

# GROUP DISAGREEMENT AND VIRTUOUS DELIBERATION IN LAW

Amalia Amaya

## 1. INTRODUCTION

Disagreement is a pervasive feature of all instances of legal decision-making the study of which has generated a substantial amount of legal scholarship. Despite its prominence in both legal practice and legal theory, the epistemology of disagreement, which is a burgeoning field in contemporary epistemology, has had little impact on work on disagreement in law. The few efforts to date that aim to show the relevance of the epistemology of disagreement to law focus on issues concerning peer disagreement.<sup>1</sup> The literature on peer disagreement, which is a dominant theme in the epistemology of disagreement, aims to answer a very specific question, namely, what an individual is rationally required to do when in disagreement with an epistemic peer, i.e., a cognitive agent who has equal evidence and cognitive capacities.<sup>2</sup> Two main views are defended in the literature on disagreement: the conciliatory views and the steadfast view. Whereas conciliationists claim that rational agents ought to decrease their confidence about  $p$  when faced with peer disagreement, steadfasters deny this claim and argue that rational agents may hold to their beliefs.<sup>3</sup>

---

<sup>1</sup> See A. Stein, 'Law and the Epistemology of Disagreements,' *Washington University Law Review*, vol. 96, 2018; W. Baude and R. D. Doerfler, 'Arguing with Friends,' *Michigan Law Review*, vol. 117, 2018; Y. Lee, 'Reasonable Doubt and Disagreement,' *Legal Theory*, vol. 23, 2017; I. V. Breulmann, *Peer Disagreement in Law*, Ducker Humblot, 2021.

<sup>2</sup> On epistemic peerhood in law, see R. G. Wright, 'Epistemic Peerhood in the Law,' *St. Johns Law Review*, vol. 91, 2017. See also Baude and Doerfler, *op. cit.*

<sup>3</sup> The literature on peer disagreement is extensive. For some representative work, see D. Christensen, 'Epistemology of Disagreement: The Good News,' *The Philosophical Review*, vol. 116, 2007; A. Elga, 'Reflection and Disagreement,' *Noûs*, 41, 2007; T. Kelly, 'The Epistemic Significance of Disagreement,' *Oxford Studies in Epistemology*, vol. 1, 2005; D. Enoch, 'Not Just a Truthometer: Taking Oneself Seriously (But Not Too Seriously) in Cases of Peer Disagreement,' *Mind*, vol. 119, 2010; R. Feldman, 'Reasonable Religious Disagreements,' L. Antony (ed.), *Philosophers without Gods: Mediations on Atheism and the Secular Life*, Oxford University Press, New York, 2006; D. Christensen and J. Lackey (eds.), *The Epistemology of Disagreement: New Essays*, Oxford University Press, Oxford, 2013; and J. Matheson, *The Epistemic Significance of Disagreement*, Dordrecht, Springer, 2015.

The debate over peer disagreement has impressively advanced knowledge about the epistemic significance of disagreement and a range of related epistemological questions. Nonetheless, its potential to give an account of the problem of disagreement in law is limited for the model frames the problem of disagreement individualistically,<sup>4</sup> whereas a substantial amount of the legal decisions is taken by groups, rather than individuals, such as juries, appellate courts, constitutional courts, regulatory agencies, or parliamentary commissions. The model focuses on the question of what rationality requires of a single individual, when he disagrees with a peer about some contested proposition. However, it does not provide any does not provide any guidance as to how to rationally proceed in cases of group disagreement which characteristically occur in the context of legal decision-making. A straightforward transfer of the strategies for dealing with peer disagreement to the case of group disagreement is not likely to be helpful given the distinctive epistemic qualities of groups.<sup>5</sup> Thus, a social, rather than individual, perspective on disagreement is needed to properly tackle disagreement in law.

In addition, the peer disagreement model is extremely restrictive in that it addresses only one segment of the phenomenon of disagreement, which spans over a much more extended process. The model enters into scene when two peers come to disagree with one another, but there are important, problematic, issues that arise *before* and *after* one is in a position to determine what one should believe in the face of such disagreement. Disagreement has to be voiced and disagreeing others have to be recognized as peers for a problem of peer disagreement to arise in the first case.<sup>6</sup> And once disagreement has been

---

<sup>4</sup> See J. A. Carter and F. Broncano-Berrocal, 'The Epistemology of Group Disagreement: An Introduction,' J. A. Carter and F. Broncano-Berrocal (eds.), *The Epistemology of Group Disagreement*, Routledge, New York, 2021, p. 1.

<sup>5</sup> That the epistemic properties of group are not simply reducible to the aggregation of the epistemic properties of its members have been argued by M. Gilbert, 'Modeling Collective Belief,' *Synthese*, vol. 73, 1987; J. Lackey, 'What is Justified Group Belief?' *Philosophical Review*, vol. 125, 2016; R. Tuomela, *Social Ontology: Collective Intentionality and Group Agents*, Oxford University Press, New York, 2013 and D. Tollefsen, *Groups as Agents*, Polity Press, 2015.

<sup>6</sup> On the problems of voicing dissent, see C. R. Johnson (ed.), *Voicing Dissent*, Routledge, New York, 2020. On the difficulties associated with perceiving interlocutors as peers and the incapability of peer disagreement models to account for them, see M. Miragoli and M. Simion, 'Gender, Race and Group Disagreement,' Carter and Broncano-Berrocal, *op. cit.*

rationally resolved (either as conciliationist or as steadfast views recommend), there remains important issues as to how such disagreement is preserved and expressed for future interactions. Both stages, i.e., the emergence of peer disagreement and the record of such disagreement, are necessary to ensure that disagreement brings about the kind of epistemic benefits that have been claimed to be associated with it.<sup>7</sup> Both stages are also central in law: it is critical that disagreement within collegiate legal decision-making bodies surfaces so that legal decisions are responsive to the different views hold within the group and the relevance of registering disagreement is explicit in the legal practice of dissenting judgment.<sup>8</sup>

Another feature of the peer disagreement model makes it less than adequate to properly deal with disagreement in legal contexts. This model focuses on a highly idealized type of situations, but in everyday situations a range of non-epistemic factors impinge on how disagreement is addressed. Some of these factors are illegitimate interventions in the process of solving disagreement –such as when an agent conciliates with an epistemic peer to be looked at favorably, whereas others are not –such as when an agent factors in the costs of being wrong in a high stakes decision when dealing with disagreement.<sup>9</sup> Furthermore, real instances of peer disagreement take place in different deliberative environments, e.g., there are important difference between instances of disagreement in which a decision should be taken, as it is the case in law, from those in which there is no decisional pressure, and this also shapes the way in which disagreement ought to be addressed. The model of peer disagreement, given its high degree of idealization, lacks the resources to guide legal decision-makers handle disagreement in a way that properly takes into account (only) the full range of relevant reasons (epistemic and otherwise) and that is properly sensitive to the specific features of the deliberative context.

