

Democracy, judgment, and juries

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The democratic character of juries has long been heralded. Aristotle famously identified a democratic citizen as one who is eligible to serve as a juror (*dikastes*) as well as a member of the Assembly, and the Athenian jury is frequently invoked as the fundamental democratic institution of Athens, partially because it heard the political trials that served as a means of political control.² In the modern era, Tocqueville highlighted the role of jury service in enabling the moral and intellectual development of citizens, giving them the “habits of mind” that “best prepare the people to be free” and could temper the risk of tyranny of the majority.³ Contemporary democratic theorists focus on the jury as a model of robust deliberation, in part because (optimally) citizens find themselves in conversation with people from different perspectives and backgrounds, and seek to draw upon these benefits in designing citizens’ juries to evaluate policies.⁴ Today, scholars and civic groups promoting jury service emphasize its democratic potential to transform citizens’ self-understanding and engagement.⁵

Although there can be no doubt that the jury is an important political institution, it is less clear whether it is a *democratic* one as such. To make an obvious point, eligibility for jury service has often been restricted – indeed, in the United States, participation on a jury was essentially limited to “key men,” or elite members of a community, until the 1960s, on the grounds that jurors ought to possess superior intellectual and moral faculties.⁶ More significantly, the aim of a jury is explicitly epistemic – it seeks to determine guilt or innocence⁷ – and the activity of other democratic institutions is only controversially so. Although, following

David Estlund, one might argue that democratic legitimacy derives from procedures tending to produce correct outcomes,⁸ few today would argue that modern legislatures should set aside preferences and interests entirely and aim at truth, or even seek in a Rousseauian fashion a uniquely correct answer to the question of the content of the general will.⁹

It is not clear, then, that the romantic conception of the jury as the exemplar of democracy is meaningful in any real sense. To the extent that the link between the jury and democracy is significant, moreover, it seems to derive from nonessential practices – such as deliberation – or from normative byproducts, such as the political legitimacy that may derive from widespread participation in a civic activity. To argue that the jury is a fundamental democratic institution, it must be because of something in its core activity – judgment of guilt or innocence – not because of one of its secondary practices or byproducts. Further, one can argue that the jury is *beneficial* to democracy without arguing that the jury itself is a democratic institution, just as one can argue, for instance, that a relatively small territory is beneficial to democracy without claiming that such a geographic phenomenon is itself democratic.

To consider what it would mean for a jury to be a democratic institution, I turn to the construction of models of judgment, seeking to determine whether one mode by which jurors might form judgments has greater democratic potential than another. To develop these models, I take up three dimensions of the formation of judgments on the part of jurors. The first is the presence or absence of “local knowledge” of three different forms: private knowledge about the case; public knowledge in the form of rumor or reputation about the case; and public knowledge in the form of knowledge of local conditions and circumstances in a given community in which the crime occurred. As we will see, historically, knowledge of the circumstances of the case and of the character of the defendant more generally was considered an affirmative good – a

qualification for service rather than a disqualifying attribute. Moreover, the idea of a jury of one's peers had as a feature one's geographic proximity. Today, however, local or private knowledge is considered unacceptable and grounds for juror exclusion, and geographic proximity is sometimes deliberately countered by moving the venue of a trial outside of an area where local knowledge of the trial is considered sufficiently robust so as to distort the capacity for impartiality. Adapting Bryan Garsten's language,¹⁰ I will refer to this dimension as the *situatedness* or *nonsituatedness* of judgment.

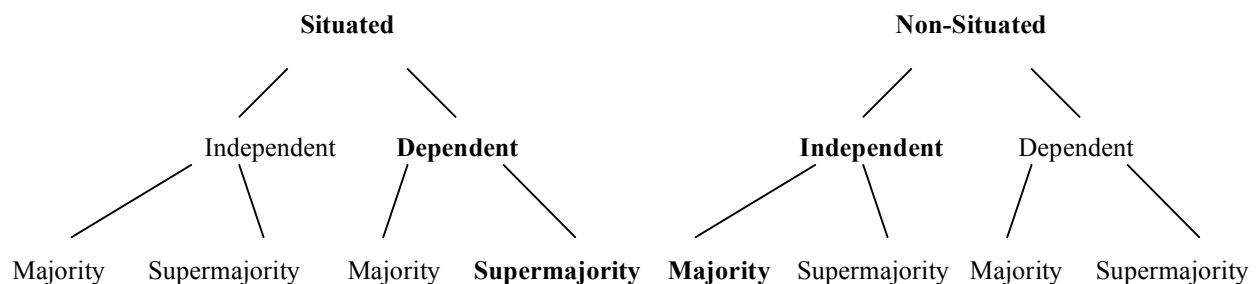
The second dimension I will examine is the question of whether deliberation ought to be permitted. To be sure, arguments for the educative effects of juries today usually rely on the experience of deliberating with fellow jurors. As mentioned, salutary effects are found both in the activity of deliberation – of exchanging reasons and arguments – and in the experience of interacting with jurors from diverse background. The purportedly superior quality of outcomes preceded by deliberation is familiar terrain. But deliberation has not, historically, been a critical feature of jury decision-making. Indeed, the most famous theoretical argument concerning juries, the Condorcet Jury Theorem, excludes deliberation, and not every jury cross-nationally is deliberative. The choice whether or not to enable deliberation depends upon the extent to which we want individual judgments to be transformed (or, put negatively, to be contaminated) or to remain independent, which in turn depends upon on the question of whether the trial conveys all the information necessary for a juror to judge well. Are there questions – e.g., the relative credibility of witnesses, the plausibility of an alibi – that an individual juror might not be able to evaluate as well independently as she would upon hearing the perceptions of others?

