Civil Juries and Democratic Legitimacy

Melissa Schwartzberg
Wilf Family Department of Politics
New York University[1]

Since antiquity, jury service has constituted a defining activity of citizenship. As the preeminent institution in which ordinary citizens render judgment, the jury plays a distinctive role in democracy. Whereas voting, the other core activity of citizens, seems to require merely the expression of interests or preferences, judgment on the jury seems to demand careful deliberation from an impartial standpoint. Despite the apparent disjuncture between jury service and voting, though, historically they have operated in tandem, in part because only those deemed competent to serve in these two domains have been accorded full, and equal, citizen rights in democracies. To be sure, the ostensible determination of competence has typically served exclusionary aims, and provided a justification for limiting full citizenship to property-holding, able-bodied, cognitively typical white adult males. But from a different vantage point, the assessment of competence reflects the significant role that *judgment* has always played in the exercise of citizen rights, even if the metric of competence has historically been unjust and misguided, and arbitrarily implemented.

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My basic claim here is that the *presumption of the equal capacity for judgment* is the foundational commitment of democracy, and that the legitimacy of democratic decisions – by which I mean that the state is permitted to coercively enforce them – derives from procedures that reflect this commitment. For ease of reference and to distinguish it from competing alternatives, I term this theory of democracy *judgment democracy*. The principle of presumed equal competence may seem intuitively implausible; most of us have had the experience of thinking that some of our fellow citizens are incompetent to judge political matters. Yet no less than Hobbes argued that the reason why equality of "faculties of the mind" seemed "incredible, is but a vain conceit of one's own wisdom"; that people "hardly believe there be many so wise as themselves … proveth rather that men are in that point equal, than unequal. For there is not ordinarily a greater sign of the equal distribution of any thing, than that every man is contented with his share."[2]

One way to demonstrate the power and plausibility of this commitment is to show that a fundamental democratic institution embodies it. The jury has often served this purpose in illuminating theories of democratic legitimacy, notably epistemic theories. Consider, for instance, Rawls' account of imperfect procedural justice, which he illustrated 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."[3] Rawls suggested that this model could travel from the jury context to the just constitution: the just constitution would be "more likely than any other" to produce just and

[2] Thomas Hobbes, *Leviathan,* I.xiii. I develop this broader account – and its implications for majority rule – in chapter 5 of *Counting the Many: The Origins and Limits of Supermajority Rule* (New York: Cambridge University Press, 2014).
[3] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), at 85-86.

effective legislation. Similarly, David Estlund's model of epistemic proceduralism 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."[4]

The focus of this paper will be the civil jury. The civil jury is frequently criticized as incompetent, particularly in its capacity to address complex technical matters. Yet the reasons why we still (should) find civil juries normatively attractive, and regard its decisions as authoritative, provide important insight into democratic legitimacy. My argument is that the epistemic claim for the civil jury – particularly with respect to the tort of negligence – is an egalitarian one, and of a type not well understood. Particularly in negligence trials, the civil jury is tasked with answering questions that we think ordinary citizens are best situated to judge. Those questions address the identification of preexisting community standards, and the determination of whether a particular action conformed to that standard.

It is worth noting at the outset that the reasons for supporting the civil jury have not always been epistemic. The justification for the civil jury, particularly at the time of the American founding, rested primarily on the jurors' tendencies to protect local debtors against more powerful private citizens and public officials, rather than their probability of yielding correct outcomes as such. These reasons remain important. But the primary justification today for supporting the civil jury derives from a commitment to a presumption of epistemic egalitarianism. My assertion is that epistemic egalitarianism is crucial for the justification of democratic decision-making more generally. Further, since the wider procedural logic of the civil trial reflects the egalitarian structure of judgment better than most existing institutions, it sheds

[4] David Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008), at 8.

light on how democratic procedures might be understood (and reformed) to produce justifiable outcomes.

By turning to the civil jury as a source for procedural justifications, a different dimension of citizens' judgment emerges. In negligence trials, the civil jury renders verdicts that do not just seek to identify the truth with respect to an independent state of the world (guilt or innocence). Instead, they first identify a standard of due care for a particular activity, and then evaluate a defendant's behavior against that standard to determine liability. It is this activity of ordinary citizens – of creating (and re-creating) standards, and of judging particular questions with respect to these standards – to which the civil jury calls our attention. And the procedural reasons why we should take civil jury verdicts to be authoritative support an epistemic-egalitarian proceduralist account of democratic legitimacy more generally.

Attractively, epistemic democracy highlights what Joshua Cohen has termed a "cognitive account of voting," one requiring the exercise of judgment (in his model, the independent content of the general will)[5], and the jury calls attention to the role of ordinary citizens in democratic decision-making. One challenge for an epistemic theory of democracy is to show that the scope of political questions for which there are "right answers" is not excessively narrow, because those critical of epistemic approaches often argue that the vast majority of democratic decisions are not truth apt. The civil jury supports the logic of a "deflated" independent criterion – one created by and subject to revision according to citizens' own deliberation. As we will see, judgment democracy is thus compatible with insights from popular constitutionalism, which emphasizes the capacity of ordinary citizens and their representatives to interpret and remake constitutional standards.

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[5] Joshua Cohen, "An Epistemic Theory of Democracy," *Ethics* 97: 26-38.

