

## **Democracy Is Not Inherently Just\***

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In Bertolt Brecht's glorious Communist propaganda play *The Caucasian Chalk Circle*, a character who is a mouthpiece for the author declares that "things belong to people who are good for them."<sup>1</sup> In other words, you are entitled to ownership of some item only if your exercise of ownership promotes the common good. This should be understood to be a maximizing doctrine. If one person's ownership of land prevents another person from using the land more productively, the first is wasting resources.<sup>2</sup> At this point in the play what is at issue is rights to use land, but later the same point is applied to politics. The wily judge Azdak displays Solomonic wisdom and demonstrates that it is a grave misfortune for the country that his political rule is coming to an end. Political power rightfully belongs to those people who are good for it.

I am an egalitarian liberal and a democrat, not a communist, but I accept the principle of political legitimacy that Brecht espouses. Systems of governance should be assessed by their consequences; any individual has a moral right to exercise political power just to the extent that the granting of this right is productive of best consequences overall. No one has an ascriptive right to a share of political power. Assigning political power to an hereditary aristocracy on the ground that the nobles deserve power by birth is wrong, but so too it is wrong to hold that each member of a modern society just by being born has a

right to an equal say in political power and influence, to equal rights of political citizenship and democratic political institutions. The choice between autocracy and democracy should be decided according to the standard of best results.<sup>3</sup>

Which political system best promotes the common good over the long run?

Many types of evidence support the conclusion that constitutional democracies produce morally best results on the whole and over the long run, but this judgment is contingent, somewhat uncertain, and should be held tentatively rather than dogmatically. In some possible worlds, probably some past states of the actual world, and possibly in some future actual scenarios, autocracy wins by the best results test and should be installed. Democracy is extrinsically not intrinsically just.<sup>4</sup>

Many contemporary political philosophers addressing the issue of the justification of democracy reject the purely instrumental approach this essay defends.<sup>5</sup> The alternative view is that democracy is a uniquely fair process for reaching political decisions. Democratic political procedures may be valued for their tendency to produce morally superior laws and policies than would tend to emerge from other procedures, and democracy may also be valued for other good effects that it generates. But even if the results overall of having a nondemocratic political regime would be better than the results of having democracy, given that democracy itself qua fair procedure is a substantial intrinsic component of justice, it might well be that opting for democracy would still be morally preferred all things considered.

Formulating the issue as a dispute between those who assert and those who deny that democracy is intrinsically just can be misleading. The former do not hold that a democratic system of government is unconditionally morally valuable in virtue of its nonrelational properties. Most would say democracy is conditionally valuable. It is valuable only given mass literacy and the presence of other cultural background conditions, according to its advocates. The idea rather is that democracy is not merely instrumentally valuable but also qualifies as a worthwhile moral goal and also that democracy is one of the requirements of justice, so that other things being equal, the more democratic the society, the more just it is.

Some philosophical accounts of political democracy take a more radical position. They hold that what constitutes justice for a given society is in principle indeterminable apart from consulting the outcome of proper democratic procedures.<sup>6</sup>

A related view holds that although we cannot ever know what is just, we can reliably distinguish fair from unfair procedures for determining how to cope with persistent disagreement about what we owe to each other. Democracy is a fair political procedure, and moral knowledge extends only to judgments about fair procedures.<sup>7</sup> From this standpoint the idea that we should judge democracy—the intrinsically fair procedure—to be morally required, optional, or prohibited depending entirely on the degree to which it contributes to some supposed substantive standard of “justice” is a nonstarter.

Refuting the radical positions just described is not the aim of this essay. My position is that democracy, when it is just, is so entirely in virtue of the tendency of democratic institutions and practices to produce outcomes that are just according to standards that are conceptually independent of the standards that define the democratic ideal. Democracy in other words should be regarded as a tool or instrument that is to be valued not for its own sake but entirely for what results from having it. I take it to be obvious that we have a lot of knowledge about the substance of justice—that slavery is unjust, for example, or that it is unjust if some people avoidably face horrible life prospects through no fault or choice of their own. Moreover, our grounds for holding these beliefs are independent of any convoluted account one might give to the effect that these positions would win a majority rule vote under procedurally ideal conditions.

My focus in this essay is on the moderate and seemingly reasonable position that political institutions and constitutions should be assessed both according to the extent to which they promote substantively just outcomes and according to the extent that they conform to standards of intrinsic fairness for political procedures. This essay argues against moderation.<sup>8</sup> I also target a view that lies between the moderate and radical positions as just described. This view holds that even if as a matter of moral metaphysics there are truths about substantive justice, they are epistemically unavailable when what is at issue is the justification of democracy, because the need for politics stems from the fact

that deep and intractable disagreement about what justice requires persists in modern times even among reasonable people.<sup>9</sup>

The purely instrumental approach to democracy can sound more extreme than it needs to be. The instrumentalist holds that democracy is to be assessed by the consequences of its adoption and operation compared with alternatives. Some might hear this as implying that “we” now have infallible knowledge of the correct moral standards, the principles of justice. This is not so. The instrumentalist as I conceive her is a realist about morality but can and should be a fallibilist about our present moral knowledge. There is moral truth, but our current epistemic access to it is uncertain, shaky. Hence one crucial standard for judging a society’s institutions and practices is the extent to which they are efficiently arranged to increase the likelihood that as time goes on our epistemic access to moral truth will improve. All of this is perfectly compatible with pure instrumentalism. Analogy: We are searching for genuine treasure, and our practices should be assessed instrumentally, by the degree to which they enable us to gain treasure. Our current maps guiding us to treasure are flawed, and our current ideas about what “treasure” is are somewhat crude, and we have reason to believe there are better maps to be located and better conceptions of *treasure* to be elaborated. So our practices should be judged by the degree to which they enable us to attain genuine treasure, and the extent to which our practices improve our understanding of the nature of treasure and help us locate better maps is an important aspect of their instrumental efficacy.