---

<sup>7</sup> On the epistemic benefits of disagreement, see C. Z. Elgin, ‘Reasonable Disagreement,’ in Casey, *op. cit.*, K. Kappel, ‘Dissent: Good, Bad and Reasonable,’ in Casey, *op. cit.*, pp. 62-63; and S. Barker, ‘Bucking the Trend: The Puzzle of Individual Dissent in Context of Collective Inquiry,’ Carter and Broncano-Berrocal, *op. cit.*, pp. 2109-116; and J. Beatty and A. Moore, ‘Should we aim for consensus?’ *Episteme*, vol. 7, 2010.

<sup>8</sup> On the convenience that the final agreement reflects internal dissent within the group, see J. G. P. Salas and X. D. Donato-Rodríguez, ‘Disagreement within Rational Collective Agents,’ Carter and Broncano-Berrocal, *op. cit.* p. 62.

<sup>9</sup> The justification of group belief is thus no more insulated from pragmatic factors than the justification of individual belief is. On the pragmatic encroachment of epistemic justification, see B. Kim and M. McGrath (eds.), *Pragmatic Encroachment in Epistemology*, Routledge, New York, 2018.

Thus, there is a need to move beyond the model of peer disagreement and examine group disagreement in law in a way that does not artificially focus on just one, partial, segment of the dialectical process of disagreement and that is not severed from ordinary practice. In this paper, I aim to contribute to the study of group disagreement in law, understood as a broad phenomenon that occurs in non-idealized conditions, by investigating it from a virtue perspective.<sup>10</sup> Specifically, I shall claim that the possession and exercise of deliberative virtues on the part of members of collegiate legal decision-making bodies helps tackle disagreement in law in epistemically productive ways by mitigating a number of deliberative biases that thwart group deliberation.

The argument of this paper will be developed as follows. First, I will explain some phenomena that distort group deliberation and the way in which they interfere with groups reaching epistemically valuable agreement. Second, I will give an account of deliberative virtues and show how they can help mitigate these deliberative distortions thereby enabling groups to converge on attitudes that are properly responsive to the reasons available within the group. Last, I will consider some objections that may be raised against the view that deliberative virtues may be helpful for addressing the problems concerning group disagreement, namely, the objection from feasibility, which states that the proposal to address group disagreement through the deployment of virtue is unrealistic and devoid of practical implications; the objection from independence, i.e., the objection that individual virtue may lead to vice, rather than virtue, at group level; and the objection from consciousness, according to which deliberative distortions are unreflective and cannot be corrected through reflective mechanisms, such as virtue-based measures. I will conclude by arguing that even though these objections may be met, virtue remedies to group disagreement face important limits, which point towards interesting connections between the epistemology of disagreement and political epistemology.

---

<sup>10</sup> For virtue approaches to peer, rather than group, disagreement, see C. W. Gowans, 'Moral Virtue and the Epistemology of Disagreement,' *Philosophical Topics*, vol. 38, 2010; D. Pritchard, 'Intellectual Humility and the Epistemology of Disagreement,' *Synthese*, vol. 195, 2018; and J. Spiegel, 'Open-Mindedness and Disagreement,' *Metaphilosophy*, vol. 50, 2019.

## 2. GROUP DISAGREEMENT AND DELIBERATIVE DISTORSIONS

An important reason for allocating legal decision-making power to groups rather than individuals is that groups may reach decisions that are better than those that would be reached by solitary deliberation.<sup>11</sup> However, group decision-making does not always outperform individual decision-making. There are some phenomena that distort group deliberation, with the result that groups often do not improve on and sometimes even do worse than their average median member.<sup>12</sup> Some of these phenomena include the following:

- a. *Amplification.* As is well known, individuals use heuristics that lead them to predictable errors and they are also subject to a number of identifiable bias.<sup>13</sup> There is significant evidence that shows that individual cognitive errors are usually amplified as a result of group deliberation.<sup>14</sup>
- b. *Suppression.* The input to deliberation is only a subset of the available information as individuals self-silence for different reasons. They are first subject to informational influences, that is, if group members share a particular belief, isolated or minority members might not speak out on the grounds that their own judgment must be wrong. A second reason for self-silencing involves social, rather than informational, influences in that individuals in a minority position

---

<sup>11</sup> There is now a large literature in support of the ‘wisdom of crowds,’ for useful reviews, see R. S. Tindale and J. R. Winget, ‘Group Decision-Making,’ *Oxford Research Encyclopedia of Psychology*, Oxford University Press, Oxford, 2019 and A. Lyon and E. Pacuit, ‘The Wisdom of Crowds: Method of Human Judgment Aggregation,’ P. Michelucci (ed.), *Springer Handbook of Human Computation*, Springer, New York, 2013.

<sup>12</sup> See C. Sunstein and R. Hastie, *Wiser: Getting Beyond Groupthink to Make Group Smarter*, Harvard Business Review Press, Cambridge, 2015, ch. 1. See also R. C. Luskin, G. Sood, J. S. Fishkin, and K. S. Hahn, ‘Deliberative Distortions? Homegenization, Polarization and Domination in Small Group Deliberation,’ unpublished manuscript.

<sup>13</sup> See D. Kahneman, *Thinking Fast and Slow*, Farrar, Straus and Giroux, New York, 2011.

<sup>14</sup> See C. Sunstein, ‘Deliberating Groups versus Prediction Markets (or Hayek’s Challenge to Habermas),’ *Episteme*, vol. 3, 2006 pp. 197-198.

might silence themselves out of fear for social sanctions, such as the risk of suffering reputational injury, being ridiculed, disliked or disapproved.<sup>15</sup>

- c. *Homogenization*. Deliberation usually reduces variance as shared information crowds out information that is held by one or few members (common-knowledge effect) and people follow the statements of their predecessors, ignoring their private knowledge (cascade effects).
- d. *Polarization*. Members of deliberating groups end up adopting a more extreme version of their pre-deliberative tendencies.<sup>16</sup>
- e. *Domination*. The attitudes of members of deliberating groups shift towards the attitude of their socially advantage members.