A related challenge for any epistemic theory of democracy is to explain why ordinary citizens are competent to render decisions in a given domain; the "vicinage" requirement of the jury – that the jurors are the defendants' peers and neighbors – serves as a partial explanation. Because of the complexity of many civil trials, the challenge is even greater; many legal scholars believe the civil jury is basically incompetent to render verdicts and, especially, to determine damages, and should be stripped of much of its power. As such, the justification of the civil jury on strictly epistemic grounds is even more difficult to sustain. I turn to the civil jury to clarify the nature of the epistemic burden in the determination of negligence, and show that this judgmental burden can be met *only* by a diverse jury composed of equally-situated citizens. I demonstrate that the general structure of decision-making on the civil jury is capable of traveling to different political domains, and that the outcomes of these procedures are similarly authoritative in these domains. Moreover, judgment democracy evades significant criticisms leveled at standard epistemic and proceduralist theories of democratic legitimacy. But let us begin by considering what the civil jury has to offer.

The reasonable person standard

Although the judgment of ordinary citizens is crucial in the determination of negligence, it has remained almost entirely unexamined by democratic theorists.[6] Negligence is a tort, a civil wrong, consisting 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

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[6] 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.

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 negligence case is tried by a jury, 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.[7] 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 standard, even if they disagree about how jurors ought to conceptualize these norms.[8] 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"),[9] 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,"[10] or whether the defendant ought to be held to be morally wrong on the grounds that her conduct fell short of prevailing community

[7] 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).
[8] 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.
[9] William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (1987)
[10] Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), at 334.

moral values (e.g., "tort law enforces community standards of financial responsibility and just compensation"[11]). Although 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.

Further, 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 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.[12] 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.

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[11] 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.

[12] 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).

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 reasonable 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…."[13] 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 reasonably careful person using ordinary care would or would not do under such circumstances. That is for you to decide."[14] 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.[15]

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.[16] Jurors are thus well positioned to evaluate the litigants' conduct against these standards, unlike the judge, whom Vidmar and Hans point out may well be a member of a socioeconomic elite, and an outlier in his perception of community standards. Further, they argue, "As a stand-in

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[13] N.Y. Pattern Jury Instr.--Civil 2:10 (3d ed. 2000); see also Kelley and Wendt, supra note 8 at 595.
[14] Kelley and Wendt*, supra* note 8, at 608.
[15] Kelley and Wendt, *supra* note 8, at 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.
[16] Neil Vidmar and Valerie P. Hans, *American Juries: The Verdict* (Amherst, NY: Prometheus Books, 2007).

for the community, the representative jury reflects current local expectations about duty and responsibility."[17] 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 jury service in 31 states and in federal courts,[18] and victims of similar crimes are likely to be excluded during *voir dire*.)

One concern with this model is that it leaves the reasonable person standard an "empty vessel," into which each jury pours its own conception of prudent conduct; Holmes' own concern about the standard derived from its excessive flexibility, and in *Baltimore and Ohio Railroad Co. v. Goodman*, he argued that courts would do well to set a specific standard that drivers who reach railroad crossings must exit their vehicle and look for trains before proceeding.[19] Steven P. Scalet defends a "binocular view," in which juries are directed to understand the standard as "the act is reasonable if persons with the relevant characteristics in similar situations typically acted that way," and the legal process would clarify the relevant characteristics of the reasonable person so that "citizens can know where to look in society for its cues about legally appropriate behaviors and beliefs."[20]

For our purposes, the attractiveness of the reasonable person standard is that the jury derives it on the basis of its own assessment of the prevailing community norms, and it is better situated

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[17] Vidmar and Hans, ibid., at 270.
[18] See Brian Kalt, "The Exclusion of Felons from Jury Service," American University Law Review 53 (2003).
[19] 275 U.S. 66 (1927); Steven P. Scalet, "Fitting the people they are meant to serve: Reasonable persons in the American legal system." *Law and Philosophy* 22(1): 75-110.
[20] Scalet, *ibid*, 104.

than a judge to identify these norms. 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."[21] 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."[22]

These community norms, I will suggest, constitute an independent standard for the purposes of the modified epistemic argument here: the jury's aim is to determine liability in light of the standard of ordinary care they believe the community holds. Similarly, as we will see shortly, citizens (and their elected representatives) must be deemed competent to identify the constitutional 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 jury procedures

My claim here is not merely that the epistemic-egalitarian principle underlying the civil jury tracks the principle underlying democracy more generally, but that this principle underlies justified procedures. One feature of this procedure is random selection, which while essential on the jury model, may not be a procedural requirement of democratic decision-making more generally. But the civil jury is procedurally relatively egalitarian in two additional respects: 1)

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[21] Oliver Wendell Holmes, Jr., *The Common Law* (Mineola, NY: Dover, 1991), at 123.
[22] Harry Kalven, Jr., "The Dignity of the Civil Jury," *Virginia Law Review* 50:6 (1964), at 1058.

the standard of proof, and 2) the vote threshold. Taken together, these features reflect the procedural accommodation of risk of error, distributed far more equitably than under a criminal model. I believe these features, highlighting the provisional and iterated feature of decision-making, are essential for the justifiability of democratic decision-making: our procedures must reflect fallibility and allocate the risk of decision-making such that the status quo is not excessively privileged. But to explain how the principle of presumptively equal competence helps to justify a particular set of procedures, it is first helpful to look closely at the way in which judgments of civil negligence are rendered.

Standard of proof

The standard of proof for virtually all trials of civil negligence is preponderance of evidence. Preponderance is 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 (*Nishikawa v. Dulles*, 1958); deportation (*Woodby v. Immigration and Naturalization Service*, 1966); civil commitment (*Addington v. Texas*, 1979) and termination of parental rights (*Santosky v. Kramer*, 1982) The most stringent, required for criminal trials, is "beyond a reasonable doubt."