## THE IDEA OF DEMOCRACY

The question whether or not it is intrinsically just that society be governed democratically cannot be addressed without some specification of the idea of democracy. As is well known, the idea is complex. In a society governed democratically, elections determine what laws will be enforced and who will occupy posts that involve political rule. In these elections, all adult members of society have a vote, and all votes are weighed equally. All adult members are eligible to run for political office in these elections, or can become eligible by some nononerous process such as establishing residency in a particular state or federal division. Majority rule determines the outcome of elections. Political freedoms including freedom of association and freedom of speech are protected in the society, so the group or faction that currently holds power cannot rig election results by banning or restricting the expression of opposing views.

A democratic society may operate in indirect rather than direct fashion. That is, rather than its being the case that all citizens together vote on proposed laws, citizens might vote for the members of a representative assembly, whose members enact laws. But indirectness does lessen the degree to which a society qualifies as democratic. This becomes clear if one imagines indirectness iterated many times--voters vote for an assembly that votes for an assembly that votes for another assembly that votes for a political group that votes for laws and votes in officials to administer them. Indirectness diminishes the democratic character of a regime because it lessens the extent to which the present will of a

majority of voters controls political outcomes. The contrast between direct and indirect democracy is connected to another, between immediate and mediate accountability of elected rulers to majority rule of citizen voters. In a political system that allows for immediate recall of officials by citizen initiative, the accountability is more immediate, other things being equal, than it would be if recall by this means were not permitted. If some part of the lawmaking power is exercised by a judicial branch of government, top members of which are appointed by some process that is more rather than less indirect, the political process is to that extent less democratic. If political officials in any branch of government, legislative, executive, or judicial, may not be removed from office once they are validly appointed, this factor also lessens the extent to which the society qualifies as democratic.

Another dimension on which a political system can register as more or less democratic concerns the scope of the authority of the majority will of the citizen voters. If there is a substantial set of restrictions, for example, a list of individual or group rights, which are constitutionally specified as the supreme law of the land, and which may not validly be altered or extinguished by majority will vote, the greater the extent of these limits on majority rule, the lesser the extent to which the political system qualifies as democratic. A provision here is that there are some individual rights that are themselves conceptually required by democracy itself, and the insulation of these rights from majority will control does not render a society less democratic.

Finally, a political system qualifies as more democratic insofar as all citizens have equal opportunity for political influence. This norm admits of various construals. Let us say that citizens have equal opportunity for political influence when all citizens with the same ambition to influence politics and the same political talents will have equal prospects of influencing political outcomes. The idea is roughly that if such factors as one's wealth or family connections affect the impact one could have on the political process if one worked to achieve an impact, then opportunities are unequal and the society to that extent less democratic. If only ambition and political talent, which includes administrative and entrepreneurial skill and the ability to persuade others and build coalitions, affect the chances that one could influence the outcomes of the political process if one tried, then opportunities in the relevant sense are equal and the society to that extent more democratic.

The statement of equal opportunity given above takes individuals as they are, with the political talents they happen to possess at a particular time, as setting the standard of equal opportunity. One might view this statement as inadequate in view of the following sort of example. Society might give access to the opportunities for training and developing political talent only to a restricted social group. If some individuals lack the opportunity to become politically talented, then one might hold equal opportunity does not prevail even though the equally ambitious and talented enjoy equal opportunities. One might then in a Rawlsian spirit hold that citizens have equal opportunity for political influence



only when all citizens with the same native potential for political talent and the same ambition to develop and exercise it have equal prospects for affecting the outcomes of the political process. This version of equal opportunity for political influence might seem better as a theoretical formulation than the one stated in the previous paragraph, but in practical terms it has the defect that may be hard in many situations to tell whether it is being fulfilled, given that the idea of potential for political talent is a vague notion.

Democracy is then a complex ideal. The judgment as to how democratic the political process of a given society is combines several dimensions of assessment, each of which varies by degree.

#### AGAINST THE RIGHT TO A DEMOCRATIC SAY

Consider the proposition that each member of society has a basic moral right to an equal say in the political process that determines the laws that the government enforces and also which people shall be political rulers or top public officials. One has an equal say when one could, if one chose, have the same chance of influencing the outcomes of the political process as any other member of society with equal political skills and equal willingness to devote one's resources to participation in politics. Saying the right to an equal say is a basic moral right includes denying that one has the right merely derivatively, on instrumental grounds. Call this right the "right to a democratic say."

The right to a democratic say so understood is a right to political power—a right to set coercive rules that significantly limit how other people will live their

lives. With this right secured, one has power over the lives of other people—a small bit of power, to be sure, but power nonetheless. My position is that there is no such basic moral right, because one does not have a basic moral right to exercise significant power over the lives of other people, to direct how they shall live their lives. Rights to power over the lives of others always involve an element of stewardship. If one has such a moral right, this will be so only because one's having the right is more conducive to the flourishing of all affected parties than any feasible alternative.<sup>10</sup>

Parents standardly have extensive power to control the lives of their children who have not yet attained adult age. My position is that there is no basic moral right to have such power. The system of parental control is justified just in case it is maximally conducive to the flourishing of those affected. In just the same way, no one has a basic moral right to be the chief warden of a prison or the director of an insane asylum.