In light of these phenomena, it has been even questioned whether we should engage in group deliberation in the first place or whether, to the contrary, some other decision-making, such as voting, would be best.<sup>17</sup> Dispensing with deliberation is not even an option in law, in which deliberation is mandatory.<sup>18</sup> More importantly, there are good reasons, epistemic and otherwise, why the mandate to deliberate should remain in place in legal contexts.<sup>19</sup> These phenomena do, nonetheless, create a challenge as to how to deliberate collectively in ways that make the gains offset the potential loss.

---

<sup>15</sup> See Sunstein and Hastie, *op. cit.* See also C. Sunstein, *Infotopia: How Many Minds Produce Knowledge*, Oxford University Press, Oxford, pp. 65-69.

<sup>16</sup> The phenomenon of group polarization is well-documented and there is also considerable support for the claim that group polarization might also take place in multimember courts. See C. Sunstein, 'Deliberative Trouble? Why Groups Go to Extremes,' *The Yale Law Journal*, vol. 110, 2000, pp. 102-104.

<sup>17</sup> For a systematic discussion of the relative epistemic merits of deliberation and voting, see F. Broncano-Berrocal and J. A. Carter, 'Deliberation and Group Disagreement,' in Broncano-Berrocal and Carter, *op. cit.*

<sup>18</sup> But see B. H. Hedden, 'Should Juries Deliberate?' *Social Epistemology*, vol. 31, 2017 (arguing for a proposal to have a non-deliberating jury).

<sup>19</sup> See S. Hartmann and S. R. Rad, 'Voting, Deliberation and Truth,' *Synthese*, vol. 195, 2018 and Carter and Broncano-Berrocal, 'Deliberation and Group Disagreement,' Carter and Broncano-Berrocal, *op. cit.*, for a defense of the epistemic value of deliberation, among other advantages.

These deliberative distortions impinge in important ways in disagreement. Most importantly, they make it the case that disagreement is silenced, exacerbated, and reached in objectionable ways. Suppression leads to silencing dissent, polarization radicalizes disagreement, and through homogenization and domination, disagreement is solved in ways that underplay the relevance of minority voices. More specifically, these distortions may result in two deliberative outcomes that are problematic, namely, the group may fail to reach unanimity or the required majority or it may settle on a mere pseudo-agreement, i.e., an agreement that is not responsive to the reasons available within the group.<sup>20</sup> Critically, such reasons include not only the reasons that are available to the group as a collective agent, but also the reasons that the group should have, insofar as they are accessible to its members.<sup>21</sup> A failure to agree may happen in cases of polarization and pose serious problems in law, such as deadlock courts or hung juries. Pseudo-agreement (or forged consensus) may result from silencing dissent within the group, i.e., when suppression occurs, and from discounting dissent, i.e., preventing dissent from properly informing the final agreement, as it occurs in cases of homogenization and domination.

Of course, not all cases in which disagreement remains unresolved or is resolved in epistemically pernicious ways are the result of deliberative distortions. Group disagreement may persist, and thereby lead to deadlock courts and hung juries, despite the fact that there is no polarization within the group. Nonetheless, when disagreement intensifies, it involves polarization, and this makes polarization a driving force of many cases in which disagreement is unresolved.<sup>22</sup> Similarly, there may be cases in which the consensus view within the group is not epistemically justified, but the reason why this is so is unrelated to phenomena of suppression, homogenization or domination. Cases in which groups reach a compromise for strategic reasons or advance hidden agendas are cases to the point. In these cases, the agreement is reached in epistemically objectionable ways, in that it is not grounded on the

---

<sup>20</sup> For a defense of the claim that a group attitude is rational to the extent that it is properly responsive to the reasons available within the group, see Salas and de Donato-Rodríguez, 'Disagreement within Rational Collective Agents,' *op. cit.* p. 50.

<sup>21</sup> Cf. Salas and de Donato-Rodríguez, *op. cit.*, p. 51 (who restrict the set of reasons upon the rationality of a group attitude depends to those that are accessible to the group at a collective level).

<sup>22</sup> See F. Broncano-Berrocal and J. A. Carter, *The Philosophy of Group Polarization*, Routledge, New York, 2021, p. 4.

reasons that are available within the group, but it rather responds to pragmatic or political purposes. However, when there is homogenization, suppression and domination, the group ends up converging on a decision that does not respond to the set of reasons available within the group.<sup>23</sup> Thus, mitigating group biases is an effective way to help groups reach epistemically valuable agreements in some important set of cases. Virtues, as I will argue in the next section, are helpful devices to do so.

### 3. THE CORRECTIVE ROLE OF DELIBERATIVE VIRTUES

Group-deliberative virtues are those traits of character that foster a productive group-deliberation. The criteria for determining whether a trait of character is a deliberative virtue is tied up with the goals of deliberation.<sup>24</sup> A central end of group deliberation in law is arguably the acquisition of true beliefs about either the facts or the law through a process of reason exchange.<sup>25</sup> A legal decision-making group that deliberates effectively has a positive ‘synergy,’ where such synergy is not only a function of the output – the acquisition of true beliefs- but also of the quality of the argumentative process that results in such an output.<sup>26</sup> Thus, group-deliberative virtues may be understood as traits of character that enhance group synergy insofar as they promote a kind of deliberative engagement that produces optimal epistemic outcomes.

There are different kinds of deliberative virtues, or rather, different kinds of virtues are relevant in the context of group deliberation.<sup>27</sup> First, members of deliberating groups should possess and exercise a number of *epistemic virtues*, such as open-mindedness,

---

<sup>23</sup> See R. Luskin and K. S. Hanh, ‘Consensus and Polarization in Small Group Deliberations,’ unpublished manuscript.

<sup>24</sup> See D. H. Cohen, ‘The Virtuous Troll: Argumentative Virtues in the Age of Technologically Enhanced Argumentative Pluralism,’ *Philosophy and Technology*, vol. 30, 201, p. 183.

<sup>25</sup> Subject to constraints, of course, deriving from other values that trials seek to protect.

<sup>26</sup> See S. F. Aikin and J. Caleb Clanton, ‘Developing Group Deliberative Virtues,’ *Journal of Applied Philosophy*, vol. 27, 2010, p. 414.

