Press, 2013), pp. 1–74. These views characterise the intentions that are necessary for moral power in different ways.

[15] In this regard, my argument will assume a basic 'triggering model', on which the non-invalidating protected reason simply results from a fact (namely, the law being democratic) triggering a pre-existent reason. For triggering reason-giving, see Enoch, 'Authority and Reason-Giving'.

[16] See Raz, *The Morality of Freedom*, chapters 2, 3, and 4. This methodology is also shared by William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge University Press, 1998), even if Edmundson proposes another understanding of authority.

III. THE AUTHORITY OF DEMOCRATIC LAW

In this section, I will argue in favour of the claim that the law gives the judge a non-invalidating preemptive reason not to modify the law, because, and to the extent that, the law is democratically made.[17]

The argument for this claim will run as follows: firstly, I will identify what I will call the Wrong of Neglecting Fallibility; secondly, I will argue that avoiding this kind of wrong requires employing democratic procedures; and thirdly, I will argue that the reason the judge has for avoiding the Wrong of Neglecting Fallibility implies that she has a reason to treat the democratically made law as giving her a non-invalidating preemptive reason. Let us take these things in turn.

[17] Daniel Viehoff argues that the considerations of relational equality imply that laws based on democratic procedures give preemptive reasons to individuals to exclude from consideration reasons to shape the coordinative schemes on the basis of justice. See Daniel Viehoff, 'Democratic Equality and Political Authority', *Philosophy and Public Affairs*, 42: 4 (2014), pp. 338–375. The problem with this argument is that justice itself acts as a preemptive reason. The usual claim, for instance, that Lady Justice is blind to any considerations unrelated to justice seems to support an interpretation of justice under which justice requires individuals to exclude from consideration any countervailing reasons. Of course, Viehoff may be correct that relational egalitarian considerations act as a preemptive reason against considerations of justice. But the problem is that those reasons of justice which they seek to preempt are not your usual first-order reasons, but second-order exclusionary reasons in their own right. On Raz's account, when two competing exclusionary reasons conflict, the question of whether exclusionary reason R1 excludes exclusionary reason R2, or vice versa, turns on which of these reasons is stronger and which is able to outweigh the other. See Raz, *Practical Reasons and Norms*, p. 40. If this is so, however, then the question of whether relational egalitarian considerations are able to *preempt* considerations of justice turns on the question of whether they are actually able to *outweigh* in strength considerations of justice. This suggests a balancing of competing moral considerations that falls short of fully vindicating authority as preemptive reason-giving. Christiano's argument for democratic authority also fails to vindicate the preemptive aspect of authority. According to Christiano, the democratic legislature has a moral right to rule which is grounded in the citizens' duty to treat each other on the basis of justice. Such a duty requires obeying democratic procedures because it is only on the basis of such procedures that publicity of justice (which for Christiano means publicity of equality) can be secured, and because publicity of justice is a component of justice itself. See Thomas Christiano, *The Constitution of Equality* (Oxford University Press, 2008). The problem is that, even assuming that democratic procedures ensure publicity of justice, it is not clear why the publicity component of justice is able to preempt acting on what the substantive component of justice requires. It might be the case that publicity overrides in some cases considerations of substantive justice, but this at most shows that the question of obeying democratic decisions is one that relies on balancing different moral considerations. For a similar argument, see Zofia Stemplowska and Adam Swift, 'Dethroning Democratic Legitimacy', *Oxford Studies in Political Philosophy*, vol. 4 (Oxford: Oxford University Press, 2018), pp. 3–27, at pp. 18–19.

A. The Wrong of Neglecting Fallibility

Suppose that the existing law coordinates everyone on a coordinative scheme S, but that someone with the relevant power to coordinate people on schemes – let us call this person A – could make use of coercion to replace S with S*. Let us suppose in addition that both S and S* are eligible schemes, in the sense that having either of them is better from the standpoint of conformity with the relevant reasons (e.g., justice, fairness, relational equality, the maximization of welfare, etc.) than not having either. Let us suppose, however, that S* is closer to the balance of reasons – i.e., to the truth about what these general reasons require in specific circumstances, and what is the morally best way to weigh them against each other in those circumstances.[18] In forcing S* on everybody, A seems to be acting on the basis of what reason (the balance of reasons) requires.[19]

Given the difficulties and complexities of moral reasoning, however, there is a sense in which A's action is wrong. Getting the balance of reasons right is a very complex exercise. Even if A is a very good moral reasoner, it still remains the case that she is fallible. Thus, when A imposes S* on everybody, there is a sense in which we could say that she thereby exhibits a wrongful disposition because

[18] In this paper, I assume something like the framework argued for in G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass.: Harvard University Press, 2008), chap. 6 and 7: there are conflicting values (and reasons) and the laws (the rules of regulation) administer these values (and reasons) by trading them off against each other in one way or another.

[19] Note that I am assuming that what makes S* closer to the balance of reasons includes everything about that scheme and its implementation that is morally relevant. That includes the costs of bringing S* about or the costs of replacing S with S*. Even if S* is, for instance, all else being equal, more just than S, it might be that replacing S with S* is so disruptive in upsetting the expectations already given by S that, on balance, the moral costs of upsetting the expectations outweigh the moral benefits obtained by the improved justice of S*. In that case, S* would not be closer to the balance of reasons.

she acts on the basis of a judgment that could be mistaken.[20] Note that the claim is not that the coordinator wrongs them by instituting a *right* scheme (if S* is actually a morally right scheme). There is no wrong there. The wrong I am interested in here is a *distinct* kind of wrong. It consists in the fact that, in imposing a law or a coordinative scheme on people (whether that scheme is right or wrong), A displays a *wrong kind of disposition*: in imposing the scheme, A imposes a scheme that *could* have been wrong, and for all that A is warranted to

[20] The moral disagreement (especially on complicated issues such as getting the balance of reasons rights) is evidence that A could be mistaken. David Christensem, 'Epistemology and Disagreement: The Good News', *Philosophical Review*, 116: 2 (2007), pp. 187–217, argues that the proper response to peer disagreement is to lessen one's confidence in a belief. See also William MacAskill, Krister Bykvist, and Toby Ord, *Moral Uncertainty* (Oxford: Oxford University Press, 2020), pp. 12–14. By contrast, David Enoch, 'Not Just a Truthometer: Taking Oneself Seriously (but not Too Seriously) in Cases of Peer Disagreement', *Mind*, 119 (2010), pp. 953–997, argues that, even though in some cases, the peer disagreement is an evidence for you that you are no longer justified in being as confident in a given proposition p as you were, in other cases, it is an evidence for you that entitles you (epistemically) to no longer treat the person you disagree with as an epistemic peer – and this is so, even if the other person is *symmetrically* justified to no longer treat you as a peer. This symmetry occurs because, given that none of you can escape your own beliefs, what it is justified for each of you to think on a given occasion is relative to your own more general beliefs (including beliefs about what makes the other a peer), and from this *first-person perspective*, each of you may be justified in thinking that the other got things wrong, and justified in confidently holding onto your own views.Now, I do not need to claim that moral disagreement makes it unjustifiable for A to continue to confidently believe a given moral proposition p. The only thing that I need to suggest is that, when we get outside what A is justified in thinking from within her first-person perspective, and adopt a sort of *impartial standpoint*, from which we can see that other individuals (who are justified – from within their own first-person perspective – to believe that non-p) disagree with A, but from which we still do not have access to the truth to judge who is correct in the dispute (in this regard, this kind of impartial standpoint is not a full-blown God's point of view), we can see – from within this special kind of impartial standpoint – that the warrant that A has for her belief is not so strong as to make the case that her belief could not be wrong.This special kind of impartial perspective is the one that is *morally* relevant in the context of our discussion (regardless of its epistemic relevance, as such). It is intuitively plausible that, if asked by B why she imposed what she took to be what true moral reason requires over B, A could respond by pointing to the fact that she was justified – by her first-person perspective – in thinking that that which she imposed is what true moral reason requires. It seems appropriate in this context for B to respond, 'Even if you are justified – by your own first-perspective – in thinking that that is what true moral reason requires, you should have paid attention to the fact that I am also justified (by my own first-person perspective) in thinking that what you imposed was not what true moral reason requires. You should have paid attention to this *not* for purposes of establishing what you should *believe*, but rather for purposes of establishing how you should *treat* me. And you should have paid attention to this, not because my views needed to be somehow respected by you, but because the fact that I *justifiably* disagree with you is evidence that, standing outside your own first-person perspective, you could be wrong'. (For an argument that in situations of potential risk imposition, the moral stakes either increase the standards for what counts as knowledge, or, if not, the moral standards for action simply diverge from the epistemic standards, see Alexander Guerrero, 'Don't Know, Don't Kill: Moral Ignorance, Culpability, and Caution', *Philosophical Studies*, 136: 1 (2007), pp. 59–97, at pp. 68–70.)

know (given the fact of her fallibility), which could *be* wrong.[21,22] Call this the Wrong of Neglecting Fallibility (WNF).

The WNF is a wrong of failing to satisfy a particular kind of interest. Individuals have an interest in being treated according to what reason, or in this case, the balance of reasons, truly requires. Note that the interest in being treated on the basis of true reason can be seen as having what we might call a 'dispositional component'. The dispositional component makes it the case that the interest in being treated on the basis of what true reason requires is more than an interest that others act in ways that happen to coincide with what true reason requires. For instance, if A has a reckless or a negligent conduct, which poses a risk of harm to B, and if she fails to harm B only by accident, there is a sense in which A will have failed to satisfy B's interest in being treated according to what reason requires. A satisfies this interest only if she has a disposition such that, across a range of relevant actual and possible situations, she will not have harmed B.[23]

The reason (that on the basis of which B has an interest that A treat him) that features in this example is a general reason to make sure that one's actions do not unjustifiably result in harming individuals. But the same point must apply *mutatis mutandis* to cases in which the reason (that on the basis of which B has an interest that A treat him) is a reason to make sure or guarantee that the laws or schemes that one imposes are morally right (or get the balance of reasons right). In this regard, B's interest that A treat him on the basis of what the balance of reasons requires is not simply an interest that A act in a way that happens to coincide with what the balance of

[21] If you think that in many cases moral disagreement does not make it epistemically appropriate to lower one's credence in a moral belief, then the claim that 'for all that A is warranted to know, she could be wrong' should not be read to suggest that A is not warranted or justified in believing that a certain proposition p, *in the sense* that there is no truth that makes her belief justified (on an externalist view of justification). Nor should it be read to suggest that, *from within her own first-person perspective*, it is not justified for A to believe that p. It could simply be read to suggest that, from the perspective of the impartial standpoint described in fn. 20, A could be wrong.