This position has attracted the objection that any substantive moral right involves power over the lives of other people. If you have full private property in some object, you have the right to determine what shall be done with it and to forbid other people from interacting with it. Since all rights involve power to direct the lives of others to some degree, nothing yet has been said to single out the right to a democratic say as specially problematic and not an appropriate candidate for inclusion in the class of basic moral rights.<sup>11</sup>

In response: Everything is like everything else, I suppose, in some way or to some degree. Still, a rough line can be drawn between rights that confer on the right-holder the power to direct how another shall live and rights that do not confer such power. Consider the moral right not to be bashed—severely injured by unprovoked nonconsensual violent physical attack. If this right is enforced, the right-holder has power over the lives of others to an extent, since she can give or withhold consent to attack and thus determine by fiat whether any other person may attack. But a right that constrains other people from engaging in a certain type of conduct toward the right-holder differs from a right to set rules that might specify what others shall do across a broad range of important types of conduct. I concede this is a difference in degree but when the difference in degree is large the difference is large and in my view morally significant.<sup>12</sup>

A second response is that perhaps we should acknowledge that many ordinary rights such as rights to private ownership do often involve significant power over others. These rights then on my view are not appropriate candidates for the status of basic moral right. Consider the owner of a factory, the sole employer in a region, who is also the owner of a company town. Here private ownership definitely gives the right-holder significant power over others. Perhaps strictly speaking only rights to capabilities (real freedom to achieve important human functionings) or rights to opportunities to genuine well-being or the like should count as appropriate candidates for the status of basic moral rights. Even if in particular circumstances one's right to capability is secured by

control over resources that give one power over others, what one is strictly morally entitled to on an approach that takes capabilities to be basic will never be the power over others but the freedom to achieve and enjoy in the ways central to human flourishing, where these core freedoms could always in principle be secured in some alternative way without the control and the power.

These two responses have some force, but to the advocate of the right to a democratic say they might seem close to question-begging. After all, what rules it out that the freedom to participate on equal terms with others in collective decision making is a core human capability, on a par with the capabilities to attain knowledge, friendship and love, and achievement? Saying no one has a basic moral right to power over others invites the counterassertion that the examples of parental rights and democratic rights show that people do indeed have such moral rights. To make further progress we need to investigate the positive arguments for the right to a democratic say. The case for instrumentalism would be strengthened if the search turns up empty pockets. The rest of this essay follows this roundabout strategy.

#### WHAT FREE AND EQUAL RATIONAL PERSONS CAN ACCEPT

We are looking for the strongest and most plausible arguments for the right to a democratic say, regarded as tantamount to the claim that democracy is an intrinsic component of justice. My search strategy is to elaborate simple considerations, raise objections, then attempt to refine the argument to see if it becomes more compelling.

Start with the idea that each person is owed equal concern and respect. Each person's interests should be given equal consideration in the design of political institutions. But any system that violates the right to a democratic say, assigning or allowing some people greater rights to participate than others, manifestly violates the basic right to equal concern and respect. This argument might be put in a contractualist formulation: Free and equal rational persons would not agree to principles that give some greater basic political rights than others. Any such principle would be reasonably rejectable.

The instrumentalist will maintain that principles of equal concern and respect are best satisfied by choice of political arrangements that maximize the fulfillment of basic human rights (other than the disputed right to an equal democratic say). We show concern and respect for people by showing concern and respect for the fulfillment of their rights. It would be question-begging to say in reply that one can only show equal concern and respect by showing respect for all basic moral rights including the right to a democratic say. This argument is supposed to establish, not presuppose, the existence of such a right.

Much the same applies to the contractualist formulation. The instrumentalist need not reject the contractualist idea that what is morally required is what free and equal rational persons would agree to as morally required. But if the choices of ideal moral reasoners determine what is moral, it should be noted that these ideal reasoners are choosing principles for a world in which human agents are not perfectly rational. There is nothing *prima facie*

puzzling in the thought of ideal reasoners choosing moral principles that require that some actual persons, less than fully rational, be denied equal rights to political power if that is necessary to produce morally best results.

Persons are not equally free and equal in ways that matter for the question, whether democracy or autocracy is morally superior as a form of governance for people under modern conditions. People vary significantly in the degree to which they are motivated to discover what is just and conform to its requirements. They vary significantly in their capacity to figure out what the requirements of justice are, either in general or in particular circumstances. They vary significantly in their capacity to figure out what ways of life and conceptions of the good are choiceworthy. They also differ significantly in the extent to which they are motivated to exercise whatever practical reasoning abilities they have in order to bring it about that they end up affirming more rather than less reasonable conceptions of what is valuable and worthy of human pursuit. Moreover, all of these significant inequalities bear directly on the issue, who should have political power. These differences in competence render it the case that it could be that under some types of circumstances some autocratic constitution of society would predictably and reliably bring about morally superior outcomes to the outcomes that any feasible form of democracy would reach. In such circumstances (which may not be the actual circumstances of our world), autocracy would be the morally superior form of governance. Given all of this,

persons who are free and equal in the threshold sense specified above may reasonably accept an undemocratic political constitution for their governance.

Recall that the question at issue is not whether autocracy is morally required all things considered, but rather whether autocracies (nondemocratic political arrangements) are intrinsically unjust, other things being equal.<sup>13</sup>

#### MUST COMPETENCE TESTS BE OBJECTIONABLY CONTROVERSIAL?

Perhaps we can make headway toward understanding the claimed intrinsic justice of democracy by noting that substantive claims regarding the shape and content of people's basic moral rights are controversial in modern diverse democracies. Reasonable members of society do not converge to agreement. Nor is there a long-term tendency toward agreement.