To adopt the standard example of jury deliberation, the climactic moment in *Twelve Angry Men* in which Juror #8 pulls out the switchblade to demonstrate the possibility of

purchasing an identical knife to the one used in the murder constitutes an example of having one's judgment altered by the distinctive experience of another juror. Since it is far from clear that such stunts are desirable, the question of whether deliberation actually enhances jurors' judgments is open. Here I do not seek to rehash the debate over the consequences of deliberation, but wish to show instead that permitting deliberation rests upon a view that individual-level judgments following a trial are not only imperfect, but that they could be improved through exchange of information. I will call this dimension the *independence* or *dependence* of judgment. Our answer to the question of whether judgments shaped by deliberation are more or less accurate or just than those free from deliberation, I will suggest, is linked to the prior question of whether we want our views to be conditioned by outside knowledge, as the situated model recommends.

The third dimension I examine is the decision rule governing the jury verdict. The epistemic reliability of a decision rule depends in turn upon the nature of the judgments it seeks to capture and to convey. For instance, if the preferred model of juror judgment is *independent*, a simple-majority threshold as prescribed by the Condorcet Jury Theorem may be preferable to preserving a minority veto – assuming that the jurors are assumed to be competent, enabling a minority to veto the presumptively correct outcome of a majority vote would be incoherent. However, if the preferred model is *dependent*, a supermajoritarian threshold may ensure that general consensus on the verdict has been reached. Although unanimity has a very long pedigree in the context of juries, dating to the medieval period, its original purpose was neither epistemic in the strictly truth-tracking sense nor in the weaker sense of minimizing the risk of false positives (convicting the innocent) and false negatives (acquitting the guilty). Instead, as will be discussed, its aim was to serve as a “moral comfort device,” enabling jurors to evade full

responsibility for judgment; it operates poorly as an epistemic device. Further, recent game-theoretic work on these questions emphasizes that the choice of an optimal decision rule depends in part upon whether or communication prior to the vote is permissible, and the nature of that communication. So the concept of jurors' judgments – as conditioned through prior knowledge (and as potentially vulnerable to strategic motivations), as constructed through deliberation, and as fraught with perceptions of moral risk – should in turn shape the choice of decision rule. I will call this dimension the *threshold*.



There are eight possible combinations of the three dimensions, twelve with a unanimity threshold, and even more if you consider threshold possibilities beyond simple-majority and an unspecified supermajority. In the United States today, the dominant (but not ubiquitous) model is *nonsituated/dependent/unanimity*. In contrast, I will focus on the two models I find plausible and analytically coherent: one of *situated/dependent/supermajoritarian* judgment (SDS), and one of *nonsituated/independent/majoritarian* judgment (NIM). I argue, first, that a preference for situated or nonsituated judgment should drive the decision as to whether or not deliberation should be permitted. The benefits of private knowledge are only fully harnessed if shared via deliberation, and the risks of partiality are mitigated through the ability to challenge others' prior beliefs. More controversial, I expect, will be the claim that if we accept the reasons for adopting

a nonsituated account of judgment (that is, that judgment should not incorporate prior private or public information about the circumstances of the case), these reasons should also incline us against deliberation. The nonsituated juror is deemed capable of assessing guilt or innocence strictly on the basis of the facts presented at trial, and the risk of distorted judgment associated with deliberation trumps whatever benefits diverse perspectives might provide. As such, situatedness ought to incline us to a deliberative model, nonsituatedness to an independent model. Finally, on Condorcetian grounds, models of independent judgment ought to incline us toward a majoritarian decision rule, whereas models of dependent judgment should direct us toward a supermajoritarian threshold, affirming the consensual nature of the verdict; unanimity is never desirable.¹¹ In conclusion, I suggest the potential such models of judgment may have for our understanding of democratic decision-making, and thus the democratic pedigree of the jury more generally.

Local knowledge and the ‘situatedness’ of judgment

The concept of “vicinage,” the requirement that jurors should be drawn from the community in which a crime was committed, has medieval and even late Roman origins. Although today the vicinage principle is sometimes challenged in circumstances in which an impartial trial is deemed impossible due to pretrial publicity, the notion that this publicity was critical for the rendering of judgment dates back centuries, and endured until quite recently. Notably, as we shall see, the exclusion of local knowledge on the part of judges was not on the grounds of partiality or the distorting effects of such knowledge, but because of the moral risk

such knowledge posed to the judges; jurors instead drew on this knowledge and incurred the risks.

Medieval judges on the Continent regularly brought private knowledge to bear on the cases before them, both because they lived in small communities and because, in cases in which they were also clerics, they would take confessions from participants in the cases.¹² Yet, ultimately, *situatedness* was considered profoundly dangerous – not, as one might today expect, for the defendants, but for the judges. To draw on private knowledge was to acquire moral responsibility for judging and inflicting bloody punishments, and in so doing to take upon themselves the danger associated with “shedding blood.” Because of this peril, a taboo against the use of private knowledge in judgment emerged, as seen in the doctrine: “*Iudex secundum allegata non secundum conscientiam iudicat.*” (“The judge judges according to the evidence presented, not according to his ‘conscience.’)¹³ The force of this doctrine for medieval canon lawyers, as Whitman has recently argued, was to prevent judges from using private knowledge of the case in their judgment, because of the grave moral peril associated with judging and with the execution of bloody punishments. As Augustine and Gratian prescribed, “*lex eum occidit, non tu.*” (“[So long as you do not use your private knowledge,] it is the law that kills him, not you.”)¹⁴ By shifting responsibility for judgment to the evidence or to the law, judges were able to evade the danger associated with using their conscience. But this could have manifestly perverse results: some theologians held that a judge was obliged to rule according to the evidence presented at the trial, even if it meant convicting an innocent person.¹⁵

As Whitman has argued, medieval criminal juries had their own means of moral protection: the ability to render “special verdicts” by which the jury did not determine guilt or innocence but simply find “facts,” and to allow the accused the benefit of clergy, which left them

subject to the (non-blood-based) punishments of the church.¹⁶ Whereas common-law judges could avoid using private knowledge (and even rendering verdicts) as a means of moral protection, jurors received no such protection. Even after jurors started hearing witnesses, they were expected to draw on private knowledge, as this passage from Blackstone suggests: “Evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge.”¹⁷ The mechanisms afforded to judges for avoiding the blood taint – shifting agency away from conscience and to the law or to the evidence presented before them – were not given to jurors, who were obliged to enter guilty verdicts. Other mechanisms, such as the “reasonable doubt” standard usually thought to prevent the conviction of the innocent, served initially to provide moral protection to jurors. But the use of private knowledge on the part of jurors was even encouraged by courts into the nineteenth-century.¹⁸

