Civil Juries and Democratic Legitimacy

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Since antiquity, two capacities have characterized democratic citizenship: the ability to vote (as a member of an assembly or for representatives) and the ability to serve as a juror. It is not obvious that these two capacities should be linked, as they seem to entail two quite different types of judgment. It would seem at first blush that the vote entails a judgment of one’s own interest or preferences, and jury service the ability to render an impartial judgment concerning whether an individual should be held responsible for wrongdoing. 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. The question of how and why these capacities were twinned – and why the qualifications for the performance of one historically did not necessarily track the other – is important. But my focus here will be on jury service, and the wider normative logic of the civil jury in the contemporary United States, while emphasizing how that logic might lead us toward a justification of democratic institutions more generally.

1 Working paper; comments and suggestions very gratefully received at ms268@nyu.edu. Earlier versions of this paper were presented at the Harvard Law and Philosophy Colloquium, the Washington University Workshop in Politics, Ethics, and Society, the Princeton Program in Ethics and Public Affairs, and the Berkeley Workshop in Law, Philosophy, and Political Theory; I thank participants at these workshops for helpful criticisms and suggestions. My interest in the civil jury arose under the auspices of the Andrew W. Mellon “New Directions” Fellowship, which I undertook at New York University School of Law; I thank the Mellon Foundation, and Rachel Barkow, Sam Issacharoff, Daryl Levinson, Trevor Morrison, and Catherine Sharkey for their courses and valuable conversations (and who are of course blameless for any errors). I am also grateful to Nicholas Almendares, Steven Kelts, Jeffrey Lenowitz, Chris Kutz, Claudio Lopez-Guerra, Bernard Manin, Ryan Pevnick, and Annie Stilz for their comments.
Note, first, that the broader societal interest (or the recognized interest of defendants) in having justice rendered by “peers” rather than judges did not automatically result in the equal allocation of the right to serve on a jury. As Akhil Amar has argued, the only right secured in all state constitutions drafted between 1776 and 1787 was the right to a jury trial in criminal cases.\(^2\) Three amendments in the Bill of Rights explicitly protect the jury: the Fifth Amendment criminal grand juries, the Sixth criminal petit juries, and the Seventh civil juries. Yet the colonies restricted jury duty to white male property holders, and though African-Americans in the United States received the right to vote under the Fifteenth Amendment, only in *Strauder v. West Virginia* (1880)\(^3\) and companion cases did the Supreme Court recognize their right to serve on juries. Though women received the right to vote under the Nineteenth Amendment, only in *Taylor v. Louisiana* (1975)\(^4\) did the Supreme Court deem unconstitutional the exclusion or automatic exemption of women from juries. 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. So in the United States, the right of citizens to serve as jurors is relatively recent in origin, and remains limited: felons, and those incapable of speaking or understanding English, are among those whose may be denied the right to serve.

Note also that the justifications for the jury more generally do not neatly track the justifications for *jury service*. For instance, the key argument on behalf of 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. And there still surely is merit in the view of jury as protector: the jury, especially in the criminal context, may


\(^3\) 100 U.S. 303

\(^4\) 419 U.S. 522
still be an “inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, and or eccentric judge.” But this claim – the instrumental value of laypersons for the defendant – does not seem to support the identification of jury service as a key right of citizens. In particular, why would we want civil juries, when the stakes are typically lower for the defendant than in a criminal trial, and in the wide array of cases in which we have no reason to believe that the plaintiff will be more powerful than a defendant?

My argument is that the core (though not sole) justification for the civil jury as an institution is epistemic, meaning that we believe ordinary citizens are best situated to judge these cases. If we failed to believe – indeed, as a great many people do – that the jury were competent to render just verdicts, we would need to situate this judgment elsewhere, even if we thought that juries were valuable for other reasons. That is, “epistemic proceduralists” are basically correct in their account of why the verdicts of juries are authoritative. 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.” This model, Rawls suggested, could travel from the jury context to the just constitution: the just constitution would be “more likely than any other” to produce just and effective legislation. Similarly, David Estlund’s model of epistemic proceduralism holds that both jury verdicts and

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5 Duncan v. Louisiana, 391 U.S. 145 (1968)
6 In his dissenting opinion in Powers v. Ohio, Justice Scalia claimed similarly that an excluded juror does not have a clear cause of action, arguing: “All qualified citizens have a civic right, of course, to serve as jurors, but none has the right to serve as a juror in a particular case. … [Batson] announced an equal protection right, not of prospective jurors to be seated without regard to their race, but of defendants not to be tried by juries from which members of their race have been intentionally excluded.” (499 U.S. 400, 424-6).
democratic laws are “legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions.”

