

## **Two Epistemic Accounts of Democratic Legitimacy**

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Abstract: Offered are two epistemic accounts of deliberative democracy which suggest the reasonable minority has epistemically sound reasons to willingly follow a *reasonable* majority position. One of these accounts suggests that the truth will be on the side of an overwhelming rational majority. This is because it is less likely that there is a widespread cognitive failure that “contaminates” the moral intuitions of rational majority than a rational minority. The second account suggests that where there is a rational disagreement, instead of assuming: a) one side is right and the other wrong or b) that they are both failing to discover what justice dictates, or c) that there is no moral fact of the matter, it is sometimes plausible to conclude that both views are compatible with justice. While the competing views can’t both be simultaneously realized, it is not contradictory to assert they are both compatible with justice.

After a vote has been taken, why should the minority acquiesce to the will of the majority? Of course, there is always the threat of great instability or even force if they don’t, but the type of answer sought here is one that provides a normative reason for obedience to the will of the majority. This question of legitimate authority wouldn’t arise if the mere existence of the majority provided an obvious reason to follow the law. But it doesn’t. This can be most clearly seen where the majoritarian electoral result is the product of an unfair procedure. Surely the minority has little reason to obey the outcome of an unfair procedure. But the minority also lacks a reason to consider themselves obligated to acquiesce to the results of a fair procedure if the outcome is *substantially* unfair.<sup>1</sup> It hardly seems compelling for the minority to accept such an unfair result merely because the procedure was fair and holds out (perhaps) the promise that they will someday be in the majority.

Does the answer to our question then lie in the fact that a procedure is not only fair but the outcome can be recognized as rational? It may seem so if we believe that rationality is a reliable tool to track the truth. There aren't likely to be any better reasons for supporting a policy than it is true. Thus it might be maintained that the minority ought to oblige the majority when the majority's position is rational. However, what if the "fair procedure leads to a *rational disagreement*? That is, perhaps reason doesn't determine a *uniquely* rational answer. If the minority's view is as reasonable as the majority's, why then should they concede and go along with the majority decision?<sup>2</sup>

I will tentatively propose two epistemic accounts of deliberative democracy which suggest the reasonable minority has epistemically sound reasons to willingly follow a *reasonable* majority position.<sup>3</sup> One of these accounts suggests that the truth will be on the side of a rational majority - or at least an overwhelming majority. This is because there is less likely to be a widespread cognitive failure that contaminates the view of a rational majority than a rational minority. The other view provides the minority with a better reason than they had before to accept a fair procedure when they end up "holding the short end of the electoral stick." But I still call this second approach an epistemic view because fair proceduralism is only appealing where reason shows that more than one view is compatible with truths of justice (or morality more broadly speaking.) What this means is that there wouldn't be a loss in reasonableness or justice if either side prevails. It is not that one side's position is true and the other rational yet not true or rational but merely an approximation of the truth. Both views can be truly labeled "just." This makes fair proceduralism more palatable. The minority doesn't have to console themselves just with the thought that their losing vote (and preference/interest or even moral view) was given the same respect as any other person's.

Nor do they have to hope, perhaps against the odds, that someday they will be in the majority and thus “get their turn at running the show.” Furthermore, they do not have to accept the majority’s judgment that their own position was wrong as would be the case on some accounts of Rousseau’s General Will.<sup>4</sup>

But there are problems with this view. We shall later consider whether the first epistemic account can come to the rescue of the second - although it too has its problems. I must admit to be not utterly convinced by either epistemic account. I am more of an agnostic than an advocate of epistemic approaches to democracy.<sup>5</sup> Nonetheless, I think the two views here are new (at least to the discussions surrounding Deliberative Democracy) and will be of some interest to others.

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What exactly is an *epistemic account of deliberative democracy*? By “democracy,” I just mean “government by the governed.” This description is abstract enough to include many different conceptions. For instance, I don’t hold that democracy has to always operate by a 51% vote. In fact, my first epistemic account of the reasons the minority has to support the majority is not at all compelling if the majority is just 51 % of those who vote.<sup>6</sup> A larger majority would be more impressive. But my second suggestion is not weakened to the same degree by a close vote.

By “deliberative” I am contrasting a conception of “discursive” democracy with the aggregative or social choice model in which voting is seen as a method of aggregating preferences. In the deliberative democratic ideal, the give and take of discursive reasoning can transform “pre-deliberative” preferences and moral views as people try to justify their

conception of the good to others. On some accounts of deliberative democracy, democratic institutions are designed to imitate or at least approximate something like a Habermasian ideal speech situation. On all accounts of deliberative democracy, the only force recognized is the force of reason. Ideally, a consensus is sought. Where this is unattainable a vote must be taken, though the deliberative democracy advocate is likely to stress that the issue can be revisited.<sup>7</sup>

The term “epistemic” of course suggests that the matter under consideration involves knowledge, truth and justification and other linked concepts. I should clarify that I am not maintaining that a democratic, deliberative majority is always in possession of a true and justified view. Such a view would be a *critical* one. That an outlook on the common good is a majority one does not make a view of the common good true. Nor do I think that an *ideally rational* group of inquirers is guaranteed to ascertain moral truths - even if they reach a unanimous decision. Nor am I even claiming that those engaged in such an ideally rational procedure are *more likely* than not to ascertain the moral truth. I can’t defend any critical view or even a probabilistic account of truth discovery for two reasons. First, I am not confident that there are moral truths. (Nor am I confident that there aren’t.) But secondly, I think that if there is a truth about the common good, it will be “procedure independent.” The truth doesn’t depend upon a community of investigators engaged in any *particular* procedure - no matter how rational.<sup>8</sup> But what I am suggesting, though very tentatively, is that a certain process, a rational, deliberative, democratic one can *reliably* track procedure-independent substantive truths. I maintain this because if there are moral truths, admittedly a very “big if,” the idea of *unknowable* (epistemically inaccessible) moral truths is very problematic, perhaps

even incoherent. *I base this on an a priori assumption that morality should guide the lives of human beings.* What can we make of the idea that there are moral truths, in particular, principles for organizing a just society, that no one can know even in an ideal situation? If the most rational people can't discover moral truths, then we have good reason to think there aren't any. (More about this later)

