

## Justice and Democracy\*

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**Abstract:** Is democracy a requirement of justice or an instrument for realizing it? The correct answer to this question, I argue, depends on the background circumstances against which democracy is defended. In the presence of *disagreement* about justice, we should value democracy only instrumentally (if at all); in the presence of *reasonable disagreement* about justice, we should value it also intrinsically, as a necessary demand of justice. Since the latter type of disagreement is pervasive in real-world politics, I conclude that theories of justice designed for our world should be centrally concerned with democracy.

### Introduction

Justice and democracy are central ideals of a liberal political morality. Although vast bodies of literature have been devoted to each of them, their relation to one another has remained relatively under-explored.<sup>1</sup> Contemporary liberals agree that only democratic arrangements can be just, but disagree about *why* democracy matters: some believe its value is instrumental, others believe it is intrinsic. On the former view, democratic participation is not a requirement of justice, but a means of either discovering, or implementing, its demands. On the latter, democracy is intrinsically just: it is part of any plausible articulation of the value of justice itself.

Which view is the correct one? In this paper, I argue that our answer depends on the circumstances under which democracy operates, and conclude that, under existing circumstances, we have primarily intrinsic reasons to support democratic arrangements. This implies that theories of justice designed for the world in which we live should be democratic at their very core. The paper is structured as follows.

In section I, I briefly define the key terms of my discussion: justice and democracy. In section II, I distinguish between two types of circumstances: disagreement about justice and reasonable disagreement about justice. I then consider the relationship between justice and democracy under each of them. In section III, I argue that, under the circumstances of disagreement, democracy can only be defended instrumentally (if at all). In sections IV and V, I show that, under the circumstances of reasonable disagreement, democracy is an intrinsic,

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\* I am grateful to the participants at the UCHV Fellows' Seminar (Princeton), and at the conference 'Justice: between Ideals and Reality' (Frankfurt) for helpful questions and challenges. Many thanks also to Enrico Biale, Emanuela Ceva, Zsuzsanna Chappel, Nannerl Keohane, Joseph Mavor, Valeria Ottonelli, Philip Pettit, Anna Stilz, and Patrick Tomlin for their detailed comments on previous versions of the paper. Finally, I am especially grateful to Christian List for his feedback and continued encouragement.

<sup>1</sup> For an important exception see the essays in Keith Dowding, Robert E. Goodin and Carol Pateman (eds), *Justice and Democracy: Essays for Brian Barry* (Cambridge: Cambridge University Press, 2004).

not simply an instrumental, requirement of justice.<sup>2</sup> In section VI, I address three objections to my thesis, and then conclude that, since reasonable disagreements are pervasive in our political world, we should value democracy first and foremost as an intrinsic requirement of justice.

One caveat is needed. Throughout the paper, I take the familiar liberal principle of equal respect for persons as a (true) normative premise. This principle entails that social arrangements should be justifiable to those who live under them as free and equal rational agents.<sup>3</sup> A defence of this principle, which my argument shares with most, if not all, of contemporary liberal political theory, is beyond the scope of this paper.

## **I. Justice and Democracy**

Let me begin by defining the key terms of my discussion: justice and democracy. Both are complex notions, but for the purposes of my argument, it will suffice to adopt the following broad definitions. By *justice* I mean a set of principles whose function is to distribute entitlements to valuable resources – including liberties, opportunities, income and wealth – among a plurality of agents competing over them. Principles of justice thus answer the question ‘Who is entitled to what?’ relative to a particular set of agents (fellow-citizens in the case at hand) who are competing over resources they need to pursue their ends and goals.<sup>4</sup>

Similarly broad is the definition of democracy I adopt for present purposes. By *democracy*, I mean a set of collective decision-making processes in which those who belong to a particular group (society in the case at hand) have an equal say in determining the rules that should govern them.<sup>5</sup> Although this principle can be operationalized in different ways, respect for it always involves protecting citizens’ rights to free speech, expression and association; letting elections determine who will hold political office and what laws will govern the community, and giving all adult members of the population an equal right to vote.<sup>6</sup>

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<sup>2</sup> Thomas Christiano’s defence of the normative authority of democracy appeals to (something like) reasonable disagreement about justice. See his ‘The Authority of Democracy’, *Journal of Political Philosophy*, 12 (3) (2004), 266-90, and *The Constitution of Equality* (Oxford: Oxford University Press, 2008).

<sup>3</sup> See Jeremy Waldron, ‘Theoretical Foundations of Liberalism’, *The Philosophical Quarterly*, 37 (147) (1987), 127-50.

<sup>4</sup> It is worth emphasizing that this definition is highly general and therefore neutral across different conceptions of justice. We can in fact derive different accounts of justice from it, depending on how we specify the relevant ‘distribuendum’ and the group of agents among whom it should be distributed. Moreover, despite its formulation in terms of distribution, this definition is compatible with both ‘distributive’ and ‘relational’ accounts of justice. We may in fact care about social distributions not only per se, but also because of the particular social relations and structures they instantiate. See Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990).

<sup>5</sup> Cf. Albert Weale, *Democracy* (New York: St Martin’s Press, 1999), p. 14.

<sup>6</sup> I borrow this description from Richard J. Arneson, ‘Democracy is not Intrinsically Just’, in Goodin, Dowding, Pateman (eds) *Justice and Democracy*, pp. 40-58.

Judging from the definitions just given, it is easy to see that justice and democracy may come into conflict.<sup>7</sup> The rules chosen through a democratic procedure might fail to align with the demands of justice. Democratic majorities (or super-majorities) can act in good faith but be mistaken about what justice requires; or they can vote selfishly, with no regard for the interests of minorities.

A common response to these familiar difficulties consists in giving the most fundamental requirements of justice the status of constitutional rights, thus removing them from the democratic process. Constitutional guarantees, such as equality before the law, the rights to life, education and subsistence, freedom of movement, religion and association, place constraints on democratic decision-making. If the outcome of a democratic procedure violates any of these constraints, so the argument goes, it is *ipso facto* unjust, hence invalid.

