

Civil Juries and Democratic Legitimacy

Melissa Schwartzberg
Department of Politics
New York University¹

Introduction

In 1880, the Supreme Court recognized that the exclusion of African-Americans from juries constituted a violation of the Fourteenth Amendment: preventing African-Americans from service “was practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulation to that race prejudice which is an impediment to ... equal justice.”² Only in 1975 did the Supreme Court deem unconstitutional the exclusion or automatic exemption of women from juries.³ As with enfranchisement, the fight to enable African-Americans and women to serve as jurors entailed a struggle for respect – in the case of the jury, equal respect for black and female citizens’ ability to stand in judgment of their fellow citizens.

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² *Strauder v. West Virginia*, 100 U.S. 303, pp. 307-308.

³ *Taylor v. Louisiana*, 419 U.S. 522

Perhaps because jury service is usually construed as an unpleasant obligation, democratic theorists have tended to overlook the jury as a fundamental site of citizens' rights. Instead, the jury – particularly the criminal jury – has illustrated the logic of imperfect procedural justice, in which there is an independent criterion for a fair outcome, but the procedure only fallibly achieves it.⁴ In particular, scholars sympathetic to epistemic justifications for democracy, those who hold that the justification for democracy must at least in part derive from its propensity to yield right answers, have turned to the jury as an example. David Estlund's influential account of epistemic proceduralism, for instance, holds that both jury verdicts and democratic laws are "legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions."⁵ Here I will argue that close examination of decision-making on the jury demonstrates the egalitarian presupposition underlying the epistemic proceduralist justifications for democracy, and, more generally, the dependence of instrumental accounts of democracy on the intrinsic value of equal respect for judgment.

Epistemic proceduralists correctly assert that the core justification for the jury, whether civil or criminal, must be that it is *instrumentally* valuable for rendering just verdicts.⁶ To be sure, its "epistemic" value should be measured by its ability to produce correct decisions within the context of a wider system of legal justice. The jury is

⁴ John Rawls illustrated imperfect procedural justice by reference to a criminal trial. On this model, the desired outcome is that a defendant is convicted only if he is guilty. The trial procedure is a fallible means of achieving that outcome: in Rawls' words, "while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it." Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), at 85-86.

⁵ David Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008), p. 8.

⁶ On the relationship between epistemic proceduralism and instrumentalism, see Fabienne Peter, "Pure Epistemic Proceduralism," *Episteme* 5 (1), 2008, 33-55.

primarily a “fact-finding” body, but its “truth-tracking” function entails not only the ability to judge accurately (for instance) that those who in fact committed a crime are guilty, but to determine that a defendant’s due-process rights were violated and should be acquitted, despite overwhelming evidence of his guilt. The historical view of the jury as “protector” reflects the distinctive character of the epistemic argument. The key argument on behalf of the civil jury at the time of the American founding drew on the jurors’ tendencies to protect local debtors from more powerful private citizens and public officials, and today the jury, especially in the criminal context, may still be an “inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, and or eccentric judge.”⁷

Nonetheless, were juries clearly incompetent, or if we believed that judges were more likely to produce just verdicts in most contexts, most of us would agree with the epistemic proceduralist that we ought to abolish the jury, suggesting that the justification of epistemic proceduralism tells us little about the value of democracy. If we do believe that the jury is justifiable, though, it must be because we believe ordinary citizens are more likely to yield just verdicts than judges. To put the matter more precisely, if we believe that the jury is a legitimate institution – that the jury issues verdicts that may rightly be enforced by means of coercion – we must presume that ordinary citizens are generally competent fact-finders (given a particular set of procedures), capable of rendering just verdicts. I will argue here that the reasonable-person standard for the claim of negligence provides a particularly clear example of the jury’s distinctive competence in identifying community norms.

⁷ *Duncan v. Louisiana*, 391 U.S. 145 (1968)

Although this is a straightforwardly instrumental defense of the jury, reflect again on the struggle for the right to serve as a juror and exclusion as a “brand of inferiority.” Particularly from the perspective of those deprived of the equal opportunity for eligibility, jury service marks *epistemic respect*, and exclusion marks *epistemic disrespect*.⁸ Although one might defend certain exclusions - of the young or of those with severe cognitive disabilities, for instance - the reasons why these exclusions might be justifiable are because we deem these fellow citizens (or noncitizen members of our community) below some threshold of competence. Previously, in the United States, this threshold was quite high: until 1960, federal courts used “blue-ribbon juries,” in which jury commissioners solicited names of “men of recognized intelligence and probity” from key men in the community. Today, we treat ordinary citizens as if they were equally able to judge: we select jurors by lot and – in principle – exclude them only on the grounds of partiality, not capability, above some low threshold. The ability to realize the instrumental value of the jury requires us to presume an equal capacity for judgment among ordinary citizens, as does the instantiation of the intrinsic value of equal respect.

My contention is that the civil jury captures what I will call *epistemic-egalitarian proceduralism*. We defend the jury as a democratic institution capable of achieving some set of correct or just outcomes only by first presuming the equal competence of citizens. If we affirm unequal competence – if we deny some the right to serve or grant others

⁸ Within her important discussion of epistemic injustice, Miranda Fricker’s account of “hermeneutic marginalization” is particularly significant in this context, as those excluded from jury duty “participate unequally in the practices through which social meanings are generated”; they may also face an *identity-prejudicial credibility deficit*, in which they are taken as less credible in providing testimony – or perhaps capable of evaluating arguments – because of their particular identity (qua black, qua felon, qua woman, qua disabled person). Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007).

plural votes – we may well yield just outcomes, justifiable on the epistemic proceduralist model. But we will be quite far from providing a justification of democracy. Although democratic legitimacy and substantive justice can indeed come apart, the civil jury clarifies the assumptions that would underlie their reconciliation.

Equal eligibility for service does not exhaust the demands of respectful treatment; procedures must also treat citizens respectfully as they exercise their capacity as judges. (Put differently, jury service is subject to the standard objection that merely “formal” procedural equality is insufficient, but the “substantive” basis of equal respect also takes a procedural form.⁹) I will suggest that trials present a conflict between the concern for just outcomes and the burdens of judgment placed on jurors. In the criminal context, the burdens are severe and may lead to disrespectful treatment of jurors in the service of justice for the defendant. In the civil context, the burdens are less onerous and jurors treated with greater respect, but the verdicts may be less reliable. This too is how civil jury provides a model of democratic decision-making: it protects not just the relational equality of citizens as judges,¹⁰ but reveals how we should construe respectful treatment of citizens in the exercise of this capacity.

The civil jury’s determination of negligence according to the reasonable person standard is the central example developed in this paper. In judging a claim of negligence, the civil jury first identifies community norms of due care and then assesses behavior

⁹ For the poverty of merely formal procedural equality, see especially Charles Beitz, *Political Equality* (Princeton: Princeton University Press, 1989).