The two epistemic approaches that I am presenting adhere to three conditions that Joshua Cohen has set forth for an epistemic interpretation of voting.<sup>9</sup> These are as follows: 1) An independent standard of correct decisions - that is, an account of justice or of the common good that is independent of current consensus and the outcomes of votes; 2) A cognitive account of voting - that is, the view that voting expresses beliefs about what the correct policies are according to an independent standard, not personal preferences for policies; 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. Thus, the epistemic conception treats processes of decision making as potentially rational processes of the formation of common judgements.

Epistemic accounts of deliberative democracy bandy about the words "rational" and "reasonable" quite a lot. These words do a lot of work distinguishing the good from the bad positions. But one is often left wondering what is meant by these terms.<sup>10</sup> If a view is reasonable merely if it passes a test for logical consistency and respect for scientific methods, then it will not be able to do much of the work its advocates hope. This is because so many of debates about justice are between positions that are logically and scientifically respectable.<sup>11</sup> It appears that the proponent of "rational" or "reasonable" politics is using such words to

suggest a cognitive failing in an opponent but I sometimes suspect the basis for the application of the pejoratives “irrational or unreasonable” are just that the recipient of the criticism disagrees with the politics/ morals of the critic.

I will speak in generalities about rationality and reasonableness, so that what I say will be compatible with virtually all the accounts that admit the morality of actions to be truth evaluable and open to rational criticism. (Thus what I say wouldn't be acceptable to a Humean.) Besides being free of formal logical errors, i.e., not contradicting oneself and using invalid inference rules, the deliberations can qualify as rational only if they are devoid of informal fallacies such as ad hominem arguments, weak inductions, slippery slope arguments, equivocation, red herring and straw man arguments, appeals to authority and other widely regarded fallacies such as those of composition, division, and begging the question. An expanded list of fallacies in reasoning can be found in almost any introductory logic or critical thinking text. I also believe that a rational tie can only come about where both sides are sufficiently aware of the suffering and frustration of others that precedes or results from the contested policy. Moreover, the contested moral views cannot be considered to be caught in a true rational stalemate if one or both are based on what is scientifically dubious, e.g. false notions of the nature of women or blacks. A rational argument should also meet some sort of generalization test/golden rule/reciprocity condition, i.e., one could accept the treatment that one was advocating another should receive if one was in that person's shoes. In other words, no double standards can be tolerated by a procedure of rational justification. A further requirement for a rational tie is that both side sides have seriously considered criticisms of their views and are aware of the relevant consequences of and alternatives to

their positions. My contention is that when these and perhaps some other similar conditions are met but disagreement persists, there may indeed exist a rational tie in which *either* both views are compatible with justice or those in the majority are correct for there is less likely to be a widespread breakdown in their “moral intuition module/faculty” than in the cognitive machinery of the members of the minority.

Before we examine rational and irrational disagreements, I need to discuss why we should think there is an intimate connection between reasonableness and truth - especially where this reasonableness occurs in democratic deliberative processes. This is a problem for even an *ideal* deliberative democratic process. For many scholars, it is virtually axiomatic that rationality is one thing, truth another. And rationality without such a connection to truth leaves us with little motivation to be impressed by rational agreements or rational disagreements. Consider first the truths of science. Why should we believe that an employment of our reason, basically logical argumentation and our reliance on what we take to be the most reasonable (scientific) methodology puts us in touch with the truth? What cause do we have to think our brains evolved the capabilities to fathom such truths of physics? These truths may be “out there” but beyond our conceptual capabilities.<sup>12</sup> Well, one response is that while we may not have grounds to believe our brains have the capacity to know the deep truths about the physical world, we are quite confident that if there are truths accessible to us, we are much more likely to discover them through use of rational methods. And in everyday matters where we don’t believe the truth is inaccessible, rational debate and methods appear more successful than the alternative. Think of the detective work of any real life Sherlock Holmes. Deductions, by which Holmes often meant inductive reasoning or

inference to the best explanation, are the best tools for getting at the truth of who did what to whom and why.

But since one can't rule out that our best attempts to use reason to obtain scientific truths will fall short, we shouldn't identify scientific truths with a Piercian or Habermasian fully rational community at the "end of the day." (A further glaring problem is how do we know that we are at "the end of the day.") But in my judgment, rational *ethical* deliberation (if we can satisfactorily spell out what this is) seems more immune to skepticism about there being an unbridgeable gap between reason and truth. I am tempted to maintain on a priori grounds that the existence of ethical truths that rational people could never access really doesn't make sense. This is, as I said before, because ethical principles are supposed to *guide* our lives. Principles that couldn't ever guide anyone's life, no matter how rational such humans were, hardly seem to qualify as ethical principles for human beings.

This claim can be illuminated by an analogy borrowed from Crispin Wright. He considers whether there could be properties of humor that no one could ever realize.<sup>13</sup> To assert that there are would make one the queerest of realists for surely humorous properties must be recognizable as humorous. Unknowable ethical properties are likewise suspect. So those who think a rationally deliberating community and the truth are *not* conceptually linked, are on apparently more solid ground regarding the sciences than they would be here in ethics. But this, of course, doesn't mean that there are ethical truths. The anti-realist of one stripe or another could still be right. My target in these passages has just been the realist who is skeptical of there being *any* link between rational discussion, agreement *and* the moral truth. Such a realist wouldn't find there to be anything of epistemic value in democratic

processes. My contention, on the contrary, is that *ethical* truths and rationality can't completely go their own ways, unlike what may be the situation in the natural sciences. While there is no guarantee that any *particular* rational deliberation might ascertain the ethical truth, if there are ethical truths, there is little reason to think they could be permanently off limits to the rational deliberations of men and women. My hope is that there will be democratic settings where these rational people are engaging in their rational deliberations.