Vicinage emerged not only because of the view that jurors were witnesses, possessing private knowledge, but because of the role that public knowledge played in trials. *Glanvill* (1187-1189) describes the mechanisms by which jurors qua witnesses were to bring to bear that which was generally known in a community.¹⁹ First, the proximity of jurors was critical: “four lawful knights of the county and of the neighborhood shall elect twelve lawful knights of the same neighborhood.”²⁰ Second, in cases in which the truth was widely but not wholly known (or cases in which witnesses refused to swear to what they knew), people could be summoned to court until twelve acknowledged that which was already known, a mechanism of “afforcing the assize.” The ability of *fama* (reputation or rumor), a concept from late Roman canon law, to constitute proof at various historical moments also underscores the significance of public knowledge: only neighbors would know the local rumors concerning facts about the case. Jurors,

then, were to bring to bear both private and public knowledge, even at their own moral peril, in rendering verdicts.

Arguments for the epistemic benefits of vicinage played a key role in the development of the constitutional norms of jury trials in the United States. As Abramson has demonstrated, the anti-Federalists targeted the original provision on juries, allowing federal criminal felony trials by jury to take place anywhere in the state where the crime occurred, while defending the benefits of local juries.²¹ Indeed, a key anti-Federalist argument on behalf of local juries held that private knowledge of the character of the accused was important in determining, for instance, whether a crime was committed accidentally or intentionally. The Sixth Amendment, providing for an “impartial jury of the State and district wherein the crime shall have been committed,” reflected in part the dispute over the relative merits of local knowledge. Contemporary defenders of a robust interpretation of the vicinage rule against transfers of venue often highlight this epistemic point. For instance, as Steven Engel has argued, in transferring the Amadou Diallo case to Albany from the Bronx, the local knowledge of Diallo’s Bronx neighborhood was lost. Whereas Albany jurors unfamiliar with the Bronx might believe that the police confronted threats around every corner and could have reasonably believed Mr. Diallo posed a threat, Bronx jurors might have had a more nuanced view of the security of the neighborhood, enabling them to challenge the officers’ defense.²²

As already suggested, then, we can disentangle three forms of knowledge that can shape jurors’ judgments: 1) private knowledge about the facts of the case or the character of those involved in the case; 2) public knowledge about the facts of the case in the form of rumor or, in a contemporary manifestation, media coverage; and 3) public knowledge about general circumstances concerning the trial, such as, in the Diallo case, the environmental conditions in

which the shooting occurred. All three of these forms can *situate* judgment, and, today, all three are frequently invoked as reasons for excluding potential jurors or changing the venue of the trial – ostensibly because, thus situated, jurors would be *partial*. Is this a legitimate concern?

A case in which a person was acquainted with, for instance, a murder victim is probably a paradigmatic example of a circumstance in which private knowledge could lead to partiality. In this example, however, it may not be private knowledge as such that might get in the way of impartial judgment, but the emotions that a trial would likely engender for friends of a victim, who might be incapable of viewing the evidence implicating the accused dispassionately. Note, however, that the desire to ensure that the right person be convicted of the crime may outweigh whatever vengeful feelings might arise against the defendant.²³ Further, recent work on the role of emotions in decision-making suggests that affect can focus deliberation and improve both the speed and the quality of outcomes.²⁴ Though deep sadness and rage can surely introduce “cognitive distortions,” the latter may generate the motivation to convict the right person, and the former may generate the “depressive realism” necessary for clear-eyed evaluation of guilt.²⁵ It is not clear that private knowledge is necessarily an impediment to impartial evaluation of evidence, at least after the passage of enough time for disruptive emotions to subside. Finally, the fact of acquaintance does not necessarily mean strong prior beliefs – nor that such beliefs cannot quickly be revised in light of new evidence.²⁶

Mere public knowledge about the facts of the case is another matter. Although prior judgments may be “tainted” by rumor, under circumstances in which rumor can be challenged – for instance, if these rumors are explicitly addressed during the trial, or if deliberation is permitted (as we shall discuss in a moment) – there is little reason to think such knowledge is necessarily distorting. Indeed, such a view may even entail a romanticization of ignorance. In

Abramson's language, "Too often, especially in highly publicized cases, the search for impartial jurors leads to the elimination of all persons who are normally attentive to and apathy become the necessary conditions for impartiality as a juror."²⁷ The sort of robust local knowledge possessed by jurors about the vicinity in which a crime occurred may enable them to challenge alibis or accounts of behavior that run counter to their experience of a specific location (its lighting, its accessibility or seclusion, its noise level), plausibly regarded as beneficial in forming a judgment.

In this context, we might also consider the *racial situatedness* of a juror. The desire on the part of racial minorities, in particular, for a "cross-sectional" jury is in no small part because of the awareness that race may indeed situate us epistemically. Situated knowledge of local conditions includes the nature of race relations in a given community, and the experience of being a member of racial minority in a neighborhood may be useful in evaluating the testimony presented at trial. Although such experiences do indeed have the potential to introduce bias, the Supreme Court's 1986 ruling in *Batson v. Kentucky*²⁸ forbids on equal protection grounds peremptory challenges based on the assertion that mere racial situatedness entails bias (i.e., striking black "veniremen" simply because the defendant is black). Indeed, we may also go a step further and hold that "nonsituatedness" – particularly with respect to race – is impossible, and to pretend that we are blind to racial considerations may introduce a greater potential for bias than would acknowledging the unconscious effect that race may have on our judgments. Indeed, recent empirical research on unconscious racial bias among trial judges suggests that when judges are not attentive to the risk of such biases, the biases have a measurable influence on their judgments; however, when judges self-scrutinize for implicit racial preferences, they are capable of suppressing biases.²⁹