¹⁰ On the importance of relational equality, see Elizabeth Anderson, “What is the Point of Equality?” *Ethics* 109, pp. 287-336 (1999); Samuel Scheffler, *Equality and Tradition: Questions of Value in Moral and Political Theory* (New York: Oxford University Press), 2010; and Daniel Viehoff, “Democratic Equality and Political Authority,” *Philosophy and Public Affairs* 42:4 (2014).

with respect to these standards. My claim is that this sort of norm-identification and evaluative judgment, at which the civil trial presumes ordinary citizens to be most competent, is also ubiquitous in political decision-making. Once we identify key features of the trial – jury selection, the standard of proof, and the vote threshold – and reconstruct their broader normative justifications, we can see how the logic of judgment formation on the jury yields an *epistemic-egalitarian proceduralist* [EEP] model of democratic legitimacy more generally. In particular, popular constitutionalism is readily explained and justified via the EEP model. As such, we have reason to believe that the account drawn from the civil jury better captures our intuitions about the grounds of democratic legitimacy than epistemic proceduralism, in particular.¹¹

The reasonable person standard and negligence trials

¹¹ The account of democratic legitimacy presented here aims to explain only how, and why, democratic decisions may be justified – that is, why the outcomes of democratic procedures (here, the civil jury) may be coercively enforced – while bracketing the question of citizens’ moral obligations to obey the outcome of such procedure. Daniel Viehoff (2014), for instance, has argued (against Thomas Christiano, most notably) that our commitment to equality does not require us to treat our fellow citizens’ judgments as correct, and for that reason obligatory upon us. Rather, Viehoff argues that we are obliged to obey the outcome of egalitarian decision procedures because doing so helps us to avoid acting on considerations (unequal power) that we should not and to affirm the value of relational equality. Although I share Viehoff’s commitment to procedural equality and to relational equality in particular, the authority of jury verdicts must derive from the view that we believe these outcomes to be (fallibly) reliable; otherwise we would have no reason to regard them as authoritative. Moreover, with Christiano [notably in *Constitution of Equality* (Oxford: Oxford University Press, 2008)], I maintain that democratic procedures must evince respect for citizens as equal moral agents capable of judgment. Again, however, I bracket the question of whether public respect requires us to obey or to publicly affirm verdicts that we believe to be incorrect, in part because I believe we can respect citizens as equal and fallibly reliable judges while maintaining that that a jury reached an incorrect verdict in a particular case (particularly when we are a member of that jury) and advocating for its rehearing.

To begin, let us turn to the example of civil negligence, a standard claim heard by civil juries but one widely neglected by political theorists.¹² Negligence is a tort, a civil wrong, which consists in injuring another person through conduct that is careless with respect to her. To prevail on an allegation of negligence, the plaintiff must establish that: 1) she suffered an injury (such as bodily harm or property damage); 2) the defendant owed the plaintiff a duty to conform her conduct to a standard necessary to avoid an unreasonable risk of harm to others; 3) the defendant's conduct fell below the applicable standard of care; 4) the defendant's carelessness was a proximate cause of the injury. When a jury tries a negligence case, the third of these issues – whether the conduct was careless – is left largely to the jury's judgment, and they are typically instructed by the judge to do so by reference to the care that would be taken by a reasonable person of ordinary prudence. They do so, scholars from disparate perspectives overwhelmingly agree, in light of their understanding of prevailing community standards. Negligence thus constitutes a key context in which to examine the mechanisms by which ordinary citizens identify and apply the norms of their community.

The negligence standard is a primary locus over which disputes about the theory of tort law are fought.¹³ My aim is to evade these issues, on the grounds that virtually all scholars accept that jurors do look to community conventions in establishing the

¹² Although political theorists have not often examined negligence, in the context of a paper celebrating the democratic implications of moral deliberation over standards, Seana Shiffrin also observes that the activity of deliberation over the reasonable person standard encourages jurors to adopt others' perspectives – both those of the other jurors, and of community practice. See Seana Valentine Shiffrin, "Inducing Moral Deliberation: On the Occasional Virtues of Fog," *Harvard Law Review* 123:5 (2010) at 1225.

¹³ For a helpful analysis of these competing model, the role of the jury in the different theories of tort, and the criticisms of the reasonable person test some theorists offer, see John Goldberg, "Twentieth-Century Tort Theory," *Georgetown Law Journal* 90 (2002).

standard, even if they disagree about how jurors ought to conceptualize these norms.¹⁴ Legal philosophers disagree about whether juries ought to determine the community's assessment of unreasonable risk according to the Carroll Towing Co. test (the "Hand Formula"),¹⁵ or whether the demands of corrective justice entails holding a defendant responsible for "failure to exercise reasonable care ... [in the sense of] a failure to abide by governing community norms,"¹⁶ or whether the defendant ought to be held to be morally wrong on the grounds that her conduct fell short of prevailing community moral values (e.g., "tort law enforces community standards of financial responsibility and just compensation"¹⁷). Although, again, some scholars are skeptical about civil juries' competence to make these decisions, particularly in complex cases, their quarrels typically do not extend to the question of whether juries ought to draw upon community standards as such under existing rules.

The reasonable person standard is often maligned. The biographical specificity of the model of the "reasonable man" highlights the obvious concerns: "he mows the lawn in his shirtsleeves in the evening and takes the magazine at home; he rides the Clapham omnibus." The vision of the reasonable man is thus an adult, middle-class, heterosexual, able-bodied and cognitively typical white male: the "reasonable man" standard thus

¹⁴ See Patrick J. Kelley and Laurel A. Wendt, "Symposium on Negligence in the Courts: The Actual Practice: What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions," 77 *Chicago-Kent Law Review* 587, at 591-593 for an overview.

¹⁵ William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (1987)

¹⁶ Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), at 334.

¹⁷ Catharine Wells, "Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication," 88 *Mich. L. Rev.* 2348 (1990), at 2411; see also Steven Hetcher, "The Jury's Out: Social Norms' Misunderstood Role in Negligence Law," 91 *Georgetown Law Journal* 633.

affirms the normalcy of this model, and serves as a legal weapon against those who deviate from this standard. Once given flesh by a jury in the determination of negligence, reference to the reasonable man – even the reasonable person – can seem to reify a narrow conception of normal behavior or “ordinary prudence.” Attempting to embody the “reasonable man” differently, perhaps as a “reasonable woman,” risks essentializing attributes and affirming stereotypes.¹⁸ Yet these concerns are mitigated by the presence of a diverse jury: as we shall see, it affects determinations of the size of the jury. Indeed, one reason to affirm the use of a jury in the negligence context is that jurors’ individual notions of the ordinary person are likely to vary, and to the extent that they smuggle in biases, they are more likely to be challenged through the deliberative procedures.

Setting aside these issues, how do jurors interpret the reasonable person standard? Before beginning deliberations, jurors receive instructions from judges, typically (in 48 states) in the form of pattern instructions. These pattern instructions define negligence by reference both to the concept of ordinary care and that of a reasonably careful person; in New York State, the instruction reads: “Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances....”¹⁹ States vary in their instructions in other respects, including the implications of acting in an emergency, that voluntary intoxication is no defense, that reasonableness does not entail exceptionally cautious behavior, and so forth. Notable is the affirmation by some states that – as in Michigan: “The law does not say what a

¹⁸ For a comprehensive discussion of the normative implications of the reasonable person standard (and within an enormous literature), see Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003).

¹⁹ N.Y. Pattern Jury Instr.--Civil 2:10 (3d ed. 2000); see also Kelley and Wendt, “The Actual Practice,” p. 595.

reasonably careful person using ordinary care would or would not do under such circumstances. That is for you to decide.”²⁰ On the basis of their exhaustive examination of states’ pattern jury instructions, Kelley and Wendt argue that the instructions point jurors to the preexisting standards of safety in the community that the plaintiff could reasonably expect from the defendant.²¹

Crucially, in their study of the civil jury, Vidmar and Hans emphasize the extent to which the jury’s determination of the reasonable person standard depends upon their knowledge of social norms.²² Jurors are thus well positioned to evaluate the litigants’ conduct against these standards, unlike the judge, who Vidmar and Hans note may well be a member of a socioeconomic elite, and an outlier in her perception of community standards. Further, they argue, “As a stand-in for the community, the representative jury reflects current local expectations about duty and responsibility.”²³ It is also the case, of course, that a juror in a civil trial is more likely to have had personal experience with the given circumstance: if the trial concerns an automobile accident, most jurors would have had experience judging the prudent course of action, for instance, at a four-way stop sign or at a railroad crossing. (In contrast, jurors on a criminal trial are substantially less likely to have had such experience with the particular criminal charge; felons are excluded from

²⁰ Kelley and Wendt, “The Actual Practice,” p. 608.