<sup>27</sup> In this sense, deliberative virtues are not a different kind of virtue, alongside moral or epistemic virtues, but rather virtues belonging to different types are particularly relevant for the purposes of fostering a genuine and productive group deliberation and should therefore be included in a catalog of deliberative virtues.

intellectual courage, perseverance, intellectual autonomy, intellectual vitality, intellectual patience, and thoroughness.<sup>28</sup> Secondly, there are a number of *moral virtues* that are critical to creating a deliberative environment that results in good epistemic outcomes. Friendliness, civility, humility, kindness, cooperativeness, temperance, and respectfulness are some of the traits of character that promote the background conditions needed to enable a productive deliberation.<sup>29</sup> Thirdly, deliberation is first and foremost a process of argumentation and this makes *argumentative virtues* pivotal for securing that group deliberation strikes a positive synergy.<sup>30</sup> Willingness to engage in communication, to listen to others, to modify one's position and to question the obvious are some of the dispositions that contribute to enhancing the quality of group deliberation.<sup>31</sup> Finally, group deliberation is a kind of communicative practice. Thus, those engaged in group deliberation should also exhibit a number of *communicative virtues*, such as sincerity, receptivity, and clarity.<sup>32</sup>

These character traits jointly contribute to fostering a genuine and productive deliberation within groups. Even though the different categories of deliberative virtues are distinct, there are important relations among them. Epistemic virtues have, of course, an epistemic rationale but they are also morally relevant. For example, there are epistemic reasons to be open-minded, but also moral reasons in that the open-minded person gives minority and marginalized voices a hearing.<sup>33</sup> Moral virtues are also epistemically relevant. For example, kindness towards other members of the deliberating group or temperance when facing disagreement are helpful in getting at the truth, for where there is a friendly deliberative environment, group members are more willing to share information, more open

---

<sup>28</sup> On epistemic virtues, see, among other, L. Zagzebski, *Virtues of the Mind*, Cambridge, Cambridge University Press, 1996; J. Montmarquet, *Epistemic Virtue and Doxastic Responsibility*, Lanham, Rowman and Littlefield, Lanhan, 1993; and R. C. Roberts and W. J. Wood, *Intellectual Virtues*, Clarendon Press, Oxford, 2007.

<sup>29</sup> On the importance of some of these moral virtues to deliberation, see Aikin and Clanton, *op. cit.*, pp. 415-420 and J. M. Harden Fritz, 'Communication Ethics and Virtue,' N. Snow (ed.), *The Oxford Handbook of Virtue*, Oxford University Press, Oxford, 2018.

<sup>30</sup> See D. H. Cohen, 'Arguments that Backfire,' D. Hitchcock and D. Farr (eds.), *The Uses of Argument*, ON: OSSA, Hamilton, 2005 and A. Aberdein, 'Virtue in Argument,' *Argumentation*, vol. 24, 2010.

<sup>31</sup> D. H. Cohen, 'The Virtuous Troll: Argumentative Virtues in the Age of (Technologically Enhanced) Argumentative Pluralism,' *Philosophy and Technology*, vol. 30, 201, p. 183.

<sup>32</sup> See N. Cooper, 'The Intellectual Virtues,' *Philosophy*, vol. 69, 1994, pp. 465-66.

<sup>33</sup> See S. F. Aikin and J. P. Casey, 'Straw Men, Iron Men and Argumentative Virtue,' *Topoi*, vol. 35, 2016, p. 438.

to criticism, and more sincere about their views, which positively contribute to reaching better epistemic outcomes. There are also important connections between epistemic and argumentative virtues in that the possession of some intellectual virtues manifests itself in a number of valuable dispositions in the context of argumentation.<sup>34</sup> For instance, the intellectually humble person will be willing to listen to others, question her own views, and revise them accordingly. The argumentative virtues have also moral import, for example, one way to show proper respect to members of deliberating groups is by being willing to listen to them. Last, communicative virtues are also importantly connected with argumentative, epistemic, and moral virtues. For example, clarity in stating one's views is a critical virtue for a successful proponent, receptivity is central to genuinely exhibiting open-mindedness, and sincerity in a communicator is central to displaying the virtue of honesty.

Deliberative virtues help reach epistemically valuable agreement through mitigating the aforementioned deliberative failures.<sup>35</sup> As both psychologists and philosophers have argued, the virtues of character provide a way to correct a number of heuristics and biases that lead to systematic errors in individual's reasoning.<sup>36</sup> Similarly, my claim is that the traits of character of a virtuous deliberator, i.e., deliberative virtues, may help correct the errors in collective reasoning that lie behind cases in which disagreement seems intractable or the

---

<sup>34</sup> There is some controversy about how to distinguish argumentative virtues from epistemic virtues, see Aberdein, *ibid.*, p. 173; Aikin and Clanton, *op. cit.*, 421; A. Aberdein, 'In Defense of Virtue: The Legitimacy of Agent-Based Argument Appraisal,' *Informal Logic*, vol. 34, 2014, pp. 88-89; and D. H. Cohen, 'Virtue Epistemology and Argumentation Theory,' H. V. Hansen et al. (eds.), *Dissensus and the Search for Common Ground*, ON: OSSA, Windsor, 2007, pp. 4-5.

<sup>35</sup> The suggestion that individual virtues may help mitigate deliberative failures is congenial to the claim, put forward by some authors, that the dangers of groupthink can be mitigated if members of the group act as critical deliberants. See Salas and de Donato-Rodríguez, *op. cit.*, pp. 60-61; D. Tollefsen, 'Group Deliberation, Social cohesion and Scientific Teamwork: Is there Room for Dissent?' *Episteme*, vol. 3, 2006 and K. B., Wray, 'Collaborative Research, Deliberation and Innovation,' *Episteme*, vol. 11, 2014. The language of virtues, I would argue, help us flesh out in detail the idea of what individual critical deliberation would involve.