In the face of such disagreement, any assertion that this particular group of persons is more competent than others at determining what rights people have and designing laws and policies to implement rights is bound to be intractably controversial. Why this particular group and not some other? Any proposal of a set of qualifications that determines who is more competent and should rule will run up against the objection that it is morally arbitrarily to favor this particular proposal over many alternatives that might have been advanced. The claim that the specially competent should rule thus conceals a naked preference for some conceptions of justice and against others with just as much rational backing.

David Estlund urges a similar argument against what he calls the doctrine of Epistocracy--rule by competent knowers. He asserts that "no knower will be so knowable as to be known by all reasonable persons."<sup>14</sup> Disagreeing about justice, reasonable people will also disagree about proposed criteria of competence and about who is more qualified than others to rule. He combines this assertion with a contractualist premise and concludes that political rule by a knowledgeable elite could never be morally legitimate. The contractualist premise is that it is wrong to act in ways that affect people except on the basis of principles they could not reasonably reject. The conclusion is that any version of Epistocracy is reasonably rejectable, hence morally illegitimate.

This line of thought collapses when one asks what counts as a "reasonable" person. If a reasonable person makes no cognitive errors and deliberates with perfect rationality, then reasonable people will agree in selecting the conceptions of justice and rights that are best or tied for best. There are other conceptions of justice that attract the allegiance of less than fully reasonable persons, but these can be set aside. The notion of competence that figures in the idea of a competent political agent can then be calibrated in terms of the best conceptions of justice. This notion of competence will not be controversial among the reasonable people. So if a "reasonable person" is identified with the idea of a maximally reasonable person, a notion of competence can be nonarbitrarily selected.



Suppose instead that we use the idea of a satisficing threshold to identify the "reasonable" person. A "reasonable" person is reasonable enough. The lower the satisficing threshold level is set, the more plausible becomes Estlund's conjecture that "no knower [or knowledge standard] will be so knowable as to be known by all reasonable persons." The question then arises, why set the threshold at any particular less than maximal point? Estlund's set of reasonable persons might be unable to agree on a competence standard for political rule because some of them are adding two plus two and getting five or making some comparable subtler mistake of reasoning. Given that the political rulers will be charged with the task of designing and administering laws and policies that will maximize fulfillment of human rights, it is incorrect to accept any satisficing standard (unless in context the maximizing strategy calls for satisficing). Only the best is good enough.

One might attempt to defend a satisficing standard for identifying the "reasonable" person by appeal to a requirement of respect. If a person has sufficient rational agency capacity to be able to recognize and formulate reasons and debate about principles, then it is wrongfully disrespectful to act toward him in ways that dismiss or slight this rational agency capacity, as though he were a mere tool to be manipulated for the common good. The requirement that the principles on the basis of which we interact with people, including the principles that determine the proper mode of political governance for our society, should

be able to elicit their assent at least if they qualify as reasonable, expresses a fundamental norm of respect for persons.

The reply is that appropriate respect for an agent's rational agency capacity is shown by recognizing it for what it is. It shows no wrongful disrespect to me to notice that I am imperfectly rational and to take efficient steps to prevent my proclivity to mistakes from wrongfully harming others or for that matter myself. This is true in face-to-face personal interaction and it is just as true in a context where what is at issue is identifying institutional procedures and norms for collective decision making. Respect for rational agency should not be interpreted as requiring us to pretend that anyone has more capacity than she has or to pretend that variation in capacity does not matter when it does. Respect for rational agency in persons requires treating them according to the moral principles that fully rational persons would choose, the principles best supported by moral reasons. Supposing there is a divergence between the principles that threshold reasonable people would unanimously accept and the principles that ideally reasonable people would accept, I submit that the latter not the former are the norms, acting on which manifests respect for persons (beings with rational agency capacity). The point I am trying to make in this paragraph was stated clearly by Mill long ago: "Every one has a right to feel insulted by being made a nobody, and stamped as of no account at all. No one but a fool, and only a fool of a peculiar description, feels offended by the

acknowledgement that there are others whose opinion, and even whose wish, is entitled to a greater amount of consideration than his."<sup>15</sup>

In passing I observe that those who deny that standards of political competence that in some circumstances might justify nondemocratic forms of governance can be nonarbitrarily and rationally identified seem to have no trouble with the idea that minimal competence standards can be nonarbitrarily formulated.<sup>16</sup> But if we say correctly that insane and feebleminded persons lack rational agency capacity and are in virtue of these facts rightly deemed incompetent in certain contexts for certain purposes, we are pointing to traits that vary by degree above whatever threshold level is singled out as "good enough."

Of course, nothing guarantees that fully reasonable persons will be able to select a single uniquely best conception of justice, which can serve as the reference point for defining a nonarbitrary standard of political competence. Suppose ten conceptions are tied for best, given the best moral theorizing and reasons assessment that is presently ideally available. In that case, it would not be unreasonable to implement a political system geared to achieving any of the ten. From the possibility of reasonable disagreement one gets a loose disjunctive standard of moral acceptability, not an argument for the unique fairness of democracy. Note that the fact that several conceptions of justice are equally acceptable for all we can know is fully compatible with there being a plethora of popular and decisively unreasonable views concerning the

requirements of justice, any of which might command a majority vote in a democracy.

In the face of disagreement about what justice requires, one might flatly deny that the opinion of any member of society can be dismissed as unreasonable. In that case one is abandoning the moderate position about justice and democracy that is my main target in this essay and is instead dismissing the possibility that a standard of justice can be available to provide an independent standard for assessing the political outcomes produced by the democratic process. The moderate as I imagine her agrees that we can have knowledge about justice but insists that democracy is an intrinsically just and fair procedure independently of its tendency to produce good results. Perhaps moderation, when pressed, slides toward radicalism.