Jury instructions vary in how they characterize the distinctions among these levels, but the threshold is typically probabilistic without being quantitative; quantifying reasonable doubt in a criminal trial is grounds for the charge of prosecutorial misconduct. Tribe (1971) suggests, for instance, that the problem with specifying a requisite probability for "beyond a reasonable

doubt" (say, at 91%) signals to jurors that the existence of some measurable modicum of doubt at to guilt is permissible, reducing the standard below that of its legal intention. However, as Kagehiro (1990) has argued, jurors tend to have difficulty applying purely legal or colloquial definitions, emphasizing the relative difficulty of the different standards: for instance, "In our legal system, there are three possible standards of proof which can be applied to the plaintiffs [specified]. In this particular case, you are to use the standard of 'preponderance of evidence', which is the least difficult standard of proof that the plaintiffs [specified] must meet."[23] Jurors tend to perform better in terms of understanding and retaining "quantified definitions," expressing the standard in probabilities, as in "Preponderance of evidence means that, on a scale of 0% (not at all certain) to 100% (completely certain), you must be at least 51% certain of the truth of the plaintiffs' case before you give a verdict in favor of the plaintiffs" [71% for clear and convincing; 91% for reasonable doubt].[24]

The reasonable doubt standard remains opaque; the instructions vary substantially across jurisdictions. In *Victor v. Nebraska*, reasonable doubt was defined as "such a doubt that would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon."[25] In her concurrence, Justice Ginsburg pointed out that the "hesitate to act" was

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[23] Dorothy Kagehiro, "Defining the Standard of Proof in Jury Instructions," *Psychological Science 1,* 194-200.
[24] Kagehiro *ibid*. A judicial survey suggests that the "clear and convincing" standard might be characterized as 70% to 80% likely, increasing slightly the risk to the defendant of being erroneously found liable, but still biased clearly against the plaintiff (again, typically the government). See C.M.A. McCauliff, "Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?" 35 Vand. L. Rev. 1293; for an overview of the empirical research on standards of proof, see David L. Schwartz and Christopher B. Seaman, "Standards of Proof in Civil Litigation: An Experiment from Patent Law," *Harvard Journal of Law and Technology* 26:2 (2013).
[25] 511 U.S. 1 (1994), Federal Judicial Center, Pattern Criminal Jury Instructions 18-19 (1987)

misleading: "'because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives - choosing a spouse, a job, a place to live, and the like - generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases.'" As we will see, the prospective and risky nature of political decisions help to explain why civil jury procedures are helpful in anchoring our views of democratic decision-making more generally.

The role of the standard of proof in allocating the risk of false verdicts is ubiquitous in the Court's opinions concerning these standards. The aim of the "beyond a reasonable doubt" standard is to minimize the risk of false convictions, raising the risk of false acquittals. The court has held that the reasonable doubt standard in criminal trials is a constitutional requirement of due process, an "expression of fundamental procedural fairness."[26] The lower the standard of proof, the more equitable the assignment of risk; as such, the threshold diminishes to near equity in the case of the civil trial. Justice Harlan's concurrence in *In re Winship* makes this explicit:

> If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each. When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate

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[26] *In re Winship*, 397 U.S. 358 (1970).

> for, as explained most sensibly, it simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before (he) may find in favor of the party who has the burden to persuade the (judge) of the fact's existence.'"

This argument in favor of the use of standards of proof extends to the middle standard – "clear and convincing evidence" as well. In *Addington v. Texas*, the Court defended the clear and convincing standard for civil commitment on the grounds that the matter entailed a balance between the individual's interest in not being involuntarily committed and the state's interest in committing disturbed individuals, and that the "function of legal process is to minimize the risk of erroneous decisions."[27] Similarly, in *Santosky v. Kramer*, the Court found that due process also 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."[28] 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 risk of erroneous conviction ought to "exclude, as nearly as possible, the likelihood of an erroneous judgment." In *Ballew v. Georgia*, the Court characterized risk in terms of type I error (risk of convicting an innocent person), which rises as the size of the jury diminishes, and type II error (the risk of acquitting the guilty), which increases with the size of the panel.[29]

The second significant distinction among these standards concerns the extent to which the outcome ought to command our confidence in its justice; that is, it constitutes a signal to the wider community that the verdict is correct. Justice Brennan's opinion in *In re Winship* makes

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[27] 441 U.S. 418 (1970)
[28] 455 U.S. 745 (1982)
[29] 435 U.S. 223 (1978)

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."[30] 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."

For criminal trials, the "beyond a reasonable doubt" verdict is intended to constitute the strongest possible signal that the accused was rightly convicted. When the standard falls, the jurors' confidence in its determination of liability may also fall. Of course, it need not: a civil jury could in principle have confidence in the liability of a defendant beyond a reasonable doubt. But because the jury does not have an opportunity to convey this information, the signal it sends to the community as a whole via the preponderance standard is necessarily less robust than under reasonable doubt.[31] That the signal is weaker, as we will see, is crucial for the justifiability of democratic decision-making more generally.