[22] For a more general defence of the claim that there are two parallel normative standards of assessment in cases of moral uncertainty, see Andrew Sepielli, 'Subjective and Objective Reasons', in Daniel Star, ed., *The Oxford Handbook of Reasons and Normativity* (Oxford: Oxford University Press, 2018), pp. 784–799.

[23] It might be the case that what accounts for this requirement is the fact that there is value in a good being provided robustly or in a way that is invariant across relevant actual and counterfactual situations. For such a view, see Philip Pettit, *The Robust Demands of the Good* (Oxford University Press, 2015), pp. 107–111, 120–137. In addition, Pettit, 'Justice: Social and Political', *Oxford Studies in Political Philosophy*, vol. 1 (Oxford University Press, 2015), pp. 8–35, at p. 25, argues that individuals' claims of justice should be understood in a similar way, as claims that need to be satisfied robustly (though he connects this point with an argument for democracy in a distinct way than I will do in this paper).

reasons requires.[24] Rather, it is an interest that, when imposing coordinative schemes, A be disposed such that, across a range of relevant actual and possible situations, A treats B on the basis of what the balance of reasons requires.[25]

Now, if A neglects her fallibility in ascertaining what the balance of reasons requires and imposes on everyone a scheme that she thinks is supported by that balance, she fails to have the proper kind of disposition: she fails to be disposed in a way that guarantees that, across a range of actual and possible situations, A treats B on the basis of what the balance of reasons requires. Even if it happens that she is right on scheme S*, the disposition with which she imposes S* ('S* should be the new coordinative scheme because S* is, according to my judgment, supported by the balance of reasons') is not the appropriate sort of disposition: given her fallibility on the matter, her judgment could have been wrong, and therefore her disposition to impose a scheme on the basis of what she takes to be the balance of reasons could have resulted in her imposing a scheme that was not supported by such a balance. Thus, her disposition does not guarantee that across a relevant range of actual and possible situations, the balance of reasons is instantiated.[26]

[24] The claim that A only *happens* to act on what true reason requires is not the claim that, either from her own perspective or from God's own point of view, the grounds on, and/or the method by, which she came to truth were not reliable. Rather, it is simply the claim that, if we take the kind of *impartial perspective* described in fn. 20, from which we step outside what A is justified, from her own first-person perspective, to believe, and from which we have no Godly access to external truth, there is no warrant to believe that her relevant belief could not be wrong, and no warrant to believe that the grounds on, or the method by, which she came to believe what she takes to be the truth could not be unjustified or unreliable. In other words, the claim that A only happens to act to act on what true reason requires is the claim that she acts upon 'not fully justified true belief', where the label 'true' is the description of her belief from God's point of view, and the label 'not fully justified' is the description of her belief from the *impartial perspective* described in fn. 20.

[25] It could be objected that I am mistaking what sorts of dispositions are appropriate. It could be argued that what matters is simply the fact that A has the *intention* that B be treated on the basis of reason, and the scheme that she imposes is a conscientious application of a laudable intention. I do not need to deny that such an intention might make a moral difference. But it seems implausible that it exhausts by itself all that is morally relevant. Consider a reckless or negligent imposition of risk. An individual who practices medicine without being sufficiently knowledgeable, thereby posing a high risk of harm, for instance, might have praiseworthy intentions, but he acts on the basis of a wrongful disposition, which does not ensure that across a relevant range of actual and possible situations, he does not harm the patient.

[26] For similar arguments that there is a wrong of moral recklessness, that consists in acting upon moral beliefs in which one is uncertain, or in which one should be uncertain, see Guerrero, 'Don't Know, Don't Kill'; MacAskill, Bykvist, and Ord, *Moral Uncertainty*, pp. 16–38; Andrew Sepielli, 'How Moral Uncertaintism Can Be Both True and Interesting', in Marc Timmons, ed., *Oxford Studies in Normative Ethics*, vol. 7 (Oxford: Oxford University Press, 2017), pp. 98–116; Claire Field, 'Recklessness and Uncertainty: Jackson Cases and Merely Apparent Asymmetry', *Journal of Moral Philosophy*, 16: 4 (2019), pp. 391–413.

Note that the WNF is what we might call a wrong of standing – it matters whether a good is provided by A to B across actual and possible situations partly because this indicates what kind of *standing* B has *for* A – it indicates whether B has such a moral standing for A that A can recognise that he warrants being treated on the basis of what true reason requires.

Note in addition that I want to allow that either one of these two possibilities is true: the WNF is not applicable when the degree of fallibility is small, or it is applicable, but it has a very low stringency (such that it is for practical purposes virtually insignificant). I take the degree of fallibility to be small not only in the case of (many, if not all) scientific judgments, but also in the case of many moral judgments (such as the judgment 'slavery is unjust'). However, the degree of fallibility is significantly higher in the case of judgments regarding the balance of reasons, in part because specifying the exact point (or range of points) at which a reason (or a value) should be traded off for another competing reason (or value) is a much more complex task. The disagreement between (equally morally competent) individuals on such matters is evidence of this.

The argument below that the law produced by democratic procedures has authority will be limited only to those issues over which there is a *high* degree of moral fallibility.

B. Why the Democratic Procedures are Special

Before I get to the argument for the authority of the democratic law, however, one more step is necessary: I need first to argue that democratic procedures are special, in the sense that the laws imposed by such procedures avoid the WNF.[27] I will argue for this in this subsection. This argument, then, will enable me to show, in the following sub-section, why democratic law has authority.

[27] Niko Kolodny, 'Rule Over None I: What Justifies Democracy?', *Philosophy and Public Affairs* 42: 3 (2014), pp. 200–204, argues that strategies to justify democratic procedures on the basis of considerations related to individuals' 'substantive interests', such as interests in justice, do not succeed. However, he does not consider – as I do here – that the relevant substantive interests are not merely interests that justice or reason be instantiated, but they are actually interests in being treated on the basis of a disposition that guarantees that justice (and reason more generally) is instantiated across a range of relevant actual and possible situations.

By democratic procedure I mean a law-making procedure that assigns equal weights to all relevant individuals' judgments about what the law should be.

My argument (in this sub-section) for the claim that laws imposed by democratic procedures avoid the WNF comes in two stages. First, I argue that a individuals that participate in a law-making procedure that satisfies what I will call the No-Imposition Constraint avoid the WNF. The No-Imposition Constraint restricts the category of eligible law-making procedures. A democratic procedure is one of those procedures, but it is not the only one. Second, I argue that the democratic procedure is special in that it satisfies the No-Imposition Constraint without at the same time giving rise to what I will call a second-order WNF.

Stage One: *The No-Imposition Constraint*. Let us assume that the law reflects or can be traced back to a least a judgment of at least one individual (whatever this judgment is, and whoever this individual is). A law placing a ceiling on the interest rate charged by investment banks, for instance, must be traced back (in whatever way) to some judgment of some individual; that judgment could be something like 'there should be such a law', or 'it would be it good if that were the law', etc. I take this assumption to be uncontroversial for positive law.

With this assumption in mind, I want to argue that one way in which individuals avoid wrongfully imposing laws on each other (in the sense of the WNF) is by participating in a law-making procedure which is such that, even if A's judgment plays a role in determining what the law is, we can still say that A does not impose her judgment – or the content of her judgment – into law.[28] A procedure of this kind satisfies what I want to call *The No-Imposition Constraint*. Before proceeding to investigate this condition more closely, a clarification is in order. I do not take the Non-Imposition Constraint as a con-

[28] Joseph Raz, 'Disagreement in Politics', *American Journal of Jurisprudence*, 43: 1 (1998), pp. 27–28; David Enoch, 'Against Public Reason', in David Sobel, Peter Vallentyne, and Steven Wall, eds., *Oxford Studies in Political Philosophy*, vol. 1 (Oxford University Press, 2015), pp. 131–133; and Daniel Viehoff, 'Democratic Equality and Political Authority', pp. 344–345, have argued, in distinct contexts, for the importance of this distinction: while the imposition of one's judgment in virtue of its being one's judgment is wrong, the imposition of what one judges to be right, in virtue of its being right (as judged by one) is not similarly wrong. In our context, however, this distinction is not so important. If A imposes on B that which she judges to be right, in virtue of its being right (as judged by her), her imposition is still wrongful in the sense of the WNF. Therefore, B's interest in being treated on the basis of true reason requires that, if there is to be a law that reflects that which A judges to be right, that must come about by a route other than A's imposing *that* which she judges to be right.

dition, either necessary or sufficient, for avoiding the WNF *tout court*. It might be that what is needed for avoiding the WNF *tout court* is to reduce one's confidence in one's moral judgments and to act upon some decision procedure that reflects this lowered confidence.[29] I want to remain agnostic on this issue. The only, and more modest claim, that I wish to make, is that *The No-Imposition Constraint* is only a sufficient condition for avoiding the WNF in *that* way that still allows one's moral judgment to be an input into the law-making procedure, even when one does not lower one's confidence in that judgment (as, *ex hypothesi*, it would have been appropriate to do, given one's fallibility). I take this constraint to be more appropriate for real-life democratic procedures. In such procedures, individuals who input their judgments do not necessarily input a judgment that reflects what they think it would be appropriate in conditions of moral uncertainty. In such conditions, I want to argue, there is a way in which the WNF can still be avoided, provided the law-making procedure satisfies the No-Imposition Constraint.