Although the constitutionalization of fundamental justice certainly limits the potential damages of democratic decision-making – preventing it from violating basic rights – it is no guarantee against injustice more broadly construed. For example, there are important matters of justice, such as the extent of legitimate redistributive taxation, which fall outside the scope of constitutional provisions. Moreover, the boundaries and relative weight of different constitutional guarantees are open to multiple interpretations, and democratic majorities might fail to select the right one.

Consider, for instance, the 2009 Swiss referendum leading to a ban on the construction of minarets in Switzerland. As David Diaz-Jogeix, Amnesty International's deputy program director for Europe and Central Asia, said 'That Switzerland ... should have accepted such a grotesquely discriminatory proposal is shocking'.<sup>8</sup> Although this democratically reached decision strikes most of us as unjust, it does not *obviously* infringe on constitutional rights such as freedom of religion. Arguably, the practice of Islam is not hindered by this law, and its discriminatory impact is purely symbolic.<sup>9</sup>

Since democratic voting rights may well lead to violations of justice, why do liberals place so much value on them? Two answers are available.<sup>10</sup> The first suggests that, although democratic outcomes can be unjust, democratic procedures are the all-things-considered best means of implementing or discovering justice. On this account, democracy is *instrumental* to justice, either as an implementation mechanism or as an epistemic device. Embracing the former view, Ronald Dworkin, for instance, argues that democracy is to be valued 'because a community in which the vote is widely held and speech is free is more likely to distribute material resources and other opportunities and values

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<sup>7</sup> Unless we stipulate (implausibly in my view) that the only requirement of justice is democracy.

<sup>8</sup> Nick Cumming-Bruce and Steven Erlanger, 'Swiss Ban Building of Minarets on Mosques', *New York Times*, November 29, 2009, <http://www.nytimes.com/2009/11/30/world/europe/30swiss.html>

<sup>9</sup> Cf. Cecile Laborde, 'Political Liberalism, Republicanism, and the Public Role of Religion', (manuscript).

<sup>10</sup> For an overview of different justifications of democracy see Thomas Christiano, 'Democracy', in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, URL = <<http://plato.stanford.edu/archives/fall2008/entries/democracy/>>

in an egalitarian [i.e., just] way.’<sup>11</sup> Those who hold this view can easily explain why democracy may sometimes undermine justice: it is an empirically fallible means of realizing justice which, albeit imperfect, is better than its alternatives.<sup>12</sup> Similarly, those who defend democracy because of its epistemic virtues – i.e., as a good heuristic mechanism to arrive at the right answer – have no trouble accounting for some of its failures. For them, democracy is the all-things-considered best truth-tracking procedure, but it may still get things ‘locally’ wrong, for instance, when the issues to be decided are particularly complex, or when voters are unduly biased in favour of (or against) a particular outcome.

By contrast, on the *intrinsic account* of the relationship between justice and democracy, democracy is seen as a demand of justice. On this view, a division within society between ‘governors’ (enjoying extensive political rights) and ‘governed’ (lacking political rights) would undermine the very ideal of free and equal citizenship on which justice is based. In other words, advocates of this view hold that respect for citizens as free and equal requires substantive as well as procedural guarantees: the latter correspond to democracy.

This view is intuitively appealing. Few would be prepared to say that a society governed by a wise sovereign, or a small enlightened elite, is fully just, no matter how equitable its distribution of resources is. The only form of political organization compatible with justice seems to be democracy. Despite its intuitive appeal, the intrinsic account faces significant difficulties when it comes to reconciling the claim that democracy is a requirement of justice with the observation that democracy may undermine justice.<sup>13</sup> How can justice demand something that may hinder it?

For example, let us assume, with Rawls, that justice requires income and wealth to be distributed so as to maximally benefit the worst-off. Now imagine that citizens of a liberal democracy are called to vote on a reform of the tax system, which would reduce the tax burden on the rich, and diminish support for the poor. If the reform were to pass, some citizens (the worst-off) would be denied what they are entitled to on grounds of justice. To vote in favour of this tax reform would be to promote the violation of other citizens’ rights. No coherent theory of justice could contain both (i) the democratic right to vote in favour of this reform and (ii) a Rawlsian account of the rights of the worst-off. Such a theory would clearly be internally inconsistent.<sup>14</sup>

Faced with this challenge, advocates of the intrinsic account might take the radical view that, beyond constitutional constraints, there is no independent

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<sup>11</sup> Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), p. 186. Dworkin oscillates between instrumental and more intrinsic justifications of democracy. For purely instrumental justifications see also Arneson, ‘Democracy is not Intrinsically Just’, Philippe Van Parijs, ‘Justice and Democracy: Are They Incompatible?’ *Journal of Political Philosophy*, 4 (2) (1996), 101-117. Van Parijs also refers to Schumpeter and Hayek as examples of theorists who endorse the instrumental account (p. 110 n. 9).

<sup>12</sup> For criticisms of this account see Charles R. Beitz, *Political Equality* (Princeton, NJ: Princeton University Press, 1989), ch. 2.

<sup>13</sup> For this account see Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 221-34, and Christiano, ‘The Authority of Democracy’.

<sup>14</sup> I am here following an argument by Ryan Davis, ‘Justice: Do It’, unpublished manuscript.

truth about justice with which democratic outcomes need to be reconciled.<sup>15</sup> On this view, democratic procedures are *constitutive* of the truth about justice: They are ‘truth-makers’. Although this view is certainly coherent, it is also deeply counter-intuitive. For instance, is there really no independent truth regarding whether it should be permitted to build minarets in Switzerland? Is there really no procedure-independent truth regarding the morally appropriate level of redistributive taxation? More generally, are the political disagreements characterizing existing democracies vacuous, because there is no truth of the matter over which to disagree? To the extent that we hesitate to answer these questions in the affirmative, we should also resist the radical version of the intrinsic account.