²¹ *ibid.*, p. 622. See Benjamin Zipursky, “Sleight of Hand,” 48 *William and Mary Law Review* (1999), for an account of how these jury instructions challenge Posner’s theory of negligence and a competing, and attractive, model of civil competency.

²² Neil Vidmar and Valerie P. Hans, *American Juries: The Verdict* (Amherst, NY: Prometheus Books, 2007).

²³ *ibid.*, p. 270.

jury service in 31 states and in federal courts,²⁴ and victims of similar crimes are likely to be excluded during *voir dire*.)

The reasonable-person standard highlights the jury's distinctive competency: its ability to identify the prevailing community norms more reliably than a judge. Even Justice Holmes, critical of giving the civil jury an ongoing role in setting the standard of care, recognized that the best case for it might be epistemic: "The court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury."²⁵ In the words of Harry Kalven, "[T]he jury, with its common sense and feel of the community, is the 'expert' tribunal for the two great distinctive issues posed by the common law: drawing the profile of negligence and handling the individual pricing of damages."²⁶

These community norms, I will suggest, constitute a procedure-independent standard: the jury's aim is to determine liability in light of the standard of ordinary care they have good reason to believe the community holds. In other words, each civil jury seeks to identify – rather than construct anew – the prevailing standard of care; if we believed the jury systematically erred in identifying this standard or were incompetent to do so, the jury would lose its authority. Similarly, as we will see shortly, citizens (and their elected representatives) should be presumed competent to identify the constitutional

²⁴ See Brian Kalt, "The Exclusion of Felons from Jury Service," *American University Law Review* 53 (2003).

²⁵ Oliver Wendell Holmes, Jr., *The Common Law* (Mineola, NY: Dover, 1991), p. 123.

²⁶ Harry Kalven, Jr., "The Dignity of the Civil Jury," *Virginia Law Review* 50:6 (1964), p. 1058.

or fundamental norms of their community, and tasked at least in the final instance with the responsibility for ensuring the congruence of political decisions with those norms.

Civil trial procedures

The central purpose of the trial is to render fair verdicts, and so justifiable trial procedures must be those that are most likely to yield just outcomes. But, as we have seen, citizens also possess a hard-won right to be eligible to serve as jurors: the history of jury selection is replete with disrespectful treatment. As noted above, in *Strauder v. West Virginia*,²⁷ for instance, the Supreme Court found unconstitutional a West Virginia statute barring African-Americans from jury service, holding that to deny them the right to serve on juries would constitute a “brand.”²⁸ Yet in *Strauder* the permissibility of excluding women was simultaneously affirmed: “We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this.”²⁹

The epistemic injustice – the intrinsic harm – of excluding racial minorities in particular from jury service is only one cost; more gravely, exclusion may make it impossible to produce the core instrumental benefit of just verdicts. Disrespectful

²⁷ 100 U.S. 303 (1879)

²⁸ *Strauder* p. 308.

²⁹ *Strauder* p. 310.

treatment of jurors on the basis of race often coincides with unjust treatment of defendants. In *Foster v. Chatman*,³⁰ the Supreme Court found that a trial court and the Georgia Supreme Court had erroneously rejected Timothy Foster’s claim that the State’s use of peremptory strikes was racially motivated in violation of *Batson v. Kentucky*,³¹ remanding the case to the Georgia Supreme Court for post-conviction review. Foster was convicted of capital murder and sentenced to death by a jury, from which all four black prospective jurors qualified to serve had been struck. The Court found compelling evidence that the prosecutor’s reasons for striking black prospective jurors applied equally to otherwise similar nonblack prospective jurors who were allowed to serve, leading “to the conclusion that the striking of those prospective jurors was ‘motivated in substantial part by discriminatory intent.’”³²

So we must seek simultaneously to achieve the instrumental goal (producing just verdicts) and to secure the intrinsic value of treating jurors with equal respect. At the limit, the denial of this right to serve constitutes a form of epistemic disrespect; it stigmatizes some citizens as incompetent to serve as judges. For those citizens granted the opportunity to exercise this right, jury service entails the most intensive form of democratic activity many of them will ever experience. As such, it is crucially important that the mechanisms of jury selection, and the procedures by which they deliberate and decide, evince equal respect for their judgment in this capacity.

To see why respectful treatment of jurors matters, consider the other fundamental activity of citizenship: voting. We typically take the ability to form one’s own judgment

³⁰ 578 U.S. ___,

³¹ 476 U.S. 79 (1986).

³² 578 U.S. ___, p. 4.

to be centrally important for the exercise of the franchise.³³ Women's ostensible inability to form these judgments - their dependence on the judgment of their husbands – served as a key justification for their denial of suffrage. Even today, we seek to preserve independence in voting: hence we prohibit electioneering near polling places, erect privacy shields to surround voting stations, and – at least ostensibly – seek to limit online voting. Broadly speaking, to interfere with a voter's ability to make up her own mind at the point of decision is to treat her judgment disrespectfully. Because the jury acts collectively, we may believe that respectful treatment takes a different form – we may wish to reject the secret ballot in favor of reason-giving – but the aim of freedom from coercion remains intact. To foreshadow briefly, disrespectful treatment of jurors most obviously occurs during jury selection, but it can also happen during deliberations and at the point of decision, at which a dissenting juror may be coerced into altering her vote. The less demanding evidentiary and vote-threshold requirements of the civil trial are, in this way, more sensitive to the burdens of judgment placed upon jurors, though potentially at the cost of producing more erroneous verdicts.

The exclusion of jurors has the ostensible purpose of promoting fair trials. For instance, the exclusion of felons from the jury pool may be justified in two ways: 1) the probability that they will be biased against the prosecution in a criminal trial because of their own negative experience with the criminal justice system; and 2) that their moral judgment is demonstrably corrupt, as their commission of a felony proves. One might

³³ While denying that voting is a fundamental right, Claudio Lopez-Guerra argues that disenfranchising cognitively typical ten-year-old citizens is unjust because of their capacity to understand the concept of electing representatives and of making moral judgments. See Claudio Lopez-Guerra, *Democracy and Disenfranchisement: The Morality of Electoral Exclusions*, Oxford: Oxford University Press, 2014).

reasonably challenge these two claims on many grounds, not least the fact that racially disparate policing and sentencing, especially for drug-related crimes, may mean that whites are less likely to be convicted of felonies and to be subsequently ineligible to serve, despite having violated the same laws. Moreover, insofar as the aim of criminal justice and imprisonment is at least in part rehabilitative, there should be no reason to preclude all those with felony convictions from service on the grounds of incorrigibility. Finally, even if one might have reason to believe that a person with a criminal conviction might be inclined to side with defendants, no such bias would operate in the civil context.

Persons with cognitive disabilities may be excluded from the pool on the grounds of incompetence, these disabilities constituting an alleged barrier to their ability to render fair judgments. In certain cases, however, these limitations are remediable; those with relatively mild disabilities may be capable of assessing evidence and rendering moral judgments, particularly if assistance is permitted. It is important to recognize that juror exclusion constitutes a form of epistemic disrespect, even if warranted under certain circumstances to secure impartial juries and fair trials.

