There Is No Right to a Competent Electorate

1. Introduction

Several political philosophers defend *epistocracy*, a form of government where votes are allocated to those who possess measurable knowledge or competence (e.g., Harwood 1998; López-Guerra 2014: ch. 1; Bell 2015: 154-157; Brennan 2016; Jeffrey 2018; Mulligan 2018; Gibbons 2021; 2022a; 2022b). The crudest form of epistocracy says persons must pass a suffrage test to gain the right to vote, but there are more sophisticated versions, such as enlightened preference voting. Most defenses of epistocracy are *instrumental* (e.g., Harwood 1998: 131; López-Guerra 2014: 52; Bell 2015: 18; Brennan 2016: 16; Jeffrey 2018: 412; Mulligan 2018: 289). These arguments say epistocracy is justified because it produces better results than its competitors according to a procedure-independent normative standard. Likewise, most criticisms of epistocracy point out negative consequences epistocracy might produce if it is tried (e.g., Bagg 2018; Klocksiem 2019; Bhatia 2020; Malcolm 2022; Méndez 2022; Somin 2022; Van Bouwel 2023). For instance, some argue the enfranchised in an epistocracy will have poor knowledge of the preferences and problems of the disenfranchised, leading to bad public policy (Méndez 2022: 154; Van Bouwel 2023: 113). Others argue that epistocracy opens the door to government abuse, as politicians will try to game suffrage exams to enfranchise their supporters and disenfranchise their detractors (Bagg 2018: 898; Klocksiem 2019: 24-26).

This focus on epistocracy versus democracy from a purely instrumental perspective is unfortunate. This is because, in our view, the most compelling argument in defense of epistocracy is not instrumental but Jason Brennan's (2011; 2016: ch. 6) *jury argument*. The

argument goes like this. Juries are charged with making decisions that have a massive impact on the lives of defendants and are imposed on them involuntarily. Given the stakes, many find intuitive the claim that persons have a right to a competent jury. If the jury refuses to listen to the facts of a case, or if they are not mentally equipped to reason well about these facts, or if they harbor some deep prejudice against the defendant, then the rights of the defendant have been violated. This claim will strike many as reasonable, but its implications run deep. Political decisions are structurally like the decisions juries make, in that the stakes are high, and they are imposed involuntarily. Since both cases involve groups of people making high-stakes decisions that greatly affect the lives of and are involuntarily imposed on others, consistency demands we proclaim that persons have a right to a competent electorate. This right is violated in all existing democracies, as much empirical work shows that voters often exhibit cognitive shortcomings when they enter the voting booth. Persons have a right to a competent electorate, but most electorates contain very many incompetent voters. To secure the right to a competent electorate, the solution is to either disenfranchise or at the very least limit the influence of incompetent voters.

The argument is incredibly compelling. Unfortunately, most criticisms of epistocracy go after its instrumental defenses, neglecting the jury argument. In this paper we take the jury argument head on. We maintain the right to a competent jury but deny the right to a competent electorate. Here is the outline. We first explicate the jury argument (§2). We then make an underappreciated methodological point: before affirming a right *R*, we need to first examine how much it costs to enforce *R* and the significance of the harm enforcement of *R* prevents (§3). Using this framework, we then argue that we should embrace the right to a competent jury and reject the right to a competent electorate (§4-5). This is because the right to a competent jury is

cheap to enforce and prevents significant harm, while the right to a competent electorate has steep enforcement costs and prevents far less severe harm.

2. The Jury Argument

Brennan asks us to imagine five different criminal trials, each with a defendant who is being prosecuted for murder. In the first trial, the jury is *ignorant*. As the trial proceeds, these jurors "ignore the evidence presented to them. When asked to deliberate, they refuse to read the transcript" (Brennan 2016: 151). In the second trial, the jury is *irrational*. These jurors "evaluate the evidence in cognitively biased, nonscientific, or even antiscientific ways" (Brennan 2016: 151-152). They might make their decision based on bizarre conspiracy theories, or perhaps wishful thinking. In the third trial, the jury is *impaired*. The jurors genuinely want to pay attention to the evidence and evaluate it correctly, but "they are simply not competent to do so. Perhaps they are cognitively impaired or the case is too complicated for their mental capacities" (Brennan 2016: 152). In the fourth case, the jury is *immoral*. Here, the jurors decide contrary to the evidence because they are wicked. They might decide to convict because "the defendant is black, Jewish, Republican, or whatnot, and they dislike people like that" (Brennan 2016: 152). In the final trial, the jury is *corrupt*, as they only find the defendant guilty because they are bribed to reach that verdict.