In light of the difficulties encountered by this account (in both its moderate and radical versions), should we conclude that people’s intuitions about the fundamental importance of democracy in relation to justice are misguided, and opt for the instrumental account? Or can we develop a philosophically coherent and plausible version of the intrinsic account?

## II. Two Types of Circumstances

To answer this question, we need to distinguish between two types of circumstances under which democracy might operate: The circumstances of disagreement and the circumstances of reasonable disagreement.<sup>16</sup> As I shall argue in the rest of the paper, our understanding of the relationship between justice and democracy (instrumental vs. intrinsic) varies depending on which circumstances we assume.

**The Circumstances of Disagreement (CD):** Citizens disagree about justice.

Under these circumstances, citizens hold different and conflicting views about how resources should be distributed within society. For example, some believe that justice requires social distributions to benefit the worst-off, others that social distributions should be determined by free market processes, others still that different kinds of goods should be distributed according to different criteria.<sup>17</sup> Despite these disagreements, we can reasonably assume that one position is correct – i.e., there is a truth about justice ‘out there’ to be discovered – and that some positions are more warranted than others.

Under these circumstances, then, disagreements about justice are on a par with disagreements in the natural, social or human sciences. Take the case of medicine. Two doctors might disagree about whether a certain patient has a regular flu or is affected by mononucleosis. In these circumstances, there is both a truth of the matter, and a simple epistemic procedure to discover it: a blood test. Or else, consider a linguistic disagreement between a well-educated native

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<sup>15</sup> In fact, one may even take the view that democratic decisions are constitutive of the truth even independently of constitutional constraints.

<sup>16</sup> Of course, if we all agreed on what justice requires the question of democracy would not arise in the first place.

<sup>17</sup> These views correspond roughly to Rawls’s in *A Theory of Justice*, Robert Nozick’s in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), and Michael Walzer’s in *Spheres of Justice* (New York: Basic Books, 1983).

speaker of English, and a foreigner who has only just started to learn the language. The best epistemic procedure to settle their disagreement would be to consult a dictionary. But suppose there isn't one available, and the disagreement needs to be solved quickly. In these circumstances, if we want to get to the truth, we should follow the native speaker's instinct, by virtue of her greater linguistic expertise.

More examples could be given, but the general point should be clear. Under the circumstances of disagreement, controversial matters of justice can be settled by appeal to reliable epistemic procedures allowing us to get as close to the truth as possible, given the constraints we are facing.

**The Circumstances of Reasonable Disagreement (CRD):** Citizens reasonably disagree about justice.

When there is disagreement of this kind, agents who need to decide how to adjudicate their competing claims come up with different solutions, *none of which can be deemed 'objectively' more warranted than others*. This situation is a consequence of what Rawls famously called the 'burdens of judgment'.<sup>18</sup> In his words 'many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion.'<sup>19</sup> Evidence may be conflicting and hard to assess. Different people might have different reasonable views about what counts as evidence. Moreover, different considerations may have different weights in the eyes of different people. Reason is common to all humans, but this does not guarantee that its proper and accurate exercise on the part of different people will always result in convergence on a single answer.<sup>20</sup>

Rawls made these remarks in relation to the disagreements over ethical and moral outlooks which, in his view, are bound to occur under free institutions. Unless state power is exercised oppressively, Rawls argued, people's views about what is of most value in life will end up diverging. These considerations, however, apply not only to overall ethical and moral outlooks, but also to conceptions of justice. The circumstances of reasonable disagreement as I understand them here capture precisely the 'justice-dimension' of pervasive ethical and moral disagreements (a dimension Rawls himself did not seem fully to appreciate).<sup>21</sup> Under these circumstances, there is no uncontroversial epistemic

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<sup>18</sup> Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 55-8.

<sup>19</sup> Rawls, *Political Liberalism*, p. 58.

<sup>20</sup> See Richard Feldman, 'Reasonable Religious Disagreement', in Louise M. Antony (ed.) *Philosophers without Gods* (Oxford: Oxford University Press, 2007), pp. 194-214 and Gerald F. Gaus, *Justificatory Liberalism* (Oxford: Oxford University Press, 1996). For further discussion of reasonable disagreement, see Christopher McMahon, *Reasonable Disagreement: A Theory of Political Morality* (Cambridge: Cambridge University Press, 2009).

<sup>21</sup> Rawls was not entirely unaware of this problem though. See *Political Liberalism* p. 227ff. For further discussion see Gerald F. Gaus, 'Reasonable Pluralism and the Domain of the Political: How the Weakness of John Rawls's Political Liberalism Can be Overcome by a Justificatory Liberalism', *Inquiry*, 42 (2) (1999), 259-84, and Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), ch. 7.

procedure we can rely on in order to discover what justice requires, and no given notion of expertise to which we can appeal. There is disagreement, but no obvious epistemic solution to it.

With a clearer understanding of these two sets of circumstances, we can now consider the relation between justice and democracy under each of them.

### **III. Justice and Democracy under the Circumstances of Disagreement**

Should a theory of justice designed under the circumstances of disagreement include any reference to democratic procedures? And if so, why? There are at least three possible answers to these questions, which I label: ‘No Democracy’, ‘Implementation Democracy’, and ‘Epistemic Democracy’.

#### *A. No Democracy*

A first possibility is to think that, under CD, democracy should play *no role* in relation to justice. Although people disagree about justice, so the argument goes, we can plausibly identify different levels of expertise among them. The distribution of power within society should then mirror that of justice-expertise.

Consider the following analogy. You have had dinner with friends, and the moment comes when you have to split the bill. Since it’s the US, in addition to the figure indicated on the bill, you have to add an 18% tip. Each of you does the calculations and comes up with a different figure. What to do in these circumstances? Suppose one of you, Jacopo, happens to be very good at calculations. Already in high school he was famous for scoring very highly at the maths Olympiads and has now completed his PhD in mathematics. It thus seems to make sense to defer to Jacopo’s judgment.