Vote threshold

The standard of proof is one mechanism distributing the risk of erroneous verdicts and generating the perception that the verdict is fair. A second is the vote threshold, in conjunction with jury size. A unanimity requirement, as for criminal trials, again distributes the risk so as to minimize false convictions, while accepting a higher rate of false acquittals. Although the

[30] 397 U.S. 358 (1970).
[31] The Department of Education's Office of Civil Rights has required universities receiving federal funding to have their campus tribunals adopt a preponderance of evidence standard for sexual assault hearings, simultaneously reallocating the risk away from minimizing false convictions but reducing the strength of the signal as to the correctness of the verdict.

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 (*Johnson v. Louisiana*[32]; *Apodaca v. Oregon*[33]), assuming the size of the jury is not as small as 6 (*Burch v. Louisiana*[34]). 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, however, the matter is different. 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 cases; the threshold drops from unanimity to supermajority after six hours of deliberation in three states (Iowa, Nebraska, and Minnesota).[35] In a recent study of civil juries under unanimity and supermajority decision-rules, it is not clear that a lower threshold substantially altered the nature of deliberation or if the outcomes would have been manifestly altered under a different rule; there is some suggestion that jurors perceived debate as more comprehensive and open-minded under a unanimity rule.[36]

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[32] 406 U.S. 356 (1972)
[33] 406 U.S. 404 (1972)
[34] 441 U.S. 130 (1979)
[35] 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.
[36] Ibid.

Yet unanimity rules court a risk of coercion. 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.[37] 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.[38] 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. Remarkably, much of the literature on the jury unanimity requirement seems to regard this coercive potential as a benefit. Since more time must be expended to try to persuade the recalcitrant voter to alter her mind, deliberations are protracted; this ostensibly encourages all the jurors, even the non-talkative ones, to participate, and the quantity of speech in lengthy deliberations means that the evidence and the law gets a fuller hearing.[39]

Regardless of the distribution of views prior to final voting, the unanimity rule seems to induce a higher level of confidence in the correctness of the verdict on the part of the jurors than does supermajority rule, if on questionable grounds. Diamond, Rose, and Murphy (2006) demonstrate that verdicts reached under a supermajority rule seemed less legitimate, affirming Abramson.[40] 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

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

[38] This section draws on Schwartzberg, *supra* note 7. John Guinther, *The Jury in America* (New York: Facts on File Publications, 1988).

[39] Reid Hastie, Steven D. Penrod, and Nancy Pennington, *Inside the Jury* (Cambridge: Harvard University Press, 1983), at 76-78. See, however, Randolph Jonakait, *The American Jury System* (New Haven: Yale University Press, 2003), arguing that nonunanimous juries have not been shown to lead to shorter trials, at 98.

[40] Jeffrey Abramson, *We the Jury: The Jury System and the Ideal of Democracy* (Cambridge: Harvard University Press, 2001).

rules.[41] But because we do not know in any given case whether a unanimous verdict under a unanimity rule arose spontaneously or under coercion if agreement were generated by coercion, the signal sent by a unanimous verdict is ambiguous. A unanimous verdict under a supermajority rule, however, sends a strong signal of the jurors' shared confidence in their verdict, and the greater perceived legitimacy of such a verdict is not unwarranted.

From liability to legislative outcomes

As we have seen, the civil jury determines negligence on the basis of the reasonable person standard, as constructed by the jury on the basis of their sense of the community norms. Its verdicts are shaped by the preponderance of evidence standard, which equitably distributes the risk of erroneous verdicts, and by the higher acceptance of type I error, increasing the risk of erroneous findings of liability while protecting the capacity for dissent. My basic claim is that the reasons identified above for situating decision-making with a civil jury rather than a judge, and for rendering verdicts after deliberation with a relatively capacious accommodation of fallibility and dissent, track our justification for democratic decision-making more generally.

The defining feature of this account of democratic legitimacy is that it suggests that democratic procedures must evince respect for citizens as *equal judges*: that is, democratic procedures must respect the presumptively equal capacity of citizens to judge matters of common concern. I will spell out the core features of this model shortly, but just to highlight why

[41] 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).

this is a plausible model of democratic decision-making, let us turn to a brief example of how it might operate in the legislative domain.[42]

Take as an example the Affordable Care Act. There are two means by which we can explain the activity of citizens, and of legislators, with respect to a local standard. In the first place, constitutional commitments provide the background norms – analogous to community standards of ordinary prudence – that guide citizens and their representatives in framing their judgments, and the latter in bargaining their way to law. One might immediately object that citizens themselves may lack the technical knowledge to debate the question of whether the ACA mandate is permissible under the Commerce or Necessary and Proper Clause, or is it better justified as a tax. But Rebecca E. Zietlow has convincingly argued that the ACA served a compelling example of popular constitutionalism in action: Tea Party activists attacked the ACA as an "unconstitutional infringement of states' rights and individual liberty," whereas political advocates insisted that health care constituted a fundamental right that warranted protection by the federal government.[43] Ultimately, on her account, Congress recognized the existence of a fundamental economic right and expanded federal protection of that right, and it is only in response to court challenges that advocates of health-care reform resorted to defending the ACA under the Commerce and Spending Clauses.[44] Second, the public openly debated the need for health-care reform with respect to the commitments of the nation more generally: the concern that a single-payer system would entail an impermissible move toward socialism, the concern

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[42] At least for now, I take electoral representation – if rendered egalitarian, both across districts and in the effective ability to stand for office – to be consistent with this account of democracy, though there are surely reasons to worry that its aristocratic lineage and operation makes it incompatible. Random selection of legislators would be consistent with this model, but it is not yet clear to me whether it is obligatory.
[43] Rebecca E. Zietlow, "Democratic Constitutionalism and the Affordable Care Act," *Ohio State Law Journal* 72:6 (2011), pp. 1369-1370.
[44] Zietlow, ibid.

that a national public opportunity would erode federalism, and so forth. Members of Congress surely considered both the expressed preferences of their constituents, if not of the nation as a whole, both as a means of determining the feasible set of policies and – more significantly – eliciting their judgments of the policy that best promotes the interests of the community as a whole.