But this “epistemic proceduralist” argument can only carry us so far. Notably, it cannot provide a justification for the equal right to serve as a juror. Again, were experienced judges to render superior verdicts, the epistemic proceduralist would have no cause for objection. Indeed, because of the complexity of many civil trials, 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. Were this true, the epistemic proceduralist must accept that citizens have no right of judgment in civil cases. So there could, in principle, be a tradeoff between society’s interest in justice and the right of citizens to judge. If we believe, however, that a defendant’s right to a fair trial is compatible with the citizen’s right to serve as a juror - that at least in certain domains there is, at least in principle, no tradeoff - we must also believe that ordinary citizens do in fact render good judgments in those domains.

Because the civil jury is dispensable – as evidenced by the fact many durable democracies long ago dispensed with it – the justifications for its retention are all the more significant. My central claim is that the reason why we believe the civil jury is justified – indeed, perhaps required – is that we believe that the epistemic burden in the determination of negligence, in particular, is best met by a diverse jury composed of equally-situated citizens. Once we deem (local) citizens optimal judges of the tort of negligence, to avoid epistemic disrespect, citizens must possess the right to jury service on broadly equal terms. My aim, then, is to show how the design of an existing democratic institution reflects a particular normative commitment to

“epistemic-egalitarian proceduralism.” This historically robust commitment, broadly speaking, entails the view that procedures that treat citizens with equal respect for their judgment are most likely to yield just outcomes.

The procedures of the civil jury shed light on how citizens exercise a distinctive form of judgment, but one that scales up remarkably well. In negligence trials, the jury first identifies a standard of due care for a particular practice, and then evaluates 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. I will argue that the normative logic in support of the civil jury also helps to vindicate popular constitutionalism.

As a caveat, I hasten to add that the arguments here are intended not to vindicate the civil jury as the triumph of democratic decision-making, much less the broader tort system: there are serious objections that can be leveled against the civil jury. However, because the United States remains bound to the civil jury – even if the vast majority of civil cases settle out of court – my aim will be to examine what the normative commitments underlying that institutional choice might be, and to see how far these commitments can take us.

The reasonable person standard and negligence trials

Although the judgment of ordinary citizens is crucial in the determination of negligence, it has remained almost entirely unexamined by democratic theorists.10 Negligence is a tort, a civil

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10 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,
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 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. 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. 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”), or whether the demands of corrective justice 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.

11 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).


entails holding a defendant responsible for “failure to exercise reasonable care . . . [in the sense of] a failure to abide by governing community norms,”14 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”). 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.

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.16 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’

16 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).
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…”17 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.”18 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.19

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

17 N.Y. Pattern Jury Instr.--Civil 2:10 (3d ed. 2000); see also Kelley and Wendt, supra note 12 at 595.
18 Kelley and Wendt, supra note 12, at 608.
norms.\textsuperscript{20} 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 for the community, the representative jury reflects current local expectations about duty and responsibility.”\textsuperscript{21} 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,\textsuperscript{22} and victims of similar crimes are likely to be excluded during \textit{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 \textit{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.\textsuperscript{23} 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

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\item \textsuperscript{20} Neil Vidmar and Valerie P. Hans, \textit{American Juries: The Verdict} (Amherst, NY: Prometheus Books, 2007).
\item \textsuperscript{21} Vidmar and Hans, ibid., at 270.
\item \textsuperscript{22} See Brian Kalt, “The Exclusion of Felons from Jury Service,” American University Law Review 53 (2003).
\item \textsuperscript{23} 275 U.S. 66 (1927); Steven P. Scalet, “Fitting the people they are meant to serve: Reasonable persons in the American legal system.” \textit{Law and Philosophy} 22(1): 75-110.
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characteristics of the reasonable person so that “citizens can know where to look in society for its cues about legally appropriate behaviors and beliefs.”