Of course, another possibility may be to deliberate and try to reach a consensus. But assume that there is no time for that. The calculations are complicated (it is a long bill!) and you want to go to the movies. Either you pay now, or you miss the cinema. The rational thing to do, under these circumstances, is to accept Jacopo’s verdict as authoritative. There is a truth about what each person’s fair share is, and the procedure that best tracks that truth, under the circumstances at hand, is one that gives Jacopo the final word on the matter.

Notice that this conferral of authority on Jacopo does not violate the mutual justifiability constraint at the heart of a liberal political morality. Since the shared goal of the group is to discover the truth about how much each has to pay, and Jacopo qualifies as an expert on the matter, they all have reason to defer to his judgment. If they want to get to the truth, and they are rational, they must recognize that Jacopo is the way to go.

Similarly, assume that we could regard political philosophers (or any other professional category) as the experts on what justice requires. It would then make little sense for anyone to insist that society should be governed democratically. The outcome of democratic procedures would in all likelihood be less just than what the philosophers could establish. More generally, if we can reasonably identify experts about political morality whose views can be trusted to reflect the truth, we are naturally drawn towards what David Estlund calls *epistocracy*: a form of government in which those who know best hold power.<sup>22</sup>

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<sup>22</sup> i.e., the rule of those who have knowledge. David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2007), p. 29.

If our goal is to govern society according to the rules of justice, we have good reasons to believe that experts on justice are best placed to do this job, just as we have reason to believe that Jacopo is best placed to decide how much each of us should pay.

Of course, one might resist epistocracy by doubting the effectiveness of leaving justice in the hands of a few (supposedly) enlightened individuals. After all, how can we trust the expert kings to behave as justice requires once they are placed in a position of power? These worries about power abuses lead us to the second answer to the question of why we should care about democracy under CD, if at all.

### *B. Implementation Democracy*

We might think that, by distributing power roughly equally across the citizenry, democracy is more likely stably to realize the demands of (egalitarian) justice than any other political system. Following this line of argument, democracy is justified as a second best. Ideally, a society of expert kings would be better, but since in our non-ideal world we cannot trust them (or anyone else) to hold so much power without abusing it, we organize society such that power is sufficiently diffuse, namely democratically. In a democracy, politicians and state officials cannot ignore the interests of the wider society, as this would prevent them from being re-elected. A democracy, then, may be thought to be more conducive to the pursuit of the common good than any other political system.

On this view, democracy is not an intrinsic requirement of justice; it is only an instrument for its implementation. As Richard Arneson says, '[s]ystems of governance should be assessed by their consequences; any individual has a moral right to exercise political power just to the extent that the granting of this right is productive of best consequences overall.'<sup>23</sup> In a similar vein, even if we can plausibly identify experts on justice, we may still want to distribute political power roughly equally across the citizenry in order to prevent flagrant abuses of it. If this is what we believe, then our defence of democracy is purely instrumental, solely grounded in concerns about the implementation of justice.

### *C. Epistemic Democracy*

Alternatively, under CD, we may want to defend democracy by appeal to its virtues as a truth-tracking device.<sup>24</sup> *If*, instead of being concentrated in the hands of a few wise individuals, expertise about justice were equally dispersed within society, democracy might indeed be the best epistemic procedure to discover what justice demands. As famously observed by the Marquis de Condorcet, if each voter has more than a fifty percent chance of getting the answer right, and

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<sup>23</sup> Arneson, 'Democracy Is not Intrinsically Just', p. 40.

<sup>24</sup> As Joshua Cohen famously described it, an epistemic account of democracy has three components (1) an independent standard of correct decisions ... (2) a cognitive account of voting — that is, the view that voting expresses beliefs about what the correct policies are according to the independent standard, not personal preferences for policies; and (3) an account of decision making as a process of the adjustment of beliefs, adjustments that are undertaken in part in light of the evidence about the correct answer that is provided by the beliefs of others. See, Joshua Cohen, 'An Epistemic Conception of Democracy', *Ethics* 97 (1986), 26-38, p. 34.

voters' judgments are independent, a majority is more likely to be correct than a single person, and the likelihood increases the more voters there are.<sup>25</sup>

Alternatively, we may think that a deliberative form of democratic politics would offer a viable approach to ascertaining what the correct course of action is with respect to specific political dilemmas. After all, deliberation and reason giving are marks of good epistemic practices. By exchanging reasons and sharing information, one could argue, citizens are more likely to discover the truth about justice.<sup>26</sup>

Moreover, deliberation and aggregation need not be mutually exclusive. Given certain facts about the distribution of expertise, it is quite plausible to argue for a combination of deliberative and aggregative processes as the best truth-tracking strategy.<sup>27</sup> Since we cannot deliberate *ad infinitum*, or until we reach a consensus, we may think of deliberation and majority rule as working in tandem, as part of a reasonably feasible and epistemically reliable political system.

To sum up, under CD, our commitment to democracy is entirely dependent on facts about the distribution of expertise and good will. If expertise is confined to a few trustworthy people, then their views should be authoritative. If, however, they are likely to abuse their power, we might prefer democracy as an implementation device. Otherwise, if expertise about political morality is evenly distributed within society, democratic decision procedures might be chosen as epistemically best (as well as, possibly, for implementation purposes).

In all of these cases, democracy is defended on instrumental, rather than intrinsic, grounds. Democracy itself is not a requirement of justice, instead, it is a means through which to realise or discover what justice requires. From this it follows that, if *we*, citizens of existing liberal democracies, were under the circumstances of disagreement, our commitment to democracy would have to be purely instrumental, not intrinsic. But can we plausibly claim that these are the circumstances under which we live? Perhaps not.

The realm of political morality is not one in which expertise, and the existence of an independent truth to be discovered, can be unproblematically assumed across the board. To be sure, the truth of certain fundamental moral tenets might be beyond reasonable doubt. For example, principles such as 'You ought to help those in need if this is not too costly to yourself' or 'You ought not to steal' may be beyond question. In fact, from a liberal perspective – the one taken in this paper – anybody who rejects the principle of equal respect for persons as free and equal rational agents counts as mistaken about political morality.