To clarify the force of this example, imagine a scenario in which the core aim of health-care reform is to reduce the number of uninsured citizens to zero, and the best way to achieve that is via a single-payer system. Yet (as polls suggest) the American public has repeatedly expressed its desire to preserve a system of private insurance and is fearful of the hypothetical threat of rationing under a single-payer system, but also recognizes that some reform is necessary to promote the community's interest in ensuring that most citizens have health coverage. The local standard, then, would not be the "best option" – a single-payer system – but the policy that best tracked the long-term commitments of the community, given the expressed judgments of the citizens.

There are three challenges that might immediately arise in response to this claim. The first is "epistocratic": if the optimal policy is single-payer, it ought to be imposed regardless of the demands of public opinion. One important objection – to which I shall return – is that doing so would disrespect citizens as bearers of judgments about their own interests and those of the community as a whole. But there are other, related problems, most seriously the problem of identification – how might we actually know that the optimal policy is single-payer? (There are other objections available, such as the inability of certain knowledge about the optimality of a policy *ex ante*, given knock-on effects and unintended consequences.) This information is necessarily elusive; the best we can hope for is that our legislation tracks the long-term interests

of the community as a whole, as judged by citizens and their representatives. Thus democratic procedures that emphasize the formation of high-quality individual and collective judgments – and which provide feedback as to the quality of policies once implemented – are essential.

The second is a metaethical challenge: does reference to local standards commit us to relativism? I believe this challenge need not disturb us here. First, it is of course possible that community norms do track universal moral standards about duties of care. Second, in the legal context, the existence of shared and secure expectations in a community is important: the existence of known practices in a community makes it possible to justly find someone liable for negligence. In the case of negligence, the community must share expectations about the duty of care that the defendant breached. Were there no such norms governing ordinary prudence, determinations of negligence would be entirely ad hoc and arbitrary.

The third challenge is serious: does positing a community's shared interests as the context in which democratic decision-making should occur produce domination, insofar as it seems to reify existing commitments and to crowd out pluralism? Recall the challenge of many scholars to the reasonable person standard on the grounds that it seemed to enshrine a particular vision of "person," one that failed to reflect the diversity of experiences and capacities of the members of a community. We might imagine this challenge to be that one, writ large: if we expect our legislators to rely on their own conception of community norms and judgments in creating laws, we will entrench these norms rather than enabling them to develop, and we will shield them from critical reflection. The work of Iris Marion Young informs this critique, but also points us to a response. In a characteristically incisive observation, Young wrote: "Reasonable people often have crazy ideas; what makes them reasonable is their willingness to listen to others who want to

explain to them why their ideas are incorrect or inappropriate."[45] They must be open-minded and willing to revise their commitments, including their conceptions of prior norms. Reasonable people aim at agreement, but they are aware that they may not succeed; as such, they require procedures that preserve the possibility of dissent. More generally, the best response to the pluralism challenge rests on egalitarian procedures, as we shall see in a moment.

The structure of judgment democracy

We can now isolate the central features of this theory of democracy:

1) The presumption that citizens are equally competent to judge within a particular domain, which supports the equal distribution of voting rights.
2) A "cognitive" account of voting, in which votes constitute expressions of judgment, both of the community standards themselves and the compatibility of a proposed policy with the preexisting standards.
3) A deliberative mechanism of judgment formation.
4) Defeasible majoritarian procedures, with only weak systematic biases in favor of one (status quo) outcome.

Let me take up these features in turn. Again, *the presumption of equal capacity for judgment* has a distinguished historical pedigree, dating to ancient Athens, but in the modern era, it has had important implications for the expansion of the franchise and jury service for racial minorities and for women. Most notably, putative claims of inferiority in judgment, manifested most

[45] Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002).

viciously in literacy tests, served to justify the exclusion of African-Americans from the polls. The presumption of equal judgment, as manifested in the equal allocation of voting rights and the equal probability of serving on a jury, is a defining feature of democracy; it is the requirement for manifesting respect for citizens as political agents. The jury – both civil and criminal – reflects this presumption through the use of lotteries for selection. 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 as presumptively interchangeable with respect to their capacity for judgment, and thus with respect.[46]

In defending the "Strong Principle of Equality," Robert Dahl argued similarly:

> If the good or interests of everyone should be weighed equally, and if each adult person is in general the best judge of his or her good or interest, then *every adult member* of an association is sufficiently well qualified, taken all around, to participate in making binding collective decisions that affect his or her good or interests, that is, to be a *full citizen* of the demos. More specifically, when binding decisions are made, the claims of each citizen as to the laws, rules, policies, etc., to be adopted must be counted as valid and equally valid. Moreover, no adult members are so definitely better qualified than the others that they should be entrusted with making binding collective decisions. More specifically, when binding decisions are made, no citizen's claims as to the laws, rules, and policies to be adopted are to be counted as superior to the claims of any other citizen."[47]

Many contemporary democratic theorists – from Charles Beitz to Ronald Dworkin – have resisted this assertion, often citing Mill's argument that "No one but a fool … feels offended by the acknowledgement that there are others whose opinions, and even whose wish, is entitled to a

[46] The use of *voir dire* is not, at least in principle, intended to exclude people on the basis of competence but to select an impartial jury.