If we discovered that a jury acted in one of these ways, we would feel compelled to declare their decision void. Moreover, there is a strong intuition that defendants who go on trial have a right to *not* be subject to such a jury. What explains these intuitions? Four features of jury trials are relevant here, according to Brennan (2016: 153):

(1) The jury is charged with making a morally momentous decision, as it must decide how to apply principles of justice. It is the vehicle by which justice is to be delivered. It has special duties to administer justice.

(2) The jury's decision can greatly affect the defendant's and others' life prospects, and it can deprive the defendant of life, liberty, and/or property.

(3) The jury is part of a system that claims sole jurisdiction to decide the case. That is, the system claims a monopoly on decision-making power, and expects the defendant and others to accept and abide by the decision.

(4) The jury's decision will be imposed, involuntarily, by force or threats of force.

So, juries can act incompetently in a variety of ways, and the stakes of jury trials—as articulated in conditions (1)-(4)—are incredibly high. Such considerations lead Brennan to the following principle, which we shall call *Jury Competence*.

> Defendants and other citizens have a right that jury decisions should be made by competent people, who make their decisions competently and in good faith. It is unjust, and violates a citizen's rights, to forcibly deprive a citizen of life, liberty, or property, or significantly harm their life prospects, as a result of decisions made by an incompetent jury, or decisions made incompetently or in bad faith (Brennan 2016: 152-154)

The general idea behind Jury Competence is clear and so is its action-guiding prescription: if we have reason to think someone will judge incompetently, then they should be excluded from jury duty.

Few will disagree with Jury Competence. Yet the same sorts of cases that lead to Jury Competence are also present in democratic politics. Indeed, we often have an *ignorant* electorate: "the majority of voters pay no attention to the details of the election or the issues at stake" (Brennan 2016: 158). Beyond this, we also have an *irrational* electorate. Though many citizens do pay attention to the issues at stake, "they vote not on the basis of evidence but rather on the basis of wishful thinking and various disreputable social scientific theories" (Brennan 2016: 158). Third, we sometimes have an *impaired* electorate. In this case, "most of the discussion… is beyond their level of comprehension, requiring more intelligence than they in fact have" (Brennan 2016: 158). Fourth, Brennan believes democracies often have an *immoral* electorate: "out of racism, the majority chooses a white candidate over a black one. Or, out of superficiality, they choose the better-looking candidate" (Brennan 2016: 158). And finally, we have a *corrupt* electorate: "the majority of voters choose a policy in their own self-interest, even though the policy severely harms or has a serious risk of imposing harm on the minority" (Brennan 2016: 158).[1]

Both electorates and juries, then, can behave incompetently. Not only this, but the stakes in democratic politics are high just as they are in jury trials. Brennan (2016: 156) notes the two domains have the following features in common:

> (1) Governments are charged with making morally momentous decisions, as they must decide how to both apply principles of justice and shape many of the basic institutions of

[1] It's worth noting that in other places Brennan (2016: 227) argues that our best empirical evidence suggests most people vote "sociotropically," which means they "vote for what they perceive to be the national common good." Corrupt electorates are thus unlikely to be a major concern for him; he is probably most concerned with irrational and ignorant electorates. Kogelmann (2023a: §6) challenges Brennan's interpretation of the relevant empirical literature.

> society. They are one of the main vehicles through which justice is supposed to be established.
>
> (2) Government decisions tend to be of major significance. They can significantly harm citizens' life prospects, and deprive them of life, liberty, and/or property.
>
> (3) Governments claim sole jurisdiction for making certain kinds of decisions over certain people within a geographic area. Governments expect people to accept and abide by their decisions.
>
> (4) The outcomes of decisions are imposed involuntarily through violence and threats of violence.

Given the symmetry, consistency requires we recoil at incompetent electorates just as we do incompetent juries. This leads Brennan to another principle, what we shall call *Political Competence*.

> It is presumed to be unjust and to violate a citizen's rights to forcibly deprive them of life, liberty, or property, or significantly harm their life prospects, as a result of decisions made by an incompetent deliberative body, or as a result of decisions made in an incompetent way or in bad faith. Political decisions are presumed legitimate and authoritative only when produced by competent political bodies in a competent way and in good faith (Brennan 2016: 142).

Like Jury Competence, the general idea behind Political Competence is clear and so is its action-guiding prescription: suffrage should be restricted, and the incompetent excluded from political participation.

To sum up the argument: given the similarity between the two cases, *if* you accept the right to a competent jury (which most people do) *then* you should also accept the right to a competent electorate and its epistocratic implications. Though the argument is compelling, we ultimately do not think it succeeds. We maintain the right to a competent jury but deny the right to a competent electorate. We begin our argument in the next section by making a methodological point: before affirming the existence of a right, we must first look at how much it costs to enforce the right and how much harm enforcement of the right prevents.