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<sup>25</sup> Condorcet's jury theory was originally meant to apply to decisions involving only two options. The theorem has been generalised to many-option cases by Christian List and Robert E. Goodin, 'Epistemic Democracy: Generalizing the Condorcet Jury Theorem', *Journal of Political Philosophy*, 9 3 (2001), 277-306.

<sup>26</sup> For a view along similar lines, which defends deliberative democracy by appeal to our commitment to 'folk epistemology' see Robert B. Talisse, *Democracy and Moral Conflict* (Cambridge: Cambridge University Press, 2009).

<sup>27</sup> Fabienne Peter, 'Democratic Legitimacy and Proceduralist Social Epistemology', *Politics, Philosophy & Economics*, 6 (3) (2007), 329-53, p. 338.

Granting all this (and, for some, this will already be a big concession<sup>28</sup>), there are many moral statements whose truth (or falsehood) is far from obvious, even from a liberal perspective. For instance, some reasonably deny the claim that ‘abortion is on a par with homicide’, but cannot conclusively show that those who affirm it are mistaken. Similarly, some reasonably believe that the use of force may be justified under extreme circumstances, yet they cannot easily dismiss pacifists as holding obviously false or unreasonable views.

More generally, citizens disagree about many of the laws and policies that govern their societies, but some of their deepest disagreements can rarely be solved by appeal to safe epistemic procedures, such as running a blood test or consulting a dictionary. In these circumstances, asking experts to settle the issue won’t do. While we can easily point to experts in physics, mathematics, astronomy, medicine and so forth, when it comes to morals, there is no undisputed, publicly justifiable, criterion for identifying expertise.<sup>29</sup>

Is the Pope a moral expert? If so, we would have to conclude that abortion is unjust. Or perhaps the Dalai Lama? In this case we would have to conclude that violence is never justified. Are political philosophers the true experts? We would then reach no conclusion because they disagree fiercely about political morality. What about political activists and free thinkers? Perhaps politicians are the experts? Perhaps judges? It seems impossible to give a non-controversial answer to these questions.<sup>30</sup> In short, many of the disagreements which characterize our political world are not ordinary disagreements, they are reasonable disagreements.

#### **IV. Justice under the Circumstances of Reasonable Disagreement**

In thinking about the relationship between justice and democracy under these circumstances we may start by looking, once again, at Rawls’s treatment of reasonable pluralism. Although, as we already know, Rawls did not focus on reasonable disagreement *about justice* in particular, we may still have something to learn from his argumentative strategy. In what follows, I will therefore first look at Rawls’s ‘overlapping consensus’ argument and its limits, and then illustrate how we can overcome these.

##### *A. Pluralism about the Good: The Overlapping Consensus Strategy*

In *Political Liberalism*, Rawls confronts the question: How can a just *liberal* society stably exist over time when, due to the burdens of judgment, its citizens inevitably hold different conceptions of the good? A just liberal society, it should be recalled, is one whose institutions, and their impact on persons’ lives, are justifiable to all citizens as free and equal. Of course, this justificatory requirement appears particularly hard to meet when the audience to which justification is directed is made up of people whose moral views differ widely.

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<sup>28</sup> For those who feel the weight of such a concession, I shall say more on what reasons we can give in support of the fundamental liberal commitment to respect for persons as free and equal rational agents in the last section of the paper.

<sup>29</sup> Estlund, *Democratic Authority*, pp. 3ff.

<sup>30</sup> On this see the instructive discussion in Gaus, *Justificatory Liberalism*, pp. 185ff.

Central to Rawls's answer to this problem is the idea of an 'overlapping consensus' between different comprehensive doctrines.<sup>31</sup> Although citizens disagree about what is of value in life, Rawls says, they will all come to endorse the same conception of justice, each from the perspective of her own moral doctrine. In other words, Rawls's favoured account of justice, *justice as fairness*, is said to lie in the area of overlap between citizens' conflicting accounts of what an ethically worthwhile life requires.<sup>32</sup> This allows for the possibility of a stable and genuinely liberal society, in which social institutions are justifiable to all citizens as free and equal, despite their different conceptions of the good life.

A crucial detail in Rawls's story is that the envisaged overlapping consensus is limited to what he calls *reasonable* comprehensive doctrines. Rawls's use of the term 'reasonable' has both substantive and epistemic connotations.<sup>33</sup> On the one hand, Rawls tells us that a necessary condition for a doctrine to count as reasonable is its compatibility with, or endorsement of, the liberal ideal of mutual justifiability to citizens as free and equal. Reasonable doctrines are therefore politically liberal doctrines, and it is no surprise that people committed to such doctrines will endorse a liberal account of justice.<sup>34</sup>

On the other hand, as we have seen, in his discussion of reasonable pluralism, Rawls focuses on the burdens of judgment, and claims that the reasonableness of this pluralism depends on the impossibility of establishing which one (if any) among different competing doctrines is correct. Here the idea of reasonableness is no longer substantive, but *epistemic*. It has to do with the limits of human reason, not with the endorsement of liberal values.

Even though Rawls uses the idea of reasonableness in both senses, he does not fully consider their joint implications. That is, he gives insufficient attention to the fact that the burdens of judgment (epistemic reasonableness) apply not only to the good, but also to the liberal concept of justice (substantive reasonableness).<sup>35</sup> If freedom and equality can be interpreted from the perspective of different conceptions of the good, it is unlikely that all interpretations will correspond to *justice as fairness*. Rather, we are to expect reasonable people

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<sup>31</sup> It is worth noting that Rawls introduced the idea of an overlapping consensus in order to explain how a just liberal society could *stably* exist over time, given its citizens' disagreements about overall conceptions of the good life. Even though originally adopted to solve the problem of stability, the idea of an overlapping consensus plays a crucial *justificatory* role: it shows how liberal principles can be defended from within different comprehensive doctrines, hence how a *liberal* society (one whose arrangements are justified in the eyes of all citizens) can exist even under the circumstances of reasonable pluralism.