Selecting jurors by lot may be justified both on instrumental and intrinsic grounds. Most saliently, the random selection of jurors aims to ensure a representative “fair cross-section” in the pool, but it also performs what Peter Stone terms a “sanitizing function,” excluding the use of reasons, good or bad.³⁴ A lottery prevents reasons from being brought to bear in the composition of the pool: there are no good reasons to identify particular citizens to serve on a jury, and many bad ones that might operate were jurors deliberately chosen. Not only does the lottery reduce the threat of partiality, it also

³⁴ Peter Stone, *Luck of the Draw* (Oxford: Oxford University Press, 2011).

eliminates merit – capacity for judgment (above some floor) – as a factor. It declares that education does not matter, nor social standing, nor experience. The lottery affirms that all citizens are presumed to be *sufficiently* capable to serve as jurors. But does the lottery treat jurors *equally*? Indeed, it does: as Bernard Manin has argued, the lot gives citizens an equal probability of obtaining an opportunity (in his example, the Athenian allocation of offices), regardless of expertise.³⁵ As Alexander Guerrero has argued, it ensures the condition of equal political power without commitment to the view that some are better able to rule than others.³⁶ After the use of the lottery, *voir dire* and challenges, both peremptory and for-cause, shape the panel, but competence as such is not supposed to be a relevant consideration. Because of the immunity from reason-giving at this stage, peremptory challenges are a locus of serious concern, both on the grounds of epistemic disrespect and because of the threat to fair trials they may pose (as *Foster* recognizes).³⁷ Juror selection reflects the Janus-faced nature of jury service: it is simultaneously intrinsically valuable for the jurors (providing a means by which they may participate in the activity of judgment on equal terms) and instrumental for the attainment of just verdicts.

In contrast, we might believe that the standard of proof is purely instrumental in nature, as it constitutes a threshold-setting device for the sufficiency of evidence. The standard of proof constitutes a measure of the strength of the evidence presented at trial, and is one means by which the trial reflects the assessment of the costs of Type I (false

³⁵ Bernard Manin, *Principles of Representative Government* (New York: Cambridge University Press, 1997), chapter 1 (*passim*).

³⁶ Alexander Guerrero, “Against Elections: The Lottocratic Alternative,” *Philosophy and Public Affairs* 42:2, 135-178, p. 169.

³⁷ The use of *voir dire* and the peremptory challenge are not, at least in principle, intended to exclude people on the basis of competence but to select an impartial jury.

positives, in which an innocent person is convicted or a defendant is wrongly found liable) vs. Type II errors (false negatives, in which a guilty person is acquitted or a meritorious claim is denied); the vote threshold, to be discussed shortly, is another mechanism. The standard of proof for virtually all trials of civil negligence is preponderance of evidence: it sets at nearly equal the costs of Type I and Type II errors, and constitutes the lowest standard of proof. The next most stringent – used for civil suits initiated by the government and which affect a defendant’s liberty – is the “clear and convincing evidence” or “clear, unequivocal and convincing evidence” standard. It has been used for cases such as denaturalization, deportation, civil commitment, and termination of parental rights. This standard treats Type I errors as substantially more costly than Type II errors, requiring that the plaintiff meet a demanding evidentiary burden. The most stringent, required for criminal trials, is “beyond a reasonable doubt,” which is solely concerned with eliminating Type I errors, at the expense of maximizing Type II errors.³⁸

Because of the weaker evidentiary standard, outcomes in a civil trial are – by design – permitted to be less reliable than those in a criminal trial. The requisite strength of the evidence, and the allocation of the costs of error, may be taken as a signal to the wider community of the correctness of the verdict. Justice Brennan’s opinion in *In re*

³⁸ For instance, in *Santosky v. Kramer*, the Court found that due process required the standard of clear and convincing evidence for the termination of parental rights. This standard, the Court held, is distinguishable in terms of the “societal judgment about how the risk of error should be distributed between the litigants.”³⁸ In a civil dispute over damages, “application of a ‘fair preponderance of the evidence’ standard indicates both society’s ‘minimal concern with the outcome,’ and a conclusion that the litigants should ‘share the risk of error in roughly equal fashion.’” In a criminal case, the Court affirmed, the aim should be to “exclude, as nearly as possible, the likelihood of an erroneous judgment.”

Winship makes this explicit: “[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”³⁹ Justice Harlan’s concurrence described the function of a standard of proof as serving to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”

The vote threshold (in conjunction with jury size) also plays an instrumental role in allocating the risks and costs of erroneous verdicts and producing confidence in the correctness of the verdict. Although the unanimity rule is nearly ubiquitous for criminal trials in the United States (it is required for federal trials and in all states except for Louisiana and Oregon), the Supreme Court has deemed it unnecessary for non-capital trials, assuming the size of the jury is not as small as 6. Justice Douglas’ dissent in *Johnson v. Louisiana* argued that the reliability of the jury would be diminished by the loss of unanimity; it would lead to “hasty factfinding” and swift deliberation, concluded once the requisite majority had been reached. In *Burch*, the majority opinion recognized the “line drawing” quality of rejecting supermajority voting under a six-person jury, but nonetheless held that the advantages (in terms of shortening deliberation and reducing hung juries) were speculative on the six-person jury, and, more importantly, that reducing the threshold in that case would threaten the “constitutional provisions underlying the size threshold.” In civil trials, federal juries still must be unanimous, but only eighteen states require unanimity. Twenty-nine states permit supermajorities of 2/3 and 5/6 in civil

³⁹ 397 U.S. 358 (1970).

cases; the threshold drops from unanimity to supermajority after six hours of deliberation in three states (Iowa, Nebraska, and Minnesota).⁴⁰

So from the “epistemic proceduralist” standpoint, the legitimacy of verdicts in a criminal trial – the extent to which we regard the coercion of defendants as justified – is stronger than the legitimacy of verdicts in a civil trial because of the evidentiary standard and the vote threshold. Jury verdicts in trials of civil negligence derive their legitimacy from a quite fallible procedure, one with a positive but relatively low probability of correctness. But let us now return to the jurors’ standpoint. The evidentiary standard reflects the far greater significance of the decision to convict than to find a defendant liable; similarly, the moral weight placed on the juror in the criminal trial is far graver than the moral weight placed on the juror in the civil trial. But the “beyond a reasonable doubt” standard, as James Whitman has demonstrated, was not originally intended to serve an epistemic function; instead, it aimed at mitigating the tremendously burdensome nature of judgment for jurors. Whitman has argued that the criminal jury trial itself emerged to “shuffle the guilt of Blood and ruin” from judges onto jurors,⁴¹ and that the “beyond a reasonable doubt” constituted a moral-comfort device, theological in origin and designed to reassure jurors that their salvation was safe as long as any doubts they harbored about the guilt of the accused were not “reasonable.”

Yet jurors have long struggled to make sense of the reasonable person standard, exacerbating the internal pressure they may feel about the obligation to condemn a person

⁴⁰ Shari S. Seidman, Mary R. Rose, and Beth Murphy, “Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury,” 100 *Northwestern U. Law Rev.*, 201-230.

⁴¹ Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008), at 24.

to prison or even death; there is much case law concerning the role that courts may play in explaining the standard, though they are in several states prohibited from trying to explain, and the Supreme Court itself has vacillated over the permissibility of the use of the term “moral certainty” as a clarifying phrase. Uncertainty over the standard exacerbates the burdens of judgment placed on the jurors; there is substantial psychological evidence that criminal jurors in particular experience substantial stress, manifesting itself in a variety of physical and physiological symptoms.⁴² Even bracketing the risk of excessive burdens placed by the evidentiary threshold, there is little question that the unanimity rule places additional pressure on jurors. Kalven and Zeisel (1966) argue that the major function of deliberation is to persuade recalcitrant members of the minority to alter their votes in line with the majority.⁴³ Psychological studies indicate that rarely does a lone holdout derail the final verdict: instead, because of peer pressure, she finally alters her vote to accord with the majority.⁴⁴ A judge may give a deadlocked jury an “*Allen* charge” or “dynamite charge,” an admonition to a deadlocked jury to try to reach a verdict (the “dynamite” is so termed because it “blasts” a verdict). But these charges have an extremely well-established risk of coercion, pressuring the minority into altering their votes; indeed, there is doctrine specifically concerning how courts are to

⁴² Capital murder trials, while obviously posing the greatest peril to the accused, post an especially serious threat to jurors’ emotional and physical well-being, including post-traumatic stress disorder. For this reason alone – among other even more serious concerns – the imposition of the death penalty constitutes a form of disrespect for citizens’ judgment; no citizen should be asked to judge whether to kill another.