The No-Imposition Constraint requires that, if an individual's judgment is to play a role in determining what the law is (such that the law in question would end up reflecting that individual's judgment or the content of her judgment), then it should *not* play that role *by way* of that individual *imposing* the (content of his) judgment on others. If the law is imposed by a procedure that satisfies the No-Imposition Constraint, then the individuals whose judgments would end up being reflected into law will not commit the Wrong of Neglecting Fallibility – and this is because those individuals' judgments play a role in determining the content of the law in a way that does not involve those individuals imposing (the content of) those judgments on others.

To see an example of a procedure that satisfies the No-Imposition Constraint, consider an arbitration procedure. A and B submit their dispute over what the law should be to an arbitrator, who assesses the cogency of A's and B's respective judgments regarding the bal-

[29] This procedure might be one that selects that option which maximizes expected moral choiceworthiness (i.e., the sum of choiceworthiness scores given by the competing moral theories, multiplied by the probability of those theories being correct), or that option that obtains the highest credence-weighted Borda score (i.e., the Borda score assigned to an option by a moral theory multiplied by the probability of that theory being correct) (MacAskill, Bykvist, and Ord, *Moral Uncertainty*, chaps. 2, 3), or that option that is supported by the class of structurally similar theories that has the highest probability (Christian Tarsney, 'Vive la Différence? Structural Diversity as a Challenge for Metanormative Theories', *Ethics*, 131: 2 (2021), pp. 151–182), or some other procedure.

ance of reasons. Let us refer to A's and B's respective judgments about the balance of reasons as judgments X and Y, respectively. Now, if the arbitrator gives a verdict on the basis of the weight she thinks those judgments deserve, and if the arbitrator happens to think A's judgment X is the correct one, and gives a corresponding verdict, then we cannot say that A imposes (the content of) her judgment X on B, and *a fortiori*, we cannot say that she imposes (the content of) her judgment on B in a way that is wrongful (in the sense of the Wrong of Neglecting Fallibility). This arbitration procedure satisfies the No-Imposition Constraint. The law reflects, or can be traced back, to A's judgment, but it is not itself the result of A's having imposed her judgment X – or the content of her judgment X – over B. Rather, A's judgment X plays a role in what law there ultimately is (such that the law can be said to reflect that judgment) by way of its being recognised as correct or true by the arbitrator, who in turn made (the content of) that judgment into law.

Crucially, the arbitrator does not act as an agent of A. If the arbitrator were merely an agent of A, then we could have seen in the arbitrator's decision A's own imposition of (the content of) her judgment X. In that case, the arbitration procedure could have been analysed under what we might call an 'agent-principal' model: the arbitrator (*qua* agent of A) would have been responsive to A's intention to *impose* (the content of) judgment X on B. Then the arbitrator would simply act upon this intention; the arbitrator would impose A's judgment X on B, and they would do so *in virtue of* A's intention to *impose* (the content of) judgment X on B. Thus, on the 'agent-principal' model, the arbitrator (acting as an agent of A) would be responsive to A's intentions regarding the *imposition of* judgment X, such that, by being so responsive, the arbitrator would need to *impose* judgment X on B.

However, the agent-principal model is inappropriate as a model for the arbitration procedure, and this is because, according to what is paradigmatically the case for an arbitrator, if the arbitrator were to impose A's judgment X on B, they would not do so in virtue of A's having intentions regarding the *imposition of* judgment X. The arbitrator is tasked only with judging whether A's judgment X is closer to the truth about the balance of reasons than B's judgment Y is. From the perspective of the truth about the balance of reasons, A's

intention to impose her judgment on B is irrelevant. The arbitrator's decision to impose judgment X is based solely on the fact that the arbitrator thinks this judgment closer to the truth.

Because the arbitration procedure cannot be analysed on an agent-principal model, the arbitrator's imposition of a law cannot be read as being A's imposition of her own judgment into law. For this reason, the arbitration procedure satisfies the No-Imposition Constraint: the law imposed by the arbitration procedure reflects A's judgment, but the judgment comes to be reflected into law in a way that does not involve *A*'s imposing that judgment into law.[30]

We can say the same about a democratic procedure, such as a majoritarian decision-making procedure. The picture of democratic procedures that we need to have for satisfying the No-Imposition Constraint is something like this: the judgments of the individuals constituting the majority play a role in determining what the law is, but they do so not by way of the majority's imposing their judgments – or the content of their judgments – over the minority.

For instance, consider the relevant democratic procedure to be that a text will become law if it is approved by a majority. Now, we can distinguish between: (i) A's *judgment* 'this text should be law' (where A makes this judgment because this text – if enacted into law – comes closer to the balance of reasons than not having this text enacted into law); and (ii) A's *intention* to impose over others her judgment 'this text should be the law' or the content of this judgment, namely the text itself.

What is characteristic of democratic procedures, or at least what is normatively significant (for purposes of satisfying the No-Imposition Constraint) is – on the picture laid out here – the fact that they are responsive to, or give weight to, (i) rather than to (ii). If A happens to be committed to both (i) and (ii), then a democratic procedure – in order to satisfy the No-Imposition Constraint – needs

[30] It could be argued that the agent-principal model is misguided, because intentions should not be relevant for determining whether A imposes the (content of) her fallible judgment, since this would imply that whether she commits a WNF depends on what intentions she has, and it is unclear whether it is A's having such and such intention that makes WNF a wrong in the first place. This objection, however, rests on a confusion. On the agent-principal model, intentions are relevant for helping us in identifying 'impositions' – but their role in this task is consistent with those impositions not being wrongful *in virtue of* the imposer's intentions, but rather in virtue of some other features. The intention would be then a necessary condition for the *existence* of the WNF, but not an explanation of the *wrongfulness* of the WNF. (By analogy, a printing press may be a necessary condition for the existence of an aesthetically valuable novel, but not also a necessary condition for, or an explanation of, the aesthetic value of the novel.)

to be responsive to, or to give a weight to, only (i), and to make abstraction of (ii). In this vein, the democratic procedure needs to determine whether this text is the law not by determining whether there is a majority of individuals who *intend* that (the content of) their judgment 'this text should be the law' be imposed over others, but rather simply by determining whether there is a majority of individuals who hold the judgment 'this text should be the law'.

Now note that if A judges 'this text should be law', she need not, by the mere holding of such a judgment, intend that (the content of) her judgment 'this text should be the law' be imposed over others.[31] If therefore the democratic procedure gives a weight to A's judgment ['this text should be the law'], as well as to C's and D's similar judgments (who together form a majority) and its giving A's, C's, and D's judgments these weights results in the imposition of a law reflecting their judgment (because all three hold the same judgment), this does not imply that the procedure gives effect to A's, C's, and D's intention to impose (the content of) their own judgment.

If the democratic procedure were to be responsive to the majority's intention to impose (the content of) their judgment, it would have been plausible to claim that the democratic procedure acts as an agent for the majority, and that A, C, and D impose their judgment via the democratic procedures. The democratic procedure would have conformed to an agent-principal model: the democratic procedure would have imposed a law *in virtue of* the majority's intentions regarding the *imposition of* their own judgment. However, the claim that I want to make is that the democratic procedure should not be understood on the agent-principal model if it is to satisfy the No-Imposition Constraint. On the picture of democratic procedure that we need (for satisfying the No-Imposition Constraint), when the democratic procedure imposes a law, it does *not* do so in virtue of the majority's intentions regarding the *imposition* of (the content of) their own judgments. The democratic procedure (on this normative model) is not responsive to such intention. Instead, the democratic procedure imposes the law only in virtue of its being responsive to the judgment 'this text should be the law'.

[31] It could be argued that it is possible to infer the latter kind of intention or judgment from the former kind of judgment, if we assume that there is a premise in the background stating that judging 'this text should be the law' commits one to intending or judging that the first judgment ('this text should be the law') be imposed over others. However, the picture of democratic procedures laid out here assumes that there is no such valid premise in the background.

Now, it is true that, if the majority had not held the judgment 'this text should be the law', the democratic procedure would not have imposed that text. But from this it does not follow that the majority imposed the judgment 'this text should be the law' or the text itself (that which their judgment was about). It was the democratic procedure which did that. This is simply because, as we have seen above, the democratic procedure (or that sort of democratic procedure that is needed to satisfy the No-Imposition Constraint) does not conform to an agent-principal model.

By analogy, in the arbitration case, it may be true that if A had not held judgment X, the arbitrator would not have imposed the content of the judgment X on B (if the arbitrator simply imposes the judgment of the party who is closer to truth, then if some party had held a judgment that would have been even closer to truth than judgment X, the arbitrator would have imposed that judgment). But from this it does not follow that A imposed her judgment X on B. It was the arbitrator who did that. This is simply because the arbitration procedure does not conform to an agent-principal model.[32]

Note that this picture of democratic procedures (which we need if we are to have a democratic procedure that satisfies the No-Imposition Constraint) is consistent with actual or real exercises of democratic law-making as we know them. It is plausible that, whatever other intentions and judgments they might have, the lawmakers (in real settings of democratic law-making) have at least the minimal judgment 'this text should be law' (or: 'this text should not be law'). Now, it might be true that they have other intentions or judgments in addition – but the point is that those other intentions and judgments lack normative significance from the perspective of the No-Imposition Constraint (this point will be crucial – as

[32] Thomas Sinclair, 'The Power of Public Positions: Official Roles in Kantian Legitimacy', David Sobel, Peter Vallentyne, and Steven Wall, eds., *Oxford Studies in Political Philosophy*, vol. 4 (Oxford University Press, 2018), pp. 28–52, at pp. 41–42, distinguishes (in the distinct context of Kantian political philosophy) between 'reflexive privileging of judgments', which occurs when one privileges one's judgment in determining some political question, and 'non-reflexive privileging of judgments', which occurs when one's judgment is privileged not by the judgment-holder himself, but by an external procedure. Something like this distinction may map onto the distinction between (i) one's imposition of the (content of) one's judgment over others, and the (ii) imposition of the (content of) one's judgment by procedures which do not conform to the 'agent-principal' model. These procedures are responsive to (the content of) A's judgment, in the sense that had A not held that judgment, they would not have imposed it. In this regard, A's judgment is 'privileged'. Nevertheless, because these procedures do not conform to the 'agent-principal' model, A's judgment is 'privileged' in a 'non-reflexive' manner: the (content of) A's judgment is not imposed in virtue of A's intending it to be so imposed.

we shall see below – for what should count as authoritative law and for how to apply the democratically made law).