Although, as Abramson and Krause have suggested, ignorance is not identical to impartiality,³⁰ and knowledge does not necessarily entail bias, nonetheless we can recognize that a nonsituated juror does have a certain epistemic advantage. By focusing exclusively on the facts of the case as presented at the trial, a nonsituated juror can evaluate the quality of the case and preponderance of the evidence strictly on its own merits. Uncolored by prior beliefs or expectations, and positioned to evaluate the alternative arguments solely in terms of the reasons advanced, such a juror may be ideally situated to dispense justice from a *neutral* perspective. However, the nonsituated model of judgment – of dispassionately weighing the evidence, and only the evidence, presented at trial and of determining from this perspective the relative plausibility of the case presented against a defendant – may indeed require the juror to actively suppress efforts to situate herself epistemically. When we receive new information, it is natural to try to assimilate it to prior beliefs or to use our standard heuristics to help us evaluate the data. But the nonsituated model may also urge us to resist this tendency: we don't want to rely on our prejudices, certainly, but the nonsituated model may also require us to suppress our well-founded perceptions of the relative level of violence in a community, for instance, in favor of the account presented by a prosecutor, or to leave our racial assumptions unexamined. The nonsituated model of judgment, then, may either leave us unanchored epistemically, or at risk of permitting our latent beliefs to color our evaluation of evidence.

Deliberation and judgment

As Bryan Garsten has recently argued, Aristotle criticized the nature of judgment exercised by courts because of its non-deliberative nature.³¹ By this, Garsten suggests, Aristotle

was not only criticizing the absence of deliberation as an activity among jurors, but the way in which judgment occurred. Whereas in a public deliberative context, such as an assembly, or in private deliberations concerning individual matters, a person judges the best means to promote his own interests or ends, the judgment performed by jurors was ostensibly impartial. However, in Aristotle's view, judgment that was not anchored a concern for one's own interests or welfare was inferior. In Garsten's language, "The problem lay in the fact that the judicial setting asked people to judge without reference to the only sort of criteria that they had experience using: the complex, differentiated and ordered set of goals and standards that they had developed throughout their lives as deliberative actors."³² Indeed, the language of the heliastic oath, the oath taken by prospective jurors at the beginning of the year, underscores this:

I will cast my vote in consonance with the laws and with the decrees passed by the Assembly and by the Council, but, if there is no law, in consonance with my sense of what is most just, without favor or enmity. I will vote only on the matters raised in the charge, and I will listen impartially to accusers and defenders alike.³³

From Aristotle's perspective, then, the nonsituatedness and, relatedly, the necessary absence of deliberation on the part of jurors was a serious liability. Should we regard situatedness and deliberation as linked, and to what extent ought we to promote deliberation in the context of either situated or nonsituated models of judgment?

First, let us consider the three forms of local knowledge upon which situated judgment relies: private information, public knowledge about the case, and public knowledge about general circumstances. Private information may be revealed through deliberation, enabling others to learn from an individuals' experience with the participants, for instance. Alternatively, deliberation can subject this private knowledge to challenge, leading the juror to reevaluate her prior beliefs about the accused or the victim. Public knowledge about the facts of the case –

rumor or reputation – may, on one hand, be further legitimized through discussion: that is, the act of reaffirming that which is widely known may give it undue weight against that which has already been presented. On the other hand, deliberation may enable these rumors to be subject to challenge or scrutiny. Finally, public knowledge about general circumstances can be distributed or rendered more precise: The lighting of a street corner at different times of day, a perceived increase in danger on footpaths, may be pooled or, alternatively, subject to challenge through deliberation. Deliberation, then, may help to clarify, validate, or discount jurors' knowledge on the situated model.

On an account of situated dependent judgment, jurors bring thick local knowledge to bear in deliberations prior to rendering a verdict. Deliberation among situated jurors may take the form of arguments drawing on any of these three forms of local knowledge (as well, of course, as the evidence presented in trial), and enables the sorting of valuable claims from useless, distracting, or wrong information. More generally, since a model of situated judgment wishes to harness the knowledge and values of the community – it relies on a conception of judgment as in part publicly constructed – a deliberative account seems to reaffirm these communal commitments. In contrast, situated *independent* judgment would seem to undercut the value of public knowledge: each juror is herself a repository of this knowledge, and is capable of fully assimilating the new information presented at trial into this preexisting framework.

One risk of the situated dependent model is that jurors who possess “public” knowledge may be insufficiently diverse. If they then engage in deliberation, the familiar problems of group polarization and other pathologies of deliberation in homogeneous groups may emerge, in which the ability to check the prior knowledge possessed by the situated is deeply attenuated. In cases in which the jurors are “privately” situated, however, the ability to share information via

deliberation and have it subject to scrutiny may be important. Although to deliberate might grant public knowledge undue influence – it would play a role in individual-level judgments and would then be reaffirmed through the exchange of information and arguments among jurors – in the absence of deliberation, the situated juror may be unable to check or recognize the biases to which her prior beliefs have given rise, nor to update these priors appropriately in light of the evidence presented at the trial. Such a possibility underscores the importance, especially on a situated account, of ensuring diversity among jurors.

Let us now consider the position of the nonsituated juror, whose freedom from private and public knowledge about the circumstances of the case ostensibly enables her to judge impartially. The question at stake is the following: would deliberation taint the attractively individualistic and neutral nature of her judgment, or is it a necessarily corrective to what otherwise might be idiosyncratic or incomplete perceptions? So what is a nonsituated juror supposed to learn? On this account, jury deliberation among nonsituated participants should enable – and only enable – the evaluation of the relative credibility of the evidence presented at trial. The argument must be that jurors will each have a subjective perception of a trial that can be improved by deliberation with others – such as the relative salience or implausibility of various arguments, or the correction of factual claims about the nature of evidence – or that jurors bring distinctive experiences or heuristics to bear from which other jurors may benefit. Unless deliberation can be shown to have a dramatic improvement in individuals' understanding of the evidence presented at trial, it ought to be discouraged on the nonsituated model.