⁴³ Harry Kalven, Jr., and Hans Zeisel, *The American Jury* (Chicago: University of Chicago Press, 1971)

⁴⁴ John Guinther, *The Jury in America* (New York: Facts on File Publications, 1988).

assess the coerciveness of an *Allen* charge.⁴⁵ If the judge even inquires into the numerical split among the jurors, “the charge is *per se* coercive and requires reversal.”⁴⁶ Evidence suggests that jurors succumb to “normative influence” (social pressure) rather than “informational influence.”⁴⁷ Although it is true that recalcitrant voters at any threshold may find themselves subject to strenuous efforts at persuasion and moral pressure, the presence of others seems to give holdouts the strength to resist these efforts when necessary.⁴⁸ If the reason why deliberation under unanimity is protracted is because it takes time to coerce dissenters into altering their view, there may be no tradeoff between achieving the instrumental goals of just verdicts and the intrinsic benefits of freedom from coercion. Paradoxically, a lower vote threshold may both improve the reliability of the verdict (a unanimous vote under a supermajority rule constitutes a clear signal), while protecting the ability of minority members of the jury to dissent.

Nonetheless, in the United States, just verdicts in criminal trials may well come at the cost of respectful treatment of the jurors. In the civil trial, there is – at least in principle – no tradeoff; those features of the trial that produce (fallibly) reliable verdicts

⁴⁵ The Ninth Circuit considers “(1) the form of the instruction, (2) the time the jury deliberated after receiving the charge as compared to the total time of deliberation, and (3) any other indicia of coerciveness.” *United States v. Freeman*, 498 F. 3d 893, 908. See <http://www3.ce9.uscourts.gov/jury-instructions/node/395>.

⁴⁶ *Ajiboye* 961 F. 2nd pp. 893-94

⁴⁷ Vicki L. Smith and Saul M. Kassin, “Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries,” *Law and Human Behavior* 17:6 (Dec. 1993), 625-643.

⁴⁸ Jeffrey Abramson, *We the Jury: The Jury System and the Ideal of Democracy* (Cambridge: Harvard University Press, 2001). Diamond, Rose, and Murphy (2006) demonstrate that verdicts reached under a supermajority rule seemed less legitimate, affirming Abramson. Robert MacCoun and Tom Tyler found that members of the community in general believed that unanimity procedures would be “more accurate and fairer” than supermajority rules. Robert J. MacCoun and Tom R. Tyler, “The Basis of Citizens’ Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency,” 12 *Law and Human Behavior* 333, at 337-340 (1988).

also conduce to respectful treatment of jurors as judges. The less strenuous evidentiary standard, and the non-unanimous threshold in particular, protect the interests of the jurors in remaining free from coercion during deliberation. In sum, the greater acceptance of fallibility in the civil trial may render the verdict less reliable, but more attractive from the perspective of ensuring equal respect for judgment, including dissenting viewpoints.

Civil trials and democratic justification

Again, jury trials are justifiable on epistemic proceduralist grounds: i.e., jury verdicts receive their binding force by being produced by a procedure which will likely yield correct outcomes. Epistemic proceduralist models are not necessarily democratic: were a judge more likely than a jury to produce correct outcomes in a civil trial, we would have good reason (indeed, we might be obliged) to choose the judge. However, the epistemic proceduralist account of the civil jury is egalitarian, and democratic, in two crucial respects. First, its reliability derives in part from the use of “ordinary citizens,” chosen at random, who are presumed to be equally competent to judge (in this case, the prevailing standards of care within the community). Put differently, at least theoretically, there is no tradeoff between the probability of correctness and the equal right of citizens to serve: the fact that citizens are presumed competent to judge supports the epistemic-egalitarian logic. Yet the distinctively respectful quality of the procedures constitutes a second, and no less important, source of the legitimacy of democratic decision-making. That is, the uniquely *democratic* character of the civil jury derives not strictly from its correctness (as produced by ordinary citizens), but from the equal respect with which it

treats the jurors. The criminal trial sacrifices to a limited extent the respectful treatment of jurors - by opening up them to coercion via the unanimity rule, and perhaps the demanding evidentiary standard – in favor of yielding just verdicts (minimizing the risk of false convictions). The civil trial accepts a higher degree of fallibility (under the preponderance standard) while protecting the capacity of jurors to dissent, under a weaker threshold.

As such, the civil jury provides a model of *epistemic-egalitarian proceduralism* [EEP] with the following features: 1) the decision depends upon the judgment of ordinary citizens; 2) the procedures yield verdicts which are openly fallible and which allocate the risk of error roughly equally; and 3) the procedures simultaneously treat citizens with equal respect for their judgment. Once we move away from the civil jury, the design of institutions – and their specific justification - may vary. For instance, it is quite possible that the right to vote reflects a different sort of equal-epistemic respect – equal respect for citizens’ capacity to judge *their own interest*. But the justificatory logic of the civil jury travels nicely to the constitutional setting, because the structure of judgment parallels that of the civil jury.

Let us examine the EEP model derived from the civil jury more closely. The core features are as follows:

- 1) The principle of equal respect for citizens in their capacity as judges;
- 2) A “cognitive” model of decision-making (in this context, jurors judge the prevailing standards in a community and the defendant’s liability);
- 3) A deliberative mechanism of judgment formation;

- 4) Defeasible majoritarian procedures, with only weak systematic biases in favor of one (status quo) outcome.

First, what does it mean to treat citizens with equal respect for their capacity as judges? Again, one way to get at this thorny point is to think about what *disrespectful* treatment – a form of epistemic injustice – would entail, and the history of exclusions from jury service are revealing on this point. The end of “blue-ribbon panels,” which required special education or training to qualify as a juror, reflects the triumph of the egalitarian model of judgment over the expert one. The random selection of jurors aims to ensure a representative “fair cross-section,” but it also treats jurors with equal respect for their capacity for judgment: any citizen is presumed, above some threshold, to be competent to serve as a judge in this domain. The exclusion of citizens from the right of service entails the view that one’s judgment is in a way defective – as suggested, the justification for the exclusion of felons, on this logic, have permanently demonstrated themselves to be inferior in this capacity, providing (in my view, quite dubious) grounds for their exclusion.

Second, this account of democratic justification rests on a *cognitive model of voting*, akin to the account offered by Joshua Cohen. For Cohen, a cognitive account of voting constitutes the view that “voting expresses beliefs about what the correct policies are according to the independent standard, not personal preferences for policies.”⁴⁹ The independent standard, as the civil jury illustrates, is best understood as existing communal commitments: the judgment is of correspondence with existing norms,

⁴⁹ Joshua Cohen, “An Epistemic Theory of Democracy,” *Ethics* 97: 26-38, at 34.

perhaps even when those norms are deficient.⁵⁰ The example of the civil jury's determination of negligence supports the view that at least some citizen judgments do take this basic structure of determining existing norms and assessing an action (or, in principle, a policy's) correspondence with them. (In a moment, I will suggest that popular constitutionalism on the civic model entails something like this activity as well.) Should the "cognitive model" govern citizens' decision-making in their other fundamental capacity as voters? Again, although this is beyond the scope of this paper, one might suspect not: a voter's selection of a representative need not, and probably should not, take the form of determining the representative's correspondence with an ideal legislator, or the probability that the representative will vote in favor of policies that are constitutionally valid. But perhaps this is yet another reason to view the election of representatives as, if not purely "aristocratic," at least not reflecting our most fundamental democratic commitments.⁵¹

Drawing on a wide literature about the value of "situated judgment," one might immediately object that the way in which individuals judge communal matters necessarily derives from their particular experiences within a community, which entails partiality and particular preferences at the initial stage. Yet few would defend the view that these immediate, individual-level judgments *suffice* to render outcomes legitimate. So, third, the formation of these judgments must derive from *deliberation*. From the perspective of generating just verdicts, deliberation improves the quality of judgment, and helps to reduce the propensity to identify either narrow or dominant-group

⁵⁰ The question of jury nullification, which I will take up briefly in conclusion, becomes salient here.