For this reason, as well as for reasons of brevity, in what follows, whenever I refer to 'democratic procedure', I mean the picture of democratic procedure that satisfies the No-Imposition Constraint.

To conclude Stage One of the argument: If parties to a dispute about the balance of reasons were to impose (the content of) their judgments on each other, they would commit the WNF. They avoid, however, this wrong, if they take part in a procedure that satisfies the No-Imposition Constraint. Both an arbitration procedure and a democratic procedure satisfy this constraint.

Stage Two: Avoiding the second-order Wrong of Neglecting Fallibility. As we have seen, the No-Imposition Constraint restricts the set of eligible procedures to only those procedures which are able to make the law reflect an individual's judgment, but in a way that does not involve that individual imposing their own judgment over others. Now, at Stage Two, I want to argue that, among those procedures that we remained with at the end of Stage One, the democratic procedure is special because it avoids what I will call a second-order Wrong of Neglecting Fallibility.

To see this, consider again the arbitration procedure. If A's judgment comes to be reflected into law by way of the arbitrator's judgment, A will not have imposed their judgment on B, and thus, she will not have committed a WNF. The arbitrator, however, would commit a WNF. This is because the arbitrator's own judgment – the content of which she imposes over the parties to the dispute – is itself a fallible judgment. Let us call the arbitrator's wrong a second-order Wrong of Neglecting Fallibility. While a first-order WNF is the wrong that one party to a dispute may commit if he were to impose his fallible judgment on the other party (to the dispute), a second-order WNF is the wrong that arises when the law-making procedure that adjudicates the dispute between the parties – or some individual that is in charge of applying this procedure – imposes some fallible judgment on the parties.

The arbitration procedure employs criteria of correctness that are independent of, or external to, each party's judgment. The truth – as judged by the arbitrator – about the balance of reasons is such an independent or external criterion of correctness. Other external cri-

teria could be: the epistemic quality of the parties, or the probability that the parties' judgment is correct. Applying these criteria is a very difficult task, and any judgment related to their correct application is fallible. It follows that, if the arbitrator – or any person who takes decisions in a procedure that adjudicates between the parties' dispute – were to make decisions on the basis of any of these criteria, she would impose (the content of) her fallible judgment on the parties to the dispute. She would commit the *second-order* WNF.

The alternative, therefore, for avoiding the second-order WNF is to have a procedure that seeks to adjudicate the individuals' disagreement *without* employing criteria of correctness that are independent of, or external to, the parties' own judgments.

Now it might be claimed that the fact that the procedure must refrain from employing external standards of correctness may still allow for the procedure to be biased towards some party's judgment or another, *provided that* this bias does not rest on an external criterion of correctness. Note, however, that allowing bias in such conditions is irrational and arbitrary. If we remove the merits of the judgment, the probability that the judgment is correct, the presumed epistemic capacity of the judgment-holder, or any other possible external standard of evaluation – and we must remove them if the procedure is to avoid the second-order WNF – we remain with no rationale for favouring one judgment over another. Insisting on favouring some judgment at the expense of another, when there is no rationale for doing so, is thus irrational and arbitrary.

In this context, I want to argue, a procedure that treats all parties' judgments equally (or gives them an equal weight) avoids the second-order WNF.

The argument for this claim runs as follows: In the absence of external standards of correctness for evaluating judgments, we have no positive grounds for treating the parties' judgments either equally or unequally (nor, *a fortiori*, for treating them unequally in some more specific way rather than another). The external standards thus tell us nothing about the weight that we should give to the parties' judgments. In this context, we may look, however, to what we may call internal standards, namely the individuals' own judgments. The individuals' own judgments can be standards of assessment, in the sense that we may assess one individual's judgment from the per-

spective of another individual's judgment. If we do this, however, we notice a *symmetry* between all relevant judgments. For instance, from the standpoint of an individual's judgment, 'this text should be law', another individual's opposing judgment, 'this text should not be law', is wrong; and vice versa. Therefore, from the perspective of the internal standards (the judgments themselves), judgments are *symmetrically* situated to each other.

A decision-making procedure that assigns judgments an *equal weight* is one which treats opposing judgments as symmetrically situated to each other. Because such a procedure does not employ criteria of correctness that are independent of, or external to, the parties' judgments, it avoids the second-order WNF. And since the *democratic procedure* is one that assigns judgments an *equal weight*, it follows that it is a procedure that avoids the second-order WNF.

To conclude the argument for democratic procedures: A procedure that satisfies the No-Imposition Constraint is a sufficient condition for avoiding the first-order WNF in a way that allows one's moral judgment to be an input into the law-making procedure, even when one does not lower one's confidence in that judgment. Now, more procedures satisfy the No-Imposition Constraint, and not all of them are democratic. However, a democratic procedure is special in that it satisfies the No-Imposition Constraint without at the same time giving rise to a second-order WNF.

C. Why the Democratically Made Law Gives Non-Invalidating Protected Reasons

We have seen so far that the democratic procedure is special in that the laws imposed through such a procedure do not give rise to the WNF. Now, building on this result, I want to argue that the fact that the law is democratically made gives the judge a non-invalidating protected reason to enforce that law: a first-order reason to enforce the law, coupled with a non-invalidating preemptive reason that protects the first-order reason by prohibiting the judge from acting

on the basis of reasons which conflict with the first-order reason to enforce the law.[33]

Imagine a coordinative scheme D that was democratically selected. D is an eligible scheme, in the sense that it reasonably administers the relevant reasons. However, there are other possible schemes, such as S, which are closer to the balance of reasons than D is. Now imagine that A is a judge that could, by means of a ruling on a dispute between parties, replace D with S* (the change may, but need not be, a large-scall change; as I understand the notion of coordinative scheme, the judge could replace scheme D with S* simply when, if the law requires that scheme D be implemented for two litigants, she instead decides that S* should be binding for the two litigants, regardless of the legal effects for third-parties). A is able to replace D with S* because the law-enforcement arm of the executive, and the citizens more generally, treat her rulings as binding.

[33] The argument in this sub-section could be subject to the following objection: Stemplowska and Swift, 'Dethroning Democratic Legitimacy', p. 15, argue that the fallibility that one claims besets judgments of justice may also threaten (and even to a greater extent) claims about legitimacy – and *mutatis mutandis* perhaps also the claim that the democratic law has authority. It is true that my own argument for democratic authority is itself fallible, but I do not see why this is a problem. It would be a problem only if fallibility would somehow render it inappropriate for us to advance any kinds of arguments. I assume it is appropriate, however, for individuals to advance arguments about justice, about the balance of reasons, and about authority, despite their fallibility. The problem is not with the arguments, but with imposing them on others: fallibility, as I argued, makes it morally problematic to impose such kinds of judgments.Now, it could be objected that I cannot escape this consequence, either, since the democratic authority implies that democratic majorities impose the (content of) their judgments on others. But I argued in this section that this is not true. When they make law on the basis of democratic procedures, *no* individual imposes in the strict sense (the content of) their judgments on others.Perhaps the concern could be that I derive practical consequences from the fallibility of judgments about substantive justice – e.g., judges should defer to the democratic law – without considering the fact that my arguments for these consequences are themselves fallible. If, *ex hypothesi*, fallibility is not by itself a reason that undermines the validity of an argument, this concern could only be the concern that I do not treat cases *symmetrically*: I apply a standard to judgments about the balance of reasons that I do not apply to judgments about the authority of the law. I take fallibility into consideration in the first case, but not also in the second. This might be a concern, but it is not *the kind of* concern that could undermine the validity of my argument for democratic authority. Consider by analogy Raz's Ann, who is confronted with the offer to make a certain investment, but who is very tired and prone to error (Raz, *Practical Reasons and Norms*, p. 37). Not making the investment is a solution to her fallibility – it spares her from the possibility of making an erroneous decision. We can imagine that Ann's reasoning is *asymmetrical* – she adopts a decision aiming to deal with her first-order fallibility on how good she is in assessing the investment opportunity, but neglects a kind of second-order fallibility, namely her fallibility in dealing with her first-order fallibility. But this asymmetry *by itself* does not seem to tell us anything about whether the decision Ann adopts is correct *qua* solution to the problem of first-order fallibility (thinking otherwise would be what William Alston calls in another context a 'level confusion': the correctness of a solution for a first-order problem would depend on whether one can give a correct solution for the second-order problem of justifying that one's first-order solution was correct. See William Alston, 'Level Confusions in Epistemology', in *Epistemic Justification* (Cornell University Press, 1989), pp. 153–171).

The democratic procedure ensures that the individuals over whom the law is imposed are not wronged in the sense of the WNF. If A, by contrast, were to impose her own fallible judgment about the balance of reasons (by replacing D with S*), she would commit the WNF. Given these two facts, the reason for avoiding the WNF gives the judge a first-order reason to enforce D rather than S*. In other words, given that A, as a judge, is to make a decision either to enforce the democratic law or to enforce some other morally relevant reason, the reason to avoid the WNF implies that, between these options, she needs to pick the option of enforcing the democratic law. Thus, the judge has a first-order reason to enforce the democratically made law.