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 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.” 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.”

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.

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24 Scalet, *ibid*, 104.
Civil jury procedures

The justificatory logic of civil trials rests not merely on their probability of yielding just outcomes, but the equal respect these procedures evince for jurors’ judgment. Random selection of jurors is perhaps the most obvious manifestation of procedural egalitarianism. But the civil jury reflects a commitment to procedural equality in two additional, if considerably more complex, respects: 1) the standard of proof, and 2) the vote threshold. In the civil trial context, to be sure, both of these features are intended primarily to yield just outcomes. But considered from the vantage point of the juror, they also instantiate equal respect for jurors as they shoulder what we might construe as the moral burdens of judgment. But to explain how the principle of equal respect for judgment 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.”

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].

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


\[28\] 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).
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.”

In her concurrence, Justice Ginsburg pointed out that the “hesitate to act” was 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.” Risk and uncertainty, of course, characterize democratic decision-making more generally; in part for this reason, the civil jury constitutes a more promising locus than the criminal jury to examine the construction of judgment.

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 decrease the probability of false convictions, while accepting a higher likelihood 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.”

The lower the standard of proof, the more equal the distribution of the risk of error, and a preponderance of evidence standard thus treats the litigants as equals with respect to this allocation of risk. This claim is made explicit in Addington v. Texas, holding that the “litigants thus share the risk of error in roughly equal fashion” in in civil cases, whereas in criminal justice, “our society imposes almost the entire risk of error upon itself.” (441 U.S. 423-4) 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.”31 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.”32 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.” 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.33

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 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

31 441 U.S. 418 (1970)
33 435 U.S. 223 (1978)
whether innocent men are being condemned.” 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. That the signal is weaker, as we will see, is important for the epistemic-egalitarian justification of the civil trial.

From the litigants’ perspective, the preponderance of evidence entails a sort of equal treatment of plaintiffs and defendants with respect to the costs of error: the costs of false positives (a verdict of liability when the facts do not warrant recovery) are set equal to the costs of false negatives (a verdict of no liability when the facts do warrant recovery). In David Kaye’s words, “By giving equal weight to each type of error, and letting the errors fall where they may, we demonstrate equal concern and respect for plaintiffs and defendants alike.” Service on a civil jury, then, entails the activity of demonstrating equal concern and respect for both sides. It entails the opportunity to engage in the morally serious activity of judgment from – at least prior to the

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35 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.
beginning of the trial – an impartial perspective: that the defendant is as likely to be right as wrong. It also entails the acceptance of fallibility, the possibility of error, with equanimity, as the costs of error, while perhaps serious, are lighter than those associated with wrongful conviction. As Justice Ginsburg suggested, the serious decisions we typically undertake are accompanied by uncertainty and risk-taking, and the open acknowledgment that civil trials often reflect considerable uncertainty may help to alleviate the anxiety jurors have perhaps always felt in rendering verdicts in criminal trials.

**Vote threshold**

The standard of proof is one mechanism allocating the social and moral costs of erroneous verdicts, and generating the perception that the verdict is fair. Another is the vote threshold, in conjunction with jury size. 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 (*Johnson v. Louisiana* 36; *Apodaca v. Oregon* 37), assuming the size of the jury is not as small as 6 (*Burch v. Louisiana* 38). 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

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36 406 U.S. 356 (1972)  
37 406 U.S. 404 (1972)  
38 441 U.S. 130 (1979)
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).\(^{39}\) 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.\(^{40}\) 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.\(^{41}\) 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.\(^{42}\) 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


\(^{40}\) Ibid.


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. 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. 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. But because we do not know in any given case whether a unanimous verdict under a unanimity rule arose spontaneously or under 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.

