

## THE EPISTEMIC DIMENSION OF DEMOCRATIC AUTHORITY<sup>1</sup>

### I. INTRODUCTION

ASSUME that for many choices faced by a political community, some alternatives are better than others by standards that are in some way objective. (For example, suppose that progressive income tax rates are more just than a flat rate, even after considering effects on efficiency.) If so, it must count in favor of a social decision procedure that it tends to produce the better decision. On the other hand, there is wide disagreement about what justice requires, and no citizen is required to defer to the expertise or authority of any other. Thus, normative democratic theory has largely proceeded on the assumption that the most that can be said for a legitimate democratic decision is that it was produced by a procedure that treats voters equally in certain ways. The merits of democratic decisions are held to be in their past.

One sort of theory treats every voter's views as equally valid from a political point of view, and promises only the procedural value of equal power over the outcome. A distinct approach urges that citizens' existing views should be subjected to the rational criticism of other citizens prior to voting. In both cases, the legitimacy of the decision is typically held to lie in facts about the procedure and not the quality of the outcome by procedure-independent or epistemic standards.

This contrast between procedural and epistemic virtues ought to be questioned. Certainly, there are strong arguments that some form of proceduralism must be preferable to any theory in which correctness is necessary and sufficient for a decision's legitimacy. Democratic accounts of legitimacy seek to explain the legitimacy of the general run of laws (though not necessarily all of them) under favorable conditions. However, even under good conditions many laws are bound to be incorrect, inferior, or unjust by the appropriate objective standard. If the choice is between proceduralism and such correctness theories of legitimacy, proceduralism is vastly more plausible. Correctness theories, however, are not the only form available for approaches to democratic legitimacy that emphasize the epistemic value of the democratic process — its tendency to produce outcomes that are correct by independent standards. Epistemic criteria are compatible, at least in principle, with proceduralism. Thus, rather than supposing that the legitimacy of an outcome depends on its

correctness, I shall suggest that it derives, partly, from the epistemic value, even though it is imperfect, of the procedure that produced it. Democratic legitimacy requires that the procedure is procedurally fair and can be held, in terms acceptable to all reasonable citizens, to be epistemically the best among those that are better than random.

## II. BEYOND FAIRNESS AND DELIBERATION

A critical taxonomy will allow the argument for Epistemic Proceduralism to develop in an orderly way.

### A. Fair Proceduralism

Fair Proceduralism is the view that what makes democratic decisions legitimate is that they were produced by the fair procedure of majority rule. A problem for this approach is that, while democratic procedures may indeed be fair, the epitome of fairness among people who have different preferences over two alternatives is to flip a coin. Nothing could be fairer. Insofar as we think this is an inappropriate way to decide some question, we are going beyond fairness.

Of course, if there is some good to be distributed, we would not think a fair distribution to be one that gives it all to the winner of a coin toss or a drawing of straws. This reflects our attention to procedure-independent moral standards applying to this choice. Since we think some of the alternative distributions are significantly more appropriate than others, we are not satisfied that mere procedural fairness is an appropriate way to make the decision. A fair procedure would be a fair way to make the decision. But if making the decision in a fair way (as in a coin flip) is insufficiently likely to produce the fair or just or morally required outcome, it may not be good enough.

I assume that making political decisions by randomly selecting from the alternatives, as in a coin flip, would not provide any strong moral reason to obey or any strong warrant for coercive enforcement. I conclude from this that the procedural fairness of democratic procedures does not lend them much moral legitimacy.

A second problem is that in this pure, spare form, Fair Proceduralism allows nothing to favor one citizen's claims or interests over another's — not

<sup>1</sup>This article is a half-length version of "Beyond Fairness and Deliberation. The Epistemic Dimension of Democratic Authority," in *Deliberative Democracy*, James Bohman and William Rehg, editors, MIT Press, 1997. I am sure that some of the deleted material must be important. I have benefited from discussion of these issues with numerous people at philosophy colloquia at Brown

University, the University of Wisconsin, Georgetown University, and the conference on Deliberative Democracy at St. Louis University, April 1996. Much of this work was supported by a sabbatical from Brown and by the fellowship (in both senses) at the Program in Ethics and the Professions at Harvard University during 1993–94.

even good reasons. It entails that no one should be favored by any reasons there might be for treating his or her claims as especially important. In this way, Fair Proceduralism is insensitive to reasons.

It is not clear that any theorists, even those who claim to appeal only to procedural fairness, have advanced this implausible pure form of Fair Proceduralism. It is widely acknowledged that the legitimating force of democratic procedures depends on conceiving them as, at least partly, procedures of rational interpersonal deliberation. "Deliberative Democracy," then, is not generally in dispute. What divides democratic theorists is, rather, whether democratic deliberation improves the outcomes by independent standards (its epistemic value), or at least whether this is any part of the account of democratic authority. Two non-epistemic versions say "no," and two epistemic versions say "yes." Begin with the nay sayers.