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Thus the stage setting is complete although it is beset by a lot of big "ifs"<sup>14</sup> such as the existence of moral truths and the acceptance that a satisfactory account of rational disagreement can be given. So I am just assuming that there are disagreements on political matters which are *rational* disagreements. And these involve people sincerely trying to convince others of the merits of a moral principle. A vote is taken after lengthy and inconclusive rational deliberation.<sup>15</sup> Let's just assume that everyone votes what they believe to be the common good or what justice demands. They do not vote their naked interests. Still, the vote is not unanimous. Let's say it is 82% in favor and 18% opposed. What epistemic reason could there be for the rational minority to side with the rational majority? Why should anyone think that the majority has some epistemically superior claim to make? If both sides are rational, isn't it just a clash of *intuitions* that separates the disputants? If so, why think the majority's intuition is superior?<sup>16</sup>

To see why this might be so, let's take a moment to consider the role played by intuitions in philosophy - and not just in moral philosophy. So many arguments come to rest

on intuitions - probably many more than philosophers are willing to admit. For example, most agreements on metaphysics (consider especially the thought experiments in the personal identity literature) are made possible by shared intuitions and not empirical facts or entailments from first principles or logical truths or inferences to the best explanation. And most of the disagreements arise from unshared intuitions. Debates often take the form of undermining others' intuitions with clever thought experiments that isolate specific properties, and harnessing support for one's own intuitions which occur when informed people "second" (endorse) one's intuitions. Sometimes we can undermine the others' intuitions by pointing out some factor that was distorting their view. Upon reflection, they realize their intuitions were based on false beliefs or, returning the discussion to ethics, were dependent upon morally irrelevant factors. Our confidence in our intuitions grows when others react to thought experiments and examples as we do. Our confidence wavers when very bright, informed and rational people react differently. If *no one* shares our intuition on some matter, we are very likely to lose faith in our ability to intuit properly - at least in this case. While we normally first assume that others have overlooked something when they disagree with us, when we find out that the vast majority considered the same matters from the same "angles" that we did and still disagree with us, we become suspicious of our own intuitions. Of course, there are some intuitions we can't imagine ourselves giving up even if no one agreed with us. For instance, if everyone else came to believe it was morally permissible to torture babies for fun, one's intuition that it was not would not weaken.<sup>17</sup> But on the more difficult issues, we, at least those of us who aren't extremely stubborn or egotistical, come to suspect ourselves if the vast majority of our rational professional peers

disagree and we can't find any basis for this disagreement in the form of an error in their reasoning, a fact they overlooked, a perverse insensitivity to relevant properties, an evident failure of imagination, or biases stemming from self interest or other inappropriate intuition-distorting character traits. Whether there is a distinct faculty of moral intuitions or not, we suspect our "moral intuition module" - or whatever one thinks is more plausible cognitive substitute- has malfunctioned.

Let's imagine that a seemingly intractable moral disagreement between rational people has arisen despite sustained deliberations. Not only are the people (in general) rational, but their arguments in this *particular* issue are reasonable. What could explain the disagreement? Assume we aren't willing to abandon the existence of moral facts because of seemingly intractable disagreement.<sup>18</sup> Somebody's intuitions are wrong. Someone's faculty of intuition malfunctioned.<sup>19</sup> Another adequate description would be to say that someone is guilty of "moral blindness," unable to "see" the relevant moral properties.<sup>20</sup> But maybe there aren't such faculties and distinctive forms of perception. Still, we are unwilling to abandon our view that some intuitions are necessarily true<sup>21</sup> and that we know them even if there isn't a special cognitive module. Who is more likely to be wrong? That is, which of the groups of rational individuals are more likely to have undergone some cognitive failure? Isn't it more likely that there has been a small scale breakdown than large scale malfunctioning? This is an even more appealing hypothesis when the public is diverse and yet there is agreement across the diversity on moral issues. Thus the minority and majority positions can't as easily be alternatively explained as just the result of the groups' common sociological backgrounds.<sup>22</sup>

My argument can perhaps be helped by an analogy of mechanistic failure. If a lot of

previously reliable different types of calculators<sup>23</sup> get the same results and then just a couple of them start to get on occasion a different answer from the rest, isn't it more likely that there is something wrong with the smaller group of calculators than the larger group? It seems plausible to think massive failures are less likely to occur than failures small in number. Thus where there appears to be rational disagreement, the intuitionist (or his cousin) may have some grounds to believe it more likely that the failure is with the few than a malfunctioning in the cognitive apparatus all at once of so many people.

Now this view doesn't depend upon the existence of a certain faculty of moral intuition and a distinct kind of perception. However the moral opinions come about, an overwhelming rational majority is more likely to be right. For instance, leaving behind classical accounts of intuitions, the same conclusion will hold for a secondary quality approach to moral judgments like that of John McDowell.<sup>24</sup> Assume that given our moral sensibility, certain actions have the dispositional power to elicit in us true moral judgments. On such a naturalistic approach, who is more likely to have become "morally color blind": the minority or majority?<sup>25</sup> So even without a special faculty for intuiting moral truths, it appears that whatever the cognitive substitute, we have reason to suspect the rational majority is correct.

Of course, one can be utterly suspicious of intuitionist and secondary quality approaches to morality. As I have said before, my paper is resting on some "big ifs." Some will say moral agreement should be explained by common upbringing and natures and moral disagreement due to differences in backgrounds or whatever forces are responsible for people's different desires. They might hold that there is more explanatory power in appealing

to common desires and projections or something else than moral facts properly intuited or sensed.<sup>26</sup> I can't defend intuitionist or secondary quality approaches to ethics here. This is not meant to be a paper defending a particular meta-ethical and epistemological approach. Instead, my aim here is merely to bring certain well-known meta-ethical and epistemological positions to bear on the question of the legitimacy of majority rule.