Some readers will suspect that my position involves an illicit sleight of hand. What we observe is the members of society disagreeing about justice. From their different standpoints they will affirm opposed standards of political competence. Even if one grants that metaphysically there are right answers to questions about the substance of justice, one cannot in this context invoke these right answers to justify some elite form of political rule, because our agreed circumstances preclude any claim that any of us has epistemic access to the truth about justice. If we disagree, then we disagree. Jeremy Waldron expresses the sense that the instrumentalist is playing an illogical trick when he writes that "any theory that makes authority depend on the goodness of political

outcomes is self-defeating, for it is precisely because people *disagree* about the goodness of outcomes that they need to set up and recognize an authority." Or again: "rights-instrumentalism seems to face the difficulty that it presupposes our possession of the truth about rights in designing an authoritative procedure whose point is to settle that very issue."<sup>17</sup>

These are sensible concerns.<sup>18</sup> There are sensible ways to address them. Consider a simple example with epistemic uncertainty. A violent altercation is underway on the street. Many people observe some of it. It is not certain who has done what to whom, with what justification or lack of justification. Among onlookers, some have a better vantage point to see what is happening, some make better use of the observational data they get, and some have a better, some a worse grip on the moral principles of self-defense, provocation, and proportionality that determine who of those involved in the altercation have right on their side. There is no consensus among reasonable spectators as to what is taking place or what should be done. Any proposal as to what intervention is justified meets with reasonable suspicion from some person's standpoint. Still, none of this excludes the possibility that you in fact perceive correctly what has happened and judge correctly what ought to be done and are rationally confident that your opinions on these matters are correct. If you happen to have the power to implement this correct assessment, you should do so, despite the fact that your assessment will not attract the unanimous assent of those affected. As G. E. M. Anscombe observes, "Just as an individual will constantly think

himself in the right, whatever he does, and yet there is still such a thing as being in the right, so nations will constantly think themselves to be in the right—and yet there is still such a thing as there being in the right.”<sup>19</sup> Paraphrasing this to highlight its relevance to our topic, we should say that just as people think they are acting justly, whether they are or not, yet there is such a thing as acting justly, so also people will think their preferred standards of competence and criteria for eligibility for political office are correct, yet there is such a thing as there being correct standards of political competence and correct inferences from these standards to judgments as to what form of political governance in given actual circumstances is just.

The resourceful Waldron has another arrow in his quiver. He argues that to suppose that an individual possesses moral rights is already to suppose that the individual has the competence to exercise them. A being that lacks rational agency capacity is not the sort of being who can be regarded as a right-bearer. Hence there is tension and perhaps incoherence in arguing that to achieve the overall fulfillment of the rights of all members of society we must deny some the right to participate as equals in the political governance process on grounds they are incompetent. If they are incompetent, how can they be right-bearers at all?<sup>20</sup>

The tension Waldron sees eases when we look more closely. Competence is not all-or-nothing. An individual might be fully competent for many tasks but less competent at some. I may have rational agency capacity that a snake or

even a gorilla lacks, and so be a candidate for ascription of moral rights that they could not sensibly be thought to possess, yet lack political competence at the level needed to contribute in a positive way to the determination of what laws and policies should be passed in order best to protect human rights. Also, the ground for ascribing some rights to people need not include strong claims about their competence to exercise the rights. I may believe that each individual has the right to live her own life as she chooses within wide moral limits. I may believe that each person has this right of autonomy without for a moment doubting that some persons have marginal or problematic competence to make good life plans and execute them. (Notice that one might believe there is a presumption in favor of each person being free to live her own life without believing that there is any presumption that everybody has an equal right to participate on equal terms in the governance of everybody's life.) The particular nature of the putative right to a democratic say is such that competence requirements apply with special force to it.

#### PUBLICITY

Some theorists who claim that democratic governance is intrinsically just point to the requirement of publicity. It is not enough that justice is done, it should be manifest that justice is done. Moreover, this requirement that justice be visible at least to a reasonable and careful observer is itself a further requirement of justice.

In a narrow sense, a society satisfies publicity when all members of society can check for themselves that the practices and institutions of the society as they actually function fully satisfy the norms and rules to which it is committed.<sup>21</sup> In a broader sense, publicity requires in addition that all members of society if they engage in reflective deliberation can see that the rules and norms to which the society is committed are themselves morally justifiable.<sup>22</sup>

This asserted requirement of publicity is parlayed into an argument for the intrinsic justice of democracy. The idea is that in a world rife with reasonable disagreement about morality and the good, it can be difficult to discern whether or not a government's policies conform closely to elementary requirements of justice. Consider the fundamental norm that each person should be treated with equal consideration and respect. All persons are of fundamentally equal worth; no one's life is inherently worth more than anyone else's.

The fact that a society that is autocratic thereby fuels a suspicion that some people's lives are being counted as more valuable than other people's. A society that is substantively democratic, that brings it about that all its citizens enjoy equal opportunity to influence political outcomes, goes further toward manifesting a commitment to the principle of equal consideration. The society with democratic governance, other things being equal, satisfies publicity to a greater degree than it would if it were undemocratic, and since publicity is a component of justice, this democratic society simply in virtue of being democratic is more just.