<sup>32</sup> Rawls, *Political Liberalism*, lecture IV.

<sup>33</sup> In *Political Liberalism* Rawls says that 'being reasonable is not an epistemological ideal (though it has epistemological elements). Rather, it is part of a political ideal of democratic citizenship that includes the idea of public reason.' p. 62.

<sup>34</sup> Since Rawls is trying to work out the implications of a liberal view, this kind of circularity is not hugely problematic. Of course, more would need to be said to show that even those who do not endorse the liberal commitment to freedom and equality ought, rationally, to endorse it.

<sup>35</sup> In his later work Rawls acknowledges that the idea of citizens' freedom and equality can be subject to multiple plausible interpretations, giving rise to an equally large number of accounts of public reason. See John Rawls, *The Law of Peoples with The Idea of Public Reason Revisited* (Cambridge, MA: Harvard University Press, 1999).

(people who hold substantively and epistemically reasonable views) to disagree not only about the good, but also about the correct interpretation of justice.

For instance, some might believe that material inequalities are a threat to persons' status as free and equal even when everyone meets a threshold of material sufficiency. In light of this, they might insist that justice requires radical redistributive policies. Others might instead believe that this sort of redistribution is inimical to individual freedom: it curtails, rather than fosters, it. On this view, so long as people have enough material goods to meet their basic needs, the demands of justice are realized.<sup>36</sup>

These reasonable disagreements render the question of liberal justice all the more complex. How can we meet the universal justifiability requirement when citizens deeply, and reasonably, disagree not only about overall conceptions of the good life, but also about what justice itself requires? It would seem that a liberal solution to the problem of justice under the circumstances of reasonable disagreement must refrain not only from invoking particular theological or metaphysical doctrines, but also from invoking a specific *conception* of liberal justice. Does this mean that the enterprise of constructing a theory of justice is doomed to fail?

#### *B. Pluralism about Justice: Hypothetical Consent and Fundamental Rights*

Luckily, we need not come to such a disheartening conclusion. We can still construct a theory of justice under the circumstances of reasonable disagreement about justice (CRD), yet one with a distinctly modest set of ambitions. In particular, under CRD, a theory of justice cannot aspire to offer a unique and complete answer to the question 'what is just?' as a matter of philosophical theory. Instead, it has to limit itself to excluding those standards which could *never* be universally accepted by free and equal agents concerned with furthering their life plans. For instance, a system of domestic laws resulting in poverty and deprivation, or denying certain fundamental liberties to part of the citizenry, could never gain universal consent. Indeed, it could *never* be interpreted as instantiating the idea of equal respect for persons.

While we cannot aspire to propose a complete account of what justice positively requires, without thereby assuming away the circumstances of reasonable disagreement, we can still identify what guarantees justice *must minimally provide*. Since I have no space to offer a comprehensive defence of these guarantees, I only make the following tentative suggestion. A society cannot be regarded as (politically) just unless it fulfils its citizens' *basic needs and liberties*, including: nutrition, shelter, education, sanitation, bodily integrity, freedom of movement, freedom of thought, and equality before the law.

Falling short of such criteria, a society counts as uncontroversially unjust: fulfilment of a person's basic physical needs and liberties is necessary for her to function as an agent, and consequently to be free to pursue her life plans.<sup>37</sup> Social arrangements cannot be justified to all citizens unless they ensure that each of them enjoys the necessary conditions to lead a life worth living, and that these conditions are equally protected for all. Of course, people will (reasonably) disagree about what conditions are genuinely necessary for this purpose, and how

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<sup>36</sup> On this see Gaus, 'Reasonable Pluralism and the Domain of the Political'.

<sup>37</sup> Onora O'Neill, *Faces of Hunger* (London: Allen & Unwin, 1986).

they should be interpreted, but we can at least identify a ‘core’ set of rights and liberties without which leading a decent human life seems impossible.

That said, the workings of a social system involve taking decisions which go well beyond abstract basic needs and liberties. What respecting such needs and liberties requires is open to some controversy and can be interpreted in a variety of different ways. In addition, redistributive policies, affirmative action programmes, abortion laws and so forth all raise issues of justice which we cannot answer simply by looking at fundamental subsistence and liberty rights. How, then, are we to make these further decisions? This is a hard question.

Under CRD, it would be unreasonable to expect a philosophical theory to produce exhaustive principles of justice on which every rational person could agree. What a philosophical theory of justice, under CRD, can offer is a framework for thinking about justice and an incomplete account of what justice requires. Beyond this limit, further specifying the demands of justice is something which can be left to each political community. A theory of justice under CRD is not about denying political disagreement, but about the legitimate boundaries within which political disagreement, and the agonism that lies at the heart of politics, can exist.

In short, under CRD, while part of our interpretation of the requirements of justice can be theoretically constructed *via* a universal justifiability test, part of it must be constructed ‘in practice’. The interpretation of justice has both a theoretical and a practical component. As I argue in the next section, its practical component corresponds to *democracy*.

## **V. Democracy under the Circumstances of Reasonable Disagreement**

Why should democratic political rights – such as the right to vote, freedom of speech, press, and association – be demanded by justice under CRD? Once again, three (non-mutually exclusive) possibilities are available: ‘Epistemic Democracy’, ‘Implementation Democracy’, and ‘Intrinsic Democracy’. Let us briefly consider them in turn.

### *A. Epistemic Democracy*

Under CRD, the epistemic version of the instrumental account is, in large part, no longer available. In the absence of a reasonably shared view of what would count as expertise about justice, we can no longer invoke Condorcet-type reasons in support of majoritarian democratic procedures. Recall, majority rule only gains privileged epistemic status when each voter is ‘competent’, i.e., when she has more than a fifty percent chance of selecting the right answer. But under CRD, there is no unproblematic notion of expertise on the basis of which to decide whether the ‘competence’ assumption holds. Catholic believers, for example, think that priests are the experts: for them, epistemic considerations tell in favour of letting them decide. Protestant believers, by contrast, think that each individual is equally well placed to come to the truth: for them, epistemic considerations point towards democracy. Of course, many more examples could be given, but the general point should be clear. Under CRD, majority rule cannot be justified to all reasonable persons on epistemic grounds.