3. Rights in Non-Ideal Theory

Brennan maintains there is both a right to a competent jury and a competent electorate. Brennan (2016: 19) also maintains his work is an exercise in non-ideal theory. While the distinction between ideal and non-ideal is subject to many interpretations (Valentini 2012), the general thrust is that non-ideal theorists take seriously empirical realities in their normative theorizing. This often takes the form of more realistic assumptions about human nature (Kogelmann 2020). To borrow Rousseau's (1987: 17) phrase, non-ideal theorists take men as they are and laws as they might be. Human nature is not the only empirical reality non-ideal theorists must take seriously, however. Following Colin Farrelly (2007), non-ideal theorists must also take seriously the *costs* of rights.

Enforcing rights costs time, money, and other resources (Holmes and Sunstein 1999). This is most obvious in the case of positive rights, but it is also true for negative rights, which require at the very least police, courts, and prisons. These costs can make enforcing some rights infeasible in certain contexts. Consider the right to healthcare. While some maintain it is a

universal human right, there are countries that cannot afford to provide quality healthcare for their citizens (Pavel 2019). Germany is a wealthy country; it spent 475 billion dollars on healthcare last year. The Republic of the Congo is a poor country; its entire GDP is around 55 billion dollars per year. The populations of the two countries are comparable. To say citizens of the Congo have the same right to healthcare as those in Germany is to say the Congolese government must spend roughly nine times its GDP every year to provide the right; this sum ignores other important expenditures, such as police, courts, sanitation, etc. Clearly, this is insane. While ideally we might want to say citizens of the Congo should have the same right to healthcare as Germans, a non-ideal normative theory that takes seriously empirical realities cannot maintain this.

Taking seriously the costs of rights not only means that enforcing some rights is infeasible; it also means that enforcing some rights is simply not worth paying these costs. Consider an example. Suppose a political philosopher develops a knockdown argument for the claim that, as a part of the general right to healthcare, individuals have a right to dental care specifically. Suppose, however, the right to dental care costs country *C* roughly 10 percent of its GDP per year in expenditures. Country *C* can technically afford to provide the right. However, provision of the right might not be worth 10 percent of GDP. Government spending (like all spending) is subject to opportunity costs; spending resources on *x* means resources cannot be spent on *y*. Governments also face real budget constraints. Even if spending is financed through debt, there is a limit to how much governments can borrow. Given these empirical realities, non-ideal theorists must think carefully not only about what rights *can* be enforced, but also about what rights are *worth* enforcing.

Suppose there exists a compelling philosophical argument for right *R*. How should non-ideal theorists determine whether *R* is worth enforcing? We propose they consider at least two factors: (*i*) how much it costs to enforce *R* and (*ii*) how significant *R* is in terms of the harm enforcement of the right prevents.

Let's consider the first factor, the costs of enforcement. While all rights cost *something* to enforce, the costs of enforcement are not equal across different rights. In most cases, negative rights are probably cheaper to enforce than positive rights. The right to free speech is likely cheaper to enforce than the right to healthcare. And there will be variation within each type. For negative rights, the right to free speech is likely cheaper to enforce than the right to bodily integrity, as the former does not require as much police presence as the latter does. For positive rights, the right to clean drinking water is probably cheaper to enforce than the right to healthcare, because water treatment facilities are mostly upfront costs with relatively low maintenance, while healthcare expenditures are ongoing. All things equal, the cheaper it is to enforce a right, the more willing a non-ideal theorist should be to affirm it, because the opportunity cost of enforcing the right is lower.

How much it costs to enforce a right is not the only thing that matters. The significance of the right—understood in terms of the significance of the harm enforcement of the right prevents—is also relevant. Not only can rights differ in terms of their enforcement costs, but they can also differ in terms of the severity of the harm they protect against. Enforcing the right to bodily integrity, for example, prevents massive amounts of harm. The right to dental care, less so. Enforcing this right does prevent *some* harm—cavities are no joke!—but not nearly as much harm as enforcing the right to bodily integrity prevents. All things equal, the more significant the

harm enforcement of a right prevents, the more willing a non-ideal theorist should be to affirm the right.

We now have a rough framework for assessing rights in non-ideal theory. A compelling philosophical argument in defense of right *R* is necessary, but not sufficient, for a non-ideal theorist to affirm *R*. Non-ideal theorists must also assess how much it costs to enforce *R* and the significance of the harm enforcement of *R* prevents. We now use this framework to analyze the right to a competent jury and the right to a competent electorate. Brennan provides compelling philosophical arguments for both rights. We must now ask: what do these rights cost? What harm is avoided when they are enforced?