Verdicts on a civil trial, then, emerge from the preponderance of evidence standard, indicating the relatively equal distribution of the costs of error, and the weaker vote threshold, indicating the acceptance of disagreement and, with that, the potentially lower degree of confidence in the outcome. So the basic normative logic is the following. Jurors are tasked with identifying community standards and evaluating a defendant’s behavior with respect to those

43 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.
standards, but their judgments are recognized as fallible (preponderance standard), and individual jurors are able to signal disagreement (supermajority rules) with the verdict. The “epistemic proceduralist” justification holds that the civil jury trial constitutes a *fallibly reliable* means of identifying community standards and liability; epistemic-egalitarian proceduralism holds that the reliability of the verdict derives from having been produced by a procedure in which ordinary citizens participate on equal terms.

But here we turn again to the means by which the civil jury trial simultaneously affirms respect for *jurors*. The civil jury protects the right of dissent on the part of jurors, reducing the risk of coercion. And deliberation enables the jury not only to render superior decisions about the content of these standards and the compatibility of the defendant’s behavior with those standards, but treats the jurors respectfully as bearers of judgment. The contrast with the criminal jury is here revealing. Whereas the criminal jury might yield just verdicts – biased by the reasonable-doubt standard in favor of acquittal – it is in this sense *less* respectful of the interests of jurors in remaining free from coercion and signaling their dissent. And because the burden of proof lies with the prosecution for criminal cases, the jury itself is not encouraged to treat the prosecutor and the defendant with equipoise, as if their positions *ex ante* merited equal consideration. So in the criminal case, the tradeoff between the interests of the defendant and the interests of the juror is resolved in favor of the defendant, whereas in the civil case (on this slightly stylized model) there is in principle no tradeoff: those features of the trial that conduce to just outcomes also conduce to respectful treatment of jurors. Let us now see how these two features – epistemic proceduralism and equal respect – fit together.
Civil trials and democratic legitimacy

My aim has not been to defend the civil jury as such, but to sketch how a stylized model of the civil jury exemplifies a particular logic of democratic judgment. As I have already argued, jury trials are typically 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, of course, 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, perhaps 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 at least in principle equally situated to judge (in this case, the prevailing standards of care within the community). Again, 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 authority 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 them to coercion via the unanimity rule – 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 democratic justification of the civil jury derives from the fact that its procedures: 1) depend for their epistemic value on the judgment of ordinary citizens; 2) are designed to treat the plaintiff and defendant equally with respect to the allocation of the risks of error; and 3) treat citizens with equal respect for their judgment throughout the decision procedure. The particular procedures may vary, in part because the types of questions posed by these institutions (e.g., legislatures) will differ, a point to which I shall return shortly. (My broader contention, which I cannot defend here, is that the right to vote reflects a different type of equal-epistemic respect – equal respect for citizens’ capacity to judge their own interest.) But it might – perhaps surprisingly - travel nicely to the constitutional setting, because the structure of judgment parallels that of the civil jury. First, however, let us examine the account of justifiable democratic decisions derived from the civil jury (which I shall term the “judgment model” of democratic legitimacy) more closely. The core features of justifiable decisions on this model are as follows:

1) The principle of equal respect for citizens in their capacity as judges
2) A “cognitive” model of decision-making (voters judge, in this case, the prevailing standards in a community and the defendant’s liability; in other domains, they may judge their own interests, or the community’s interests)
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 in their capacity as judges? One way to get at this thorny point is to think about what disrespectful treatment – a form of epistemic injustice – would entail. As described above, the history of exclusions from jury service are revealing on this point: the acquisition of the right to serve was hard-fought, and the reasons for the exclusion of racial minorities and women were largely based on their supposed inferiority, and the justification for its extension entailed a claim from equal respect. In Strauder v. West Virginia, 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 place: “practically a brand upon them, affixed by law, an assertion of their inferiority.” 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.” Again, only in Taylor v. Louisiana (1975) did the Court deem unconstitutional the exclusion or automatic exemption of women from juries. 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

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46 100 U.S. 303 (1879)
47 Strauder at 308.
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 – indeed, 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 legitimacy 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.” The independent standard, as the civil jury illustrates, is best understood as existing communal commitments: it is thus a “deflated” epistemic standard, reflecting not necessarily correctness as such, but correspondence with existing norms. Jurors render judgments both about the requisite standard of care, and about whether the litigants have satisfied it. As I have suggested en passant, although voting itself does also entail the activity of judgment, I would not argue that the vote need or should take the form of determining whether a policy tracks an independent standard. But the example of the civil jury’s determination of negligence supports the view that at least some citizen judgments do take the form 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.)