Some readers might not take issue with the assumption that there exist moral truths, but may contest the use I try to put them to in defense of majorities. They may criticize my earlier example of the legitimacy of the majority position because there I relied on a case of an overwhelming majority, 82% in favor and 18% opposed. These critics may argue that in such scenarios majority rule is unlikely to provide especially controversial.<sup>27</sup> The implication being that it is where there is a small majority that the question of majority rule is really an issue. Perhaps there is something to this charge, but I still can't help thinking that majority rule is problematic even when the minority is small for it may be convinced its position is the reasonable one. An 18% minority, confident that it has reason and justice on its side, can quite plausibly ask why it should accept the majority position? And it is not much if any easier for a nonepistemic account of democracy to answer this than if the minority was closer to fifty percent. It is important to distinguish *types* of majorities and minorities, for the makeup of such groups determines, to a considerable extent, the epistemic significance that should be accorded the percentages of people composing the minority and majority factions. For instance, a mere fifty-five percent majority that is extremely diverse is more epistemically impressive than even a larger majority of a homogenous group. Where the

majority includes very different types of people, this can increase our confidence that the error does not lie with the majority. The reason for this confidence is that such an error would have to occur in many “cognitively different” types of people. The fact that an agreement was reached by a majority of people of diverse backgrounds, assumptions, experiences and interests provides considerable support to the idea that a fact about justice has been tracked and discovered. And the diversity of such a majority makes us less sympathetic to the competing hypothesis that the large degree of consensus is reached merely because the inquirers have similar backgrounds, dispositions and intellectual habits. A majority consisting of a homogenous group of people is more like the mass production of many calculators of one particular model. If the vast majority of calculators are of the same design model, an error in their engineering would show up in all of them and thus there would be no reason to trust the larger number of calculators when they give an answer different from a smaller number of a different model of calculators. So, all things being equal, a small but diverse majority (composed of people of different religions, cultures, classes, races, sexes, educations, etc.) is less likely to provide erroneous intuitions than a larger group that is more homogenous. So there are times that we have greater reason to have confidence in the beliefs of a fifty-five percent majority than those promoted by an 82% majority.

A belief that it is a small majority that really poses a problem for legitimating majority rule provides a good segue way to my second epistemic defense of majority rule. The grounds for skepticism about my first attempt to bestow a privileged epistemic position upon the majority when it is a slim one may actually provide a reason that strengthens the second defense of epistemic democracy that I present. Perhaps motivating a reader making

the objection in the above paragraph about large majorities is that s/he believes that where a majority is overwhelming one is less likely to think that the minority could be right. If this is the reader's assumption, then s/he is much more likely to think, all other things being equal, that the minority may be on the right track when it is a very large rather than a small minority. One tends to be more open to the possibility that both sides may be reasonable and that their competing views may both be compatible with justice if the sides are virtually evenly split (and their membership diverse). Thus if the criticism of my first epistemic defense of a majority decision is that it is unneeded when the majority is large while epistemically unimpressive and unconvincing when it is a small majority, this may provide a point in favor of the second defense that both views are compatible with justice.

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The second approach to the legitimacy of abiding by the majority vote of a rational majority doesn't involve seeing the majority's view as true and the minority's as false. Rather, this approach declares that since both sides are rational, there wouldn't be a loss of rationality or value if the decision went either way. The claim is that both rational views are consistent with justice. Since there wouldn't be a loss in justice with either outcome, this gives us a new and better reason to tolerate a fair proceduralism. The minority is not condemned to accept what it believes is a substantial wrong for the sake of social cooperation or because of just a fair procedure. Instead, the majority view can be seen to be equivalent to the outcome of a fair coin toss between equally rational views of the common good.<sup>28</sup> My claim is thus that fair proceduralism is not only tolerable but can be seen as morally legitimate when the outcome is not an unjust one or merely a compromise in which interests

are aggregated.

I am maintaining that rational disagreement should perhaps not lead people to believe the anti-realist line that there is not a right answer, but instead to view both positions as compatible with justice. Of course, there are other alternatives, one of the more appealing would be Mackie's view that rational disagreement suggests that there isn't any truth any group of inquirers is tracking. Moral disagreement may make us ethical skeptics. But there is also a lot of ethical agreement. Why should the disagreement rather than the agreement tip the meta-ethical scales? I offer here a realist response to the anti-realist argument based on widespread, seemingly intractable disagreement between rational people. Some anti-realists are quite impressed by this disagreement amongst rational people. This suggests to them that there aren't any truths to be tracked. When it is pointed out that there is considerable moral consensus, and thus if disagreement provides some reason in support of anti-realism, the moral realist could just as well take comfort in the widespread moral agreement, their standard response is no. The anti-realist believes he can tell a convincing psychological and sociological story about the agreement coming from like upbringing or common nature etc., while the realist can't explain why rational men from the same culture are disagreeing with each other as often happens in legal, political and moral philosophy journals (perhaps the epitome of rational discourse?) Their disagreement can't be laid at the door of ignorance of some facts or different cultural backgrounds. Rather, it is thought to suggest that there aren't any moral truths. But an advocate of my second epistemic account is able to respond that we can just as well interpret disagreement between rational men not as evidence that there isn't any truth to track, but as the truth being that both views are compatible with justice.