In reply: Neither the wide nor the narrow ideal of publicity qualifies as an element in the set of basic moral rights definitive of justice. That it is manifest that the rules a society claims to enforce are actually fully implemented likely tends to elicit people's allegiance and in this way contribute to the long-run stability of the system. If the rules manifestly conform to principles that almost all citizens accept, this tendency is likely reinforced. If these speculative hunches are empirically corroborated, publicity promotes justice and should be valued in this purely instrumental way.

None of this provides any support at all for the quite different claim that there is a basic moral right to publicity, that publicity is intrinsically just. Consider cases in which the aim of achieving publicity and the aim of achieving justice (aside from publicity) conflict. Let us say we must choose between a policy that over the long run secretly prevents more murders or an alternative policy that prevents fewer murders but does so in a way that satisfies publicity. Once we get the issue clearly in focus, and set aside the here irrelevant likely instrumental benefits of publicity (that it possibly might prevent more murders overall in the long run), I submit that publicity should have no weight at all in conflict with other justice values.

I deny that publicity is an intrinsic component of justice. But I also deny that autocracy inherently is incompatible with publicity. If instrumental or best-results justifications of democracy in a particular setting do not succeed, and

autocracy would in that setting produce morally superior results—let's say, more just results, then autocracy can satisfy publicity.

In the argument from publicity to the claim that democracy is intrinsically just, the fact that society is democratic evidently conveys a message to members of society. Democratic governance procedures are used to signal the commitment of society to the principle of equal consideration. But messages can be communicated in various ways. Why suppose that the only effective way to convey a commitment to justice is through instituting and maintaining democracy?

If autocracy is chosen on the ground that it leads to morally superior results, and this surmise is correct, then over time autocracy will produce justice, or at least more justice than would be obtainable under any other type of political regime. What could manifest a commitment to doing justice more obviously and credibly than actually doing justice over time? We are not talking here about private acts performed in people's bedrooms, we are talking about the public policies pursued by a government and the changes over time in its institutions, social norms, and practices.

The claim is made that in a diverse society whose members fan out to embrace a wide array of conflicting views of morality and value, there will inevitably be a degree of uncertainty and a lack of precision in people's estimation about the extent to which their government over time brings about basic social justice. So publicity cannot be satisfied merely by aiming at morally

better policies. More is needed. The symbolism of democracy—everyone counts for one, nobody for more than one—has an important role to play in securing that it is manifest that justice is done, or approximated to a good enough degree.

If the fact that the government over the long haul enacts policies that bring it about that social justice requirements are fulfilled across the society does not suffice to satisfy publicity, because people of diverse standpoints disagree about justice, I do not see why the fact that the society is democratically run must succeed in conveying the message to all that the society is committed to justice. Some may see democracy as catering to the lowest common denominator of public opinion.

The thought might be that the very existence of an autocratic system, a clique of persons who wield power and are not accountable to those over whom power is wielded, must fuel suspicion. But an autocracy need not select the members of the ruling group by a hidden process. The process by which membership in the ruling group is set may be open for public inspection, and conform to the norm of careers open to talents or a stronger meritocratic principle such as the Rawlsian norm of equality of fair opportunity.

For concreteness, imagine an egalitarian social justice party that overthrows a clearly unjust regime and institutes autocratic rule. Any adult member of society is eligible to apply for party membership, and the criteria for membership are a matter of public record. Applications are assessed on their

merits, and those deemed most qualified are admitted to the ruling group. Moreover, education and other forms of societal assistance to childrearing practices are set so that any individuals with the same ambition to participate in political rule by joining the ruling party and the same native (potential for) political talent have identical prospects of success in gaining party admission. In other words, the political process satisfies norms of formal equality of opportunity and also substantive equality of opportunity (Rawlsian equality of fair opportunity). Here then is a further response to the demand for publicity. The imagined autocratic society makes manifest its commitment to social justice, especially to the fundamental norm that all are entitled to equal consideration and respect, by bringing it about that its policies and practices achieve justice and also by regulating access to membership in the group that exercises political power according to meritocratic norms. So if publicity were itself an intrinsic component of justice, this would not tend to show that democracy is intrinsically just, because some versions of autocracy can satisfy publicity.

Fans of publicity and democracy have a riposte to the argument made to this point. The idea is that the meritocratic ideal that political rule should be exercised by the competent, not by all citizens, unravels and reveals itself as inherently unfair as we try to specify it. There are no neutral criteria of competence. The criteria of political competence will inevitably be calibrated in terms of some controversial moral ideal, which the ruling autocrats label “justice.” But this gambit takes us back to the claim—already discussed and

rejected in this essay-- that standards of political competence invoked to support some type of nondemocratic regime must be morally arbitrary and capricious.

### CONCLUSION

This essay has searched without any success for sound arguments for the claim that there is a noninstrumental moral right to a democratic say. This is good news for the purely instrumental approach that I favor. The victory for instrumentalism is nonetheless incomplete pending a full account of human rights that enables us to see why the justifications for the fundamental human rights do not include a justification of a fundamental intrinsic right to a democratic say. This is a story for another day.

\*I first encountered Brian Barry's work when I was a graduate student who wanted to do political philosophy but was clueless as to what the enterprise was or how it might profitably be conducted. Barry's essay "Warrender and His Critics" made a deep and lasting impression. Since then I have continually found in Brian Barry's writings an inspiring combination of analytic rigor and sharp intelligence, originality and verve, and humane and sensible political engagement. I admire the man and have the greatest respect for his immense wide-ranging intellectual achievements. It's an honor to honor him by contributing to this festschrift.