What about deliberation? Exchanging reasons, listening to those who disagree with us, and defending our convictions in the face of sceptics are all good epistemic practices. Couldn’t a deliberative form of democracy still be defended on epistemic grounds, under CRD? Unfortunately the fate of

deliberation under CRD parallels that of majority rule. A Catholic believer would probably defend deliberation *among* Catholic bishops and priests as the best epistemic strategy; an atheist might instead think that we are most likely to get to the truth if political philosophers deliberate and decide how society should be run, and so forth. Although democracy (whether deliberative, majoritarian or a combination of both) is not epistemically hopeless, under CRD, it cannot be defended *as epistemically best* in the eyes of all rational people.<sup>38</sup>

### *B. Implementation Democracy*

That said, under CRD, we might still want to defend democracy instrumentally, as a way to ensure against the tyranny. Since democracy presupposes an equal allocation of political power across citizens, it is unlikely to degenerate into forms of government that violate the basic constitutional constraints (i.e., liberty and subsistence rights) which are part of any plausible interpretation of justice. To the extent that this is true, we may still have instrumental (implementation-related) reasons to defend democracy under CRD.

### *C. Intrinsic Democracy*

Finally, we may think that, under CRD, democracy is a justificatory device, a way of moving the process of inter-subjective justification from philosophical theory to real-world political practice. On this view, democratic procedures – both deliberative and aggregative – confer normative authority on policies which, given reasonable disagreement about justice, could not otherwise be justified in the eyes of all rational persons.<sup>39</sup> To respect persons' status as free and equal rational agents under CRD, so the argument goes, is to allow each of them to contribute to collective decisions.

This way of conceptualizing the relationship between justice and democracy sheds light on the apparent inconsistency in the intrinsic account discussed in section I. The worry took the following form: How can a theory of justice contain democratic rights to vote *against* what the theory indicates as requirements of justice? In other words, how can a theory of justice contain rights to violate other people's rights? For instance, if we can plausibly assume that justice requires implementing the difference principle, how can we also say that there is a justice-based democratic right to vote in favour of (or against) tax reforms that would prevent the difference principle from being realized?

Looking at justice under CRD allows us to make sense of this apparent inconsistency. Consider the tax reform example. For those who advocate the difference principle on grounds of justice, citizens are treated as free and equal only if the distribution of income and wealth benefits the worst-off. But under the circumstances of reasonable disagreement, we cannot unproblematically assume

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<sup>38</sup> Estlund explicitly makes this point in his *Democratic Authority*. Despite this, he still believes that the authority of democracy is largely grounded in its tendency to deliver right answers.

<sup>39</sup> On justice-based reasons in favour of democracy in the presence of disagreement about justice see Christiano, 'The Authority of Democracy', pp. 272ff. In particular, Christiano argues that 'democracy is required by justice understood as the public realization of equal advancement of interests' (p. 269) and that 'democratic assemblies have genuine legitimacy if there is reasonable disagreement on the justice of the legislation at issue.' (p. 285)

that this is what equal respect for persons *actually* requires. Some may reasonably hold this view, but others may equally reasonably believe that respect for persons has different distributive implications.

Under such circumstances, we cannot take ourselves to *respect* others if we simply impose our views on them. To do so would be to fail to recognize their status as free and equal rational agents. That said, we cannot suspend judgment and refrain from taking decisions about social distributions until full agreement on matters of justice has been reached, as this would obviously lead to social paralysis. In this scenario, justice requires that we address reasonable disagreements and come to select particular social outcomes in a way that reflects citizens' status as free and equal agents and practical reasoners. This is what democracy, *via* deliberation and majority rule, allows us to achieve. In short, on this view:

*Democracy is what equal respect (procedurally) requires when there is reasonable disagreement about what equal respect (substantively) requires.*

In particular, by deliberating and listening to one another's reasons, we express respect for each other as rational persons. Moreover, as reasoners who disagree, we may hope through argument to make progress in understanding one another, and converge on a single answer we all regard as compelling. This would allow us fully to realize the ideal of mutual justification at the heart of the liberal understanding of justice. This ideal of complete mutual justifiability is of course one we should aspire to, but know are unlikely ever fully to achieve. If disagreement is indeed central to politics, hoping for universal agreement is somewhat utopian.<sup>40</sup>

Since decisions have to be taken, deliberation is not enough. The deliberative phase has to be followed by some aggregative process (most likely majoritarian) allowing us to establish which view is to prevail. This may look like a less-than-perfect solution, in that it inevitably results in the imposition of what a majority, however qualified, considers the appropriate interpretation of justice, when we know, *ex hypothesi*, that the minority's view could also be correct (because disagreement is reasonable). Given the need to take some decisions, this is the best we hope for under CRD. Under these circumstances, then, a democratic system is the only one that expresses respect for free and equal rational agents.

## **VI. Objections**

So far, I have argued that, under CRD, we may have important intrinsic (and instrumental) reasons to defend democracy – understood as a combination of deliberative and aggregative processes. Before concluding my discussion, I wish to consider three objections against my view. I call them the 'lottery', 'legitimacy', and 'asymmetry' objections.

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<sup>40</sup> On the effects of deliberation in generating greater agreement without, however, reaching full consensus on the substance of the issues discussed see Christian List, 'Two Concepts of Agreement', *The Good Society*, 11(1) (2002), 72-79.

### A. *The Lottery Objection*

This objection targets my claim that ‘a democratic system is the only one that expresses respect for free and equal rational agents under CRD’. In particular, it says that, under CRD, we have no more reason to adopt deliberation-cum-majority-rule, than we have to adopt decision-by-lottery. Democracy and decision-by-lottery, so the argument goes, can both be justified in the eyes of free and equal rational agents. Is this really the case? I believe not.