### *B. Fair Deliberative Proceduralism*

Consider Fair Deliberative Proceduralism: it makes no claims about the epistemic value of democratic deliberation, but it insists that citizens ought to have an equal or at least fair chance to enter their arguments and reasons into the discussion prior to voting. Now the impartiality is among individuals' convictions or arguments rather than among their preferences or interests. Reasons, as the voters see them, are explicitly entered into the process, but no particular independent standard need be appealed to in this theory. The result is held to be legitimate without regard to any tendency to be correct by independent standards; its legitimacy lies in the procedure's impartiality among individuals' convictions and arguments.

Why does deliberation help? Perhaps the idea is that voters' convictions will be more genuinely their own after open rational deliberation. This would make it simply a more refined version of Fair Proceduralism. Fair Deliberative Proceduralism, however, cannot really explain why deliberation is important. If the outcome is to be selected from individuals' views, it can perhaps be seen as enhancing fairness if their views are well considered and stable under collective deliberation. If the goal is fairness, though, why select the outcome from individuals' views? It is true that if the outcome is not selected in this way it might be something no one would have voted for. But that does not count against the fairness of doing so. It is just as fair randomly to choose from the available alternatives.

If we add to fairness the aim of satisfying at least some citizens, we will want the outcome to be one that some would have voted for. There is still no

ognize the better reasons, those reasons are being counted as better by procedure independent standards. Then to say that the outcome reflects the better reasons can only mean that the outcome meets or tends to meet that same procedure independent standard. By contrast, in the case of Fair Proceduralism, the procedure is never held to recognize the more fair individual inputs. If that were the basis of its claim to fairness, then it too would be an epistemic view. The space held out for a nonepistemic Rational Deliberative Proceduralism has disappeared. Deliberative democracy, as a theory of legitimacy, then, is either an inadequate refinement of Fair Proceduralism, or it is led to base its recommendation of democratic procedures partly on their performance by procedure independent standards.

This is a good place to recall what is meant here by “procedure independent standards.” This does not mean that the standards are independent of any possible or conceivable procedure, but only that they are independent (logically) of the actual procedure that gave rise to the outcome in question. Fair Proceduralism’s standard of fairness is defined in terms of the actual procedures producing the decision to be called fair, and so Fair Proceduralism admits no procedure independent standard in this sense.

Consider, in light of this point, a view that says that democratic outcomes are legitimate where they (tend to) match what would have been decided in a certain hypothetical procedure, such as the Rawlsian original position, or the Habermasian ideal speech situation, or some ideal democratic procedure. Joshua Cohen writes, “outcomes are democratically legitimate if and only if they would be the object of an agreement arrived at through a free and reasoned consideration of alternatives by equals.”<sup>3</sup> This may seem not to require recognizably democratic institutions at all, but he also says, “The ideal deliberative procedure provides a model for institutions, a model that they should mirror, so far as possible.”<sup>4</sup> The combination of these two claims implies that actual procedures that mirror the ideal procedure will tend to produce the same results as the ideal, though not necessarily always. This would be an epistemic view as defined here, since the ideal procedure is logically independent of the actual procedures. For this reason, I interpret Cohen as developing one kind of epistemic theory. This implication is in some conflict, however, with his claim that “what is good is fixed by deliberation, not prior to it.”<sup>5</sup> That statement may be misleading, since on his view, the good is fixed by ideal, not actual, deliberation, and actual deliberation is held to this logically prior and independent standard. Within the class of epistemic theories there will be a number of important distinctions, such as that between standards defined in terms of hypothetical pro-

reason, however, to let an alternative's chance of being chosen vary with the amount of support it has among the citizens. It would be perfectly fair to take the outcome randomly from the set of alternatives that at least some voters support after deliberation. Call this method a Post-Deliberative Coin Flip. This is importantly different from randomly choosing a citizen to decide. That would favor the more popular alternatives. The idea here is rather to let all alternatives with any support have an equal chance of being chosen. In one respect this can look even more fair: no one's view is disadvantaged by the fact that few others support it.

The objection is not that fairness based views are undemocratic in allowing coin flips; I leave that question aside. Rather, their allowing coin flips highlights their indifference to the epistemic value of the procedure. Post-deliberative voting probably has considerable epistemic value, but Fair Proceduralism, deliberative or not, must be indifferent between it and a coin flip. The legitimacy of the coin flip is all the legitimacy Fair Deliberative Proceduralism can find in democratic social choice. But it is epistemically too blunt to have much legitimacy, at least if there are better alternatives.

### C. *Rational Deliberative Proceduralism*

Some authors seem to advocate a view that is like Fair Deliberative Proceduralism except that the procedure's value is primarily in recognizing good reasons rather than in providing fair access (though fair or equal access would be a natural corollary).<sup>2</sup> We might thus distinguish Fair Deliberative Proceduralism from Rational Deliberative Proceduralism. This latter view would not claim that the procedure produces outcomes that (tend to) approximate some standard (of, say, justice or common good) that is independent of actual procedures, doing so by recognizing better reasons and giving them greater influence over the outcome (e.g., by way of voters being rationally persuaded). To do so would make the view epistemic. Instead, Rational Deliberative Proceduralism insists that the only thing to be said for the outcomes is that they were produced by a reason-recognizing procedure; no further claim has to be made about whether the outcomes tend to meet any independent standard of correctness. The outcomes are rational only in a procedural sense, and not in any more substantive sense. This claim would be analogous to Fair Proceduralism's claim that outcomes are fair in a procedural, not a substantive sense.