Now, this first-order reason might be outweighed by the conflicting reasons to enforce S* instead. Nevertheless, the individuals' interest in being treated on the basis of reason also give A a *non-invalidating preemptive reason* that makes it morally inappropriate for her to act upon these conflicting reasons, regardless of their strength. This preempts A from enforcing S* instead of D.

To see why A is bound by this non-invalidating preemptive reason, let us start by considering an analogy. (Note that in the analogy that will follow, we have a preemptive reason that preempts not the balance of all reasons, as is the case with the democratic authority, but only a specific set of reasons, namely reasons to maximize welfare.)

In an ordinary case in which an individual would act recklessly if he were to perform some action, the fact that his action would risk harming third parties is not merely a reason to be balanced against the value that would *actually* be realised if he were to perform the action. When a risk-imposition is impermissible (whatever it is that makes it impermissible),[34] there is a limited range of values that the expected benefits accruing from the risky conduct could take, and which do not change the fact that the conduct is wrong, even if, *objectively*, the benefits, but not also the costs, will materialise. For instance, if there is a low probability that demolishing a building would kill ten people, and there is a high probability that demolishing the building would bring small improvements in wellbeing for

[34] I want to leave open, however, what is the correct account for determining when a risk-imposition is permissible or not. For a possible account, see John Oberdiek, *Imposing Risk: A Normative Framework* (Oxford: Oxford University Press, 2017), chap. 5.

many people (e.g., for aesthetic reasons), there is a range within which we can increase by stipulation the size of the wellbeing improvements, without changing the fact that demolishing the building is wrong, even if, *objectively*, there is no one that would actually be killed, and many people that would actually benefit.

An actor might have a moral reason for maximizing (objective) welfare, and thus a reason for bringing those benefits about. But the reason to avoid WNF *preempts* that reason from making the risky conduct permissible.[35]

By parity of reasoning, the reason that a judge has to avoid WNF must also *preempt* the reason to institute the morally correct coordinative scheme. Since what it takes for a judge to avoid the WNF – when confronted with the choice of either obeying the democratically made law or instituting the morally correct scheme – is to obey the democratically made law, it follows that the reason to obey the democratically made law is a *preemptive reason* – a reason that preempts the reason that the judge has to institute the scheme that is closest to the balance of reasons.[36]

So far, we have seen that the reason to follow the democratic law gives A a preemptive reason. But let us now see why this preemptive reason is a *non-invalidating* one.

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[35] Chaim Gans, 'Mandatory Rules and Exclusionary Reasons', *Philosophia*, 15: 4 (1986), pp. 373–394, at pp. 385–386, argues that Raz's argument that uncertainty or fallibility provides an exclusionary reason rests on a confusion. It might be true, as Raz claims, that in such conditions, one may be justified in taking a decision that is not based on the first-order merits of the subject-matter. But this does not show that the first-order merits of the subject-matter have been excluded by the second-order reason to act cautiously under uncertainty. Rather, Gans claims, all that it shows is that the first-order merits have been *outweighed* by the first-order considerations related to the costs of further inquiry. But it is consistent with Gans' argument to say that there are precautionary reasons that act as preemptive reasons. All that Gans' argument may have shown is that those precautionary reasons do not become operative when the costs of further inquiry are outweighed by the expected benefits of taking an informed decision. But it is consistent with Gans' argument that, *when* those precautionary reasons become operative (whatever it is that makes them operative), they preempt the first-order reason to perform an action. It is intuitive that in a situation in which there is no time for further inquiry to determine whether a bottle contains either poison or medicine, the reason to give the patient the stuff from the bottle (which is supported by a reason to cure the patient's headache, as well as by the fact that the bottle *actually* contains medicine) is preempted by a reason to act cautiously. The (objective) reason to give the patient the stuff from the bottle is not balanced against the (subjective or evidence-based) reason not to risk the patient's death (these two reasons operate on different planes, as it were). It is rather simply preempted by the latter reason.

[36] Note that this argument avoids the complications Viehoff's argument (in 'Democratic Equality and Political Authority') gives rise to (see *supra*, fn. 17). Even though the balance of reasons includes reasons of justice, and even though these reasons are, in their turn, second-order exclusionary reasons, my account will not have the implication (as Viehoff's account does) that the preemptive reasons given by the law will have to be balanced against the preemptive reasons given by justice. On my account, the preemptive reasons given by justice will themselves be *preempted* by the reasons given by the democratic law.

The reason to avoid WNF is entailed by the individuals' interest in being treated on the basis of reason. This is an interest that individuals have that true reason obtains across a range of actual and counterfactual scenarios. But if WNF is entailed by an interest in true reason, this means that true reason, including true reason in the actual scenario, could not be morally irrelevant. This is still a morally *valid* reason – even if it is preempted by the reason to avoid the WNF. Compare again with cases of reckless or impermissibly risky conduct. Consider, for instance, that A performs a medical operation, but he has insufficient relevant knowledgeable. The moral reason that A has to bring about a benefit for the patient is preempted by the reason to avoid the WNF. Nevertheless, it still remains true that the objective benefit for the patient (assuming A's operation would actually be successful) remains a *valid* moral reason for A to operate the patient. This reason is preempted, but its validity as a moral ground for the decision to operate the patient is not denied. (This structure is similar with that of the 'no relatives rule' from Section II: this rule preempts the reason given by the merit of the candidate, but it does not deny that his merit is a valid moral ground for selecting him.)

By analogy, given that the judge's reason to avoid the WNF is entailed by the individuals' interest in being treated on the basis of true reason, the reason that the judge has to has to institute $S^{\star}$ rather than D remains a morally valid reason or ground for her to do so – even if this reason is preempted by the reason to follow the democratically made law.

But this just is to say that the reason to follow the democratically made law must be a *non-invalidating* preemptive reason. This preemptive reason allows that the fact that a decision would bring about the (scheme that is closest to the) balance of reasons is valid as a ground or reason for taking that decision, even while it prohibits that decision, thus preempting the balance of reasons that (validly) supports that decision. (Compare again with the non-invalidating preemptive reason discussed in Section II: the 'no relatives' rule does not deny that A's merit is a valid ground or reason for selecting A, but it prohibits that decision, and thus it preempts the reason given by A's merit which validly counts in favour of that decision.)

To conclude: given the individuals' interest in being treated on the basis of true reason, the fact that the law is democratically made gives the judge a first-order reason to enforce the law protected by a non-invalidating preemptive reason that enjoins A from acting on any reasons whose requirements are in conflict with the requirements of the law (for short, it gives a *non-invalidating protected reason*). This means that A will be enjoined from enforcing the balance of reasons, if what this balance requires is in conflict with the democratic law.[37]

IV. THE ASSERTIVE CONTENT AND LEGISLATIVE INTENT

We have seen so far that a democratically made law has authority, giving non-invalidating protected reasons to the judge to enforce the democratic law. In Section IV.A, I argue that this implies that both OVERRIDING INTENTION and CABINED INTENTION are false. In Section IV.B, I argue that this implies that, when the assertive content (the public meaning) is unclear, the judge ought to select that interpretation that is closest to the balance of reasons.

A. The Moral Authority of the Assertive Content of the Statute

First, the coordinative scheme that the judge is bound by the non-invalidating protected reason to enforce is *not* what the majority *intended*. As we have seen in Section III, that which counts as morally authoritative (i.e., that which the judge has a non-invalidating protected reason to enforce) is not what the majority intended – since otherwise the imposition of the law would be wrongful in the sense of the WNF. The judge has a protected reason to enforce the democratically made law in part because (and to the extent that) this law is the output of a procedure that satisfies the No-Imposition Constraint. And, as we have seen, what qualifies as the output of a procedure that satisfies the No-Imposition Constraint is not what the majority intended. Whatever it is that the majority intended (if there is anything that it intended) – e.g., that the meaning it intended the audience to recognise be such and such, that the legal content be

[37] Of course, it is consistent with this argument to claim that if the law is unjust in a way that can be recognised as being unjust by means of a judgment with a *low* degree of fallibility, then the judge is not bound by it.

such and such, that the effects in the world of the enactment be such and such – is not morally authoritative. There is no protected reason to enforce it.

This argument rebuts CABINED INTENT: the judge ought not to enforce the intention of the majority, when the public meaning of the statute is unclear. It also rebuts OVERRIDING INTENT: the intent of the majority could not override the public meaning of the text.

Second, the coordinative scheme that the judge is bound by the non-invalidating protected reason to enforce is defined or determined by the public meaning (or the assertive content) of the text of the statute. This is because what the judge has a non-invalidating protected reason to enforce is the text imposed by a procedure that satisfies the No-Imposition Constraint. And, as we have seen, the democratically enacted text qualifies as the output of a procedure that satisfies the No-Imposition Constraint because (and to the extent that) it is the text that was selected by a procedure that was responsive to the individuals' *judgments* (as opposed to being responsive to their intentions) regarding that text. So, it is *that* text, with regard to which individuals held their judgment, that should be taken as authoritative.

Now, that text regarding which the individuals form the judgment 'this text should be the law' is a text with a certain public meaning. Lawmakers form the judgment 'this text should be the law' partly because that text bears such and such a public meaning.

The purpose of the law-making process is to coordinate individuals around a certain scheme. When some lawmakers judge that a certain scheme is sufficiently close (and when some others judge that it is not sufficiently close) to the balance of reasons to be enacted into law, the scheme that they are judging is a coordinative scheme.[38] But if it is a coordinative scheme, then that which they are judging must be something which is publicly available to all persons who are supposed to be coordinated by the scheme in question. So, out of the many possible judgments that lawmakers might have, the judgment that is (normatively) relevant here is that judgment about the public meaning (or the assertive content) of the text – i.e., about the meaning that the audience of the law (the person to whom the law is

[38] I want to allow that the class of the persons who are coordinated by a statute might vary from case to case.

addressed) would reasonably infer the drafter to have intended.[39] It is not a judgment about the meaning that the drafter *actually* intended, since that meaning might not be publicly available. Thus, the judgment that is normatively relevant here is something like: 'This text, with this public meaning (i.e., with the meaning that the addressees of the law would reasonably infer to have been intended by the drafter), is sufficiently close to the balance of reasons to be enacted'.