⁵¹ For the aristocratic account of representation, see Manin 1997.

conceptions of community standards. The special importance of deliberation in negligence trials derives from the necessity to specify the reasonable-person standard. Because this standard is grounded on community sentiment, a diverse jury is likely to outperform a judge or a small body; the Court has affirmed the importance of a diverse and sufficiently large jury to promote deliberation, drawing on empirical evidence arguing that the smaller the group, the less likely the “critical contributions necessary for the solution of a given problem” are to arise, and that smaller juries are less likely to be able to reconstruct from memory the key pieces of evidence or argument.⁵² Moreover, from the perspective of jurors, there is evidence that deliberation is a personally valuable experience: the work of John Gastil and co-authors suggest that jurors regard deliberation as fundamental to their experience, and that deliberative participation in the jury may increase the probability of participation in other areas of public or political life.⁵³

Fourth, and finally, this account of democratic decision-making rests upon *majoritarian procedures*, with only weak systematic biases in favor of one (status quo) outcome. The support for majority rule rests on both instrumental and intrinsic grounds. The Condorcet Jury Theorem is the most famous epistemic argument in favor of majority rule. Although its generalizability is often challenged, we might think that in this context – in which the aim is to accurately identify the community standard – the presumption of better-than-average competence is plausible; indeed, it must be for jury decision-making to be justifiable. Although on the Condorcetian model, an alternative receiving supermajority support in its favor is even more likely to be accurate, a supermajority

⁵² *Ballew v. Georgia*, 435 U.S. 223

⁵³ See John Gastil, et al., *The Jury and Democracy* (Oxford: Oxford University Press, 2010).

threshold enables a (presumptively incorrect) minority to veto. If – as in the jury context – we have good reason to bias our decision-making in favor of one alternative (e.g., to minimize Type I errors), the supermajority rule is justifiable. Yet we should resist the presumption that all constitutional norms merit such protection.⁵⁴ One way to draw the analogy to the jury trial is to consider whether the evidentiary standard for democratic decisions as more closely resembling “preponderance,” “clear and convincing,” or “beyond a reasonable doubt.” On David Estlund’s account, the defense of democracy on the epistemic proceduralist model requires only that the outcomes produced are better than random, which we might construe as comparable to a preponderance of evidence standard: a weakly positive probability of correctness. One might reasonably argue that the standard should vary across domain – that constitutional decision-making should require a more stringent “standard of evidence” than ordinary legislation, for instance – but in general, the hypothetical risks and costs of erroneous decision-making should be construed as roughly equally distributed across alternatives. That is, our probability of changing good laws to bad should not be taken to be substantially greater than the probability of changing bad laws to good (i.e., no strong risk aversion), nor should the costs associated with altering existing law be construed as substantially greater than the costs associated with preserving existing law (i.e., no strong conservative presumption or status quo bias). In other words, the strong presumption of innocence should not extend to the constitutional domain.

⁵⁴ For the extension of this argument, see Melissa Schwartzberg, *Counting the Many: The Origins and Limitations of Supermajority Rule* (New York: Cambridge University Press, 2014).

From the intrinsic standpoint, majority rule also treats agents respectfully. To begin, note that those who turn to the Condorcet Jury Theorem in support of the instrumental (epistemic) value of democracy must themselves presume, rather than empirically demonstrate, the competence of citizens; this presumption is itself a marker of respect for citizens' judgment. Yet majority rule is itself a mechanism that promotes equal respect for judgment, insofar as it weighs votes equally; we presume that the judgments held by any (anonymous) citizen possess equal value to any other, and that *ex ante* any member is equally likely to any other to be decisive.⁵⁵ As such, majority rule treats *agents* respectfully insofar as by granting their judgments equal weight.⁵⁶ One might argue (for instance) that supermajority rules may be non-neutral, and thus partial with respect to the treatment of judgments, but impartial with respect to the agents who make them.⁵⁷ But in many contexts – especially the constitutional contexts - supermajority

⁵⁵ See in particular Douglas W. Rae, "Decision-Rules and Individual Values in Constitutional Choice," *American Political Science Review* 63 (1): 40-56; Schwartzberg 2014; Niko Kolodny, "Rule of None II: Social Equality and the Justification of Democracy," *Philosophy and Public Affairs* 42:4 (2014).

⁵⁶ Contemporary sources for such claims include Christiano 2008; Robert Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989); Schwartzberg 2014 and Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), p. 51.

⁵⁷ Here I depart from Kolodny's rejection of the special value of majoritarianism and his suggestion even that unanimity requirements to depart from the status quo would be justifiable under his conception of social equality, because what matters are substantive considerations rather than formal considerations. I share Kolodny's general claim that *equal a priori chances of being decisive* matters, but I reject the view that neutrality among alternatives (as supermajority and unanimity rules both violate) does not matter. First, Kolodny argues that this principle holds only where "no pattern of X-ing by others is more likely than any other pattern." But if we believe political decisions reflect distributive conflict, there are *always* some set of agents who benefit from the status quo, and who will predictably veto any effort to redesign institutions; hence unanimity rules, and most supermajority rules, will fall short of the aims of social equality. Second, on strictly formal grounds, supermajority rules require *more* votes (a greater number of agents with contributory influence) for one alternative than another, and so I do not have

rules protect a status quo that reflects power distributions at the time of the norm's enactment, thereby systematically privileging the judgments of some citizens over others: this constitutes disrespectful treatment. For civil and political rights, where we believe that distributive concerns are outweighed by the substantive and shared benefits of these norms (and we have good reason to believe that these norms merit a bias in their favor), supermajority rules may well be justifiable.

The central claim of the EEP account of democratic legitimacy is that democratic decisions are authoritative insofar they result from procedures that treat citizens with equal respect for their capacity to render reliable, if fallible, judgments. What these procedures require will differ across domains, in part because the nature of the judgments required will differ. Perhaps surprisingly, though, there are reasons to think that if citizens' judgments in the constitutional domain possess authority, it would be for reasons that track those supported by this model.

The EEP model and popular constitutionalism

Popular constitutionalism has many variants, but the central aim is to provide an account of constitutional emergence and change that situates authority with the people "themselves," rather than with courts or with the impermeable barrier of the amendment clause contained in Article V of the United States constitution. For our purposes, the most important claim is that ordinary citizens themselves must retain the ultimate power to

an *equal a priori* chance of being decisive because I need more contributing agents to achieve my preferred outcome than someone who prefers the alternative (often if not always the status quo).

express their constitutional commitments. Elizabeth Beaumont has recently demonstrated the historically significant and ongoing role that ordinary citizens have played in both producing and giving interpretive force to constitutional norms. She describes how formal textual provisions are the “visible outgrowth of groups’ work to plant new governing ideals or transform older ideas,” and that civic groups of ordinary citizens played a crucial role in shaping and reshaping the boundaries and lived meanings of constitutional provisions.⁵⁸ Others, especially Larry Kramer, Mark Tushnet, and Jeremy Waldron, argue specifically for the capacity of ordinary citizens to render judgments about the sorts of questions situated, at least in this country, with the judiciary; in their view, the turn to judges relies on and reflects a profound skepticism about the ability of politicians and ordinary citizens to hand constitutional questions. Mark Tushnet, for instance, has defended populist constitutional law, by which the people themselves resolve questions of the “thin constitution,” its fundamental guarantees of equality, freedom of expression, and liberty.⁵⁹ Bruce Ackerman has held that “the People should not be confused with their government, but that they can speak in an authoritative accent through sustained and mobilized political debate and decision,” rejecting a formalistic reading of Article V in which only amendments passed through that mechanism possess constitutional standing.⁶⁰ Yet because of the difficulty of enacting constitutional change, Ackerman has defended a Popular Sovereignty Initiative that would entail a referendum (authorized by the President and Congress) for constitutional amendment, as a means of

⁵⁸ Elizabeth Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path towards Constitution* (Oxford: Oxford University Press, 2014), at 7.