It is often hard to say when there is a rational tie for both sides are likely to think the other is making a mistake in their reasoning, perhaps not a logical one, but just one in their weighting of principles. The easiest scenario to judge a tie will be a case in which the reader can't make up his or her mind because s/he feels the pull of both positions. Even if this reader ends up tilting one way, the awareness of how precarious was the tilt, just a slight shift of weight will produce a tilt in the other direction, will lead such a person to consider the possibility that there was nothing at stake. By "nothing at stake" I don't mean that it was not a morally weighty issue but rather that justice does not demand a unique answer. Where there is a "moral tie," those advocating the minority position should be willing (or, at least, more willing than they were before) to accept the voted will of the majority for there isn't a loss in moral value. If justice is not exclusively on one side, siding with the majority to break the tie has not only the fairness of counting everyone equally and favoring increasing the aggregate utility (considering the preferences being roughly equal), but can be viewed as a surrogate for a coin toss and thus imbued with the fairness of a flipping a coin.

I think the debate over affirmative action can illustrate this notion of a rational tie. Aren't there good arguments on both sides of the affirmative action debate? Well, this wouldn't be the case if the motivation behind all the arguments is to further one's own race or self interest which is tied to the absence of preferential treatment. But this need not be the case with affirmative action. There are critics of affirmative action, often members of the minority, who stress the damage preferential treatment does to the minority.<sup>29</sup> It promotes the minority student's self doubts and then s/he has to prove to everyone else s/he "belongs" there while these others get the benefit of the doubt from having made it through the standard

admissions process. Such minority and majority doubts and resentments could lead to self-chosen campus ghettoization which defeats the goal of experiencing diversity. And the minority students who are accepted without any preferential treatment will be grouped with those who did need such admissions' favoritism. Furthermore, at least with affirmative action in the universities, there is usually an institution one level below at which minority students can thrive rather than struggle at the more demanding place. And the minorities "helped" are often children of the black middle class and least in need of a "helping hand." Another benefit of ending affirmative action is it will eliminate the resentment of the majority race students who feel they have personally suffered or overcome as great if not greater disadvantages than many black recipients of preferential treatment and also those who feel they are innocent of any blame for the handicaps confronting the minority. Obviously, one standard for all is appealing and socially cohesive. Even the advocates of affirmative action look with favor upon the ideal of a single standard in the *future*, it is just that they insist that the present disparities prevent its establishment from *now* being substantially fair. When and whether they will admit the playing is level is a good question. There is the related danger that "set asides" lead to sense of entitlement and thus produce poorer performances from those with protected niches.<sup>30</sup> Furthermore, can one have a medical researcher, a surgeon, a lawyer or teacher etc. that is too talented?<sup>31</sup> Don't we want the best people providing vital services? Wouldn't minority communities also benefit from more talented teachers, doctors, scientists, lawyers etc?

But let's now look at the other side of the debate and consider what can be said in favor of affirmative action. It helps to keep in mind that no one has a *right* to a college or

graduate education. If a state lacks a law school, residents cannot claim that their rights have been violated as would be the case if an adult had to wait an abysmally long time for one's day in court or a child was denied a slot in any elementary school because of the scarcity of courts and grade schools. Since the state doesn't have to build a medical or law school if it doesn't have one, while it has to build courts and elementary schools if the present number is insufficient, it can provide institutions of higher education and admission spots on the basis of its *policy* concerns rather than in response to the *right* claims of its citizens. And it certainly seems to be a good, social harmony promoting policy to have jobs and wages spread between the races in numbers closer to the proportion in which they are in the population. In the absence of this, there will almost always be at least the perception of unfairness. And it would be desirable to give the historically mistreated minority a sense of belonging which can come from a display of solidarity when the historically advantaged group opens its doors to and even sacrifices for the other. And isn't it more likely that minority professionals rather than white professionals will service minority communities desperate for professional services? And aren't these areas starved not just for services but for same race role models? And what exactly is the *merit* that minority students allegedly given "preferential treatment" lack? "Merit" is defined by the goals of the institution. The goals of colleges aren't automatically served by people who do the best on their math SATs. If the goals are to make a better society, one more integrated, one in which minorities feel they belong, one in which there aren't huge wage differentials between the races and one in which there are role models and services provided by the institutions to the minority communities and where knowledge is spread to all segments of the population, then since a dark skin can contribute to these

goals, even race can be considered a merit.<sup>32</sup>

Moreover, if the psychological effects of affirmative action are so intolerable, the student can always refuse such an admission. Since it is his or her psyche that is allegedly being damaged so, why not allow those allegedly threatened to make the decision whether or not to accept such “psychic” burdens? Anyway, many of the minority students benefitted by affirmative action may feel in their hearts that they are just as capable and will “catch up” in college despite their starting point being behind the others. And shouldn’t the onus be on the majority race students to assume the minority students are just as capable until proven otherwise? Not only do some have the just mentioned potential, but not all minority students on campus were even admitted by a special standard. Furthermore, isn’t the exposure to different cultures rewarding? People who have lived besides, listened to and studied with other races will be better prepared for a diverse workplace when they graduate. And the alleged reverse discrimination against whites is perhaps somewhat misleadingly named for it not done with hostility to those discriminated against, as was historically the case towards blacks. The whites today are not being told to don’t even bother applying for they are inferior. They are just being informed that if they do apply, factors other than grades and test scores are considered in the admissions decision. Moreover, aren’t many whites, who often insist they are not guilty of any racist acts, still benefitting from the effects of past racism - if not present prejudice towards minorities - through the less powerful competition for these positions? Without a racist legacy, the competition would be more fierce. So perhaps the set asides wouldn’t be given to the borderline white applicants who claim they are hurt by affirmative action. For if the racism which affirmative action is meant to rectify had never

taken place (or had been rectified earlier) than better prepared blacks would occupy these borderline spots.<sup>33</sup> It is plausible to maintain that the borderline white applicants have benefitted from racism even if they are not racist. They should keep in mind that possessors of illicit goods, even if acquired without mens rea, say having innocently bought stolen goods, are very often morally compelled to forfeit them.