<sup>36</sup> See Kahneman, *op. cit.*, p. 46; K. E. Stanovich, *What Intelligence Tests Miss: The Psychology of Rational Thought*, Yale University Press, New Haven, 2009, p. 69; R. C. Roberts and R. West, 'Natural Epistemic Defects and Corrective Virtues,' *Synthese*, vol. 192, 2015; P. L. Samuelson and I. M. Church, 'When Cognition turns Vicious: Heuristics and Biases in Light of Virtue Epistemology,' *Philosophical Psychology*, vol., 28, 2015; B. de Bruin, 'Epistemic Virtues in Business,' *Journal of Business Ethics*, vol. 113, 2013; and V. Correia, 'The Ethics of Argumentation,' *Informal Logic*, vol. 32, 2012; H. Alsharif and J. Symons, 'Open-Mindedness as a Corrective Virtue,' *Philosophy*, vol. 96, 2020. See also C. F. Rees, 'A Virtue Ethics Response to Implicit Bias,' M. Brownstein and J. Saul, *Implicit Bias and Philosophy*, Vol. 2, Oxford University Press, Oxford, 2016.

agreement that has been reached is epistemically non-valuable.<sup>37</sup> Group polarization, which may lead to failure to agree, may be attenuated if individual deliberators have some key epistemic virtues, such as open-mindedness and intellectual humility, argumentative virtues, critically, willingness to listen to others and to modify one's position, moral virtues, like prudence or temperance, and communicative virtues such as politeness.

Deliberative virtues also help mitigate the effects of suppression, homogenization and domination that lead groups to reach agreement that is not epistemically valuable. First, deliberative virtues may prevent suppression from occurring. Self-silencing on the grounds that one's beliefs are likely to be incorrect given that they are contradicted by the majority position would be less likely if individual deliberators are intellectually autonomous and intellectually humble, and thereby possess an appropriate degree of self-trust, rather than a self-aggrandized or, more to the point here, self-debasing attitude towards their own cognitive resources. Self-silencing because of social, rather than epistemic, reasons may also be attenuated if those in a minority position exhibit courage, which would be greatly facilitated if there is a cooperative and friendly deliberative environment, and those in a majority position are willing to listen to other viewpoints and show proper respect.

Homogenization is less likely to take place if members of collegiate legal decision-making bodies have the virtue of intellectual autonomy and are thus disposed to form their own independent views about the case and resist a tendency -as in cascades- to follow the lead. A willingness to question the obvious enables deliberators to adopt a critical stance towards shared beliefs within the group – and thereby prevent common-knowledge effects from arising. The virtues of tenacity, inquisitiveness and intellectual vitality are critical to counteract the intellectual sloth and laziness which oftentimes leads to simply abiding by the majority or falling back in previously stated views.<sup>38</sup>

---

<sup>37</sup> I have argued for the corrective role of deliberative virtues in the context of legal fact-finding by juries and composite courts, in A. Amaya, 'Group Deliberative Virtues and Legal Epistemology,' in J. Ferrer and C. Vázquez (eds.), *Evidential Legal Reasoning: Crossing Civil Law and Common Law Traditions*, Cambridge University Press, Cambridge, forthcoming. This point is also argued by R. B. Talisse, 'Why Democrats Need the Virtues', in L. E. Goodman and R. B. Talisse (eds.), *Aristotle's Politics Today*, State University of New York Press, Albany, 2007, p. 51.

<sup>38</sup> Mental laziness, as Salas and de Donato-Rodríguez point out, is often a vice that lies behind cases of agreement. See Salas and de Donato-Rodríguez, *op. cit.*, p. 60-61.

Domination may be mitigated when individual deliberators are humble -and thereby committed to an egalitarian stance,<sup>39</sup> civil and impartial, as these character traits contribute to generating an inclusive deliberative environment, rather than one in which there is a diminishing attitude towards members who are socially disadvantaged and socially advantaged members have a disproportionate capacity in determining the consensual view of the group. The virtue of epistemic justice would also be central to correcting the distinctive forms of testimonial injustice that are pervasive in instances of domination.<sup>40</sup>

Thus, deliberative virtues, by mitigating these distortions, help avoid a failure to agree – and thus problems of hung juries, deadlock courts and, more generally, situations in which legal decision-making bodies fail to reach a joint judgment, which may have a negative impact on the group synergy in the future- as well as cases of forged agreement – in which consensus results from silencing dissent and is grounded on social, rather than epistemic, reasons. Hence, deliberative virtues help reach agreement that is epistemically valuable in that the consensual view is fully responsive to the range of information and reasons available within the group. Furthermore, the agreement that is reached through a virtuous process of deliberation would be not only epistemically sound, but also morally, valuable. In virtuous group deliberation, participants relate to each other with civility, kindness, and respect; there reigns an egalitarian ethos that yields an inclusive deliberative environment in which different views are given a hearing and taken seriously; and argument exchange is done against a background of cooperation in pursuit of common ends. Given that all these features are a landmark of the kind of social relationships and deliberative endeavors that a democracy aspires to establish and promote, virtuous group deliberation, and the agreement it yields, has an important moral and political value.

---

<sup>39</sup> On the connection between humility and egalitarianism in the context of legal decision-making, see A. Amaya, 'The Virtue of Judicial Humility,' *Jurisprudence*, vol. 9, 2018.

<sup>40</sup> On virtue as a corrective to testimonial injustice, see M. Fricker, *Epistemic Injustice*, Oxford University Press, Oxford, 2007.

#### 4. OBJECTIONS AGAINST A VIRTUE APPROACH TO GROUP DISAGREEMENT

I will now consider three objections that may be raised against the claim that deliberative virtues may be helpful in dealing with group disagreement in a way that makes it likely that groups do not fail to agree and that the agreement they reach is epistemically valuable rather than counterfeit.

##### a) The Objection from Unintentionality

The claim that deliberative virtues may correct the deliberative distortions that are the source of failures to agree and pseudo-agreements may be questioned on the grounds that these distortions operate automatically, rapidly, and unconsciously, and thus are difficult to control even by the most well-intentioned member of the jury or court.<sup>41</sup> How could then the virtues, which are traits of character that we ‘consciously cultivate and practice,’<sup>42</sup> help us counteract non-volitional errors in collective reasoning? There are two reasons why the seemingly unconscious and automatic nature of these failures does not detract from the remedial value of deliberative virtues. To begin with, the process whereby the virtues are acquired is at least in part self-reflective, but the virtues, once inculcated, become a kind of ‘second nature.’ Thus, the virtuous response is in many cases automatic and does not require a conscious effort on the part of the individual deliberator.<sup>43</sup> In this sense, it may often counteract the unconscious process that leads to deliberative failures without taxing our cognitive resources and with rapidity and efficacy.