This procedural sense of rational outcomes is not available to the advocate of this reason-recognizing procedure, however. If the procedure is held to rec-

<sup>2</sup>See, for example, Seyla Benhabib, "Deliberative Rationality and Models of Democratic Legitimacy," in *Constellations*, 1, 1 (1994).

<sup>3</sup>"The Economic Basis of Deliberative Democracy," in *Social Philosophy and Policy*, 6, 2 (1989):32.

ognize the better reasons, those reasons are being counted as better by procedure independent standards. Then to say that the outcome reflects the better reasons can only mean that the outcome meets or tends to meet that same procedure independent standard. By contrast, in the case of Fair Proceduralism, the procedure is never held to recognize the more fair individual inputs. If that were the basis of its claim to fairness, then it too would be an epistemic view. The space held out for a nonepistemic Rational Deliberative Proceduralism has disappeared. Deliberative democracy, as a theory of legitimacy, then, is either an inadequate refinement of Fair Proceduralism, or it is led to base its recommendation of democratic procedures partly on their performance by procedure independent standards.

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cedures and those defined in other ways. Those distinctions are not at issue here, for all such views invoke procedure independent standards in one important respect: they all use standards logically independent of the actual procedures.

Without any space for the view that democratic outcomes are procedurally, even if not substantively, rational, deliberative conceptions of democracy are forced to ground democratic legitimacy either in the infertile soil of an impartial proceduralism, or in a rich but combustible appeal to the epistemic value of democratic procedures.

### III. TWO EPISTEMIC THEORIES: THREE CHALLENGES

#### A. Introduction

Turning then to epistemic theories of democratic legitimacy, there is a fork in the road. Three challenges for epistemic theories are helpful in choosing between them: the problem of *deference*, the problem of *demandingness*, and the problem of *invidious comparisons*. Epistemic Proceduralism, I will argue, can meet these challenges better than non-proceduralist epistemic approaches, which I am calling correctness theories of democratic legitimacy. The latter sort of theory holds that political decisions are legitimate only if they are correct by appropriate procedure-independent standards, and adds the claim that proper democratic procedures are sufficiently accurate to render the general run of laws and policies legitimate under favorable conditions. This was Rousseau's view. Having pushed things in an epistemic direction, I now want to prevent things from getting out of hand. Existing epistemic conceptions of democracy are, in a certain sense, too epistemic. (See Fig. 1).

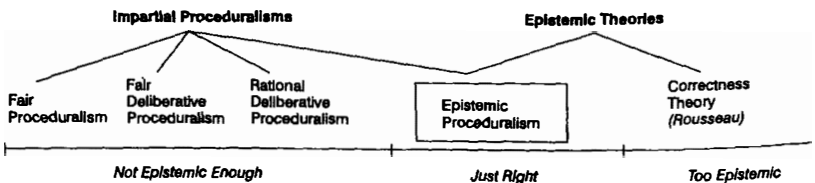


Figure 1. Epistemic Conceptions of Democracy

#### B. Deference

It is important to appreciate the reasons many have had for resisting epistemic accounts of political authority. Some seem to have thought that if there

<sup>4</sup>"Deliberation and Democratic Legitimacy," in *The Good Polity*, Hamlin and Pettit, eds. (Blackwell, 1989), p. 26

<sup>5</sup>*Ibid.*, p. 29.

<sup>6</sup>I make this case at length in "Making Truth Safe For Democracy," in *The Idea of De-*

*mocracy*, Copp, Hampton, Roemer, eds. (Oxford University Press, 1993).

<sup>7</sup>*On The Social Contract*, Book I, chapter iv, paragraph 4. (Hereafter, SC I.iv.4.)

<sup>8</sup>*The Second Treatise of Civil Government*, Chapter VIII, Section 96.

existed epistemic standards, then it would follow that some know better and that the knowers should rule, as in Plato's elegant and repellent Republic. In order to reject what we might call "epistocracy," or rule of the knowers, some think it is necessary to deny that there are any procedure independent epistemic standards for democratic decisions. An adequate answer to this worry, I believe, is to argue that sovereignty is not distributed according to moral expertise unless that expertise would be beyond the reasonable objections of individual citizens. But reasonable citizens should (or, at the very least, may) refuse to surrender their moral judgment on important matters to anyone. Then, unless all reasonable citizens actually agreed with the decisions of some agreed moral/political guru, no one could legitimately rule on the basis of wisdom. So there might be political truth, and even knowers of various degrees, without any moral basis for epistocracy.<sup>6</sup>

The moral challenge for any epistemic conception of political authority, then, is to let truth be the guide without illegitimately privileging the opinions of any putative experts. Experts should not be privileged because citizens cannot be expected or assumed (much less encouraged or forced) to surrender their moral judgment, at least on important matters — to say, "that still doesn't seem right to me, but I shall judge it to be right because I expect this person or that thing reliably to indicate what is right." Rousseau proposed an epistemic conception of democracy which was sensitive to this danger, but yet violated it in the end. This is of some independent interest since Rousseau is perhaps the originator of the strong conception of autonomy that is at stake.