4. The Costs of Enforcement

How much does it cost to enforce Jury and Political Competence? Answering this question is the goal of the current section. We focus on three types of costs. First, we focus on *resource costs*, or the time and money required to exclude the incompetent. Second, we focus on *psychological costs*, or the emotional toll imposed on the incompetent when they are excluded. Third, we focus on *moral risk costs*, or the potential wrong we do when we exclude the incompetent.[2] Enforcement of *any* right incurs these costs to some degree, but not all rights are equally costly to enforce. We argue it is cheaper to enforce Jury Competence than it is to enforce Political Competence.

[2] We do not mean to suggest these are the *only* costs worth considering. Another relevant cost is the likelihood that the political institutions used to enforce the right will be captured by bad political actors (Kogelmann 2023b). We do not discuss these costs, both due to space constraints and because other papers in the secondary literature on epistocracy already highlight these costs for the right to a competent electorate specifically (e.g., Bagg 2018: 898; Klocksiem 2019: 24-26).

What kind of resources are needed to exclude the incompetent from participating in juries? To begin, note there is limited demand for competent jurors. Juries typically consist of twelve individuals. They are small. This means that at most twelve competent individuals are needed for a jury trial to proceed. Of course, a useful data point here would be the total number of people who serve on a jury each year. Federalism and the fact that jury trials occur at different levels of government in the U.S. makes finding a composite number difficult. However, we know that 43,697 people were selected to serve on federal juries in 2016 (Gramlich 2017). The Center for Jury Studies estimates that around 1,526,520 individuals serve on state juries annually (Mize *et al* 2007: 7-8). Supposing an adult population in the U.S. of around 260 million, only a very small percentage of the population needs to serve on an annual basis for the legal system to function. So, only a very small percentage of the population needs to be screened for incompetence.

Of those that are screened, it's not very difficult to separate the competent from the incompetent. The *voir dire* interview already exists to do this. During the interview the judge and litigating parties "question prospective jurors as to their willingness and ability to follow the law" (Gold 1984: 163). There are a few reasons to think the *voir dire* interview need not be overly labor intensive. The skills needed to be a competent juror are not great. The task jurors confront is manageable for most people. The decision confronted by any given juror is binary: guilty or not, meaning the choice menu is inherently small. The task is not a scalar one; the jury is not responsible for determining to what *degree* the defendant is guilty. Moreover, the determination made by jurors is one of objective fact. The accused either committed the criminal act or they did not. The task is not about something subjective and, as a result, open to a greater range of interpretations. Finally, juries address what Joel Feinberg (1974: 301) calls issues of

noncomparative justice, which refers to what an individual is due irrespective of what others are due, thus simplifying the task. For these reasons, we believe most people have the intellectual capability of being competent jurors. This implies that the *voir dire* interview need not be terribly lengthy or intrusive.

In response, it might be argued that this ignores the possibility of jurors who are intellectually capable to judge but incompetent across other margins—that is, we have ignored the irrational, immoral, and corrupt jurors. The *voir dire* interview also seeks to exclude these people. However, we also believe searching for these facets of incompetence will not be too difficult. The reason why is that there is little incentive—except maybe in blockbuster court cases that capture the nation's attention—for incompetent persons to fake competence so they can serve on a jury. That is, there is little reason for an irrational or immoral or corrupt person to fake rationality or morality to serve on a jury. The reward for serving on a jury (if there is any at all) is simply not great enough for people to do this. Indeed, serving on a jury is often viewed as a chore or sacrifice that people only do out of a begrudging sense of civic duty. Hence, those conducting a *voir dire* interview can take candidates' answers at face value, because the incentive to lie about one's biases is small.

Let's turn to the resources needed to enforce Political Competence. The simplest epistocratic proposal is to introduce a suffrage exam (Brennan 2016: 211-214). If you pass the exam you can vote; if not, then not. In principle, implementing such an exam would not be that costly. Perhaps people just take the exam at the DMV when they register to vote. While a suffrage exam would be easy to implement, it does not exclude the incompetent (Moraro 2018: §3; Kogelmann 2023a: §4). At best, it eliminates the ignorant and impaired, but doesn't do anything to eliminate the irrational, immoral, and corrupt. In fact, there is compelling evidence

that those who are most informed about politics (and thus most likely to pass an exam) also tend to be highly partisan, and thus reason about politics irrationally (Gunn 2019: 35; Hannon 2022; Somin 2022: 32-33). Relying on a suffrage exam alone could get rid of the uninformed and impaired, but may *amplify* the voices of irrational partisans, another form of incompetence. To truly exclude the incompetent, a further selection mechanism is required.