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<sup>1</sup>. Bertolt Brecht, *The Caucasian Chalk Circle*, tr. Eric Bentley (New York: Grove Press, 1947). Why call this a *propaganda* play? At the time of its writing, Brecht aims to cast in a favorable light Stalinist political regimes, the horrific nature of which is reasonably described in Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (New

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Haven and London: Yale University Press, 1999), chapter 5. Why then call the play *glorious*? In my judgment it has considerable aesthetic merit and addresses significant issues in intellectually interesting ways.

<sup>2</sup>. John Locke asserts a version of this idea in the form of a No-Waste condition on justified appropriation of land. He writes, "Nothing was made by God for man to spoil or destroy." He does not interpret the No-Waste condition as requiring maximally productive use, however. See John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett Publishing, 1980), chapter 5 (originally published 1690).

<sup>3</sup>. In this essay I leave it an open question, what is the moral standard for assessing results that determines which ones are best. Some of my formulations suggest that the best results standard is consequentialist, or more specifically a consequentialism of rights. But nonconsequentialist moral views could embrace a best results standard for assessing forms of governance. For example, a version of a Lockean natural rights view might hold that a state is morally more acceptable, the more it promotes the fulfillment of natural rights (without itself violating any). John Locke suggests such a view though he does not fully commit to it. See Locke, *Second Treatise of Government*.

<sup>4</sup>. J. S. Mill defends this position in *Considerations on Representative Government*, in Mill, *Collected Works*, vol. 19, ed. J. M. Robson (Toronto: University of Toronto Press, 1977), chapter 8. Ronald Dworkin defends a version of this view in *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), chapter 5.. See also my "Democratic Rights at National and Workplace Levels," in *The Idea of Democracy*, ed.

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David Copp, Jean Hampton, and John E. Roemer (Cambridge: Cambridge University Press, 1993), pp. 118-148.

<sup>5</sup>. The theorists who hold that democracy is intrinsically just include Charles Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton: Princeton University Press, 1989); Thomas Christiano, *The Rule of the Many* (Boulder, CO: Westview Press, 1996); Christiano, "Knowledge and Power in the Justification of Democracy," *Australasian Journal of Philosophy*, vol. 79, no. 2 (June, 2001), pp. 197-215; David Estlund, "Making Truth Safe for Democracy," in David Copp, Jean Hampton, and John E. Roemer, eds. *The Idea of Democracy* (New York and Cambridge: Cambridge University Press, 1993); Estlund, "Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority," in James Bohman and William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge MA and London: MIT Press, 1997), pp. 173-204; Harry Brighouse, "Egalitarianism and Equal Availability of Political Influence," *Journal of Political Philosophy*, vol. 4 (1996), pp. 118-141; Joshua Cohen, "Procedure and Substance in Deliberative Democracy," in *Deliberative Democracy: Essays on Reason and Politics*. Ed. James Bohman and William Rehg (Cambridge, MA and London: MIT Press, 1997), pp. 407-438; Joshua Cohen, "For a Democratic Society," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003, pp. 86-138 ; Jeremy Waldron, *Law and Disagreement* (Oxford and New York: Oxford University Press, 1999); John Rawls, *A Theory of Justice*, revised ed., (Cambridge: Harvard University Press, 1999); Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); William Nelson, *On Justifying Democracy* (London and New York: Routledge and Kegan Paul, 1980); Robert

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Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989). In

“Political Legitimacy and Democracy,” Allen Buchanan asserts that “where democratic authorization of the exercise of political power is possible, only a democratic government can be legitimate” (p. 689). But as he develops this claim he leaves it open that the choice of democratic governance is only morally required when democracy “can produce laws that satisfy the requirement of equal regard for all persons’ basic interests” (p. 712). If “can produce laws” means “actually produces laws,” then Buchanan is only committed to the claim that a moral preference for democracy is a tie-breaker to be employed when democratic and nondemocratic governance procedures would equally satisfy the relevant best results standard. This essay is in *Ethics*, col. 12 ((July, 2002), pp. 689-719.

<sup>6</sup>. Robert Dahl endorses something in the neighborhood of this position in his *Democracy and Its Critics* (New Haven: Yale University Press, 1989).

<sup>7</sup>. For a subtle discussion that finds insistence on fair procedures more sensible than insistence on any conception of substantive fairness of outcomes, see Stuart Hampshire, *Justice Is Conflict* (Princeton: Princeton University Press, 1999). Hampshire does not endorse the radical affirmation of the intrinsic fairness of democratic procedures as I characterize it in the text of this paragraph.

<sup>8</sup>. *Moderation* as conceived here includes a wide array of possible views. At one extreme, the moderate might hold that the right to a democratic say is just a tie-breaker that favors a democratic over a nondemocratic regime if the results of each would be equally good. At the other extreme, one might hold that the right to a democratic say is the right of rights in the sense that it trumps all others combined, and one should always prefer the more democratic over the less democratic regime, allowing the justice of the



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results of the operation of the system only to act as a tie-breaker among equally democratic regimes. Of course there are indefinitely many intermediate views.

<sup>9</sup> . Thomas Christiano and Jeremy Waldron develop versions of this position. For Christiano, the intrinsic fairness of democratic procedures follows as a uniquely uncontroversial inference from a conception of substantive justice whose other significant implications are controversial.

<sup>10</sup> . “Flourishing” here is just a place-holder referring to whatever the correct best results standard turns out to be. That standard might be a consequentialism of rights position along the lines developed by Amartya Sen in “Rights and Agency,” *Philosophy and Public Affairs*, vol. 11 (1982), pp. 3-39. For some doubts about Sen’s position, see Richard Arneson, “Against Rights,” *Philosophical Issues*, vol. 11, *Social, Political, and Legal Philosophy*, supp. to *Nous* (2001), pp. 172-201.