Rousseau argued that properly conducted democratic procedures (in suitably arranged communities) discovered a procedure-independent answer to the moral question, "what should we, as a political community, do?" The correct answer, he held, is whatever is common to the wills of all citizens, this being what he called every citizen's "general will." In this way, citizens under majority rule could still "obey only themselves," securing autonomy in a way in which under Locke's theory, for example, they could not. (For Locke, the minority simply loses, since the majority determines the direction of the whole group.<sup>8</sup>) For Rousseau, democratic procedures discover the general will when citizens address themselves to the question of the content of the general will, though they often use the process illegitimately to serve more particular ends. The key point, for our purposes, is that according to Rousseau, outcomes are legitimate when and because they are correct, and not for any procedural reason. When they are incorrect, they are illegitimate, because nothing but the general will can legitimately be politically imposed.

Rousseau, uncharacteristically, asks the citizen to surrender her judgment



to the properly conducted democratic process. "When, therefore, the opinion contrary to mine prevails, this proves merely that I was in error, and that what I took to be the general will was not so."<sup>9</sup> The minority voter can, of course, conclude instead that the process was improperly conducted, and that others have not addressed the question that was put to them. But she must decide either that it is not even a legitimate collective decision, or that it has correctly ascertained the general will — the morally correct answer. In a well-functioning polity, where she has no grounds to challenge the legitimacy of the procedure, she must not only obey it but also surrender her moral judgment to it. She must say to herself "while it doesn't seem right to me, 'this proves merely that I was in error.'"

One problem with Rousseau's expectation of deference is suggested by a passage in John Rawls's doctoral dissertation. In chastising appeals to exalted entities as morally authoritative, he writes,

The kinds of entities which have been used in such appeals are very numerous indeed. In what follows I shall mention some of them very briefly. The main objection in each case is always the following: how do we know that the entity in question will always behave in accordance with what is right[?] This is a question with [sic] which we always can ask, and which we always do ask, and it shows that we do not, in actual practice, hand over the determination of right and wrong to any other agency whatsoever.<sup>10</sup>

Here, ironically, Rawls appears only to generalize one of Rousseau's central teachings, that no one's reason should be subordinated to anyone else's.

In *A Theory of Justice*, Rawls applies the idea to democratic choice:

Although in given circumstances it is justified that the majority . . . has the constitutional right to make law, this does not imply that the laws enacted are just. . . . [W]hile citizens normally submit their conduct to democratic authority, that is, recognize the outcome of a vote as establishing a binding rule, other things equal, they do not submit their judgment to it.<sup>11</sup>

This is the problem of deference faced by epistemic approaches to democracy. The objection is not to Rousseau's requirement that the outcome be obeyed. I believe (and will argue below) that something much like Rousseauian voting can perhaps justify this requirement. Rousseau goes wrong, I believe, in resting this case on the fact — when it is a fact — that the outcome is the general will, the morally correct answer to the question faced by the voters.

<sup>9</sup>SC IV.ii.8.

<sup>10</sup>John Rawls, *A Study in the Grounds of Ethical Knowledge*, Princeton Doctoral Thesis, 1950 (Available from University

Microfilms International, Ann Arbor Michigan), p. 319.

<sup>11</sup>John Rawls, *A Theory of Justice* (Harvard University Press, 1971), pp. 356–57.

Here we can see the promise of an epistemic form of proceduralism, one that holds that the outcome is legitimate even when it is incorrect, owing to the epistemic value, albeit imperfect, of the democratic procedure. Such an account would not expect the minority voter to surrender her judgment to the procedure in any way, since she can hold both that the process was properly carried out, and that the outcome, while morally binding on citizens for procedural reasons, is morally mistaken.

What if a correctness theory can support the claim that the majority is overwhelmingly likely to be correct? Wouldn't it be sensible to expect deference to the outcome in that case? Recent discussions of the epistemic approach to democratic authority have usually invoked the striking mathematical result of Rousseau's contemporary, Condorcet, known as the Jury Theorem: roughly, if voters are better than chance on some yes/no question (call this their individual competence), then under majority rule the group will be virtually infallible on that question if only the group is not too small.

Plainly, this result is important for the epistemic approach to democratic authority. It promises to explain, as fairness alone cannot, why majority rule is preferable to empowering randomly chosen citizens: under the right conditions majority rule is vastly more likely than the average individual to get the morally correct answer. But the Jury Theorem's very power ought to raise a warning flag. Is this really an instrument to which we can comfortably surrender our moral judgment on certain matters?

One objection to the surrender of judgment is that there is, perhaps, never sufficiently good reason for thinking the supposedly expert person or procedure really is so reliable. Applying this caution to the Jury Theorem, we notice that you cannot think majority rule is nearly infallible unless you think individual voters are (at least on average) better than random. But why ever substitute the outcome of majority rule for one's own moral judgment, if all that is required in order to stick with one's own judgment is to believe that the voters must probably have been, on average, worse than random? A voter has no more solid basis for the probabilities the Theorem requires than she has for her moral judgment that the outcome of the voting procedure is morally mistaken. It is doubtful, then, that the Jury Theorem can ever give a person good reason to defer in her moral judgment to the outcome of a majority vote. This objection to correctness theories says that the minority voter's disagreement with the outcome is a perfectly good reason for doubting that the procedure is highly reliable.