It might be argued that, even if lawmakers have such judgments, and even if they are normatively relevant, they may also have intentions (e.g., an intention that, by adopting this text, the legal content be modified in such and such ways, or an intention that, by adopting this text, such and such effects should occur in the world), and those intentions take normative priority over the judgments they have about the text with a public meaning. But we have just seen above that these kinds of intentions (if they exist) are not normatively relevant for what counts as morally authoritative. What counts as morally authoritative (what is that the judge has a non-invalidating protected reason to enforce) is the output of a procedure

[39] What about the alternative possibility that the judgment that is normatively relevant is not a judgment about the meaning that the audience could reasonably infer the drafter to have intended (i.e., about the text's assertive content, or 'what is said' by an author in a text), but rather simply a judgment about the *literal* meaning of the words, regardless of what the drafter could reasonably be inferred to have intended by using those words? For the distinction between these categories, see François Recanati, *Literal Meaning* (Cambridge: Cambridge University Press, 2004), chaps. 1, 2; Scott Soames, *Philosophical Essays*, vol. 1: *Natural Language: What It Means and How We Use It* (Princeton: Princeton University Press, 2009), chaps. 10, 11, 15; Robyn Carston, 'Legal Texts and Canons of Construction: A View from Current Pragmatic Theory', in M. Freeman and F. Smith, eds., *Law and Language* (Oxford: Oxford University Press, 2013), pp. 8–33, at pp. 30–31. I do not have a *normative* argument for preferring assertive content over the literal meaning. It is plausible, however (and this is something that my normative argument cannot rule out), that the judgments about the text in the procedure that satisfies the No-Imposition Constraint are judgments about the assertive content of the text, and this might be so for the simple (non-normative) reason that this is a more natural way in which to construe what it is to have a judgment about a text. Because of this, I will assume, unless otherwise specified, that what the judge has a non-invalidating protected reason to enforce is the assertive content, rather than the literal meaning, of the text. But even if we take the relevant judgments to be about, and thus, the authoritative content to consist in, the literal meaning of the text, that would not diverge in practice very much from the outcome we would end up with if we took the authoritative content to consist in the assertive content of the text. And this is because the conversational background in the context of legislation is not rich enough in most contexts to enable the drafters of the legislative text to intend to assert something else than the literal meaning of the text. See Marmor, *The Language of Law*, pp. 30–34; Asgeirsson, *The Nature and Value of Vagueness in Law*, pp. 106–117.

that satisfies the No-Imposition Constraint, and, as we have seen, the output of such a procedure cannot be what the majority intended.[40]

What about those (rare) situations, however, in which some lawmakers are mistaken about, or misidentify, the public meaning of the text, so that their judgments about a text are in fact judgments about a content that is distinct from the public meaning that the text *actually* has? Here, my account does not imply that it is that content mistakenly believed by (some) lawmakers to be the public meaning of the text (*if* there is a majority who misidentifies the public meaning) – rather than the *actual* public meaning – that is morally authoritative. And that is because what is morally authoritative – what is that the judge has a non-invalidating protected reason to enforce – is the output of a procedure that satisfies the No-Imposition Constraint. And it is not a requirement that, in order for the content conveyed by a text to qualify as the output of a procedure that satisfies the No-Imposition Constraint, the participants' judgments about the text that bears that content actually be judgments about *that* content. What seems to be required is only that there be one thing (content) that all participants target as the object of their judgments, even if some participants' judgments inadvertently fail to be about it.[41]

To see this, compare with an arbitration procedure (which, recall, is another procedure that satisfies the No-Imposition Constraint). We might imagine that one of the parties to the dispute (B) inad-

[40] Note that it is not possible for an utterer to have an intention that the audience recognise the utterer to take his use of *x* as meaning *y*, if the utterer knows that, by using *x*, it is impossible for the audience to recognise meaning *y*. So, the utterer could not have an intention, when using phrases, to mean things that depart from the public meaning (or the meaning that that the audience would reasonably infer him to have intended). See Stephen Neale, 'Pragmatism and Binding', in Z. G. Szabó, ed., *Semantics vs. Pragmatics* (Oxford: Clarendon Press, 2005), pp. 165–285, at p. 181; Larry Alexander, 'Simple-Minded Originalism', in Grant Huscroft and Bradley Miller, eds., *The Challenge of Originalism* (Cambridge: Cambridge university Press, 2011), pp. 87–98, at p. 90; Larry Alexander, 'Goldsworthy on Interpretation of Statutes and Constitutions: Public Meaning, Intended Meaning, and the Bogey of Aggregation', in *Law Under a Democratic Constitution*, pp. 5–11, at pp. 10–11. If this is so, then taking the public meaning as morally authoritative (as my account does) would have results that converge in practice with those OVERRIDING INTENTION accounts that take the author's actual semantic intention as morally authoritative. The only difference would be that, when, for instance, members of the majority inadvertently misidentify the public meaning of the text that they approve, then the OVERRIDING INTENTION account would take that public meaning that the majority misidentified, rather than the *actual* public meaning of the text, to be authoritative. See Alexander, 'Goldsworthy on Interpretation of Statutes and Constitutions', pp. 10–11. By contrast, as we are about to see, under my account, what is morally authoritative is the *actual* public meaning of the text. See the argument *infra*, the text accompanying fn. 41 to 46.

[41] I will leave aside in what follows cases in which everybody makes the *same* mistake in identifying the public meaning, because it is not clear why, given the pervasiveness of that 'mistake', we would still be warranted to view it as a mistake, and not as a correct identification of the public meaning.

vertently misidentifies the argument of the other party, with the result that their judgments are not, properly speaking, about the same thing. But that does not imply that the verdict that the arbitrator will yield will be about that thing that B misidentified as the object of dispute. Rather, it will be – and it must be, in order for the arbitrator to properly discharge its arbitral function – about *that* thing which was the *actual* object of dispute, and which B's judgment purported, but failed, to be about. More generally, the arbitrator's verdict must be about *that* thing – the *actual* object of dispute – which the parties try to target as the object of their judgments, even if some of the parties' judgments may inadvertently miss it. In other words, the arbitral verdict must be a verdict about that thing which the parties' judgments purport to be about, and not about that thing misidentified by one or another party.[42]

(Note that this feature of the arbitral verdict is also a feature of what makes the arbitration procedure a procedure that satisfies the No-Imposition Constraint – and thus it is a feature that is relevant for the analogy with democratic procedures. Discounting cases in which the arbitrator themselves may inadvertently misidentify things, an 'arbitral' verdict that is concerned with the things that one party misidentified as the object of dispute, rather than with the thing that is actually the object of dispute (that actual thing which the party strive their judgment to be about), would make, in a way, the 'arbitrator' a mere agent of that party that misidentified the object of dispute, or at least it would make the arbitrator partial and non-neutral, and that would not be consistent with the motivation behind the No-Imposition Constraint.)

To keep the analogy with the arbitration procedure, this suggests that, in order for the democratic procedure to qualify as a procedure that satisfies the No-Imposition Constraint, its output must be that *actual* thing that the participants' judgments strive to be about, and not that thing which some of them misidentify as the thing they are striving to judge. And that actual thing (which they strive to judge) must be the *actual* public meaning of the text. Given that the democratic procedure seeks to discharge a coordinative function, and that the coordinative function is achieved by the (actual) public

[42] Note that this is consistent with claiming that, if the parties *deliberately* talk past each other, so that there is no thing that we can say that needs adjudication, the procedure in which they participate can no longer be called arbitral.

meaning of the text, it is plausible that, when participants in this procedure make judgments about the meaning of the text (e.g., 'This text, with this meaning, is closest to the balance of reasons'),[43] what is that they are trying to take as the object of their judgments (or what is that their judgments strive to be about) is the actual public meaning of the text. (They cannot strive to have judgments simply about what they parochially take to be the public meaning, and not about what the public meaning *actually* is, since that would amount to failing to have a judgment about a text that is supposed to coordinate everyone, and thus to be understood in the *same* way by *everyone* concerned.)

So, that output of the democratic procedure that qualifies as the output of the No-Imposition Constraint must be the actual public meaning of the text. This vindicates the claim that what is morally authoritative – what is that judges have a protected reason to enforce – is the actual public meaning (assertive content) of the text.[44]

In addition, recall that the output of a democratic procedure is morally authoritative not only in virtue of its being the output of a procedure that satisfies the No-Imposition Constraint, but also in virtue of its being the output of a procedure that gives everyone's judgment an *equal weight*, and thus avoids the second-order WNF. But it is the actual public meaning of the text, and not the public meaning that some (or the majority) misidentify, that is the output of a procedure that gives equal weight to all parties' judgments.

A democratic procedure that yields as an output the actual public meaning of the text (rather than the public meaning misidentified by some) gives an equal weight to everyone's judgments – more

[43] A judgment about the public meaning of a text can be construed as a judgment about the candidate norm (or the candidate legal content) conveyed by the public meaning of that text.