Free and equal rational agents are committed to justifying their claims to one another, and mutual justification can only occur through deliberative reasoning, not through lotteries. Imagine a Catholic and an Atheist who are told that the decision about whether abortion should be legally permissible will be taken by tossing a coin. Surely both could reasonably object to this proposal on the grounds that it fails to express respect for their status as rational agents. Respect for this status requires their reasons (in favour or against abortion) to be heard. Adopting lottery-based procedures would be equal to moving from reason to randomness.

The supporter of lotteries may accept that deliberation uniquely satisfies equal respect, and reformulate her objection more locally, suggesting that lotteries could, in principle, replace majority rule. On this view, lotteries would be employed to decide which of the views that have survived deliberation should prevail. This second version of the ‘lottery’ objection also fails to express respect for persons. Respecting persons as rational agents requires that we allow them to be *responsible* for political outcomes. When a particular law or policy is selected by a majority of the citizenry, these citizens may be appropriately seen as responsible for it. They are genuine authors of the law, who can be held accountable by the minority. In the case of lotteries, this accountability mechanism ceases to exist. Authorship of the law is no longer in the hands of citizens *qua* rational agents. Instead, it is in the hands of chance.<sup>41</sup> Both deliberation and majority rule, then, are superior to lotteries on respect grounds.<sup>42</sup>

### B. *The Legitimacy Objection*

The second objection does not take issue with the substance of my argument, but with its presentation. I have claimed to address the relationship between justice and democracy, and distinguished between two types of circumstances under which the question about this relationship might arise (CD and CRD). One of the would-be innovating conclusions of the paper is that, if we take CRD seriously, theories of justice should be democratic at their very core. The problem, an objector might suggest, is that this would-be novel conclusion only gives us the

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<sup>41</sup> Ben Saunders has argued that lotteries may be superior to majority rule under circumstances in which majority rule might exclude a permanent minority. This may be the case in real world political circumstances, however, in a system where reasonable citizens deliberate with one another about what justice requires, this type of unfairness probably would not arise. If it did, then lotteries *might* be warranted (to establish this, one would need to look at the case at hand). See Saunders, *Democracy as Fairness* (Oxford: D.Phil. thesis, 2008).

<sup>42</sup> Notice that democratic procedures also have instrumental advantages compared to lotteries, insofar as their outcomes are likely to be more politically stable, as they *always* track the will of the majority.

well-known concept of legitimacy. Once this is revealed, the message of the paper no longer appears so radical: legitimacy requires democracy. This may be correct, but is also quite unexciting. How can one respond to this charge?

I agree that the notion of justice under CRD is in many ways close to the idea of legitimacy. Yet I do not think this undermines the paper's contribution. The paper has the virtue of showing that the notions of justice and of legitimacy are in fact both answers to the *same* question, namely how to distribute resources within society in a way that respect persons as free and equal rational agents. If there is a difference between these two notions, this lies in the background conditions against which this question is asked. That said, since the two notions answer the same question, I am not sure why they should be denoted by completely different terms. Moreover, since justice is taken to be the central concept of political philosophy, one of the messages of this paper is that the idea of justice political philosophy should be concerned with (if political philosophy is to be of relevance to the real world) is much closer to the idea of legitimacy than commonly acknowledged.

### *C. The Asymmetry Objection*

The asymmetry objection points to what looks like an inconsistency in my argument. On the one hand, I place great emphasis on the circumstances of reasonable disagreement. On the other, my whole argument assumes a commitment to equal respect (i.e., justifiability to free and equal rational persons). But where does that commitment come from? Can we say that equal respect is a true demands of justice? Couldn't someone reasonably disagree with it?

I can think of three ways of answering this challenge. Here I want to remain non-committal with respect to each of these strategies, but simply flag them as possible responses to the objection. Each reader should pick whichever she finds most convincing.

First, it might be responded that we do in fact have sufficient evidence to regard the principle of equal respect as true, insofar as all main moral codes incorporate it in one form or another, and those which do not are typically based on incorrect factual claims – e.g., that people of a certain race are genetically less intelligent.<sup>43</sup> Following this line of argument, although the ideal of equal respect qualifies as a truth about justice, its implications are unclear (or indeterminate). Responding to this fact, in a way consistent with equal respect, is the task of democracy.

Second, we might argue that a commitment to equal respect *qua* justifiability to free and equal rational agents is not of a substantive but of a methodological kind. On a *Kantian, public, understanding of reason*, a correct or valid claim must be justifiable to all rational persons. If others are rational, use their powers of reason properly, and yet they still disagree with us (i.e., if there is reasonable disagreement), this meta-principle tells us that our views do not have the required validity to qualify as correct, hence to be genuinely normative for them.<sup>44</sup>

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<sup>43</sup> Cf. David Miller, 'Two Ways to Think about Justice', *Politics, Philosophy and Economics*, 1 (1) (2002), 5-28, pp. 22-3.

<sup>44</sup> Ronzoni and Valentini, 'On the Meta-ethical Status of Constructivism'.

Third, and finally, we might simply acknowledge that we, western liberals, have such a deep commitment to mutual justifiability to persons as free and equal that it would be impossible for us to theorize about justice prescind from that commitment. Although we cannot establish whether it is true or not, we cannot avoid appealing to it when we think about justice. In normative theorizing we have to start from somewhere, and there seems to be no place other than our most deeply held convictions.

### **Conclusion**

The aim of this paper has been to examine the relationship between justice and democracy. I have argued that our understanding of this relationship depends on whether we regard reasonable disagreement about justice as one of the background conditions under which democracy operates. If we do not take reasonable disagreement into account, then we are bound to consider democracy at most instrumentally valuable: a means of discovering or realizing justice. But if we take reasonable disagreement about justice to be part of the background circumstances in which the question of justice arises, democracy becomes an integral part of justice (in addition to being instrumentally valuable, as an implementation strategy). On the view I have advocated, if it is indeed plausible to think that we live in conditions of reasonable disagreement about justice, a theory of justice designed for these conditions is ultimately a theory about the external limits, and internal constitution, of democracy.