⁵⁹ Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press), at 11 and *passim*.

⁶⁰ Bruce Ackerman, *We The People: Transformations* (Cambridge: Belknap Press, 2000) at 384.

ensuring that the Constitution “register[s] the considered judgments of We the People of the *United States*.”⁶¹ Similarly, Akhil Amar has argued that Article V is not the exclusive means by which constitutional change must occur, and has defended a reading of “We the People” that entails an appeal to a majority vote of the electorate for amendment.⁶²

Jeremy Waldron has emphasized the importance of citizen participation (as opposed to judicial supremacy) in determining the scope and nature of constitutional rights – the apogee of community norms. Citizen participation in this domain “calls upon the very capacities that rights *as such* connote and ... evinces a form of respect in the resolution of political disagreement which is continuous with the respect that rights as such evoke.”⁶³

The standard justifications for popular constitutionalism thus closely track the EEP account. As on the civil jury, it suggests that ordinary citizens are best situated to identify the most fundamental standards of their community: again, in Ackerman’s words, the “considered judgments of We the People.” Given the difficulty of Article V, in effect, the Supreme Court constitutes the ultimate judges of the compatibility of legislation with these fundamental standards; the aim of popular constitutionalists is, if not to strip the power of judicial review from the courts, to make it easier for ordinary citizens to ensure that the constitution accurately reflects their commitments in light of judicial interpretation that misconstrues the standards (from their perspective). So the judgment of citizens – of the compatibility of the constitution with their own sense of the fundamental commitments of the community – is here central.

⁶¹ *Ibid.*, p. 410.

⁶² Akhil Reed Amar, *Consent of the Governed*, *Columbia Law Review* 457, 458–59 (1994).

⁶³ Jeremy Waldron, *Law and Disagreement*, p. 252.

If citizens should be regarded as the best judges of constitutional commitments – the epistemic-egalitarian claim – what procedure will be most likely to yield just outcomes while simultaneously treating citizens with equal respect for their judgments? As on a jury, one might believe that they must be deliberative, entailing both assemblies at the local, state, and national level, as well as a national educational campaign providing materials about the costs and benefits of proposed amendments. The aim of these procedures must be to elicit high-quality discussions about the reasons for and against proposed amendments among the citizenry as a whole.⁶⁴

Must the procedure be majoritarian? One might suggest there an impermissibly high risk of error – notably, the failure to recognize the equal status of citizens *qua* judges in substantive legislation – on this theory. Here is where the distribution of biases becomes important. Like the bias against the risk of erroneous conviction, at least some constitutional norms – those protecting fundamental civil and political rights such as the rights to vote and to serve on juries, for instance – merit a bias in favor of their protection against the risk of erroneous repeal. This is why majoritarianism is defeasible. However, because no norm is guaranteed to yield just outcomes (especially once interpreted), no norm merits permanent entrenchment, nor a status quo bias via a supermajority threshold that is *de facto* unattainable or sufficiently high to preclude meaningful efforts at revision. As we have seen, the justifiability of democratic decision-making rests on the respectful treatment of citizens as bearers of judgment. On this account, the respectful treatment of citizens requires that we regard citizens as competent to make the ultimate determination of whether constitutional norms cohere with their commitments. When these standards

⁶⁴ Schwartzberg 2014, at chapter 7.

may no longer remain subject to meaningful citizen judgment and revision, they become unjustifiable on democratic grounds.⁶⁵ EEP thus helps to provide a principled foundation for the important historical and institutional insights of popular constitutionalists.

Challenges to epistemic-egalitarian proceduralism

As we have seen, attention to the civil jury provides a distinctive account of democratic legitimacy. Although this account is indebted to the logic of epistemic proceduralism, its egalitarianism gives it a different cast; similarly, although the account defends egalitarian procedures, it does so from an epistemic vantage point.

First, how is the EEP model of democratic legitimacy different from Estlund's epistemic proceduralism? In *Democratic Authority*, Estlund sketches the case of Prejuria to demonstrate that the authority of a randomly chosen jury derives from the fact that it is epistemically superior to anarchic or vigilante justice, and that it is not ruled out by invidious comparisons (as, he suggests, an alternative model of judgment by church fathers might be). The randomly chosen jury constitutes the "best epistemic instrument so far as can be determined within public reason," and its verdicts derive an obligation of compliance from the "fact, acceptable to all qualified points of view, that the jury system has epistemic value – an ability to do better than random at producing substantively just verdicts."⁶⁶ Note that, on Estlund's account, egalitarianism derives from the concern about invidious comparisons – the inability to fairly determine who possesses superior

⁶⁵ See Melissa Schwartzberg, *Democracy and Legal Change* (New York: Cambridge University Press, 2007).

⁶⁶ Estlund, note 8, at 156.

judgment – with the implicit alternative an arbitrary mechanism. My argument has been, in the first place, that the civil jury’s egalitarianism derives from the belief that ordinary citizens are the best judges of community standards. In other words, it operates not as a sort of side constraint on correctness, but as the *condition* of epistemic validity. This is why attention to the civil jury yields epistemic-egalitarian proceduralism. On any epistemic proceduralist account, if we believed that judges (or monarchs) would yield better outcomes for civil trials, we would have no reason to resist it. If we do not – if we think that the egalitarian force of qualified acceptability restricts us from this move – then we might also ask whether the epistemic argument is truly doing the justificatory work in the argument.⁶⁷ Indeed, the long history of democratic institutions reveals that the allocation of citizen rights depends upon the view that ordinary citizens are highly competent to render judgments; if we dispute this view, we may no longer be democrats.

⁶⁷ For a similar critique of Estlund, see Thomas Christiano, “Debate: Estlund on Democratic Authority,” in *Journal of Political Philosophy* 17(2): 228-240 (2009). Of course, one might argue that there are features of the jury that should give us greater confidence in the justice of its verdicts than those of a judge or even a panel of judges: the value of “the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence.” (*Williams v. Florida*) But Estlund specifically excludes these institutional details from his consideration, arguing strictly from the perspective of reliability; at most, he suggests that a “democratic procedure involves many citizens thinking together, potentially reaping the epistemic benefits this can bring, and promoting substantively just decisions better than a random procedure.” But the stylized Prejuria model involves only six randomly selected jurors, who possess moral authority essentially because they (may) outperform vigilantes in realizing substantive justice. It is a thin basis on which to defend the epistemic value of democratic procedures, and again, it suggests that egalitarianism may be doing substantial work.