[44] It is possible that this result can also be reached more generally by those accounts of democratic authority that see democratic procedures as discharging an arbitral function (even though they do not proceed from the same premises as my account does). For such an account, see Scott Shapiro, 'Authority', in Jules Coleman and Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), pp. 382–439, at pp. 435–436. As we have seen, in an arbitration procedure, it is not the object of individuals' actual judgments that constrain what is picked out as the object that is being adjudicated, or as the output of the procedure, but it is that thing which their actual judgments strive to be about. And, since, in order for the arbitral procedure to satisfy a coordinative function, it must be that that thing which they strive their actual judgments to be about just is the actual public meaning of the text, it seems to follow that what is authoritative on such accounts must be the actual public meaning of the text. (On Shapiro's account, democratic procedures provide a fair arbitration of disputes, by giving everyone an equal power. It is not clear, however, why Shapiro, pp. 437–438, takes this arbitral function to show that the 'will of the majority' – rather than, say, the public meaning of the text each had an *ex hypothesi* fair and equal power to adopt – is authoritative.)

specifically, to all participants' judgments about *that* thing which they try to target as the object of their judgement (even if they may miss it). *That* thing – which they try to target as the object of their judgments – is the *actual* public meaning of the text (whatever that meaning is). Even if they have a judgment about the thing that they actually succeeded in judging (which is the public meaning that may have *mis*identified), there is a sense in which they also have a judgment about that thing which they were trying to, but failed to actually, judge. (That judgment might be false, by dint of being misdirected. But it is hard to see how it is not a judgment, whether true or false, about that thing which it tried to be about, but it missed.)[45] A procedure yielding as its output the *actual* public meaning of the text (which is that thing which everyone tries to judge) would give an *equal* weight to these judgments.

By contrast, if the output of the procedure were the meaning that some members of the majority misidentify as the actual public meaning, it would be more difficult to see how that procedure gave equal weights to all relevant judgments. Under such a procedure, all the weight would be given to those judgments of the members of the majority, or to those judgments (whether or approval or disapproval) that implicitly *mis*identify the public meaning in the same (mistaken) way as the above-mentioned members of the majority do, and no weight at all to those judgments (whether of approval or disapproval) that implicitly identify the public meaning in a *different* way. In order for a procedure to avoid the second-order WNF, it needs to give equal weight to all disputing judgments. Even if there is a sense in which a judgment approving a text misidentified as having the meaning *x* and a judgment disapproving a text identified as meaning *y* are not in dispute, there is another sense in which they are, since they both purport to be judgments regarding the *same* thing – namely, the text with its *actual* public meaning. This suggests that the output of a procedure that gives equal weight to all relevant judgments (that are relevant for purposes of avoiding the second-order WNF) must be the *actual* public meaning

[45] Consider, as an analogy, the judgment of someone about Aristotle. He might say, 'Aristotle's position that x is F is insightful'. If it turns out that Aristotle did not actually say that x is F, there is still a sense in which his judgment is about Aristotle. (This is also indicated by a practice of accountability, in which people are held accountable for the mistaken judgments that they have. If it were true that the judgment had not been Aristotle, that would implausibly imply that a critic would not be warranted in responding, 'But you are wrong in saying that that is Aristotle's view'. The criticism would simply be misdirected.)

of the text (whatever that is), and not the meaning that only some misidentified as the public meaning.

And since the content that is morally authoritative – that which a judge has a protected reason to enforce – is authoritative partly in virtue of being the output of a procedure that gives an equal weight to all relevant judgments (since such a procedure, as we have seen, avoids the second-order WNF), it follows that what is *morally authoritative* must be the actual public meaning, and not the meaning misidentified by members of the majority.[46]

So, to conclude the discussion so far: Both OVERRIDING INTENT and CABINED INTENT are false. What is morally authoritative – what the judge has a non-invalidating protected reason to enforce – is *not* the majority's intention or what the majority intended. It is neither the legal content, nor the communicative content, that the majority intended. Nor is it the purpose (of whatever generality or specificity) that the majority had in enacting the text. Rather, what is authoritative is simply the (actual) public meaning or assertive content of the text – or the meaning that the relevant audience could reasonably infer the drafter of the text to have intended to convey.

Note that the rejection of OVERRIDING INTENT and of CABINED INTENT is consistent with the claim that legislative intent is a necessary condition of legislation, or that it is needed, as a conceptual matter, for something to count as law.[47] Such a necessary intention would be a minimal intention, something like the legislature's corporate or group intention (however to be characterised) to enact a law, and to do so by means of a certain procedure.[48] An

[46] Similar results could be reached by social-egalitarian accounts of democratic authority. See Viehoff, 'Democratic Equality and Political Authority'; Niko Kolodny, 'Rule Over None II: Social Equality and the Justification of Democracy', *Philosophy and Public Affairs*, 42: 4 (2014), pp. 287–336. On such accounts, equality of power is a dimension of social equality, and the democratic law is morally authoritative in virtue of being the output of a procedure that gives everyone equal power. If the choice is restricted between the option (actual public meaning) and (the meaning misidentified by members of the majority), what is morally authoritative on such accounts must be the former, since it is only the former, but not also the latter, that we can say that everyone has had an equal power to adopt.

[47] Raz argued that it cannot be the case, for instance, that if I now start to do so some action or another, I would, unbeknownst to me, thereby enact a law. Enacting law must require, among other various things, an intention on the part of the enactor that, by doing such and such, they are enacting law. See Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2012), pp. 274–275, 281–282.

[48] Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012), pp. 56–58, 220, argues that the legislature, in making laws, acts upon a 'standing intention', which is an intention to use such and such procedures (for instance, majority rule) to enact a law.

intention of this kind can be a necessary condition for a procedure (such as a democratic procedure) to count as the sort of procedure that, by doing this or that, is thereby adopting a law. But that is consistent with claiming that what is morally authoritative – or what is that the judge has a protected reason to enforce – is not the legislature's corporate intention, but rather the public meaning of that text that the legislature enacts into law.[49]

B. When the Public Meaning is Unclear

There is still one more thing to investigate: CABINED INTENT has been rejected. But what do we put in its place? What are the judges bound by when the public meaning is unclear, if they are not bound

[49] Larry Alexander gives the following argument for OVERRIDING INTENT. We start by noting that a law-making procedure promulgates a legal norm, not a text. The text is simply an instrument, by means of the meaning of which the lawmaker conveys the legal norm. If the lawmaker could have conveyed the legal norm telepathically, without a text, it would have done so. Call this Text as Instrument Premise (TIP). From TIP, we derive the conclusion that what is authoritative is the legal norm intended by the majority (regardless of whether that norm is conveyed via a text or by telepathy). But since the intended norm that is intended by the lawmaker need not correspond with the public meaning of the text of the law, it follows that the public meaning is not authoritative. See Larry Alexander, 'Telepathic Law', *Constitutional Commentary*, 27 (2010), pp. 139–150, at pp. 140–145.This purported conclusion, however, does not follow from TIP. The claim that what the lawmaker promulgates is a legal norm, and that the text is a mere instrument for conveying that norm, is consistent with the claim that what is morally authoritative is the public meaning of the text that conveys that legal norm. First, this is simply because TIP is consistent with the claim that the legal norm that the lawmaker promulgates just is the legal norm – and nothing else besides – that is conveyed by the public meaning of the text. Given that in the actual world, the medium for conveying the legal norm *is* the public meaning of the text, then the lawmaker's intention to create a legal norm could simply be the intention to create *that* legal norm that is conveyed by the public meaning of the text. The lawmaker might lack an intention to create a legal norm that it does not succeed in conveying by means of the public meaning of the text. It might be true that, in a world where it could telepathically convey the legal norm, it would not need to be so constrained in its intentions. But this does not show that, *when* it is constrained by the medium of written communication, and by the need to convey the same message to everyone for *coordination* purposes, its intentions are not constrained in the way just indicated. (In such a case, the claim that the public meaning is authoritative would just be a shorthand for the claim that *that* legal norm that the lawmaker succeeds in conveying by means of that public meaning – and no other putative legal norm – is authoritative.)Second, even if we assume, for the sake of argument, that the lawmakers have an intention to create a legal norm that is not necessarily identical with the content that it succeeds in conveying by means of the public meaning of a text, TIP still does not entail that what is authoritative is this kind of intention, and not the public meaning of the text. My argument in this paper falsifies this purported implication. My argument is consistent with TIP, and thus it provides, contra Alexander, an instance, in which we can both affirm TIP and affirm at the same time that what is authoritative is the content conveyed by the public meaning of the text. If, *ex hypothesi*, the members of the majority have the intention to enact a legal norm or a legal content that may be different from the legal content that the public meaning of the text enacted by the legislature succeeds in conveying, that would satisfy TIP, but is would be consistent with my argument. For my argument does not need to deny the factual presence of such an intention. Regardless of its factual existence, my argument entails that this kind of intention is *irrelevant* for what should count as *morally* authoritative. My argument establishes that what is morally authoritative – what is that the judge has a protected reason to enforce – is the legal content conveyed by the public meaning of the text, and not the legal content actually intended by the majority.

by the majority's intent? On my account, when the public meaning is unclear, judges are bound by democratic authority to enforce that interpretation of the text which is closest to the balance of moral reasons. Let us see why this is so.

Among the cases in which the public meaning is unclear, I want to focus in this paper mainly on those cases in which the public meaning supports more than one interpretation. If the public meaning is defined (as I assume here) as the communicative content that the author (namely, the drafter) can reasonably be inferred to have intended (regardless of whether this is the content they actually intended), then these are cases in which more than one interpretation is reasonable – it is reasonable for the audience to infer the drafter to have intended *x*, at the same time as it is reasonable for the audience to infer the drafter to have intended *y*. In these cases, then, the public meaning warrants more than one outcome.[50,51]

For instance, imagine a statute that makes it a misdemeanor to bring vehicles in the park, and which contains a provision that increases the fine depending on whether the defendant has been fined in the past for 'littering, battery, or assault in a park'. Does the qualifier 'in a park' apply to all elements from the series or only to the last one? Both the case that it applies to the whole series and the case that it applies to the last item seem plausible.[52] The drafter(s) of the text could be reasonably taken to have intended to mean the

[50] If we took the literal meaning (rather than the objective assertive content) to be the authoritative content, then we would also have cases in which the authoritative content warrants more than one meaning. This would be so, for instance, when a word is ambiguous or polysemic.