The empirical evidence on this question is decidedly mixed. To the extent that jurors engage in the construction of individual narratives based on their own experiences to fill in evidentiary gaps, and to the extent that these narratives may be incompatible as long as the legal

ramifications are identical, deliberation may be unnecessary.³⁴ Note also that the attractive feature of the nonsituated model – the immunity from prior knowledge that could introduce bias – may be undercut by a deliberative structure. Male jurors, highly educated jurors, and jurors with high-status occupations – as well as the foreperson, who is typically also of a higher social status and is disproportionately male³⁵ – tend to dominate deliberations.³⁶ Although a nonsituated and independent jury may be dissimilar to the accused, because it seems to encourage the possibility of shifting the venue in the case of notorious crimes, the absence of deliberation here may actually help to ensure that minority perspectives are not systematically marginalized. Their votes, the only means jurors have of expressing their judgment on the independent model, are of equal weight to those of the privileged.

The empirical evidence on deliberation sheds light on the connection between situated judgment and deliberation, on one hand, and nonsituated judgment and the absence of deliberation, on the other. In their classic study *The American Jury*, Harry Kalven and Hans Zeisel found that deliberation revealed evidentiary disagreements, which in turn enabled the “liberation” of judgment to be made on the basis of “sentiment.”³⁷ If we regard situated judgment as more susceptible to the role of emotion in the first place – and if we were to view this as a potentially attractive feature – deliberation that is even unconsciously emotion-driven may enable the jury to quickly sift through the evidence until they reach a point of uncertainty, and then fully embrace the sentiments that they have harbored. As a corollary, if we think affect ought to be minimized to the greatest extent possible, as the nonsituated view suggests, then there is good reason to eschew deliberation.

Judgment and the decision threshold

We have now developed two models of judgment: *nonsituated and independent* and *situated and dependent*. Although unanimity is the dominant threshold for jury verdicts in the United States today, the Supreme Court has held that it is not a constitutional requirement,³⁸ nor is it in widespread use cross-nationally. Indeed, among countries with what Ethan Leib has termed “pure” juries (in which jurors deliberate and issue verdicts without professional judges’ participation), only Canada and Australia (and the latter only for very serious charges) retain a unanimity requirement.³⁹ Given the possibility of a weaker threshold for rendering a verdict, what decision rules are appropriate for the nonsituated/independent and situated/dependent models?

The *nonsituated and independent* model of judgment emphasizes individual decision-making capacity in the absence of the potentially distorting effects of local knowledge or the persuasive power of fellow jurors. The aim, then, should be to choose a decision rule that reflects this view of the individual competence of jurors.⁴⁰ Fortunately, these conditions – in which voters are presumptively deemed competent, and in which their judgments are independent (in other words, the judgment of each is not correlated with the judgments of others, as they might be on a deliberative model)⁴¹ – are perfectly compatible with the most famous account of jury decision-making, that of the Marquis de Condorcet. Briefly, the Condorcet Jury Theorem holds that if each voter has a competence, measured in terms of the probability of accurately determining guilt or innocence, of better than 50%, the probability that a majority vote will be correct is an increasing function of the size of the jury pool, and approaches 100% as the number of jurors becomes infinitely large. Considered from the opposite perspective, a supermajority or unanimity rule would enable an almost certainly mistaken minority to veto the decision of the

majority. On Condorcet's account, then, majority rule is the optimal solution.⁴² In fact, Brazil features a jury system capturing at least the independent and majoritarian dimensions of the *NIM* model: jurors do not deliberate, vote privately, and a simple-majority rule governs the verdict.⁴³

Two points regarding institutional design are worth noting. First, this model might also encourage us to expand the size of juries. The Athenian example of jury panels, which ranged in size from 201 (for small-claims private prosecutions) to 2501 (and, in one case, 6000) for a public prosecution, may be more than necessary. Although the costs associated with such a large panel might seem excessively high, the reduction in the duration of the jury service because of the absence of deliberation and the benefits of improved accuracy might make an at least moderately expanded jury feasible. Second, there are potential paradoxes that arise in the aggregation of judgment under a majoritarian procedure; such findings ought to discourage juries from structuring votes to aggregate the plausibility of multiple premises, at a minimum.⁴⁴

The *situated and dependent* model of judgment requires no such views about the competence of individual jurors. Although any argument on behalf of juries in criminal trials must rest on their ability to render correct verdicts, the Aristotelian "many minds" argument can do the work: although individually judgments may be imperfect, through drawing on thick local knowledge and through the learning process that deliberation enables, the collective capacity for judgment is enhanced. On this model, then, what decision threshold is required?

It might be thought that the standard unanimity requirement should hold: after all, the aim of consensus is promoted by both the situated and dependent features of the model, and the unanimity requirement ensures that the verdict emerges from the jury as a whole. From inception, however, unanimity has a complicated strategic dimension. Turning to the medieval context, again, on Whitman's account, the unanimity rule requiring the agreement of 12 jurors

(via the mechanism of “affording the assize”) served as not an epistemic but a “moral comfort” procedure. Unanimity enabled jurors to share the responsibility and the peril of judgment.⁴⁵ Let us unpack the logic. Under majority or supermajority rule, the proportion finding the defendant guilty would have the responsibility for judgment distributed among fewer agents, suggesting that the responsibility of judgment is a divisible bad, a smaller share of which is desirable. Although the jury was expected to render a judgment in accordance with what was publicly known, an individual juror might wish to evade the taint of judgment by finding a defendant not guilty. There was a strong incentive, then, for an individual juror to defect if he expected the others to find the defendant guilty. Indeed, the procedure of ensuring, through threats and even starvation a unanimous verdict, suggests that the risk of defection was well known. Those who chose to defect, further, could be charged with perjury. The unanimity requirement thus served a strategic purpose, designed to oblige jurors to swear to that which was publicly known.