---

<sup>41</sup> This is an objection analogous to the objection according to which virtue cannot correct for non-volitional prejudices. On this objection, see E. Anderson, ‘Epistemic Justice as a Virtue of Social Institutions,’ *Social Epistemology*, vol. 26, 2012; L. M. Alcoff, ‘Epistemic Identities,’ *Episteme*, vol. 7, 2010. See also B. R. Sherman, ‘There’s No (Testimonial) Justice: Why Pursuit of a Virtue is Not the Solution to Epistemic Injustice,’ *Social Epistemology*, vol. 30, 2016. For a reply, see M. Fricker, ‘Replies to Alcoff, Goldberb, and Hookway on Epistemic Injustice,’ *Episteme*, vol. 7, 2010.

<sup>42</sup> Alcoff, *op. cit.*, p. 132.

<sup>43</sup> See Correia, *op. cit.*, p. 234 and Fricker, *op. cit.*, p. 166. That the virtuous response is immediate, rapid, and direct is a point that is central to both intuitionistic models of virtue as well as skill models of virtue. On the former, see J. McDowell, ‘Virtue and Reason,’ *The Monist*, 62, 1979. On the latter, see J. Annas, *Intelligent Virtue*, Oxford University Press, Oxford, 2011.

It is not, however, in my conception of virtue, that it needs to operate on a volitional, conscious, mode and thus that the virtuous response will always be spontaneous or automatic. Virtue, even if habitual, involves in difficult cases a proper amount of reflection.<sup>44</sup> Reflective abilities, alongside intuition, form the core of virtuous deliberation. Hitting the right mean in a particular deliberative context may require a conscious effort on the part of the deliberator. For example, one may need to engage one's reflective abilities in order to determine when one needs to be open to other's peers arguments and when, to the contrary, one should ignore indefensible views or irrelevant objections.<sup>45</sup> Reflection may also be called for to deliberate in situations in which the virtues impose conflicting demands upon one's behavior, for instance, to address conflicts between intellectual autonomy and intellectual humility or between willingness to modify one's position and intellectual integrity. However, that virtue operates (and is partly acquired) by a process of conscious reflection does not detract from its capacity to mitigate deliberative distortions. Self-reflective regulation has been shown to be an effective safeguard against a number of individual cognitive bias that are also automatic and unconscious.<sup>46</sup> Similarly, virtuous deliberation –even if it involves conscious reflection– may also be capable of mitigating deliberative distortions that are, like individual biases, non-volitional.

## **b) The Objection from Feasibility**

It may be argued that the proposal to tackle group disagreement in law by means of virtue is unfeasible. The peer model of disagreement was found wanting in that it is overly idealized, but the model I am advancing unrealistically places the prospects of solving disagreement in ordinary settings (which are subject, as argued, to different distortions) in

---

<sup>44</sup> I have argued for this claim in A. Amaya, 'Virtue and Reason in Law,' M. Del Mar (ed.), *New Waves in Philosophy of Law*, Palgrave, New York, 2011. That the virtuous person's experience may include conscious deliberation in particularly difficult circumstances is acknowledged, although perhaps not sufficiently stressed out, in Annas' model of virtue as a practical skill. See, Annas, *op. cit.*, pp. 77-78. Indeed, what distinguishes the virtuous person, like the person who is an expert in a practical skill, is not that that he is able to solve all cases unreflectively, but that she has the reflective abilities required to satisfactorily solve cases that would pose an insurmountable challenge to the novice.

<sup>45</sup> On failing to be open-minded by the vice of excess, see Aikin and Casey, *op. cit.* p. 439 and D. H. Cohen, 'Keeping an Open Mind and Having a Sense of Proportion as Virtues in Argumentation,' *Cogency*, vol. 1, 2009.

<sup>46</sup> See Fricker, 'Replies,' *op. cit.*, p. 165.

the virtue of individual deliberators. This is hopelessly idealistic and unhelpful for the purposes of ameliorating group legal decision-making. I provide two comments by way of a reply. First, a virtue approach to group disagreement has important implications for educational policy, specially, for legal education. If, as argued, deliberative virtues are critical for mitigating the deliberative distortions that prevent groups from reaching epistemically valuable agreements, then there seem to be good reasons to revise and rethink legal education (including law school curricula as well as legal professional training) with a view to inculcating the deliberative virtues. For example, given the importance of imitation in virtue development, one may promote the exposition and critical discussion of exempla among law students, recover the book of exempla, alongside case books, as pedagogical tools, and include explicit teaching on the virtues and interventions for promoting virtue proposed by positive psychologists in courses of professional legal ethics.<sup>47</sup> Furthermore, given the involvement of individuals without legal training in legal decision-making collegiate bodies, most importantly, but not exclusively, the jury, the relevance of virtue education is hardly restricted to legal education, but it should be also a goal of general, civic, education.<sup>48</sup>

Secondly, there are several ways in which one can nudge behavior within collegiate decision-making bodies to elicit deliberative behavior that is if not out of virtue, at least, in accordance with virtue.<sup>49</sup> Admittedly, this will not bring about genuine virtue within the deliberating group, for the deliberative behavior would not emanate from virtuous motivations, but it would get members of decision-making groups deliberate as a virtuous

---

<sup>47</sup> On the relevance of exemplars for virtue development, see L. Zagzebski, *Exemplarist Moral Theory*, Oxford University Press, Oxford, 2017. For its relevance to the legal context, see A. Amaya, 'Admiration, Exemplarity and Judicial Virtue,' A. Amaya y M. Del Mar (eds.), *Virtue, Emotion and Imagination in Law and Legal Reasoning*, Hart Publishing, Oxford, 2020. On virtue-based interventions, see J. Wright et al., 'The Psychological Significance of Humility,' *The Journal of Positive Psychology*, vol. 12, 2017 and C. Lavelock et al., 'The Quiet Virtue Speaks: An intervention to Promote Humility,' *Journal of Psychology and Theology*, vol. 42, 2014. On virtue in legal education, see A. Szerletics, 'The Role of Virtues in Legal Education,' *Oñati Socio-legal Series*, 7 (8), 2017; and M. Mangini, 'Ethics of Virtue and the Education of the Reasonable Judge,' *International Journal of Ethics Education*, vol. 2, 2017.