### *C. Demandingness*

Epistemic Proceduralism does not require democratic procedures to be as

epistemically reliable as Correctness theories do. More precisely, Epistemic Proceduralism generates more legitimacy out of a given level of the procedure's epistemic value, because unlike Correctness theories it allows that there can be legitimacy even without correctness.

This might be questioned in the following way: the Jury Theorem does not support moderate epistemic value except in cases where it also supports strong epistemic value. Therefore, if Epistemic Proceduralism relies on the Jury Theorem for its moderate epistemic claims on behalf of the procedure, then it is committed to just as much epistemic value as correctness theories are.

The Jury Theorem seems to imply that, in groups of much size, if it is correct more often than not then it is also virtually infallible. Majority rule is only better than random if voters are better than random; but if they are, then in large groups majority rule is virtually infallible. In that case, the minority voter would have no basis for thinking the procedure tends to be correct which was not an equally good basis for thinking it is almost certainly correct every time. To accept this is to surrender one's judgment to the process. The proceduralist version would seem to provide no advantage on this score.

In reality, however, the fates of proceduralist and non-proceduralist epistemic accounts are not as closely linked as this suggests. It is possible to have majority rule perform better than .5 (random) even if voters are on average worse than .5, so long as individual competences are arranged in a certain way. For majority rule in a given society to be correct more often than not, all that is required is that, more often than not, voters have, for a particular instance of voting, an average competence only slightly better than .5. Then the group is almost certain to get it right in every such instance, and so more often than not. After that, it does not matter how low voter competence is in other instances, and so they could drag the overall average competence, across instances of voting, well below .5.

Certainly non-proceduralist epistemic conceptions can weaken their own competence requirements by using the same device: letting average competence vary from one voting instance to another. But this will not change things much. The view still depends on the outcome being correct almost all the time, and so the minority voter who accepts this account will have to believe she is most likely mistaken. This consequence can only be avoided by requiring less credulity of the voters. A non-proceduralist epistemic theory can only do this by counting fewer decisions as legitimate.

The weaker use of the Jury Theorem, as presented here, still depends on that model's applicability to real contexts of democratic choice. This cannot be confidently maintained owing to at least the following two difficulties. First, there are still many questions about what kinds and degrees of mutual influence

<sup>12</sup>David Estlund, "Opinion Leaders, Independence, and Condorcet's Jury Theorem,"

*Theory and Decision*, 36, 2 (1994).

or similarity among voters are compatible with the Jury Theorem's assumption that voters are independent. Independence is not automatically defeated by mutual influence as has often been thought,<sup>12</sup> but whether actual patterns of influence are within allowable bounds is presently not well understood.

Second, the Jury Theorem assumes there are only two alternatives. In some contexts it does look as if there are often precisely two alternatives. Consider the choice between raising the speed limit and not raising it, or forbidding abortion or not. These are genuine binary choices even though the "not" in each case opens up many further choices. Of course, they have been somehow selected from a much larger set, and we would want to know something about the likelihood that these two are better than the others.

For these and other reasons, the Jury Theorem approach to the epistemic value of democratic procedures, is less than trustworthy. Epistemic Proceduralism needs some basis for its epistemic claims, though it need not be seen as wedded to the Condorcetian device. If the Jury Theorem is applicable, then it is worth worrying whether anytime it supports moderate epistemic value of the procedure it also supports strong epistemic value, vitiating Epistemic Proceduralism's claim to be demanding less. I have argued that a weaker use of the Jury Theorem can solve the problem. If the Jury Theorem is not applicable after all, then there is little reason to think, even initially, that the problematic entailment might hold.

#### *D. Invidious Comparisons*

Just as moral experts will be too controversial, even if they exist, to figure in any justification of authoritarian political arrangements, any particular set of criteria for determining whether the average voter is better than random (as, for example, the Jury Theorem requires) will be just as controversial. If the qualifications of an alleged moral expert will always be subject to reasonable disagreement, then so will any list of qualifications itself. So, even if (as I doubt) you or I might sometimes have good reason to think the requirements of the Jury Theorem are met, and so have good reason to surrender our moral judgment to the majority outcome when we disagree with it, there will always be reasonable grounds for others to deny this by rejecting the criteria of moral competence that we have used. This is a third challenge faced by epistemic approaches to democracy; call it the problem of Invidious Comparisons.