It is for this reason that Larry Kramer describes supporters of judicial supremacy as “today’s aristocrats.”⁶⁸

Because it picks out capacity for judgment as the basis on which citizens warrant respect, to what extent does epistemic egalitarianism depend upon unattractively perfectionist ideals? I cannot address this question at length here. To be sure, the ostensible determination of citizens’ competence has typically served exclusionary aims, and has provided a justification for limiting full citizenship to property-holding, able-bodied, cognitively typical white adult males. Most notably, putative claims of inferiority in judgment, manifested most viciously in literacy tests, served to justify the exclusion of African-Americans from the polls. But considered from a different vantage point, insofar as democracy depends for its legitimacy on citizens’ judgments on this model, institutions designed to support and develop citizens’ critical faculties become all the more essential. Debra Satz has persuasively argued that the “idea of educational adequacy should be understood with reference to the idea of equal citizenship.”⁶⁹ As she demonstrates, in the New York State educational adequacy rulings, the Court of Appeals held that the constitution requires that the state provide an education sufficient to enable children “to eventually function productively as civic participants capable of voting and serving on a jury.”⁷⁰ In a subsequent ruling, New York Judge Leland DeGrasse struck

⁶⁸ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2005) at 247. Contemporary work on the challenge of voter ignorance to democracy [e.g., by Jason Brennan, in *The Ethics of Voting* (Princeton: Princeton University Press, 2011) and Ilya Somin, *Democracy and Political Ignorance* (Palo Alto: Stanford University Press, 2016)] may be vulnerable on similar grounds.

⁶⁹ Debra Satz, “Equality, Adequacy, and Education for Citizenship,” *Ethics* 177 (July 2007): 623-648, at 635.

⁷⁰ *Campaign for Fiscal Equity, et al. v. The State of New York* 86 N.Y. 2nd 316

down the entire New York State school financing system on the grounds that the New York constitution invokes an idea of education that involves: “more than just being qualified to vote or serve as a juror, but to do so capably and knowledgeably.”⁷¹ Insofar as we recognize that the justifiability of democratic procedures require them to instantiate equal respect for citizens’ capacity for judgment, the injustice of unequal educational opportunities becomes quite stark.⁷² So situating procedural justifications upon the requirement of equal respect for the capacity for judgment – while congruent, I believe, with many of our existing intuitions – also may entail a reallocation of resources and a redesign of institutions. (Indeed, the institutional reform might also extend to the jury itself, notably on the use of peremptory challenges.)

How does this model differ from other egalitarian accounts of proceduralism? It demonstrates, for instance, why Estlund’s argument that a coin-flip would be a fair procedure fails as account of democratic procedures.⁷³ The coin-flip is insensitive to reasons; again, as Peter Stone has argued, the central reason for the use of a randomization device is to “sanitize” our decisions in which we do not want reasons to be brought to bear.⁷⁴ The coin flip may be a fair procedure insofar as it yields unbiased outcomes, but it fails to treat people with respect for their judgments; that is, although it treats these judgments equally – it ignores them all – it is uniformly *disrespectful*. Simultaneously, however, the epistemic-egalitarian justification provides a distinctive

⁷¹ *Campaign for Fiscal Equity, et al. v. The State of New York* 100 N.Y. 2nd 893

⁷² This might also entail the requirement to provide resources to cognitively disabled people so as to enable them to exercise citizen rights, including, potentially, to serve on juries. See Martha Nussbaum, “The Capabilities of People with Cognitive Disability,” *Metaphilosophy* 40:3-4 (July 2009).

⁷³ Estlund, *Democratic Authority*, p. 107.

⁷⁴ Stone 2011.

response to the “substantive” objection to proceduralism: the risk that democratic procedures may yield unjust outcomes. Any proceduralist must acknowledge that there may be some justifiable democratic decisions that are unjust: political legitimacy and justice may come apart. (This is one reason to separate the question of political obligation from the broader question of political justification.) Moreover, it is also important to bear in mind that there are no infallible procedures: *any* procedure may yield unjust outcomes, and no philosopher-kings, capable of picking out only substantively just results, dwell in our midst. Although the example of the jury affirms the importance of choosing procedures that will yield just outcomes, which may entail introducing biases into decision-making, the epistemic-egalitarian account reminds us that treating citizens with equal respect for their judgment is a competing goal. The value of a democratic procedure, on the epistemic-egalitarian account, is that it accords citizens the respect for their capacities as judges that one would hope citizens extend to each other in the substance of their decisions.

Finally, why *epistemic* egalitarianism? As has been suggested, one reason is historical: the struggle for citizen rights has long entailed the effort to be respected as a judge of one’s fellow citizens, as well as of one’s own interests and of those of the wider community. (To be sure, the extension of these rights has not always reflected respect for judgment; for instance, the expansion of inquest juries in medieval England was not due to the Crown coming to respect the capacity of free peasants and villeins to judge as such, but the Crown’s need for the information – especially about property holding – possessed by these groups.) EEP, at least on my account, does not entail the view that all domains of political activity are truth-apt, that there is an independent standard of correctness that

can move across domains. Rather, the “epistemic” feature of “epistemic proceduralism” depends upon the question. In the case of the civil jury, the question is: “Did the defendant’s behavior fall short of the standards of care prevailing in this community?” In the case of constitutional politics, the question is: “Does the existing constitutional norm reflect the fundamental commitments of this community?” As I have suggested, epistemic-egalitarian proceduralism as a justification for democratic decision-making entails the view that ordinary citizens are the best judges of the answer to this question. But this is not to insist that citizens must, in every domain, be deemed equally competent; again, one could reject (for instance) an epistemic-egalitarian procedural justification for judicial review or even for representative assemblies on the grounds of expertise. In legislatures – where the question may be “Does this piece of legislation promote the interest of the community?” – we may believe that representatives, and not ordinary citizens, are the best judges. But the long history, dating to Athens, of this justificatory logic gives us good reason to think that institutions that derogate from this presumption may fall short of being fully democratic, if nonetheless defensible.

Conclusion

In recent years, epistemic defenses of democracy have attained new salience. My contention here is that the civil jury points to the dependence of “epistemic proceduralism” on egalitarian conceptions of judgment. The civil jury’s to produce reliable verdicts depends on the presence of an equal and diverse jury of ordinary citizens, presumed (and not “tested”) to be sufficiently competent to identify the

prevailing norms in their community and to judge on that basis. In assigning to ordinary citizens responsibility for judgment, we publicly evince epistemic respect, but we also must ensure that such respect extends to minimizing coercion and fostering independence in judgment.

In defending the significance of jury service as a fundamental right of citizens, I have sought to affirm the importance of judging one's fellow citizens, which in democratic theory has typically been construed as the responsibility for sanctioning representatives via elections. I have not here been able to fully address the related issue of judging norms. As I suggested, the activity of identifying constitutional norms may also enable their revision and critique. Similarly, jury nullification entails the activity of identifying and rejecting laws, typically on the grounds of their immorality. If jury nullification is justifiable – and I cannot here address this question fully – it would be on the grounds that the responsibility for judging one's fellow citizens according to standards must also entail the activity of rejecting those standards when they fail by the jury's own lights. That is, it would extend the presumption of epistemic egalitarianism to the legislative domain, a move, which while in many respects plausible, would challenge many existing defenses of representation.

Finally, if the presumption of equal ability to judge is a marker of epistemic respect, the exclusion of a great many community members from this presumption warrants even greater attention than it has received here. In 2013, Governor Jerry Brown vetoed a bill, passed by the California legislature, authorizing lawful permanent residents who were non-citizens to serve; he defended his decision on the grounds that “jury

service, like voting, is quintessentially a prerogative and responsibility of citizenship.”⁷⁵

A convicted felon is not permitted to serve in the majority of states and in Federal courts, excluding at least a quarter of black men. The arguments here identify only part of the injustice associated with these exclusions in the form of epistemic disrespect. But they also highlight the instrumental cost of these exclusions, if we believe that the capacity to reach correct verdicts requires diverse and inclusive juries. Here, too, we see how the jury box reveals both the strength and the limitations of our commitment to democracy.

⁷⁵ <http://blogs.sacbee.com/capitolalert/latest/2013/10/immigrant-jury-duty-jerry-brown-veto-california.html>