Drawing on 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

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48 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.

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 conceptions of community standards. 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.”50 Yet in *Ballew v. Georgia*, striking down a five-person jury, the Court drew 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.51 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

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50 399 U.S. 78
51 435 U.S. 223
experience, and that deliberative participation in the jury may increase the probability of participation in other areas of public or political life.\textsuperscript{52}

Fourth, and finally, this account of justified democratic decision-making requires \textit{majoritarian procedures}, with only weak systematic biases in favor of one (status quo) outcome. Although majoritarian procedures should be preferred on the grounds that they treat these judgments equally,\textsuperscript{53} they may be defeasible, as in cases in which the community regards the costs of some errors (convicting the innocent; eliminating fundamental rights) as substantially greater than the costs of others (acquitting the guilty; protecting defective norms). As we will see in a moment, 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. As a general presumption, this is mistaken, as I have argued elsewhere. 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.\textsuperscript{54} 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 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

\textsuperscript{52}See John Gastil, et al., \textit{The Jury and Democracy} (Oxford: Oxford University Press, 2010).
\textsuperscript{54}Schwartzberg \textit{supra} note 42, at 129, and chapters 5-7.
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. 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 perceived legitimacy may not be
grave, and may be importantly offset by the value of preserving the possibility of dissent and
equalizing judgment.

So the central claim of this “judgment model 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 ‘judgment 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 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 has described 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. Others, especially Larry Kramer, Mark Tushnet, and Jeremy Waldron, have argued 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. 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. 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 ensuring that the Constitution “register[s] the considered judgments of We the People of the United States.” 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

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58 Ibid. at 410.
the People” that entails an appeal to a majority vote of the electorate for amendment. Wol 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.”

The justification for popular constitutionalism, I believe, closely tracks the account I have offered of the civil jury. 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.

If the judgment model reflects the view that 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? Elsewhere, I have sketched complex-majoritarian amendment procedures. At a minimum, they must be deliberative, entailing both deliberative assemblies at the local, state, and

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60 Jeremy Waldron, supra note 53, at 252.
national level, as well as a national educational campaign providing materials about the costs and benefits of proposed amendments. Their aim must be to elicit high-quality discussions about the reasons for and against proposed amendments among the citizenry as a whole.\(^{61}\)

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 may no longer remain subject to meaningful citizen judgment and revision, they become unjustifiable on democratic grounds.\(^{62}\) The epistemic egalitarianism of the judgment model of democratic legitimacy, then, helps to provide a principled foundation for the important historical and institutional insights of popular constitutionalists.

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\(^{61}\) Schwartzberg, *supra* note 42, at 188.

Challenges to the judgment model of democratic legitimacy

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 judgment 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.” Note that, on Estlund’s account, the egalitarianism here derives from the concern about invidious comparisons – the inability to fairly determine who possesses superior 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 an *epistemic-egalitarian proceduralism*. On any epistemic proceduralist account, if we believed that judges (or monarchs) would yield better outcomes for

63 Estlund, note 8, at 156.
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. Indeed, the long history of democratic institutions reveals that the allocation of citizen rights depends upon the presumption that ordinary citizens are competent to render judgments; if we dispute this view, we may no longer be democrats. It is for this reason that Larry Kramer describes supporters of judicial supremacy as “today’s aristocrats.”

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? We cannot here address this question at length. One might note that, 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

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64 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.  