I propose to answer this objection indirectly. I shall sketch an account of social and structural circumstances that might suffice for the weaker kind of epistemic value required by Epistemic Proceduralism. Of course, a social/struc-

tural account might be employed in support of a correctness theory's strong epistemic claims as well, and if successful it could meet the challenge of avoiding invidious comparisons. I assume, however, that showing a procedure to have higher epistemic value requires more appeal to the epistemic capacities of the participating individuals. If so, a social/structural basis for the procedure's epistemic value has a better chance of supplying the moderate epistemic value required by Epistemic Proceduralism than the strong epistemic value required by correctness theories. There is no intention of showing that these considerations suffice for moderate epistemic value, nor of showing that they could not suffice for strong epistemic value. The point is only that the need, stemming from the problem of invidious comparisons, to stay with a social/structural account favors the more moderate needs of Epistemic Proceduralism. I propose the following conditions as examples drawn from familiar ideas:

1. Every adult in the society is permitted to participate.
2. Participants sincerely address questions of justice, not of interest group advantage, and it is common knowledge that this is so.
3. Participants accept and address a shared conception of justice, and this is common knowledge.
4. Participants evaluate arguments fairly, irrespective of the identity of the person, or the size of the group offering the argument.
5. Each participant's views are easily available to the others (at least via some other proponent of the views, and at least those views that would have any chance of gaining adherents).
6. Participants represent a variety of life experiences — personal, educational, and cultural.
7. Participants' needs for health and safety are sufficiently well met that it is possible for them to devote some time and energy to public political deliberations, and in general all are literate.

No individual experts are involved in the way they are in the case of epistocracy, but the epistemic needs of Epistemic Proceduralism cannot be met without the voters having a certain decent level of competence. The thing to avoid is using any considerations that would also imply specific conclusions about which individuals are likely to be morally wiser than others. First, there are the situational assumptions, that all are allowed to participate, all are sincere, all address a shared conception of justice, and so on. Then we must add a claim about the usual power of interpersonal deliberative procedures under such conditions. This, too, leaves aside any claims about which kind of person is morally wisest. In this way, the account avoids what appears to be the main threat of reasonable disagreement.

#### **IV. WHY OBEY BAD LAWS?**

What moral reason is there to obey the decisions of the majority, when they

meet the criteria of Epistemic Proceduralism, even if they are incorrect? I know of no moral principle, widely accepted, from which this obligation can be derived. It finds support, however, in the limitations of the idea of procedural fairness. Procedural fairness is a way of being impartial among individuals' competing interests, even while producing a command or directive that suits the interests of some and not of others. Procedural fairness, is designed for the case where the only standards of evaluation are, first, each individual's interests, and second, the moral principle of impartial treatment. It is not well suited to cases where there is a procedure-independent standard of moral correctness that applies to the decision that must be made.

Begin, then, with a case where it is granted that each individual is under an obligation to abide by the outcome of a fair procedure. The question, "What should we do?" is treated as answered by aggregating what each of us wants to do in some impartial way. But now suppose it is known that the choice we make will be morally better or worse, and we do not all agree on which choices are morally better. First, it would be odd to use a procedure that operated solely on our individual interests, ignoring our moral judgments. I assume that there would be little obligation to obey the outcome of such a procedure despite its procedural fairness. Second, it still seems an insufficient ground of obligation merely to use a procedure that chose the alternative in accord with the moral judgments of a majority for reasons of fairness. There is no point in attending to moral judgments rather than interests if they are simply to be counted up on the model of procedural fairness. Why should this produce any stronger sort of obligation than the straight procedurally fair aggregation of interests? The reason for moving to the moral judgments could only be to apply intelligence to the moral issue at hand.

I propose, as the counterpart of the idea of procedural fairness in cases where there is an independent moral standard for the outcome, the idea of Epistemic Proceduralism: procedural impartiality among individuals' opinions, but with a tendency to be correct; the impartial application of intelligence to the cognitive moral question at hand.

Why do you have any obligation to obey such a procedure when you firmly believe it is mistaken? The question is produced by supposing that the epistemic dimension is meant to make the procedure's outcome also the individual's best guess as to the answer, as if the goal of the procedure were epistemic reasons. But that is not the role of the epistemic dimension in Epistemic Proceduralism. That would be roughly like supposing the role of majority rule in Fair Proceduralism is to make the outcome conducive to my own interests. Thus, one would ask, why obey a fair procedure when it doesn't accord with

meet the criteria of Epistemic Proceduralism, even if they are incorrect? I know of no moral principle, widely accepted, from which this obligation can be derived. It finds support, however, in the limitations of the idea of procedural fairness. Procedural fairness is a way of being impartial among individuals' competing interests, even while producing a command or directive that suits the interests of some and not of others. Procedural fairness, is designed for the case where the only standards of evaluation are, first, each individual's interests, and second, the moral principle of impartial treatment. It is not well suited to cases where there is a procedure-independent standard of moral correctness that applies to the decision that must be made.

Begin, then, with a case where it is granted that each individual is under an obligation to abide by the outcome of a fair procedure. The question, "What should we do?" is treated as answered by aggregating what each of us wants to do in some impartial way. But now suppose it is known that the choice we make will be morally better or worse, and we do not all agree on which choices are morally better. First, it would be odd to use a procedure that operated solely on our individual interests, ignoring our moral judgments. I assume that there would be little obligation to obey the outcome of such a procedure despite its procedural fairness. Second, it still seems an insufficient ground of obligation merely to use a procedure that chose the alternative in accord with the moral judgments of a majority for reasons of fairness. There is no point in attending to moral judgments rather than interests if they are simply to be counted up on the model of procedural fairness. Why should this produce any stronger sort of obligation than the straight procedurally fair aggregation of interests? The reason for moving to the moral judgments could only be to apply intelligence to the moral issue at hand.