[47] Robert Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989) at 105. The following several paragraphs are adapted from Schwartzberg, *Counting the Many* (*supra* note 2).

greater amount of consideration than his."[48] Dworkin, for instance, dismisses out of hand the idea that we might want equality of influence – "we want those with better views or who can argue more cogently to have more influence" – and has rejected the majoritarian premise on these grounds.[49] Indeed, Richard Arneson has held that the ostensible fact that citizens possess unequal capacity for practical and moral reasoning means that there is no right to any share – let alone an equal share – of political power, and thus democracy cannot be justified on intrinsic grounds.[50]

One way of defending the presumption of equal judgment is by arguing that there can be no fair test of competence. Jeremy Waldron, for instance, writes that "If the mark of wisdom is having come up with just decisions in the past, and people disagree about what counts as a just decision, then it is not clear how we can determine who is wise and who is not without failing in respect for persons [in the sense of recognizing the "burdens of judgment"]."[51] Similarly, Thomas Christiano has compellingly argued that generating a test of competence would necessarily generate disagreement over the appropriate criteria, and by accepting some members' criteria over others, we necessarily presuppose the merits of our judgment or of one set of citizens' judgments over what constitutes the appropriate dimension on which competence should be assessed – and thus the interests of one group over another.[52]

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[48] John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford World Classics, 1998) at 335.
[49] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), at 27.
[50] Richard Arneson, "Democratic Rights and National and Workplace Levels." In *The Idea of Democracy*, edited by David Copp, Jean Hampton, and John Roemer (Cambridge: Cambridge University Press, 1993).
[51] Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), at 114.
[52] Thomas Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2008).

Yet this concedes too much. It is not merely that the effort to determine who possesses these capacities entails "invidious comparisons,"[53] or as Amy Gutmann suggests, that because inequalities in the capacity for "rational planning and judicious behavior" are not associated with "easily discernible traits, with any class, ethnic, racial, or sexual characteristics of persons, … you cannot justly design political institutions that favor some groups over others."[54] The core problem is not that we could not design an adequate or generally acceptable test for the talents on the basis of which we could assign votes unequal weight. We could probably come up with a scheme for predicting the probable quality of judgments over different sorts of questions; neither the technical difficulties nor the normative liabilities might constitute an impermeable barrier. But the *assessment of competence* itself – subjecting citizens to scrutiny of their capacity for judgment – constitutes an infringement upon citizens' social basis of self-respect, to adapt Rawls' language. Elizabeth Anderson, in responding to the luck-egalitarian claim that the state should compensate the disabled, unintelligent, untalented, and the ugly for their misfortune, argues similarly, having sketched a hypothetical letter from the "State Equality Board" outlining to recipients the justification for sending them a check: "Could a self-respecting citizen fail to be insulted by such messages? How dare the state pass judgments on its citizens' worth as workers and lovers!"[55] Though granting unequal weight to voters constitutes judgment about their public

[53] Estlund, *supra* note 4, at 36.
[54] Amy Gutmann, *Liberal Equality* (Cambridge: Cambridge University Press, 1980), at 45. Gutmann's additional direct response to those who are critics of egalitarianism is more compelling – the key capacities for a well-functioning polity are those to abide by laws and to choose a "reasonable plan of life," as well as the capacities for "self-respect and human dignity," can plausibly be taken to be equally distributed. But the contention here is that the relevant consideration is indeed capacity for judgment, and that to treat members of a decision-making body as if these capacities in general were of unequal is indeed an affront to their dignity.
[55] Elizabeth S. Anderson, "What is the Point of Equality?" *Ethics* 109:2 (Jan. 1999), 287-337, at 305.

and political, rather than private, activities, Anderson's objection to the state habitually passing judgments on people's native endowments holds.

Second, judgment democracy 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."[56] The independent standard, as the civil jury illustrates, is best understood as existing communal commitments; jurors render judgments both about the requisite standard of care, and about whether the litigants have satisfied it. Returning to the example of the ACA, the standard is given by the long-term commitments of the community: the community's (plural) commitments within the domain of health care, and the constitutional limits setting the bounds of legitimate state action. The cognitive model does require that legislators form judgments among the set of feasible policies to determine the policy that will best comport with the shared commitments and interests of the community as a whole, and that the judgments of the long-term commitments are informed, if not wholly determined, by the expressed judgments of citizens.

One important question raised by the cognitive model of voting is whether individual preferences are impermissible guides to the compatibility of a particular outcome with the long-term commitments of the community, as Cohen suggests they might be. One possible response is to suggest that the determination of individuals' preferences or interests entails a cognitive process: "Citizens do not advance their interests directly; they advance what they believe to be their interests. So where there are conflicts of interests, they are conflicts between what citizens

[56] Cohen, *supra* note 5, at 34.

judge to be their interests."[57] A second response derives from Dewey, who defended the capacity of ordinary citizens to judge best "where the shoe pinches." Drawing on these responses and a wide literature about the value of "situated judgment," one might think 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*. This is for two reasons: deliberation improves the quality of judgment, and helps to reduce the propensity to identify either narrow or dominant-group conceptions of community standards. Both functions are essential to the epistemic-egalitarian commitments undergirding judgment democracy. Again, 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 the diverse and sufficiently large jury to promote deliberation. In *Williams v. Florida*, justifying a six-person jury, the court held that the size needed to be large enough "to promote group deliberation … and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six than when it numbers 12 -- particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size."[58] Yet in *Ballew v. Georgia*, striking down a five-person jury, the Court drew on empirical evidence arguing that the smaller