Recent work on the epistemic risks associated with strategic voting by jurors is significant and complex.⁴⁶ One major finding from Feddersen and Pessendorfer (1998), however, is that under conditions in which a voter is pivotal (as under a unanimity rule in which all others have voted to convict) and is informed about others’ “signals” of guilt (by their vote to convict), she may vote “strategically”; that is, a rational voter may well allow those signals to outweigh the signal she received that the defendant is innocent, and she may alter her vote accordingly. When jurors vote strategically, however, unanimity rule results in a positive probability of acquitting the guilty and convicting the innocent; in this case, also, increasing the size of the jury may exacerbate the problem. The information revealed by deliberation may constitute the sort of “signaling” that induces strategic voting, and the pathologies identified by it.

Further, the coercive nature of unanimity is often recognized. Work by Kalven and Zeisel (1966) demonstrates that the major function of deliberation is to persuade recalcitrant members of the minority to alter their votes in line with the majority. 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.⁴⁷ 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.⁴⁸ 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 majority rule. Thus, even if agreement was generated by coercion, the presence of dissenters seems to threaten the legitimacy of the verdict; as such, many scholars regard the capacity to generate *apparent* – i.e., false – consensus as an attractive feature of the rule.⁴⁹ In the language of Michael J. Saks, “Perhaps most troubling, when convicting, quorum rule juries did so with less confidence that they were correct than was true of juries deciding under a unanimous rule. Apparently, at the end of the day, the existence of dissenters left even the majority with some lingering doubts that it had reached the right verdict.”⁵⁰

The desire to signal perfect concord on the verdict is perhaps understandable – it may, similarly, be a preference among Supreme Court justices for major decisions⁵¹ – but is nonetheless regrettable. First, it actively encourages coercion of jurors. It is true that a juror probably should consider very carefully whether she is misperceiving a given issue or whether she is harboring some bias in the face of widespread opposition; she may have good epistemic

reasons to alter her vote, and, if we regard a personal belief in one's fallibility as a virtue, she may even have moral reasons to do so except in circumstances in which she is positively certain.⁵² Yet enabling a juror to dissent under those circumstances honors her individual dignity as a distinct member of a collective body without forcing her into the difficult moral position of hanging the jury or encouraging her to cast a dishonest vote. Indeed, although Saks deems this finding troubling, from another perspective, that a jury should recognize its outcome as potentially fallible has normative appeal. The "beyond a reasonable doubt" provision should not entail a view that the verdict is infallible, and the awareness that a verdict could be overturned in the presence of new evidence ought to reassure, rather than unsettle, jurors.

Second, if correct, the finding that jurors have less confidence in the verdict in the presence of dissent, weakening the legitimacy of the system overall, is itself problematic. Why a jury would regard a verdict generated by browbeating the recalcitrant minority into altering its votes as epistemically superior – and therefore more legitimate – to a verdict in which jurors dissented is far from clear. Indeed, one might regard the presence of dissent as evidence of the lack of coercion within the jury deliberations, and therefore have *greater* confidence in the verdict. Moreover, if true, the argument that the legitimacy of the legal system rests on false beliefs about the level of concord in jury decisions should leave us with grave concerns.

If we reject a unanimity threshold, ought we to adopt a supermajoritarian rather than a majoritarian threshold? The role that public knowledge plays on the SDS model should, it seems, incline toward a supermajority rule. This is because the fact that a view is widely shared counts, on the SDS model, towards its probability of correctness. Whereas the NIM model explicitly prizes independent judgment, free from the corrupting effects of outside information, the SDS model emphasizes the benefits of public knowledge – in fact, it may even regard community

beliefs about the case as constituting support for a verdict. On this account, if that which is generally held has some presumptive validity, a supermajoritarian threshold signals that there has widespread consensus. Although on the Condorcetian account a verdict supported by a supermajority is more likely to be correct than that supported by a simple majority, a supermajority threshold places veto power with a presumptively incorrect minority; it is thus incoherent on the NIM model. However, on the SDS view, a supermajority threshold makes sense insofar as our confidence in our vote derives from the fact that it is widely shared.

Conclusion

In *Williams v. Florida*,⁵³ the Supreme Court held that the “essential feature of a jury obviously lies in the interposition between the accused and his accuser 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.” Here I have focused on this idea of “common sense judgment of a group of laymen.” We have seen two models of the “common sense” dimension of judgment, in assessing the implications of judgment as situated or nonsituated, and the nature of the “group” as constituted solely through the aggregation of independent individual judgments or as formed through deliberation. In conclusion, I would like to turn to the implications of the “community participation and shared responsibility” dimension of the ruling for the SDS and NIM models, and for democratic theory more generally.

To the extent that we understand the value of “community participation” in an epistemic sense, it should be clear that situated judgment captures this ideal more closely than does nonsituated judgment. The nonsituated nature of judgment takes the status of the juror as a

representative member of the community to be, at best, a matter of indifference. What is salient on the nonsituated model is *neutrality* with respect to the case. If a juror were to view herself as a member of the community in which the crime allegedly occurred, and thought she thus ought to bring to bear community norms or knowledge to bear in rendering the verdict, she may risk biasing her judgment. Likewise, to the extent that we regard “shared responsibility” in an epistemic sense – that all⁵⁴ shared in the formation of the judgment – we might think that the deliberative feature of the SDS model is invoked. Although we might each have contributed a fraction of the judgment on an independent model, the language of “sharing” does not seem quite apt: it seems that only the activity of deliberation, of exchanging reasons and arguments, may enable jurors to feel that they have participated in a communal activity of truth-finding.

But there is reason to think that the purported values of “community participation and shared responsibility” are not reducible to epistemic benefits. Rather, Justice White’s opinion seems to suggest that whereas the “common sense” of the laymen is epistemic, the “community participation and shared responsibility” is a normative by-product of the activity of judgment. It emerges as a function of a jury large enough (but not necessarily 12, the opinion finds) to engage in “group deliberation,” to be “free from outside attempts at intimidation” and to “provide a fair possibility for obtaining a representative cross-section of the community.” The democratic potential of juries on this score is not captured by its core epistemic activity, but by its preconditions and by-products – the activity of performing a public service, of meeting diverse people and (given deliberation) exchanging arguments and views with them.