<sup>48</sup> On virtue education, see J. Baehr, *Intellectual Virtues and Education*, Routledge, New York, 2015; N. Snow, *Cultivating Virtue*, Oxford University Press, Oxford, 2015; R. Harrison and D. I. Walker (eds.), *The Theory and Practice of Virtue Education*, Routledge, New York, 2018; D. Carr (ed.), *Cultivating Moral Character and Virtue in Professional Practice*, Routledge, New York, 2018; C. A. Darnell, (ed.), *Virtues and Virtue Education in Theory and Practice*, Routledge, New York, 2021.

<sup>49</sup> On nudging, see R. H. Thaler y C. R. Sunstein, *Nudge*, Pengüin, London, 2008.

deliberator would.<sup>50</sup> In the case of repeated players, this may turn out to be a venue for developing the motivational profile and affective dispositions characteristic of virtue.<sup>51</sup> Different structural mechanisms may be put in place to foster virtuous deliberation.<sup>52</sup> For instance, one may promote a virtuous legal culture by including the virtues in the strategies of law schools, law firms, and codes of professional conduct and introduce measures that facilitate virtue in the organizational structure of legal institutions.<sup>53</sup> One may also shape legal deliberations in ways that enable the exercise of virtuous dispositions: for instance, one may indirectly promote impartiality by instructing deliberators to seriously consider alternative views<sup>54</sup> and foster open-mindedness by asking them to overshoot on the side of charity in interpreting arguments, since we are naturally disposed towards dogmatism.<sup>55</sup> Norms of deliberation and even the framing of the deliberative setting may prove instrumental to nudging group deliberation in accordance to virtue.

Thus, the proposal to address group disagreement by correcting deliberative distortions through means of individual virtue is not unfeasible but it may be implemented by a number of concrete educational policies and institutional reforms.

### **c) The Objection from Independence**

---

<sup>50</sup> On the insufficiency of these measures to elicit genuinely virtuous behavior, see P. Horowitz, 'Judicial Character and does it Matter,' *Constitutional Commentary*, vol. 26, 2009, pp. 65-70.

<sup>51</sup> In this sense, institutions may play a distinctive formative role, see T. Rogers, *The Authority of Virtue: Institutions and Character in the Good Society*, Routledge, New York, 2021.

<sup>52</sup> See Anderson, *op. cit.*, p. 168.

<sup>53</sup> For a discussion some of these measures in the context of business organizations, see D. Vera and A. Rodriguez-Lopez, 'Humility as a Source of Competitive Advantage,' *Organizational Dynamics*, vol. 33, 2004, and B. De Bruin, *Ethics and the Global Financial Crisis*, Cambridge University Press, Cambridge, 2015. Much more controversial are the proposals to promote virtue through systems of reward, moral audits, and performance management systems, which rather than fostering virtue may turn out to be detrimental to virtue development. See G. R. Weaver, L. K. Treviño and B. Agle, 'Somebody I Look Up To: Ethical Role Models in Organizations,' *Organizational Dynamics*, vol. 34, 2005, p. 327-8 and M. E. Brown and L. K. Treviño, 'Ethical Leadership: A Review and Future Directions,' *The Leadership Quarterly*, vol. 17, 2006., p. 610.

<sup>54</sup> This is the 'consider the opposite' instruction. See D. Simon, 'A Third View of the Black Box: Cognitive Coherence in Legal Decision-Making,' *The University of Chicago Law Review* vol. 71, 2004.

<sup>55</sup> As demanded by the Aristotelian doctrine of compensation, see Aikin and Casey, *op. cit.*, p. 439.

It may be objected that individual virtue is not a tool fit to solve disagreement through correcting deliberative distortions because these distortions are group-based (i.e., collective biases or vices).<sup>56</sup> Thus, the appropriate virtue-based remedy would need to involve collective virtues, which cannot be thought as the summation of individual virtues.<sup>57</sup> A main lesson from collective epistemology is that the epistemic qualities of groups are independent from the epistemic qualities of individuals. This is the reason why merely transferring the results of peer disagreement to group disagreement did not appear to be a good strategy in the first place. According to the ‘independence thesis,’ ‘epistemically well-performing individuals might make up epistemically ill-performing groups and, conversely, epistemically well-performing groups might be made up of epistemically ill-performing individuals.’<sup>58</sup> The same independence applies to virtue ascriptions. A group may be virtuous even if the individual members are not. Furthermore, it may even turn out that individual vice is a way to reach collective virtue, e.g., biases in individual scientists have been argued to importantly contribute to scientific progress.<sup>59</sup> If this is so, then cultivating individual virtue may not be an effective means (in fact, it may be counterproductive) for correcting group deliberative biases.

Indeed, if deliberative distortions are group-based pitfalls in reasoning, then collective virtue may also be needed, and, since this virtue does not amount to the summation of individual virtues, that individual deliberators behave virtuously would not secure that the group does. This, however, only shows that the cultivation of individual virtues may not be sufficient to elicit virtuous group behavior, but it does not detract from the value of individual

---

<sup>56</sup> For an argument to the effect that polarization may be best understood as a collective vice, rather than as a collective bias or, what is most important for the argument here, as the summation of individual biases or vices, see Broncano-Berrocal and Carter, *The Philosophy of Group Polarization*, *op. cit.*, chapter 8.

<sup>57</sup> On non-summativism about virtue ascriptions, i.e., the view that collective virtue is not merely the sum of the individual virtues of its members, see R. Lahroodi, ‘Collective Epistemic Virtue,’ *Social Epistemology*, vol. 21, 2207; M. Fricker, ‘Can There Be Institutional Virtues?’ *Oxford Studies of Epistemology*, vol. 3, 2010; and R. Lahroodi, ‘Virtue Epistemology and Collective Epistemology,’ H. Battaly (ed.), *The Routledge Handbook of Virtue Epistemology*, Routledge, New York, 2019.

<sup>58</sup> See M. Skipper and A. Steglisch-Petersen, ‘When Conciliation Frustrates the Epistemic Priorities of Groups,’ Carter and Broncano-Berrocal, *op. cit.*, p. 69. For the independence thesis, see C. Mayo-Wilson, K. Zollman, and D. Danks, ‘The Independence Thesis: When Individual and Social Epistemology Diverge,’ *Philosophy of Science*, vol. 78, 2011.