<sup>11</sup> . Thomas Christiano makes a criticism close to this one in footnote 13 of “Knowledge and Power in the Justification of Democracy.” Christopher P. Griffin develops this and other criticisms of the purely instrumental view of democracy in “Democracy as a Non-instrumentally Just Procedure,” *The Journal of Political Philosophy*, forthcoming. For a reply, see Arneson, “Defending the Purely Instrumental Account of Democracy,” *The Journal of Political Philosophy*, forthcoming. This criticism was first developed by Robert Sugden in an incisive commentary on Arneson, “Democratic Rights at National and Workplace Levels.” See Robert Sugden, “Justified to Whom?,” in *The Idea of Democracy*, pp. 149-154.

<sup>12</sup> The claim in the text that rights vary in the extent to which they confer power over the lives of other people and that rights that involve significant power over the lives of others

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require a best results justification might be challenged. The challenge repeats the point that any moral right involves power over others. Consider many people's exercise of their private ownership rights over small resource holdings. In the aggregate, these exercises of a very small degree of power might very significantly restrict other people's life options. Millions of people might exercise their rights in ways that leave some individuals with just a single employment option or access to just one person who is willing to sell them food needed to live. How does this differ from the way that many people's exercises of the franchise might aggregate to issue in coercive rules that specify how others shall live their lives? In reply: I don't deny that any moral right you might care to name might in some circumstances confer power over the lives of others. I deny this must be so. Consider a world in which small groups of voluntarily associating adults live at great distance from each other. The members of each group may have many moral rights that do not, in isolation or in the aggregate, involve significant power over the lives of others. Moreover, in the case just imagined, where many people exercise rights over small bits of property that in the aggregate significantly begin to restrict the lives of others, I would say the "intrinsic moral right" gives way and a best results standard becomes operative. Here I intend to contrast moral rights that confer lots of power over the individual's own life and moral rights that involve significant power to direct the lives of others. One might hold that moral rights that confer significant control over the direction of one's own life are justified by a principle of autonomy or personal sovereignty. Hence your right to act as you choose so long as you do not harm others in certain specified ways might be thought not to require a best results justification. Your

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right stems from a right of personal sovereignty, not from the fact that you are more competent to run your own life than others are to run it for you.

<sup>13</sup> . Why do not the pro-autocracy considerations adduced here suffice to establish at least a strong presumption in favor of the claim that autocracy is morally superior to democracy all things considered? Three countervailing concerns are pertinent. One is “Quis custodiet custodiet?”. Concentrating political power in the hands of an elite can produce horrible consequences if the elite becomes corrupt or incompetent. In choosing forms of governance, we should give special weight to preventing moral catastrophes. (A system of Madisonian checks and balances might mitigate this problem.) A second consideration is that political science has not devised a feasible reliable procedure for distinguishing competent from less competent agents and installing only the former as rulers. A third consideration, prominent in democratic theorists such as J. S. Mill, is that aside from a possible tendency to produce better legislation and policies and better implementation of these laws and policies, democracy tends to produce other indirect morally valuable results such as social solidarity and the moral and intellectual development of the democratic citizens. A fourth consideration is that if people are somewhat disposed to use whatever power they have to advance their interests, it is better (though not good), other things being equal, that laws and policies cater to the interests of majorities than to the interests of smaller groups.

<sup>14</sup> . Estlund, “Making Truth Safe for Democracy,” p.88. It should be noted that Estlund himself is trying to defeat the claim that authoritarianism in the form of rule by moral experts is morally required. I am treating his argument as though he were making a positive argument for the right to a democratic say. For commentary on Estlund, see

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David Copp, “Could Truth Be a Hazard for Democracy?”, in Copp, Hampton, and Roemers, eds., *The Idea of Democracy*.

<sup>15</sup> . Mill, *Considerations on Representative Government*, p. 474. Mill’s statement occurs in the course of an argument for a plural votes scheme, in which more educated citizens, and those who pass a political competence examination, are allotted extra votes beyond the single vote that every adult citizen gets.

<sup>16</sup> . Christiano accepts a minimal competence qualification for the right to a democratic say in “Knowledge and Power in the Justification of Democracy,” pp. 207-208.

<sup>17</sup> . Both quotes are from Waldron, p. 253. For criticism of Waldron, see David Estlund, “Waldron on *Law and Disagreement*,” *Philosophical Studies*, vol. 99 (2000), pp. 111-128.

<sup>18</sup> . However, Waldron overreaches in stating that the point of political procedures is to settle the truth about what rights we have. A vote can fix the content of legal rights in some political jurisdiction, but this does not settle the issues (1) whether it is morally right that these legal rights are instituted and enforced and (2) whether these legal rights coincide with the moral rights that people have in this setting.

<sup>19</sup> . G. E. M. Anscombe, “War and Murder,” reprinted in Anscombe, *Ethics, Religion and Politics: Collected Papers*, vol. 3 (Minneapolis: University of Minnesota Press, 1981), pp. 51-61. The quote is from p. 52

<sup>20</sup> . Waldron, *Law and Disagreement*, pp. 250-251.

<sup>21</sup> . Christiano deploys a narrow publicity requirement in his argument in “Knowledge and Power in the Justification of Democracy.”

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<sup>22</sup> . On wide publicity, see Rawls, *A Theory of Justice*, chapter 3. For an interesting deployment of this publicity requirement in a controversy concerning what distributive justice requires, see Andrew Williams, “Incentives, Inequality, and Publicity,” *Philosophy and Public Affairs*, vol. 27 (Summer, 1998), pp. 225-247.