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.” 66
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.” 67 In a subsequent ruling, New York Judge Leland DeGrasse struck 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.” 68 Insofar as we recognize that democratic legitimacy
depends upon demonstrating equal respect for citizens’ capacity for judgment, the injustice of
unequal educational opportunities becomes quite stark. 69 So situating democratic legitimacy
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 justification for democratic decision-making differ from other egalitarian
accounts of proceduralism? It demonstrates, for instance, why Estlund’s argument that a coin-flip

623-648, at 635.
67 Campaign for Fiscal Equity, et al. v. The State of New York 86 N.Y. 2nd 316
68 Campaign for Fiscal Equity, et al. v. The State of New York 100 N.Y. 2nd 893
69 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).
would be a fair procedure fails as account of justifiable democratic procedures.\textsuperscript{70} The coin-flip is insensitive to reasons; 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.\textsuperscript{71} The coin flip may be a fair procedure insofar as it yields unbiased outcomes, but it fails to treat people respectfully as bearers of judgment; that is, although it treats these judgments equally – it ignores them all – it is uniformly disrespectful.

Simultaneously, however, this justification provides a distinctive response to the “substantive” objection to proceduralism: the risk that democratic procedures may yield unjust outcomes. Indeed, one must admit at the outset that a proceduralist justification entails 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.) Yet it is also 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. Is there an impermissibly high risk of error – of failure to recognize the equal status of citizens \textit{qua} judges in substantive legislation – on this theory? Here is where the distribution of biases becomes important. Like the bias against erroneous conviction, constitutional norms in principle merit a bias in favor of their protection against 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 \textit{de facto} unattainable or sufficiently high to preclude meaningful efforts at revision. Justification derives from citizen and/or legislative participation in

\textsuperscript{70} Estlund \textit{supra} note 8, at 107.
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.\(^{72}\)

Finally, why *epistemic* egalitarianism? One reason is historical: the struggle for citizen rights has long entailed the effort to be taken seriously as a judge 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.) Epistemic-egalitarian proceduralism, 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, we should – and often do – presume that equally-situated citizens are the best judges of the answer to this question.

In the case of ordinary politics, however, the questions might be quite different: “Do you believe that this representative will serve as the best advocate for your interests?” Or: “Do you believe that this piece of legislation is in your own interest?” Or even, if more tendentiously: “Is it in the community’s interest?” Epistemic egalitarianism here simply insists again that we must presume that citizens themselves – or, perhaps, their elected representatives – are competent, if fallible, judges of the answers to the various questions posed to them. It maintains that

democratic procedures yield outcomes that are authoritative because they treat citizens respectfully in virtue of this capacity for judgment.

**Conclusion**

I have argued that reflection upon the civil jury sheds light on a distinctive theory of democratic legitimacy. Because the civil jury might be regarded as an inessential democratic institution – as it is in decline both globally and within the United States – it provides a unique vantage point for normative theorizing. The structure of the argument here has been the following: (1) if we believe we should have a civil jury, it should be because we believe it is the institution most likely to yield just outcomes in civil trials (epistemic proceduralism); (2) the probability of yielding just outcomes derives from its *egalitarianism*, insofar as judgment lies in the hands of ordinary citizens, who are local experts of community standards (epistemic-egalitarian proceduralism). Yet (3) the choice of a civil jury – opening the opportunity for judgment to ordinary citizens – also creates a corresponding right on the part of citizens to serve as civil jurors; excluding citizens from jury service constitutes a form of epistemic disrespect. Finally, (4) demonstrating equal respect for citizens’ capacity for judgment also entails a thicker set of commitments, including the ability to exchange views via deliberation, to dissent from verdicts with which they disagree, and to remain free from coercion as they render judgments.

My broader aim here has been to emphasize the link between epistemic and egalitarian justifications in democratic decision-making. Whereas epistemic justifications are necessarily contingent upon domain and context, and do not inevitably support democratic decision-making, egalitarian justifications for democracy may be deracinated or self-defeating, in which
inegalitarian institutions are deemed essential to yield egalitarian outcomes. Turning to the civil jury provides some support for the view that, within democracy, egalitarian and epistemic justifications operate in tandem. But demonstrating that the link between these justifications constitutes a necessary, and not merely contingent, element of democratic legitimacy must remain for future investigation.