<sup>59</sup> See Lahroodi, ‘Virtue Epistemology and Collective Epistemology,’ *op. cit.*, p. 415, fn. 11 and Skipper and Steglisch-Petersen, *op. cit.*, p. 68.

virtue as a tool to combat the biases that stand in the way of reaching epistemically valuable group agreements. The objection, however, not only raises the need to complement individual virtue remedies with other remedies at group level, but rather more seriously questions the virtue-based approach to group disagreement as it opens up the possibility that individual vice be instrumental to collective virtue. If so, then the virtue approach to group disagreement would not only be incomplete but also inadequate.

However, even if we were to grant that there may even be situations in which the interaction of bias could lead to produce virtuous behavior and that, in those cases, perhaps individual bias, rather than virtue, contributes if not to group virtue (for the group would not be virtuously motivated or praiseworthy), for group behavior that would be in accordance with virtue and that would produce epistemically valuable agreement, still this does not undermine the plausibility of a virtue-based approach to group disagreement.<sup>60</sup> It is critical to note that it is not mere vice on the part of individual members that is claimed to produce good epistemic outcomes at group level, but rather distinctive ‘vice profiles,’ i.e., specific distributions of vices and virtues within the group.<sup>61</sup> For the most part, in most situations, individual virtue, rather than vice, would be the route to build collective virtue and fix the deliberative distortions the prevent groups from handling disagreement rationally.

In addition, from the perspective of the individual deliberator, it seems too risky a bet to behave viciously, on the assumption that it may be one of these situations in which individual vice may be epistemically productive, e.g., stubbornness in sticking to one theory of the case, despite evidence to the contrary, might help ensure that the group does not commit to an alternative theory prematurely.<sup>62</sup> Thus, epistemically productive vicious behavior would be rare and, at any rate, irrational on the part of the individual deliberator. Similar considerations apply to those in charge of designing educational policies and

---

<sup>60</sup> For arguments against the claim that individual vices may lead to group behavior that is correctly described as virtuous, see Fricker, ‘Can There be Institutional Virtues?’ *op. cit.*, and A. K. Ziv, ‘Collective Epistemic Agency: Virtue and the Spice of Vice,’ H. B. Schmid, D. Sites and M. Webe (eds.), *Collective Epistemology*, Ontos Verlag, Frankfurt, 2011.

<sup>61</sup> See Lahroodi, ‘Collective Epistemology,’ *op. cit.*, p. 415.

<sup>62</sup> This is, in fact, what has been reported as a case in which individual vice, on the part of stubborn scientists, have led to epistemic benefits, in that it has contributed to scientific progress. See K. Zollman, ‘The Epistemic Benefit of Transient Diversity,’ *Erkenntnis*, vol. 2, 2010.

institutional environments with a view to minimizing the possibility that collective biases distort the process of legal deliberation, thereby impeding that epistemically sound agreements be reached: given that it is only specific amalgams of vice that may lead to collective virtue and that it is not possible to determine, from their own perspective, whether any of these would be likely to obtain in the future, it seems wise to put in place educational and structural measures that promote individual virtue in members of legal decision-making groups.

Furthermore, vice on the part of deliberating members would not only threaten the epistemic value of group deliberation, but it would also taint the process of deliberation and deprive it of the moral value that, as argued, virtuous deliberation endows the agreement with. Thus, even if collective virtue may also need to be cultivated in order to address effectively the problem of group disagreement, the virtue of individual members of collegiate legal decision-making bodies remains an important tool for correcting deliberative distortions and reaching agreements that are both epistemically and morally valuable.

## **5. CONCLUSIONS**

This paper has argued that the possession and exercise of deliberative virtues by members of collegiate legal decision-making bodies may help address the problem of group disagreement in law by mitigating some deliberative distortions that lie behind lack of agreement or counterfeit agreements. This virtue-based strategy is, however, a limited tool for tackling group disagreement in law. First, virtue remedies are not the only means whereby one may mitigate the collective biases that distort group deliberation and that make agreement either intractable or epistemically objectionable. Non-virtue-based debiasing techniques may also be useful for counteracting deliberative distortions and thereby effective for the purposes of producing epistemically valuable agreements, such as prompting conscious reflection and raising awareness about these collective biases among members of deliberating groups. In addition, a number of measures for structuring group deliberation may also prove to be useful for reducing deliberative failures, such as the Delphi method –which

involves the anonymous statement of private opinions prior to deliberation, rewarding success, involving a team leader or a member with experience, or the introduction of an advocacy procedure.<sup>63</sup>

Second, individual deliberative virtues (whether inculcated through education or triggered through institutional design) do not exhaust the kind of virtue-based tools useful for addressing group disagreement. The promotion of collective virtue in sites of group legal decision-making may also be, as suggested, necessary. The instalment of collective virtue, however, should be viewed as a complementary, rather than an antagonistic, strategy for helping groups reach epistemically valuable agreements, given that individual virtue is in most cases positively correlated with collective virtue. Moreover, individual virtue enhances the ethical quality of agreements in a way in which individual vice (even if it were on occasion instrumental to collective virtue) does not. Interestingly, some structural measures for nudging individual virtue may be viewed as virtue-based collective remedies,<sup>64</sup> and this further supports the view that individual and collective virtue are best conceived as reinforcing each other, rather than as competing strategies for dealing with group disagreement.

Last, some of the problems associated to disagreement, from whether it is voiced to how it is shaped and, eventually, solved, are epiphenomena of broader, political, problems. Social segregation is a major factor leading to group dynamics that result in the kind of deliberative distortions that are at the source of failures to reach an agreement that is epistemically valuable. Thus, large-scale social changes seem necessary to promote the kind of social of integration that is conducive to satisfactorily addressing group disagreement in law.<sup>65</sup> Ultimately, the kind of group deliberation that enables legal decision-making groups reach agreements that are both epistemically and morally valuable requires the inculcation of civic virtues and an egalitarian ethos, which are necessary for a properly functioning

---

<sup>63</sup> See Sunstein and Hastie, *op. cit.*, chapter 6, for a discussion of different correctives to deliberative failures. See also Carter and Broncano-Berrocal, *The Philosophy of Group Polarization*, chapter 9, for some remedies to polarization, which may also be applied to deal with other deliberative distortions.

<sup>64</sup> See Anderson, *op. cit.*, p. 168.

<sup>65</sup> On group integration as a structural remedy for the lack of epistemic justice as an individual virtue, see Anderson, *op. cit.*, p. 171.

democracy. Thus, the development of a virtue approach to the epistemology of group disagreement in law is of a piece with a broader investigation into the political implications of virtue jurisprudence.