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[57] Christiano, *The Rule of the Many* (Boulder, CO: Westview Press, 1996), at 113.
[58] 399 U.S. 78

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.[59]

One concern is whether deliberation produces group polarization or other pathologies. In the context of civil trials, Cass Sunstein and co-authors have demonstrated the high degree of consensus (even without deliberation) among demographically diverse jurors in terms of their judgments that a defendant not only committed a tort, but did so in a wanton or willful manner that warrants some liability beyond compensatory damages. This is further evidence of the ability of jurors to draw consistently on a "bedrock of moral intuitions that are broadly shared in society."[60] Yet social consensus does not extend to the assignment of dollar awards, which are unpredictable; Sunstein et al. argue that this is in large part attributable to the lack of guidance in selecting a choice on an unbounded collar scale. Deliberation, Sunstein et al., exacerbates the gap between the consensus in judgments over liability and the erratic quality of damage assignment. Even without deliberation, Sunstein et al. hold, jurors may share judgments about the community norms that undergird findings of negligence, and so deliberation may at points be either supererogatory or even dangerous. Careful design of deliberative institutions would obviously be necessary. But as the empirical evidence drawn upon by the Supreme Court suggests, there are good reasons to believe that deliberation in civil juries enables the pooling of evidence, the reconciliation and challenging of competing narratives, and the checking of biases.

The language of deliberation may still produce skepticism among those who see Congress or politics more generally as a space of distributive conflict and competition over interests. One

[59] 435 U.S. 223
[60] Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade, and W. Kip Viscusi, *Punitive Damages: How Juries Decide* (Chicago: University of Chicago Press, 2002), at 35.

response is that deliberation may helpfully reduce and clarify the dimensions of conflict, even if we agree that the mechanism of judgment will ultimately be aggregative.[61] The second challenge entails a more comprehensive attack on the entire enterprise of using a jury to shed light on the normative justification of democratic decision-making. The argument, briefly, is that legislative politics entail bargaining, and a model of democratic decision-making drawn from a jury encourages us to abstract away from this fundamental mechanism. A civil jury ultimately seeks to make just determinations of liability; it may differ in procedure but only to a limited extent in aim from a criminal jury. A theory of democratic legitimacy drawn from the civil jury eschews the fundamental mechanism of democratic decision-making, providing a sanitized account of legislatures and of political conflict elsewhere in society.

I believe this constitutes an important objection to the line of argument I have developed in this paper. If bargaining is an inevitable – and perhaps even salutary – feature of democratic politics, it seems that turning to the civil jury will provide no room for it, and thus is doomed. One possible response is to accept that judgment democracy rejects bargaining, and serves merely as a regulative ideal for democratic decision-making. But a more attractive line of argument points us toward a fruitful avenue for normative inquiry, one informed by recent literature on the moral limits to markets.[62] As the ACA example suggests, one way to understand the claim that legislatures are tasked with identifying the background norms of the community is that these norms provide the space within which legislative bargaining over policy occurs. Although this is well beyond the scope of this paper, there may be normative constraints on what

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[61] Jack Knight and James Johnson, "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy," *Political Theory* 22 (1994).

[62] Debra R. Satz, *Why Some Things Should Not Be For Sale: The Moral Limits of the Market* (Oxford: Oxford University Press, 2010); Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Farrar, Straus and Giroux, 2013).

ought to constitute an enforceable political bargain, given deep and persistent power disparities. One can imagine, similarly, these constraints operating within both the criminal and civil justice systems, binding prosecutors in plea-bargaining, and constraining the permissible set of settlements within civil legislation among parties with highly unequal resources. For now, however, the primary observation is that democratic legitimacy does not *preclude* bargaining, even if it also does not require it.

Fourth, and finally, judgment democracy requires *majoritarian procedures*, with only weak systematic biases in favor of one (status quo) outcome. Even though the model of judgment democracy should be egalitarian - majoritarian procedures should be preferred on the grounds that they treat these judgments equally[63] - they may be defeasible, as in cases in which the community prefers to bias in favor of one set of judgments (as in the case of the jury, whether criminal or civil). High supermajoritarian amendment procedures reflect the view that constitutional norms need to have a strong bias in their favor, because amendment courts greater risk of error than entrenchment. This, I have argued elsewhere, in general is mistaken. To be sure, there are some norms that express fundamental commitments of the community – civil and political rights, for instance – and which may merit this bias.[64] In many other cases, though, norms do not merit such a bias in their favor. Given the possibility of "utility drift," failure to amend may create a greater risk of instability than amendment. The reason to emphasize the equitable allocation of risk is that it ensures the capacity to revise both particular policy

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[63] Contemporary sources for a defense of majority rule on egalitarian grounds would include Christiano, *supra* note 52 and 57; Dahl, *supra* note 47; Schwartzberg, *supra* note 2; and Waldron, *supra* note 51.
[64] Schwartzberg *supra* note 2, at 129, and chapters 5-7.

decisions, and, perhaps more importantly, to ensure that the presence of a local independent standard does not lead to domination.[65]

Judgment democracy vs. epistemic proceduralism

As I have suggested, epistemic democracy and judgment democracy have deep compatibilities, particularly in the cognitive account of voting. However, they depart from each other in crucial respects: whereas the independent standard on the orthodox epistemic model is correctness, judgment democracy radically deflates the standard to community norms; moreover, this standard is subject to ongoing reinterpretation and deliberate revision in a way that correct answers presumably may not be. But a more helpful contrast is with David Estlund's influential epistemic proceduralist model.