Neither the SDS nor the NIM model is normatively ideal from a democratic perspective: both the SDS model and the NIM model of judgment have features that might discomfort us. Whereas the SDS model may seem attractively democratic insofar as it emphasizes the collective

formation of judgment, it may risk partiality insofar as the jurors draw upon extra-trial knowledge, and to have coercive potential if deliberation takes the form of persuasion aimed at meeting a high decision threshold. Whereas the NIM model is perhaps unappealingly atomized insofar as its members are removed from their intimate connection to the community's knowledge and do not pool their perceptions of the trial through deliberation, the democratic aim of avoiding coercion is realized through a majoritarian threshold, granting each vote equal weight. 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. Unanimity and even supermajority thresholds may artificially reduce the size of the minority, insofar as members are encouraged to succumb to peer pressure and falsify their votes.

Yet if we imagine these models of judgment traveling to a legislative context, perhaps we can envision the democratic potential of the jury in a different way. Few would argue for a nonsituated model of legislative behavior – the structure of representation would be fundamentally altered on such an account⁵⁵ – and perhaps even fewer would argue that the legislature ought not to be deliberative. To the extent that we are uncomfortable with the idea of severing representatives from a particular community and its interests and preferences, and preventing them from exchanging reasons and arguments about the optimal design of legislation, the SDS model of judgment would seem to trump the NIM model. Even if we strongly doubt that legislators typically confront questions for which there is a uniquely right answer, to the extent that we wish to improve the epistemic capacity of legislatures, it may help us to imagine first the optimal mechanisms by which we would wish our representatives to form their judgments. To be sure, the jury box is an imperfect repository of our ambitions for democracy. Yet if we structure

jury decision-making correctly, ordinary citizens may be able to serve as models of judgment for their representatives. Herein may lie the jury's true democratic potential.

¹ Draft: Please do not circulate or cite without author's permission. Comments and suggestions are very welcome at ms3125@columbia.edu.

² Hansen, Mogens Herman, *The Athenian Democracy in the Age of Demosthenes* (Oxford: Blackwell, 1991), p. 179.

³ de Tocqueville, Alexis. *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop. (Chicago: University of Chicago Press, 2002). I.ii.viii, p. 262.

⁴ Ackerman, Bruce and James S. Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004), pp. 66-69.

⁵ See, for instance, the National Endowment for the Humanities' funded website for the Constitutional Rights Foundation Chicago "The American Jury: Bulwark of Democracy" project <http://www.crfc.org/americanjury/index.html> (accessed on March 3, 2009) and the website for the Jury and Democracy Project at the University of Washington <http://depts.washington.edu/jurydem/index.html> (accessed on March 3, 2009).

⁶ That a democracy may champion its inclusiveness while restricting the opportunity to participate in political life ostensibly to those possessing faculties of judgment of suitable quality (e.g., not women or slaves) is not surprising: the blindness or hypocrisy of societies from Athens to the United States in this respect has long been noted. "The Jury Selection and Service Act," 28 U.S. C. secs. 1861-69; *Taylor v. Louisiana*, 4199 U.S. 522,528 (1975). See Abramson, Jeffrey, *We the Jury: The Jury System and the Ideal of Democracy* (New York: Basic Books), pp. 99-100. Although eligibility for jury service was formally democratized by the mid-1970s, jury pools are still restricted in the United States through the criterion of voter registration; in many states, citizens who do not register to vote are not selected for jury duty. Although in other states possessing a driver's license is sufficient, even this requirement may circumscribe the pool of eligible jurors along socioeconomic lines.

⁷ My focus here is on criminal juries, in which, of course, part of the epistemic aim may be to minimize the risk of false positives and negatives.

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

⁹ For instance, even Ronald Dworkin distinguishes between "choice-sensitive" and "choice-insensitive" matters. See Dworkin, Ronald, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000), pp. 204-205.

¹⁰ Garsten, Bryan, *Saving Persuasion: A Defense of Rhetoric and Judgment* (Cambridge: Harvard University Press, 2006), ch. 4 and *passim*

¹¹ Less controversially, neither is a submajority rule. For an intelligent recent discussion of the utility in other contexts of submajority rules, see Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York: Oxford University Press, 2007), pp. 85-113.

¹² Whitman, James Q., *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008), pp. 108-109, citing Knut Wolfgang Nörr, *Zur Stellung des Richters im gelehrten Prozess der Frühzeit: Iudex secundum allegata non secundum conscientiam iudicat* (Munich: Beck, 1967), and Antonio Padoa-Schioppa, *Sur la conscience dans*

le *Ius Commune* Européen, in Jean-Marie Carbasse and Laurence Depambour-Tarride, eds., *La conscience du juge dans la tradition juridique européenne* (Paris: PUF, 1999).

¹³ Whitman, p. 105

¹⁴ *ibid.*, p. 112

¹⁵ *ibid.*, p. 113

¹⁶ *ibid.*, pp. 155-6

¹⁷ *ibid.*, p. 152

¹⁸ *ibid.*

¹⁹ McNair xxx

²⁰ “*quatour legales milites de comitatu et de uisneto eligantur duodecim legales milites de eodem uisneto.*” *Glanvill* II.10, in Hall trans. 30.

²¹ Abramson, p. 122.

²² Engel, Steven A. “The Public’s Vicinage Right: A Constitutional Argument.” 75 *N.Y.U.L. Rev.* 1658, p. 1661, pp. 1693-94.

²³ For instance, there are abundant cases of families calling for new trials or the release of a convicted murderer in cases in which evidence emerges to cast doubt on his guilt.

²⁴ See, most notably, the work of Antonio Damasio (as in *Descartes’ Error: Emotion, Reason and the Human Brain* (New York: HarperCollins, 1994); see also Elster, Jon, *Alchemies of the Mind: Rationality and the Emotions* (Cambridge: Cambridge University Press, 1999), especially pp. 287-297; McDermott, Rose, “The Feeling of Rationality: The Meaning of Neuroscientific Advances for Political Science.” *Perspectives on Politics* 2(4) (December 2004): 691-706; Krause, Sharon, *Civil Passions* (Princeton: Princeton University Press, 2008), ch. 2.