Hopefully the reader has felt the pull of both views, pro and con. It doesn't seem a moral disaster to me which side wins out. Rationality is not exclusive here. It is not an either/or choice, one option rational and the other not. The position that I have argued for means that justice does not necessary determine a unique answer to each of its questions. Just as both the practice of affirmative action and its absence could be compatible with justice, the same may be true for other issues - though it will often be the case that the debating parties aren't aware of it. It will be hardest to convince one party to a debate that it is a rational tie when they find their opponents' view to be very counterintuitive, unlike the affirmative case where many people on both sides recognize some attractive aspects of the opposing view. But if one can't point out any errors in an opponent's reasoning, any fallacious inferences, and facts ignored or suffering not vividly imagined etc., then it may indeed be a rational disagreement. The cognitive failure of the two debating sides would be one only of second-order rationality: a failure to see that the other is not making any mistakes other than a failure to notice the propriety of his opponent's reasoning and to infer that both views are compatible with justice. But again, I am not insisting that such controversial debates always indicate a moral tie. I merely want to allow for a tie that can be unrecognized.

The phenomenology of moral disagreement is often not conducive to getting the

opposing parties to hold that there is not any real difference between the views in terms of justice. Typically, both sides think the other is wrong, and each assumes that there is a failure of reasoning on the part of the other. The contrary conclusion of a rational tie is more likely to arise when one party feels torn and pulled in both directions as I personally do with affirmative action. I chose the affirmative action example because I suspect that readers might also be split on the issue, feeling the pull of both positions. Perhaps it is a tendentious strategy. Anyway, my claim is that the two sides, each insisting upon the correctness of their position, are only making what can be called a “second-order mistake.” They are each wrong to believe the other party’s position is unjust. They would do better to describe their situation as one in which neither opponent is making a first-order error, i.e., neither side is putting forth a view that is unjust. I think that despite the initial moral disagreement and its accompanying phenomenology, the two opposing sides can *sometimes* be brought to realize this when they cannot find a flaw in the other’s reasoning. They may begin to look at the rational conflict between themselves and others much as they look at an internal conflict whenever they “feel” the pull of two contrary positions. This recognition of the absence of a first-order error about justice and a change in the phenomenology of the disagreement may be obtained when it is discovered that the other side is not guilty of any of the following: a) logical or informal fallacies b) a lack of imagination which manifests itself as an insensitivity towards the suffering and frustration of others, c) a failure to put forth a view that can pass some form of Kant-like universalization or generalizeability test, d) an inability to appreciate the consequences of the recommended policy e) overlooking any relevant alternatives and f) basing their views upon assumptions incompatible with the best natural and social science of

the day. I think it is fairly safe to assume that these criteria will be found in almost every account of rational discourse. Readers are free to alter the provided account if they believe that the common denominator of the major accounts of rationality is different. What I ask is just that they then give my conclusion a fair hearing when there arises a tie between rival positions that both meet whatever rational criteria that they believe should be in place.<sup>34</sup>

However, it may seem to some readers that it is contradictory to hold that both affirmative action and its absence are just. They may be wondering how could a claim in favor of something and its negation both be rational? Isn't that like insisting something is round and not round? Well, no. I am not claiming that affirmative action is both just and unjust. What I am saying is that justice *permits* more than one principle and institutional practice though they cannot coexist. An analogy might help. I assume it is just that there are congressional elections every two years. If we change the system and have the election every two and a half years we obviously are not having the election every two years. But it shouldn't be hard to imagine that two and a half years is also a just gap between votes. And if the two and a half year election is just, this doesn't mean the two year election is unjust. Both are within the parameters of justice. Of course, not holding an election would be unjust as also would be having an election only every twenty years. But having an election every two years or having it every two and a half years can both be just alternatives though incompatible ones.

So if we have a rational disagreement and both views are permitted by justice, then there isn't a loss of moral value<sup>35</sup> whichever view prevails. Thus fair proceduralism is more tolerable here than in those conditions mentioned in the introduction. But someone might

object why not instead implement the minority position? Isn't this just as fair?<sup>36</sup> One reason to go with the majority where doing so would not make a victim of either truth nor reason is along aggregating or social choice lines. We maximize interests, counting everyone's the same, without sinning against truth and reason. But is this fair? What if the members of the minority persistently makeup the minority? However, this should be unlikely because we are assuming in a deliberative democracy that people here are not voting their interests but their rational view of the common good. Interests, of course, are likely to be determined by group membership (socio-economic, race, religious etc.) and thus majority and minority groups will have relatively stable memberships. But if the majority and the minority are *rational* ones, then it is less likely that a rational person will always be locked into the losing group wherever there is a rational disagreement. And thus the minority can take consolation in the fact that the next day "rational ties" may be resolved in their favor.

But some readers may not think this to be a sufficient response. Maybe what is causing the voting differences amongst the two rational views originates in the voter's social group.<sup>37</sup> The rational minority may turn out to be continuously in the minority which will perhaps still make some people question the fairness of democratic majority rule. Perhaps a minority member is not going to be content knowing that his vote for a just outcome counted as much as the votes of others for a different but still just outcome since he rarely gets his moral view to be the majority position. While members of the minority, on my view, would recognize that a moral tie means no loss of moral value or justice, they could still account for the loss in the vote as a loss in personal preference realization even though this state of affairs is certainly superior to losing out to a majority view that doesn't deserve to be called

just or rational.