How might this be accomplished? Perhaps election officials could interview individual voters to determine their competency. This, after all, is how judges and attorneys examine the competence of potential jurors at *voir dire*. This process, we noted, is costly. What makes it a reasonable selection mechanism for jurors is twofold. First, relatively few jurors are needed each year for the legal system to function. By contrast, this interview process would need to be done for *every* eligible voter (recall, there are around 260 million adults in the U.S.) and would likely need to be redone periodically throughout a voter's life to make sure their competency has not changed. Those deemed incompetent will surely want another chance to prove their competence, and competent people can become incompetent over time. The size of the electorate makes a *voir dire*-like process exorbitantly costly as a method for determining voter competence.

Second, when it comes to jury selection, there is really no incentive for the incompetent to fake competence. This means the interviews can occur quickly and at a mostly superficial level. We suspect the opposite is true in politics. Here, there will be incentive for the incompetent—the irrational partisans, for instance—to fake competence to gain the franchise, for a few reasons. First, the outcome of a jury trial typically does not affect the jurors, but the outcome of an election affects all voters. Second, people seem to care more about participating in politics than they do about participating in juries; some liken political participation to intense sports fandom (Brennan and Lomasky 1997: 33; Brennan 2016: 5). This means that a *voir dire*-

like process to determine eligible voters would need to be especially rigorous to sniff out irrational partisans who fake competence. So, not only must the selection procedure be applied to *more people* in politics when compared to juries, but the selection procedure must also be *more rigorous* and thus time consuming. The resources needed to enforce Political Competence are far greater than those needed to enforce Jury Competence.

Enforcing rights not only costs time and money; it can also inflict psychological costs. Consider an example. Suppose a society decides to enforce the right to life for fetuses, rendering all abortions impermissible. The psychological costs of enforcing this right are tremendous. Enforcing the right requires forcing women to carry unwanted pregnancies to term and then either raise unwanted children or give them up for adoption; this is incredibly emotionally taxing. As another example, suppose engaging in hate speech is a protected right. Enforcing this right may result in psychological costs. Persecuted minorities in such a society may have to frequently listen to horrific, vile things said about them, resulting in a significant emotional toll. This is not to say there are no benefits to enforcing these rights. Enforcing the right to life may avert serious moral horrors (depending on the moral status of fetuses); perhaps it also has a positive effect on family formation and fertility rates. Enforcing the right to engage in hate speech allows people to express themselves even when their views are unpopular; it also eliminates a potential source of government repression. This section, however, focuses on the costs of enforcing rights, so we now examine the psychological costs of enforcing the right to a competent jury and competent electorate. The benefits of enforcing rights are discussed in the next section.

What psychological costs are inflicted on the incompetent when Jury and Political Competence are enforced? No doubt being told you are incompetent stings regardless of the

context. However, we believe being labeled too incompetent for jury duty harbors fewer psychological costs than being labeled too incompetent to vote, for two reasons. First, when you are rejected at *voir dire* because you are incompetent, you can never be sure *why* you were rejected, because prospective jurors are sometimes rejected for reasons other than their incompetence. Some people are rejected at *voir dire* because they are not sufficiently competent to be a juror. Others are rejected because the defense or prosecution thinks they will be too sympathetic or unsympathetic to the defendant given their demographic characteristics. Some are rejected because they are *too smart* and thus too difficult to convince or too difficult to fool. This ambiguity allows the incompetent rejected from jury duty to live in blissful ignorance. By contrast, we imagine that in an epistocracy the *only* reason you are rejected from participating in the electorate is because you are incompetent. There is no mystery why you can't vote. Blissful ignorance is not possible.

Second, those deemed too incompetent to serve on juries are not periodically reminded of their incompetence. Most people go about their daily lives without interacting with the criminal justice system. Elections, by contrast, are hard to avoid. Everyone knows when election day is, even if they don't vote. As elections approach, debates are televised and commercials for candidates constantly air on TV and radio. If you are deemed too incompetent to vote, then you will be frequently reminded. Every political ad you see, every televised debate that airs, every election day you are reminded that others think you are incompetent. For these reasons, we believe psychological costs are greater when the incompetent are excluded from electorates than when they are excluded from juries.