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your own best interests? I am taking as a starting assumption that the fairness of the procedure is a fully adequate reason to obey in simple non-epistemic cases. The problem is to stay as close to this model as possible, while making adjustments to fit the case where there is a procedure-independent moral standard for the outcome. In neither case will the reason to obey be based on any substantive feature of the outcome — both are pure proceduralist accounts of the reason or obligation to obey.

Mere procedural fairness is a very weak reason to obey when I believe the outcome is morally mistaken. It may seem, then, that my own moral judgment about the outcome is supreme in my own deliberations. That is not, however, the only reason for thinking procedural fairness is insufficient in such cases. A different reason is that procedural fairness is not equipped to address cognitive issues — it is not a cognitive process. This can be remedied without making my own moral judgment supreme, if fair proceduralism can be adapted to cognitive purposes. This is what is accomplished by a process that is impartial among individual opinions, yet has some tendency to be correct. It is suited to the cognitive task, and it is impartial among participants. Thus, there is a moral reason to abide by its decisions quite apart from their substantive merits, just as there is reason to abide by a procedure that fairly adjudicates among competing interests quite apart from whether it serves your interests. Epistemic Proceduralism is proposed as a conservative adaptation of the idea of procedural fairness to cases of morally evaluable outcomes. It is conservative in requiring no more epistemic value than necessary (just-better-than-randomness so long as it is the best available) — while still fitting the cognitive nature of the cases.

### Postscript: Reply to Gaus and Rehg

The nature of Epistemic Proceduralism might be made clearer by briefly addressing the points of two critics.

Gerald Gaus<sup>13</sup> argues that I give no good reason to prefer, Epistemic Proceduralism to what I call “Queen for a Day” (hereafter, “QUEEN”).<sup>14</sup> As I argued, even if a properly constituted majoritarian voting procedure (hereafter, “majoritarianism”) is likely to produce a correct outcome more often, QUEEN’s departures from the correct answer are likely to be more extreme, since any nut might be chosen, by lot, to be the temporary ruler. I added that QUEEN will occasionally take advantage of the rare sage, the philosopher-king in waiting, and that this consideration seems to balance out the other. Gaus is quite right to say that we have no clear reason to assume that *deviations* in one direction would be balanced out by deviations in the other; suppose that among the “correct” solutions (those that meet a certain procedure-independent stan-

<sup>13</sup>Gerald Gaus, “Looking for the Best and Finding None Better: The Epistemic Case for

Democracy,” this journal, this issue.

<sup>14</sup>Gaus, §II.



dard), even the very best are not much better than the minimally correct. But the argument I intended is not that the deviations in each direction balance each other out. Rather, so far we have no reason to think that QUEEN's greater expected deviations will either favor it or disadvantage it relative to majoritarianism. This is not to deny that there are arguments in each direction, nor is it to claim that these arguments are a perfect wash, with a perfect balance of reasons. I know of no specific attention to the question, and I see no simple way to settle it quickly.

In an important way, it is Gaus who prejudices the merits of the possible positions. He claims that there will be reasonable disagreement among citizens as to whether, for example, QUEEN's wild failures are as weighty as its wild successes. Then, by the liberal standard of legitimacy QUEEN could not be held, for purposes of political justification, to be inferior to majoritarianism. I prefer to say that given that the matter has not been studied there is no way to tell in advance whether disagreement about this could be reasonable. Gaus's very useful reflections on the issue are not enough to determine this. They show only that it is a difficult question. Rather than prejudice it, I asked whether it would be a serious problem for Epistemic Proceduralism if it could find no reason for majoritarianism over QUEEN. I said that if QUEEN is epistemically better than voting, Epistemic Proceduralism would not be embarrassed to recommend it as the appropriate procedure for democratic social choice. The same, of course, goes if there is reasonable disagreement as to which is epistemologically better. I will not repeat the argument here, but it turns on how much like voting QUEEN could be. My case for EP does not need to insist that QUEEN can be defeated beyond a reasonable doubt by majoritarianism, nor have I conceded that it cannot be.

Gaus argues, then, that the very idea of epistemic value needed by EP is subject to reasonable controversy. While this challenge is not limited to the contest between QUEEN and majoritarianism, it is hard to tell how broadly it is meant to apply. In one sense, the standard of epistemic value is subject to reasonable disagreement if reasonable citizens can't agree on *every* ranking of two procedures with respect to epistemic value. But this need not be troubling, since there might yet be no reasonable controversy about what the *best* procedure is; that may not be the focus of the controversy. For example, no reason has been given to think that reasonable citizens could disagree over whether the more reliable of two procedures which had (by some measure) the *same* expected deviation was the epistemically better of the two. Furthermore, even if there is reasonable controversy about the best procedure, there may be no reasonable doubt that among the contenders (those procedures that at least some reason-

dard), even the very best are not much better than the minimally correct. But the argument I intended is not that the deviations in each direction balance each other out. Rather, so far we have no reason to think that QUEEN's greater expected deviations will either favor it or disadvantage it relative to majoritarianism. This is not to deny that there are arguments in each direction, nor is it to claim that these arguments are a perfect wash, with a perfect balance of reasons. I know of no specific attention to the question, and I see no simple way to settle it quickly.