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,"

[65] The lower threshold – a supermajoritarian threshold on the civil jury, or a majoritarian threshold in other contexts – preserves dissent and weighs judgments more equally than a more stringently biased model, but one final question is whether doing so may reduce the quality of deliberation. There is some evidence that the duration of deliberation is decreased under a lower threshold. But if the reason why deliberation under the unanimity model is protracted is because it takes time to coerce dissenters into altering their view, there may be little loss and substantial gain to preserving the possibility of minority dissent. As we have seen, it is also possible that the interaction between the lowering of the threshold and the shortening of deliberation may lead to the perception that the verdict is less "legitimate." In the context of civil trials, governed by a preponderance of evidence standard, the hypothesized loss of legitimacy may not be grave, and may be importantly offset by the value of preserving the possibility of dissent and equalizing judgment.

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] Estlund argues that democratic authority operates similarly: political decisions made democratically bind us because they have some epistemic reliability, if perhaps less than a well-functioning criminal trial system.

One might immediately ask why, on Estlund's model, the alternative is not an experienced, highly educated judge: after all, we have reason to believe she will perform far better than random in producing substantively just verdicts, and potentially better than the jury in complex trials. Granting her authority would not obviously run afoul of Estlund's "qualified acceptability" requirement (particularly if we presume that the judge is not always a white male), which prescribes only that the exercise of political power be "justifiable in terms acceptable to all qualified points of view." Indeed, if we believe that the judge's expertise may enable her to outperform the jury, on Estlund's model, we have a moral duty to accept her verdict as binding. 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]

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[66] Estlund, *supra* note 4, at 156.
[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

Judgment democracy solves this problem, if in part by fiat. On the account I have offered here, the justification for situating authority with ordinary citizens – rather than judges – on a civil jury is indeed epistemic: Ordinary, equally-situated citizens are the best judges of community norms. One challenge to the overarching logic of the epistemic model of democracy is: how would you know whether a democratic outcome is correct such as to be able to justify decision-making by reference to its correctness? We have no independent access to the truth, neither about liability nor about the content of community norms. While Estlund recognizes this as an important challenge to a "substantive" model of epistemic democracy – in which legitimacy strictly derives from the identification of right answers - Estlund responds to this challenge by positing the authority of a procedure that will most reliably produce just decisions, again, as long as it is acceptable to all qualified points of view. Yet even on Estlund's own account, the only procedure for the determination of community standards that *would* be acceptable to all qualified points of view is egalitarian. The civil jury model helps to reveal the deep compatibility of egalitarian and epistemic procedures from the standpoint of democratic decision-making.

Identifying the equal-judgment basis of democratic procedures also helps to evade some challenges facing those defending pure-proceduralist models. It shows, for instance, why a coin-flip does not constitute a fair procedure: it is not responsive to the judgment of citizens. In a more complicated fashion, the equal judgment presumption also provides a response to an important objection to those defending majoritarian decision procedures: what if majority rule is used to disenfranchise minority voters, or to enact unjust laws? This requires several steps. First, one must admit at the outset that justifiable democratic decisions may be unjust – that legitimacy

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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.

and justice may come apart. (This is one reason to separate the question of political obligation from the broader question of political justification.) Yet, second, it is important to bear in mind that *any* procedure may yield unjust outcomes: no philosopher-kings dwell in our midst. And the value of a democratic procedure, on this model, is that these procedures accord the judgmental capacity for citizens the respect one would hope citizens extend to each other. In defending the ability of ordinary citizens and their representatives to render judgments about the scope and nature of constitutional rights – the apogee of community norms – Jeremy Waldron's signature insight holds. 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."[68]

Is there an impermissibly high risk of error – of 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, constitutional norms in principle merit a bias in favor of their protection against the risk of erroneous repeal. Because no norm is guaranteed to yield just outcomes (especially once interpreted), though, 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. Justification derives from citizen and/or legislative participation in the activity of recreating standards; when these standards may no longer remain subject to meaningful citizen judgment and revision, they become unjustifiable on democratic grounds.[69] The epistemic egalitarianism of judgment democracy, then, helps to provide a principled foundation for the important historical and

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[68] Waldron *supra* note 51.
[69] See Schwartzberg, *Democracy and Legal Change* (New York: Cambridge University Press, 2007).

institutional insights of popular constitutionalists such as Bruce Ackerman, Elizabeth Beaumont, Larry Kramer, and Mark Tushnet, among others.

Conclusion

I have argued that reflection upon the civil jury sheds light on a distinctive theory of democratic legitimacy. The core of this theory is the principle of presumptive equal capacity for judgment, and my argument is that a particular set of egalitarian procedures – notably, the ongoing deliberative and (defeasibly) majoritarian activity of identifying anchoring community standards and of evaluating proposed decisions against these standards – best instantiate this principle.

The civil jury, in decline globally and at home, remains an unlikely source for democratic theory. Yet its ostensible faults – inexpert rulings, ongoing and flexible determination of community standards, non-unanimous thresholds – become distinctive benefits for democracy more generally. The civil jury recognizes both the moral and the epistemic value inherent in empowering ordinary citizens to serve as the arbiters of community standards; these two distinct merits of the jury procedure are unified by a democratic commitment to equal judgment. How robust this commitment must be, and how far this model can travel, remains for further inquiry.