Finally, it is important to examine the *moral risk costs* associated with enforcing the relevant rights. The moral landscape we face is complicated and uncertain (Bykvist 2017). When

we decide to enforce a moral right or some other moral claim, we can never be certain we got it right. Therefore, some believe we should approach moral dilemmas by considering the wrong we do if it turns out we are mistaken (Moller 2011). Suppose, for instance, a society believes they have discovered the right position on abortion: fetuses are not moral persons, so women can permissibly get abortions. There is a possibility the society is wrong, of course. And if they are, they are *really* wrong: millions of innocent lives are murdered every year. By contrast, the opposing position is less risky from a moral perspective. Suppose a different society decides fetuses are moral persons and thus have an inviolable right to life. It is thus impermissible for women to receive abortions. If the society is wrong, they commit grave harms: they force women to carry unwanted pregnancies to term for no reason. However, murdering innocent lives is worse than forcing women to carry unwanted pregnancies to term, which means there are *less* moral risk costs in the pro-life society than there are in the pro-choice society. We can approach Jury Competence and Political Competence from a similar perspective. What moral risk costs do we incur by enforcing these rights?

The moral risk costs for enforcing Jury Competence are not, in our view, very high. There are a few considerations supporting this conclusion. First, we can find few people who argue that there is a right to serve on juries (Underwood 1992; Grossman 1994). Thus, the credence we place in there being such a right is low; if such a right exists, more people would argue for it. Suppose there is such a right, however. Even so, the number of times the right is violated is small. Roughly eight million U.S. adults report to jury duty each year (total adult population in the U.S. is around 260 million), though far less actually serve on a jury (Chalabi 2015). Suppose you are summoned to jury service five times in your adult life, which we think is a realistic estimate. Suppose you are rejected from participating in a jury each time you are

summoned because you are deemed incompetent. Your right to serve on a jury has been violated five times over the course of your life. Any rights violation is serious, of course, but five violations over an entire lifetime seems to be on the less serious end.

By contrast, the moral risk costs for enforcing Political Competence are very high, for a few reasons. First, there are very many people who disagree with the epistocrats and defend the idea of *political equality*, that all adults should have an equal capacity to influence political outcomes regardless of competence (e.g., Brighouse 1996; Beitz 1989; Dworkin 2000; Cohen 2001; Dahl 2006; Christiano 2010; Viehoff 2014; Wilson 2019). Because so many people seem to think there is such a right, the credence we place in the right existing is higher than the credence we place in the existence of the right to participate in juries. Furthermore, if there is such a right then epistocracy violates it frequently. Suppose you are deemed incompetent by whatever standard the epistocrat deploys. Your right to participate is now violated in *every election* going forward. In the United States, federal elections occur every two years; there are even more elections at the state and local levels. Your rights are violated on a yearly basis for the rest of your adult life.

To close this section, we qualify the arguments just made. We have just argued that enforcing the right to a competent electorate is more costly—in terms of resource costs, psychological costs, and moral risk costs—than enforcing the right to a competent jury. There are many forms of epistocracy and thus many ways to enforce the right to a competent electorate (Brennan 2016: ch. 8). Does our argument apply to all of them equally? No. We now briefly walk through how enforcement costs vary for different forms of epistocracy. We focus on five types of epistocracy: restricted suffrage, plural voting, enlightened preference voting, values-only voting, and the enfranchisement lottery.

Resource costs will be significant for any form of epistocracy that requires screening the competence of every citizen. This includes restricted suffrage epistocracy, plural voting, and enlightened preference voting, for these forms of epistocracy allocate votes according to individual competence. It excludes values-only voting and the enfranchisement lottery. In values-only voting, everyone can vote, but what they vote over is restricted. In the enfranchisement lottery, only a small randomly selected group of citizens has the opportunity to vote (if they successfully complete competence-building exercises). These two forms of epistocracy can be implemented with comparatively few resources because they do not require assessing the competence of every voter.

Psychological costs will be significant for any form of epistocracy that reveals to incompetent voters that they are, in fact, incompetent, for being labeled incompetent inflicts psychological harm. This includes restricted suffrage epistocracy, plural voting, and enlightened preference voting; these forms of epistocracy reveal to voters they are incompetent by either not letting them vote or giving them fewer votes. This excludes values-only voting and the enfranchisement lottery, because these systems do not tell voters they are incompetent even when they are. Values-only voting lets everyone vote, and the enfranchisement lottery restricts voting to a randomly selected group of citizens.[3] We should expect these two forms of epistocracy to have little to no psychological costs.

[3] The enfranchisement lottery is a bit more complicated than this. A small subset of the population is randomly selected to engage in competence-building exercises, and those who complete the exercises can vote. Thus, the enfranchisement lottery makes negative judgments about the competence of individual voters who are selected to engage in competence-building exercise but are unable to complete them. This group is such a small subset of the population, however, that the psychological costs under this system of epistocracy are negligible even when they are not zero.