While I don't believe that the denial of a "preference" for a moral view due to an equally good moral position is that bad a state of affairs, the earlier epistemic account may help here to assuage the minority. Recall, that we gave some reasons to believe the majority position would be true. This when considered along with the latter account can buttress majority rule. But the reader might wonder how are the two epistemic accounts compatible? The earlier position was that there is a truth and it is likely to be the majority position and that there is a false position which is most likely to be the minority view. The second epistemic approach is that neither of the two sides is false (except as they may have suffered a second order failure of rationality leaving them unable to see the comparable merits of their opponents' position) and that reason and justice are compatible with both. The two epistemic accounts seem to exclude each other. Well, they are indeed exclusive. Nonetheless, if the second view is false either on this one occasion or if there is never a rational tie, then one of the most promising alternatives to the second epistemic account is that the majority is correct for the reasons mentioned in the first epistemic account. So while the first epistemic account doesn't salvage the second view, yet as a default view it gives the minority an additional though different reason to side with the *majority position*.

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The success of this paper hinges on the plausibility of an account of rational disagreement and moral realism. There is not space to attempt to provide such accounts. In fact, I am not sure I want to. Recall, that I said I was more of an agnostic than an advocate of moral realism and the two epistemic approaches. My aim here in this paper was just to put

forward two *plausible* epistemic accounts of deliberative democracy, not to crown and swear my allegiance to one of them.<sup>38</sup>

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1. What is meant by a “fair procedure” could be a number of things. In the case of a fair vote, what people have in mind is usually something along the lines of everyone gets one vote, the ballot is secret, votes aren’t bought, only residents vote, and, very important to advocates of deliberative democracy, citizens are able to participate in pre-election deliberations and do so with enough resources in order that their view gets a reasonable hearing and a good faith debate ensues between them and their opponents. On some accounts, fairness will also involve restrictions on the type of reasons (public reasons a la Rawls) that can be introduced for consideration.

2. I am using reasonable and rational interchangeably throughout this paper. Rawls, famously, distinguishes the two.

3. The position that the majority may be more likely to be correct is of course not new. Condorcet, Bentham and Rousseau all held something along this line. For an account of Condorcet’s Jury Theorem see note # 6 below. While Bentham distinguished correct answers (in accordance with the Principle of Utility) from majority opinions, he did claim that “general consent provides the surest visible sign and immediate evidence of general utility.” Cited in Ross Harrison, *Bentham*, (London: Routledge and Kegan Paul, 1983) p. 214. And according to Joshua Cohen in his “Epistemic Populism” *Ethics* October 1986 p. 28 “While Rousseau thought that the general will - which aims at the common good - ‘is always right,’ he denied that it ‘follows that the people’s deliberations always have the same rectitude’ since those deliberations may reflect insufficient information, or be

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dominated by private interests, or subordinated to factional conflict, or addressed to issues on which there is not common interest. He concluded that majority judgments are good if fallible indicators of the general will under certain specific background conditions, including good information, widespread political participation, absence of factions (or else a multiplicity of factions), limited economic inequality, and the rule of law. And even with these qualifications, Rousseau did not endorse rule by *simple* majorities. Rather, he thought that, on more fundamental issues, it would be reasonable to require larger majorities. In fact, only on ‘business matters,’ as distinct from laws, is it in general true that simple majorities should be decisive.”

4. See David Estlund’s critique of Rousseau’s demand that those in the minority relinquish their epistemic autonomy and concede that we were wrong in his “Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority.” Reprinted in *Deliberative Democracy: Essays on Reason and Politics*. Eds. James Bohman and William Rehg. (Cambridge: MIT Press, 1997) pp.198-200.

5. And this agnosticism extends to moral realism. Or more accurately, some of the reasons for the latter agnosticism motivate the agnosticism regarding the epistemic accounts of democracy.

6. Condorcet’s Jury Theorem, on the other hand, maintains that a mere 51% of the vote is good reason to believe a view is true if people are right more than half the time. Estlund

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offers a nice account linked to the “Law of Large Numbers” of what Condorcet’s theorem implies. “If each voter has an individual likelihood above 50% (call it  $[50+n]\%$ ) of giving the correct answer (whatever it is) to a dichotomous choice (heads/tails, yes/no, true/false, better/worse, etc.), then in a large group the percentage giving the correct answer is bound to be exceedingly close to  $(50+n)\%$ . Therefore, the chance that it will be at least 50% is even higher, approximating certainty as the group gets larger or the voters are better. In summary, if voters are all 51% likely to be correct, then in a large number of voters it is almost certain that almost exactly 51% will be correct, and so even more certain that more than 50% will be correct.” “Beyond Fairness and Deliberation” in *Deliberative Democracy*. pp. 202-203. Because Condorcet’s theorem works with a mere majority, some readers might find my first epistemic account less appealing. But the Jury Theorem has its well known problems. Its axioms may not hold in a complex modern democracy. See Estlund *IBID*. pp. 186-191 and T. Christiano’s “Freedom, Consensus and Equality in Collective Decision Making.” *Ethics* Oct. 1990 pp. 151-181.

7. For fuller accounts of deliberative democracy see the volume *Deliberative Democracy*, especially Joel Cohen’s contribution “Deliberation and Democratic Legitimacy” pp. 67, 72-73.

8. See Estlund’s “Beyond Fairness and Deliberation” for a discussion of procedure and procedure-independent epistemic approaches to democracy. pp. 176-181.

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9.Cohen. “Epistemic Populism.” p. 34.

10.For a confusing array of sample usages of reasonable and rational which may leave one believing if the terms are not ambiguous they are then what Wittgenstein called “family resemblance” terms, see the various offerings in the *Deliberative Democracy* anthology.

11.For skepticism about overcoming the plurality of moral views that characterizes modern societies through democratic deliberations, see Gerald Gaus’s “Reason, Justification and Consensus: Why Democracy Can’t Have it All.”pp. 207, 215 and Christiano’s “The Significance of Public Deliberation” pp. 250, 264, 266-270. Both are in *Deliberative Democracy*. See also Christopher McMahon’s review of *Deliberative Democracy* in *Ethics* April 1999 pp. 648-650..