[51] This is a case which Jules Coleman and Brian Leiter, 'Determinacy, Objectivity, and Authority', in Andrei Marmor, ed., *Law and Interpretation* (Oxford University Press, 1995), 213–215, 226, 236–239, would classify as one kind of indeterminacy. What is specific of this kind of indeterminacy is that there is an oversupply of legal reasons (too many reasons to warrant only one outcome) – by contrast with other kinds of indeterminacy, where there is an undersupply of legal reasons (not enough reasons to warrant any outcome).

[52] See *Lockhart v United States,* 577 US 347 (2015), in which the issue was whether a statutory provision that enhances a sentence for possession of child pornography depending on whether the defendant had any prior state convictions for crimes 'relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or a ward' is triggered if the defendant had been convicted in the past of sexual abuse which did not involve a minor or a ward.

phrase 'in the park' to qualify only the last element – but an interpretation that they intended it instead to qualify any element from the series seems also reasonable.[53]

In those cases where the public meaning warrants more than one interpretation, we can say that the judge complies with the protected reason to enforce the public meaning if she enforces *any* one of the interpretations that the public meaning warants.[54] Since the public meaning does not provide grounds for selecting one interpretation over another, and since the judge is able to comply with the protected reason if she enforces any of these, it seems that it would be permissible for her to simply pick at random which one of these interpretations she prefers. However, this inference would be unwarranted.

To see why, recall that the *non-invalidating* preemptive reason which binds the judge does not render invalid the grounds or the reasons to bring about the balance of reasons. This is so, as we have seen, even when these reasons support actions that the preemptive reason prohibits. (Recall that the non-invalidating preemptive reason does not deny that the fact that a scheme is closer to the balance of reasons is a valid reason or ground for bringing about that scheme, even while it prohibits bringing about that scheme.) But if so, then it follows *a fortiori* that the reasons to bring about (the scheme that is

[53] For another case in which the public meaning supports more than one reasonable interpretation, consider a statute that refers to a contract 'not to be performed within one year from the making thereof'. It is unclear whether the provision is triggered when the contract is not performed by one party or only when it is not performed by both parties (Francis Bennion, *Statutory Interpretation: A Code*, Butterworths: London, 2002, p. 422). Or consider a statute that requires a regulatory agency to adopt standards with a view to ensuring that 'to the extent feasible', no harm from toxic materials results for employees. *AFL-CIO v. American Petroleum Institute*, 448 US 607 (1980). There are more ways in which the feasibility constrained could plausibly be interpreted. For another similar case, consider *Bromley London Borough Council v. Greater London Council* [1982] 1 All ER 129, in which the question was whether reducing public transport fares by 25% and compensating for the resulting loss by fiscal means was a measure that promoted '*economic* transport facilities and services'. The public meaning also seems to support more than one interpretation in *United States v. Locke*, 471 U.S. 84 (1985). The author of a text that states that some claims must be filed 'prior to 31 December' could reasonably be taken to have intended to mean the claims must be filed on or before 30 December, just as they could reasonably be taken to have intended to mean the claims must be filed on or before 31 December. Similarly, in *Niz-Chavez v. Garland*, 593 U.S. _ (2021), 'a notice to appear' could reasonably be interpreted as referring to either a single document or a notification in multiple instalments.

[54] Of course, nothing in my argument depends on denying that there may be cases in which there is *only one* reasonable interpretation of the public meaning, even if the literal meaning may diverge from this interpretation. This might be the case in *Cernauskas v. Fletcher*, 211 Ark. 678, 201 SW 2d 999 (1947)(where the drafter meant that only the laws in conflict with the provisions of the statute, and not all the laws of the state, are repealed), or in *R v. Liggets-Finlay Drug Stores Ltd* [1919] 3 WWR 1025 (where the drafter who wrote that 'all drug stores shall be closed at 10 p.m'. meant that the drug stores be closed until morning, not only 5 minutes past 10 pm).

closest to) the balance of reasons remain valid for those actions which the preemptive reason *allows*. Since enforcing any of the interpretations that are warranted by the public meaning is allowed by the protected reason, it follows that, among these interpretations, the reasons that the judge has to select that interpretation which is closest to the balance of reasons, remain *valid*.[55]

The judge will have a non-preempted valid reason to select that interpretation which is closest to the balance of moral reasons.[56] She will have a *valid* reason to do so because she has a more general reason to act on the balance of moral reasons (or to bring about that scheme that is closest to the balance of reasons) – and this reason is *not* invalidated by the preemptive reason to enforce the democratically enacted statute. And she will have a *non-preempted* valid reason, because choosing *either* interpretation of the public meaning of the statute could count as a way of enforcing the statute that she has a protected reason to enforce.

The balance of reasons that a judge should use in identifying which interpretation to enforce is that balance of all moral reasons that are relevant to, or bear on, the decision going one way rather than another. If, in our example above, the balance of reasons supports not applying an increased fine to the defendant, then the interpretation of the public meaning that the balance of reasons supports enforcing is the one under which 'in a park' qualifies only the last element of the series. (So, the claim that an interpretation is

[55] Compare the principle, sometimes applied in the British legal system, that in cases where a statutory provision bears more plausible meanings, the court should enforce the one that is more just. See S.G.G. Edgar, *Craies on Statute Law* (London: Sweet and Maxwell, 1971), pp. 86–87, 94–95.

[56] Note that this account, on which judges are morally required to enforce that interpretation of public meaning that is closest to the balance of moral reasons is distinct from other accounts, such as Dworkin's, on which moral principles figure in the application of statutes. On Dworkin's account from *Law's Empire* (London: Fontana, 1986), chap. 9, the ideal judge reads statutes in light of those moral principles that best justify the enactment of the statutes by the legislature. There are at least three differences between Dworkin's account and my account. First, on Dworkin's account, the moral principles serve as a way of 'reading' or 'interpreting' the statute. I make no similar claim. On my account, enforcing that interpretation of the statute that is closest to the balance of moral reasons is not itself a way of 'reading' or 'interpreting' the statute. It is rather simply a freestanding moral requirement. Second, for Dworkin, the moral principles in light of which the statute is to be read must fit the particular history of the legal community and must cohere with the purposes that led the legislature to enact the statute. By contrast, on my account, the moral reasons that the judge is bound by are simply moral reasons, and they have a validity that is independent of the past decisions and purposes of a legal community or of the legislature. Third, on my account, the 'trigger' for bringing the moral reasons to adjudicate between competing interpretations is when the *public meaning* of the of the text of the statute is unclear. There is no similar 'trigger' on Dworkin's account. On his account, the reading of statutes in light of the moral principles that best justify them is operative even when the statutes in question have a clear public meaning (see *ibid*., pp. 351–352).

supported by the balance of reasons is simply the claim that the (in)action or decision that amounts to enforcing that interpretation produces results that are closer to the balance of reasons.)[57]

Note that the conclusion of this paper – that democratic authority entails that judges have a non-invalidating protected reason to enforce the public meaning of the statute, when this is democratically enacted – means that democracy converges to some extent with the rule of law. Both require, though for different reasons, that judges enforce the public meaning of the statutes.[58] The fact that, under my account, when the public meaning is unclear, judges are required to enforce that interpretation of public meaning that is closest to the balance of reasons would pose no obstacles to the benefits that the rule of law secure (such as fair notice, reliance on predictable official actions, or capacity for planning), since these benefits could not plausibly be achieved by unclear public meaning.

V. CONCLUSION

Democratic authority entails that the judge is bound by a non-invalidating protected reason – a first-order to enforce the public meaning of the text of the statute, coupled with a non-invalidating

[57] The moral considerations that go into the balance of reasons are only considerations isolated to the individual case that is being adjudicated. A practice of treating the interpretation that a superior court chose to enforce in a case as binding for other cases falling under the same statutory provision does not seem in conformity with the balance of reasons, since there is no guarantee that the interpretation whose enforcement secures the morally best result in one case would also secure the morally best result in another case. If there is a practice of this sort, then the judge will have a moral obligation to disregard the practice, and rule in accordance with what the balance of reasons supports in a given case. If, however, it is foreseeable that judges in next cases will treat one's decision to enforce one interpretation as binding, then, of course, the moral considerations that go into the balance of reasons in deciding what interpretation to enforce is not limited only to the considerations of the individual case that is being adjudicated.

[58] Note, however, that this convergence goes only so far. Following, for instance, the public meaning of a statute that deprives courts of judicial review of administrative action might damage on balance the rule of law. *If*, however, depriving courts of judicial review of administration has some morally relevant benefits, and *if* there is moral controversy over how to trade-off these benefits against the rule-of-law losses, then, even if it happens that the court not enforcing the statute (i.e., proceeding to a judicial review of the administrative action) is the action actually supported by the balance of reasons, the reason for avoiding the WNF implies nonetheless that the court has a non-invalidating protected reason to enforce the (public meaning of the) statute, and refuse to proceed to a judicial review of administrative action. Note that this is, of course, consistent with acknowledging that there is a point at which the judgment that disregarding this kind of statute is what the balance of reasons requires has a low degree of fallibility – and this might be in those circumstances when, for instance, it is obvious that there are no compensating moral benefits that are being achieved by sacrificing the rule of law in this particular instance, or when it is obviously clear that, if there are benefits, those are outweighed by morally relevant rule-of-law losses. In such contexts, the moral reason to disregard the statute is *not* preempted by the democratic pedigree of the statute.

preemptive reason that makes it impermissible to enforce reasons that conflict with the requirements conveyed by the public meaning. This kind of preemptive reason does not render invalid, however, the reasons to enforce the balance of reasons (or whatever is closest to that balance), even while it preempts them, and makes such an enforcement impermissible in cases in which this enforcement conflicts with the public meaning of the statute. This sort of protected reason implies, as we have seen that (i) when the public meaning of the statute is clear, the judge ought to enforce it, and (ii) when the public meaning warrants multiple interpretations, the judge ought to select that interpretation which is closest to the balance of moral reasons.

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