Restricted suffrage epistocracy, plural voting, and enlightened preference voting have the highest moral risk costs. This is because (according to our reading of the literature) nearly all democratic theorists condemn political systems that grant citizens unequal voting power, which is precisely what these three epistocratic systems do. If that many experts believe there is something wrong with these epistocratic systems, then we assign relatively high credence that the systems are, in fact, wrong. By contrast, the moral status of values-only voting and the enfranchisement lottery is mirkier. Some criticize sortition, a key component of the enfranchisement lottery (e.g., Lafont 2020). Others argue that sortition is an expression of democratic values (e.g., Landemore 2020). Because there is more disagreement among experts about the moral status of these epistocratic systems, their moral risk costs are lower. We assign relatively low credence that the systems are wrong.

Summing up, values-only voting and the enfranchisement lottery are relatively low-cost ways to enforce the right to a competent electorate; restricted suffrage epistocracy, plural voting, and enlightened preference voting are relatively high-cost ways to enforce the right to a competent electorate. It's worth noting that that the most popular forms of epistocracy (according to our reading of the literature) are plural voting (Harwood 2008; Mill 2015: 292-293; Moyo 2018: 198; Mulligan 2018) and enlightened preference voting (Brennan 2021: 379-382; Ahlstrom-Vij 2022). So, though some forms of epistocracy may escape our criticism, the most popular ones do not.

5. The Harm Enforcement Prevents

In the last section we established that, all things equal, a non-ideal theorist should be more willing to affirm Jury Competence than Political Competence because the former is cheaper to enforce than the latter. Also relevant, however, is the significance of the harm enforcement of the right prevents. If Political Competence prevents astronomical harm, it might be worth its steep cost; if Jury Competence prevents little to no harm, its relatively cheap cost might still not be worth paying. In fact, the opposite is true. In this section we argue that more harm is done if Jury Competence goes unenforced than if Political Competence goes unenforced. There are three reasons why we believe this.

The first reason concerns how *direct* the impact of incompetence is in the respective domains. In criminal trials the jury's decision is often binding. If the jury says "guilty" then punishment is imposed on the defendant; if they say "not guilty" then punishment is not imposed, and the defendant walks free. Thus, if a jury is incompetent—for instance, if they deliver a guilty verdict when the most reasonable interpretation of the evidence points in the opposite direction—then their decision will have an immediate and negative impact on the defendant.

By contrast, the incompetent's impact on politics is far less direct. Epistocrats mostly worry that incompetent voters have bad policy preferences due to their lack of social scientific knowledge. For instance, low-information voters tend to view immigration and free trade as economically harmful when the opposite is true (e.g., Brennan 2016: 192-193). While we don't deny incompetent voters harbor such preferences, we note that there is by no means a clean causal chain between what incompetent voters want and the policies that are ultimately implemented. Outside referenda, voters do not vote for *policies*; they vote for *representatives*. These representatives tend to be highly competent across at least across some dimensions. They

are often highly educated (Besley and Reynal-Querol 2011; Thompson *et al* 2019; Arceneaux and Vander Wielen 2023); not only this, but there is evidence that politicians tend to be in the upper echelons of raw intelligence (Bó *et al* 2017; Jokela *et al* 2023). While competent representatives are no doubt influenced by their constituents' wishes, the fact that voters can only imperfectly monitor and sanction them suggests competent representatives have significant latitude. To borrow a distinction from political theory, competent representatives are often able to act as *trustees*, not mere *delegates* (Rehfeld 2009).

Representatives' policy preferences are not the end of the story, either. Political parties discipline representatives to ensure they either support or oppose certain policies (Kam 2009; Pearson 2015). Special interest groups and lobbyists also exert influence (Lohman 1998; Hall and Deardorff 2006). When the whole policy process is said and done, the actual impact incompetent voters have is unclear. This is something political scientists recognize. As one summary of the literature puts it, "whereas some analysts find a strong and persisting impact of public opinion on public policy, others reject the idea that the public has consistent views at all or, even if it does, that those views are capable of exercising much independent influence over policy making" (Manza and Cook 2002: 630-631). Because the effect incompetent voters have on policy is messy and unclear, we are not as worried about Political Competence going unenforced as we are Jury Competence. It's clear and obvious how incompetent jurors impact outcomes; it's far less clear and obvious what impact (if any) incompetent votes have on outcomes.

The second reason we are more worried about Jury Competence going unenforced than Political Competence concerns opportunities to contest bad decisions. If a jury makes an incompetent decision, the defendant can appeal to a higher court. This is typically the only way a

defendant can appeal a bad decision. If the higher court rules against the defendant, then she may appeal if there is an even higher court; quickly, however, she will run out of courts and hence opportunities to combat incompetence.