²⁵ See Elster, pp. 298-301, citing Alloy, L. and Abramson, L., “Depressive Realism,” in L.B. Alloy (ed.), *Cognitive Processes in Depression* (New York: Guilford Press, 1988), p. 223-65.

²⁶ The cliché of press interviews after a neighbor commits a violent crime is suggestive on this score: “I never would have thought that he could do such thing! He was so quiet!”

²⁷ Abramson, p. 21

²⁸ 476 U.S. 79

²⁹ Rachlinski, Jeffrey J., Sheri Lynn Johnson, Andrew J. Wistrich, and Chris Guthrie, “Does Unconscious Racial Bias Affect Trial Judges?” *Notre Dame Law Review*, 84:3, 2009.

³⁰ Krause, p. 138

³¹ Garsten, p. 125

³² *ibid.*, p. 128; see Aristotle, *Rhetoric*, 1354b30.

³³ Hansen, p. 182, citing Frankel, M. “Der attische Heliasteneid,” *Hermes* 13 (1878), 452-66.

³⁴ Vidmar, Neil and Valerie P. Hans, *American Juries: The Verdict* (Amherst, NY: Prometheus Books, 2007), pp. 132-135, 142. Other studies have shown that unanimity rules, insofar as they prolong deliberation, lead to the correction of factual errors.

³⁵ *ibid.*, 143

³⁶ *ibid.*, 143-144

³⁷ Kalven, Harry, and Hans Zeisel, *The American Jury* (Chicago: University of Chicago Press, 1971), pp. 164-165

³⁸ *Apodaca v. Oregon* 406 U.S. 404 (1972); *Johnson v. Louisiana* 406 U.S. 356 (1972). Note that in *Burch v. Louisiana* 441 U.S. 130 (1979), the Court held that unanimity was required on a six-person jury, though, as one commentator has noted, “the Court’s rationale was murky.” See

Jonakait, Randolph, *The American Jury System* (New Haven: Yale University Press, 2003), p. 96.

³⁹ See Leib, Ethan, "A Comparison of Criminal Jury Decision Rules in Democratic Countries." *Ohio State Journal of Criminal Law*, vol 5, 2008.

⁴⁰ One might note that the choice of a jury rather than a panel of judges must rely upon the view that laypersons are competent to judge guilt or innocence, at least on a collective level; in the absence of such an assumption, judges rather than jurors would render verdicts.

⁴¹ On the effects of correlation, see Ladha, Krishna, "The Condorcet Jury Theorem, Free Speech, and Correlated Votes," *American Journal of Political Science* 36: 617-634 (1992) and Mueller, Dennis, *Public Choice III* (Cambridge: Cambridge University Press, 2003), p. 130.

⁴² There is a substantial literature on the Condorcetian use of supermajority thresholds. For instance, Mark Fey's account requires a large electorate and an average competence greater than the proportion of votes needed for passage (e.g., accuracy under a two-thirds threshold would require competence greater than 66.6%). See Fey, Mark, "A Note on the Condorcet Jury Theorem with Supermajority Rules," *Social Choice and Welfare* 20 (1), February 2003, pp. 27-32.

⁴³ See Leib, p. 636; Abramson, p. 205; Leib also cites Gomez, Luis Flavio and Ana Paula Zomer, "The Brazilian Jury System," 2001 St. Louis-Warsaw Transatlantic L.J. (2001/2002).

⁴⁴ Pettit, Philip. "Deliberative Democracy and the Discursive Dilemma," *Philosophical Issues*, vo. 11, pp. 268-99; List, Christian and Philip Pettit. "Aggregating Sets of Judgments: An Impossibility Result." *Economics and Philosophy* (2002) 18: 89-110.

⁴⁵ Whitman, p. 204.

⁴⁶ See Austen-Smith, David and Jeffrey S. Banks, "Information Aggregation, Rationality, and the Condorcet Jury Theorem," *American Political Science Review* 90:1 (1996), pp. 34-45; Krishna Ladha, Gary Miller, and Joe Oppenheimer. "Information Aggregation by Majority Rule: Theory and Experiments." University of Maryland Typescript.

⁴⁷ Guinther, John. *The Jury in America* (New York: Facts on File Publications, 1988).

⁴⁸ Hastie, Reid, Steven D. Penrod, Nancy Pennington, *Inside the Jury* (Cambridge: Harvard University Press, 1983), pp. 76-78. See, however, Jonakait 2003, arguing that nonunanimous juries have not been shown to lead to shorter trials (Jonakait 98).

⁴⁹ Jonakait 2003, Hastie, Penrod, and Pennington 29; Saks, Michael J. "What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?" 6 S. Cal. Interdis. L.J., Saks 41.

⁵⁰ Saks, p. 41.

⁵¹ See Abraham, Henry J., *Justices and Presidents* (New York: Oxford University Press, 1992); Schwartz, Bernard, *Super Chief: Earl Warren and his Supreme Court – A Judicial Biography* (New York: New York University Press, 1983), cited in Jeffrey R. Lax, "The Conflict of Consensus: Unanimity and Dissent in the Supreme Court." Typescript.

⁵² For this argument in the context of Rousseau's thought, see Schwartzberg, Melissa, "Voting the General Will: Rousseau on Decision Rules," *Political Theory*, June 2008, 36:3, 403-423.

⁵³ Drawing on *Duncan v. Louisiana* 391 U.S. 145.

⁵⁴ The phrase "community participation and shared responsibility" is ambiguous insofar as it is not clear whether "community" is intended to modify "shared responsibility" as well as "participation."

⁵⁵ Though see Rehfeld, Andrew, *The Concept of Constituency: Political Representation, Democratic Legitimacy, and Institutional Design* (New York: Cambridge, 2005)