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able citizens think to be best) each is acceptable, all are better than random, and all are better than the non-contenders. Society could choose any one of them, as against the non-contenders, on grounds provided by EP. I am inclined to agree with Gaus that no complete criterion of the epistemic value of a social choice procedure could be beyond reasonable objection, but it remains to be seen whether the extent of reasonable disagreement is any serious difficulty for EP. As for QUEEN, if it can't be beaten it can be joined.

Finally, it is important to see how little Gaus grants of the epistemic approach to democracy despite his allowing "Democracy's Minimal Epistemic Claim." (Gaus §III) In supposing that the idea of epistemic value will be too controversial among reasonable citizens to support democratic procedures, Gaus points out that this same controversy may well prevent any other procedure from defeating democracy on epistemic grounds. This is democracy's minimal epistemic claim and the source of the title of Gaus's comment. But this is of no use to an epistemic approach to democracy at all, since it is based on the assumption that no procedure can be legitimately compared on epistemic grounds with any other procedure. That would surely defeat the epistemic approach. However, the assumption has not been established. Gaus has advanced my understanding of the issues at stake in the use of such an epistemic standard. He has not, however, shown that reasonable disagreement will strike at the points that EP needs to defend, namely the specification of a social choice procedure that is better than random, procedurally fair, and better (in a way that is beyond reasonable objection) than available alternatives.

*Rehg*

William Rehgl<sup>15</sup> proposes a problem for the view I call Epistemic Proceduralism, and offers a distinct view as a solution. Space prevents me from considering the positive view that he puts forward as a solution. The problem, though, as he sees it, is this: it is hard to see why the epistemic value of a procedure should be any consolation to the voter who believes a particular democratic outcome is flatly incorrect. The fact, even if the minority voter grants it, that this democratic procedure tends to get the right answer, doesn't make this outcome any more correct.

If a certain medicine fails to cure me, there is no medical value for me in the fact that the medicine *usually* works. The medicine analogy is mine, not

<sup>15</sup>William Rehgl, "Legitimacy and Deliberation in Epistemic Conceptions of Democracy: Between Habermas and Estlund," this journal, this issue.

<sup>16</sup>Its classic statement is in "Legal Obligation and the Duty of Fair Play," John Rawls, in *Law and Philosophy*, S. Hook, ed. (NYU

Press, 1964). It is instructively discussed in John Simmons, *Moral Principles and Political Obligation* (Princeton University Press, 1979) and an exchange between Simmons, George Klosko, and Thomas Senor. in *Philosophy & Public Affairs*, Summer 1987.

Rehg's, but I believe it captures the gist of Regh's objection to Epistemic Proceduralism. A democratic procedure's tendency to get the right answer cannot be seen as a reason for complying with it by someone who believes it has failed in this case. But why not? Is the citizen's only source of reasons the procedure-independent justice or correctness of an outcome? Is the medical patient's only source of reasons the medical value of the medicine? Surely a medical patient could be in circumstances that make the medicine's cure rate a reason for taking it even when she knows it will not cure her. For example, she might have joined a scientific study in which she promises to try any treatment she and her doctor judge to have a sixty percent cure rate for a certain ailment of hers. Having agreed to this she is morally bound to take such a treatment, even in cases where she knows it will not cure her (suppose it does not cure the ailment in people who have ever taken steroids, which she has, but that the study is also interested in its other effects). In certain extreme cases the obligation would lapse, as in cases where the treatment would be a threat to her health. The point is that there may be a moral background that makes the cure rate a reason to take the medicine even when she knows it will not cure her, and even though her reasons for joining the study involve her effort to be cured. Her role as a voluntary subject in the study provides the moral background in this case.

Similarly, there is a moral background to the case of the minority voter. Her role as a citizen in a just liberal democracy provides her with moral reasons sometimes to comply with laws and policies even if (as she correctly believes) they are unwise or even unjust by appropriate public standards. In that role, her personal views about the justice or wisdom of a law are not sufficient grounds for her choice whether to comply. Legal society, or so I assume, would be impossible if everyone were permitted such independence, and no single person has any special claim to it. Roughly, it would be unfair to arrogate such leeway to oneself under these conditions.

This is a familiar form of argument for a duty to obey even unjust laws so long as a certain moral background exists.<sup>16</sup> In its usual form, the salient part of the background is the procedural fairness of the legislative procedure. Epistemic Proceduralism is allied with this familiar "fair play" approach against Regh's insistence that a citizen's reasons for compliance rest on procedure-independent features of the outcome. There can be a moral background that puts the emphasis on procedural features of the outcome. Procedural fairness is one example of the sort of procedural feature that might be paramount. I have argued that it is insufficient at least in cases where there are important procedure-independent standards of, say, justice or common good. Still, the ar-

gument from fair play works to show that citizens may not simply apply their personal judgment about the justice of a law and comply or disobey accordingly, at least not if some suitable procedural value can be found. I propose Epistemic Proceduralism as a corrective to the moral lightness of mere procedural fairness in such contexts. It is not very different from Fair Proceduralism in the way it responds to Rehg's challenge. It is, however, a significantly different account of democratic legitimacy, with a rather different conception of political deliberation.