By contrast, there are more avenues to contest incompetent political decisions. Citizens can go to the courts, they can lobby other branches of government, they can lobby other levels of government if they live in a polycentric system, they can fight through bureaucracies via the notice and comment process, etc. Not only are there more *avenues* for contestation, but there are also more *opportunities*. Bad policies are always one election away from being overturned. By contrast, if you are a federal defendant who suffers injustice at the hands of an incompetent jury, and the Supreme Court refuses to issue a writ of certiorari, your opportunities are exhausted. There is nowhere else to turn. There is *always* somewhere else to turn in a democracy. This optimism is what keeps the democratic game going (Miller 1983).

The third reason we are more worried about Jury Competence going unenforced than Political Competence concerns opportunities the incompetent have to corrupt the respective processes when they are allowed to participate. So far, we have assumed incompetent jurors and voters corrupt the respective processes by voting poorly. Incompetent jurors vote guilty when the evidence points to the contrary (or vice versa). Incompetent voters vote for bad policies and candidates. If the incompetent are allowed to participate in juries, however, there is another way they can corrupt the process. Before they vote, juries deliberate. An incompetent juror can corrupt the deliberative process. She can convince others to reason just as irrationally or immorally as she does. So not only does she cast a bad vote, but she may convince others to cast bad votes.

Of course, the incompetent in politics can both vote poorly and corrupt democratic deliberation as well. The incompetent in politics, however, can corrupt democratic deliberation *regardless of whether Political Competence is enforced*. Declaring someone too incompetent to vote does not stop them from logging on to Twitter or Facebook and spreading fake news. Excluding the right to vote, epistocracies are committed to protecting basic liberal rights, so the incompetent can still exercise free speech (Brennan 2023: 247). In the political arena, the incompetent corrupting deliberation is already baked into the cake; enforcing Political Competence cannot prevent it. By contrast, whether the incompetent corrupt deliberation in juries is a choice; it can be prevented by enforcing Jury Competence. To put it another way, if we don't enforce Jury Competence, we risk bad voting and deliberation; if we don't enforce Political Competence, we only risk bad voting.

We have just argued that we should be more worried about Jury Competence going unenforced than Political Competence because incompetent jurors have a more direct impact, there are less ways to contest their bad decisions, and they have more opportunities to corrupt the processes they participate in. A defender of Political Competence can take all this on board and argue that incompetent voters *still* produce more harm due to *how many* people they impact with their bad decisions. Most people will never be criminal defendants. Everyone is affected by the political choices of their country, however. So, while it is true that incompetent jurors have a more direct impact, there are less ways to contest their bad decisions, and there are more opportunities for them to corrupt the processes they participate in, they still do less harm than incompetent voters because their incompetence impacts *fewer people*.

We disagree. Incompetent jurors, like incompetent voters, have a society-wide negative impact. Incompetent jurors convict innocent defendants, a deep injustice to be sure. Beyond this,

incompetent jurors—if they appear frequently in civil and criminal cases—can undermine the *rule of law*. According to F.A. Hayek, the rule of law allows people to plan their lives. He writes: "The knowledge that in such situations the state will act in a definitive way, or require people to behave in a certain manner, is provided as a means for people to use in making their own life plans" (Hayek 2007: 114). Not only is the capacity to plan one's life good in itself (Lomasky 1987), but the rule of law's facilitation of planning has a salutary economic impact (Soto 2000; Mahoney 2001). Complex production and consumption are disincentivized when there is no ability to plan.

Incompetent jurors threaten the rule of law because they introduce unpredictability into the legal system. They do so by making legal verdicts contingent on the idiosyncrasies of jurors with serious epistemic-moral vices rather than written law. What kind of legal remedy will be afforded for breach of contract? If jury incompetence is widespread, then the answer to this question depends less on what contract law says, and more on whether the jury is racist, sexist, unwilling to pay attention at trial, and so on. When incompetent juries are widespread, the law matters less and the composition of the jury matters more. This unpredictability decreases people's ability to plan. The result is that "not only are people's expectations disappointed, but increasingly they will find themselves unable to *form* expectations on which to rely, and the horizons of their planning and their economic activity will shrink accordingly" (Waldron 2016: §6). Incompetent jurors do more than harm defendants. The harm they do to the legal system is far-ranging.

6. Conclusion

We can now put the pieces of our argument together and state our conclusion. For non-ideal theorists (like Brennan), what rights you affirm depends on the costs of enforcement and the significance of the harm enforcement of the right prevents. Though they are similar in many ways that Brennan highlights, the right to competent jury and the right to a competent electorate differ across these dimensions. The right to a competent jury is relatively cheap to enforce and prevents significant harm. The right to a competent electorate is very expensive to enforce and prevents less severe harm. This gives us reason to affirm the right to a competent jury but deny the right to a competent electorate.

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