12.If one thinks that there can’t be unknowable truths for they imply concepts we can’t grasp which Davidson showed was incoherent in his “The Idea of a Conceptual Scheme,” I suggest they read Fodor and Nagel’s responses respectively in *The Modularity of Mind* (Cambridge: MIT Press,1983) pp. 120-124 and *The View From Nowhere* (Oxford University Press, 1986) pp. 93-98.

13.Wright, Crispin. *Truth and Objectivity*. (Cambridge: Harvard University, 1992)

14.One was that there are moral truths. A second “big if” was that my argument hangs on

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there being a justifiable conception of practical rationality which others might doubt.

15. Though “inconclusive” is used above in the sense that we didn’t achieve unanimity, the *deliberative* process could have been constructive in revealing flaws in one side’s reasons which thus makes the other view more attractive by default, or perhaps improved both sides but neither to the point where it appears to persuade the other side, or revealed in a better light the opponent’s principles. All of these could make what originally looked like a disagreement where one side maintained that the other was irrational into a disagreement where both sides view the other as rational or, at least, an impartial outsider can view them as “rationally and morally tied.”

16. Again, this is supposing the involved parties believe in morality that can be intuited. If not, then the following will not be persuasive.

17. But this may in part be due to the fact that the others previously agreed with oneself.

18. J.L. Mackie advocated such abandonment in a section entitled “The Argument from Relativism” in his *Inventing Right and Wrong* reprinted in *Essays on Moral Realism* ed. Geoffery Sayre-McCord. pp 109-110.

19. I believe that the intuitionist view which I am putting forth would be compatible with Alvin Plantinga’s account of non inferential basic beliefs that have warrant and thus count as knowledge when they are produced by faculties functioning properly in the

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environment that they were designed for. See his account in *Warrant and Proper Function*, (Oxford: Oxford University Press, 1993).

20. Perhaps it would be better to say “moral blindspot” than “moral blindness” for the latter appears to suggest more blindness than the former. But maybe someone *completely* unethical or amoral should be considered morally colorblind.

21. As Thomson puts it, if any moral claim is true it is that torturing babies for fun is wrong. Thomson, Judith Jarvis. Introduction to her *The Realm of Rights*. (Harvard University Press, 1990) p. 18.

22. A related criticism pointed out by C. McMahon is that if the majority is under the sway of a single charismatic leader, then there is little reason for the minority to heed the will of the larger group for the former is in a sense in a disagreement with but a single person. It is as if one person has been cloned enough times to form a majority. So my argument is the strongest where a diverse group of people independently reach the same decision. But McMahon, in a written communication, responds that this leads to a kind of paradox. He writes “If the views of those on the other side have been arrived at independently, then they have paid little or no attention to what others think is reaching them. They have made up their own minds on the basis of the evidence. There is a kind of paradox here. The less attention others have paid to what other people believe, the stronger the reason provided to me by the fact that many other people hold a particular

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position. But if this is the case, it would be odd for me to respond to this reason by simply assuming I am wrong. The response that is most in keeping with the way the reason arises would be to reexamine the issue to see if I can discover any mistakes I have made. But if I cannot, I should hold on to my view. I should not conclude that others are probably right just because so many of them hold the same view. This would be to reject in my own case the independence that is the *sin qua non* of the agreement of many others having any rational significance at all.”

23.The many different models of calculators is comparable to the diversity of the moral community in the previous passage.

24.See his article “Values and Secondary Qualities” reprinted in *Essays on Moral Realism* pp. 166-180.

25.Again, just as chances are that the minority is more likely than the majority to perceptually deviate and thus make a mistake in color perception, so too with the moral analogy. Note, however, that this probabilistic claim doesn’t contradict what I said earlier about it not being more probable that a rational group of inquirers would attain the truth. The antiprobabilistic claim there was due to my doubts that there were any moral truths. The probabilistic aspects of my epistemic account here rests on the assumption that there are moral truths.

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26. Gilbert Harman takes this approach as does John Mackie. Both are reprinted in Sayre-McCord *Essays on Moral Realism*. Harman's account is on pp.119-126.

27. This is a version of a criticism that an anonymous reviewer put forth.

28. According to Estlund, a coin toss may be the paradigm of fairness. See his "Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority."

Reprinted in *Deliberative Democracy: Essays on Reason and Politics*. pp. 176-179.

29. See, for example, Shelby Steele's *The Content of our Character*. (New York: St. Martin's Press, 1990) pp. 111-126.

30. This entrenched minority power play (of academics, administrators and students) is the equivalent of whites being opposed to affirmative action *merely* because it takes away opportunities from them.

31. This might not be the case for those employed in certain jobs where intelligence above a certain level normally has little impact on job performance for the work is not intellectually demanding.

32. Dworkin makes this point in his "Reverse Discrimination" in his *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) pp. 223-248 and in his writings on the Bakke case reprinted in *A Matter of Principle*. pp. 293-315.

33. Admittedly, there are some contestable counterfactual assumptions being made here.

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34. Chris McMahon has expressed to me his skepticism about my account of a “rational tie.” He doubts that it accords with the phenomenology of moral disagreement. In his view, it is unlikely that a prolonged tie will lead to the conclusion that there isn’t a sought after unique right answer. The opposing parties are more likely to insist that the other is wrong, even if they can’t presently point out the cognitive failure the other side suffers from. An anonymous reviewer made a similar point.

35. Or total summed moral value as the abortion case illustrates.

36. Well one problem is that the majority could still get their way by voting for the position they don’t really want since they know the minority will triumph when there isn’t a full consensus. But this can be avoided if people are really voting for the public good, which we stipulated they would do for the sake of discussion or by randomly altering the majority/minority “sweepstakes.”

37. This is likely to be the case with affirmative action. Another example would be if members of a poor minority ethnic group were the ones regularly being sentenced to death rather than life imprisonment.

38. I would like to thank Christopher McMahon and a pair of anonymous reviewers for insightful and helpful comments on this paper.