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Against Deliberation? Addenda to the Limits of Deliberation in Democracy

> 'If we are to be always deliberating, we shall have to go on to infinity' (Aristotle, NE, Book III, 1113a)
> '(…) Of things past there is no deliberation.' (Hobbes, Leviathan, Part I, Ch. VI)

Let me begin with a somewhat long, but hopefully rhetorically useful fragment from one of Pliny the Younger's letters to Titus Ariston:

> 'A debate', Pliny remembers, 'arose in the senate concerning the freedmen of the consul Afranius Dexter; it being uncertain whether he killed himself, or whether he died by the hands of his freedmen; and again, whether they killed him from a spirit of malice, or of obedience. One of the senators (it is of little purpose to tell you, I was the person) declared, that he thought that these freedmen ought to be put to the question, and afterwards released. The sentiments of another were that the freedmen should be banished; and of another, that they should suffer death. It was impossible to reconcile such a diversity of opinions. What agreement can be framed between the sentence for death, and the sentence for banishment? No more indeed than between the sentence for banishment, and for acquittal. The two latter are however a little nearer than the two former. In both the last cases, life is spared; by the former motion, it is taken away. In the meantime, such of the senators, who had given their voice for death, and such of them, who had declared for banishment, sat together: *by this temporary feint of unanimity, their disunion could not be discovered*. I desired them, that the three different opinions should be numbered; and that the two parties, who had made a momentary truce, should be separated. I required too that the persons who had voted for capital punishment should be entirely divided from those who had voted for banishment. And that both the parties, who had differently opposed the acquittal, should not be suffered to unite together; because it was of little consequence that they disagreed as to one point, while they did not agree in another. To me it seemed an astonishing circumstance, that any person, who had condemned the freedmen to banishment, and the slaves to death, should be obliged to vote separately on each point; and that the person, who had adjudged the freedmen to death, was to be numbered among those who had adjudged them only to banishment. For, if the opinion of one senator ought to be divided, because it comprehended two distinction propositions, *I did not conceive how the opinion of any two senators could be united, when their sentiments were so widely different*. And therefore permit me to offer you the reasons of my decision, in the same manner, as if I were in the senate (…).

> Let us suppose that three judges only had been appointed to determine this cause; one of whom had declared that the freedmen ought to suffer death; another had been of opinion, that they ought to be banished; and the third had been given his voice for the acquittal. Shall the first opinion, because the authors of them joined together, destroy the third? Or ought not each opinion to have as much weight as any one of the two others? For the first bears no nearer a comparison to the second, than the second to the third. In the senate therefore, votes ought to be numbered as contrary, when they are effectually incompatible. For if one and the same person should adjudge the same person to be banished, and to be executed, must they, according to that sentence, undergo banishment and death? Or, lastly, could it be thought one single sentence, which comprehended such different decrees? When one man has determined that they ought to die, another that they ought to be sent into banishment, how is it possible to *affirm the determinations of two persons to be only one*, when, if they were pronounced by any single senator, they would be deemed two distinct awards? (…). But it may be objected that if the votes of those, who were for death, were divided from those, who were for banishment, the voices for an absolute acquittal would prevail. *Such an effect is not to be regarded by the persons, who give that judgment; in whom it would be indecent to use any kind of art, or skill, that might prevent the milder sentence from taking place*. (…) [T]hose who are for death ought to immediately separate themselves from those who are from banishment, as soon as the latter have declared their opinion; or else they ought not to be permitted to separate themselves from companions, to whom they originally adhered.
> But why should I assume the part of a matter, when I would willingly be taught, whether these several opinions ought to have been separated or not?' (1756: 202-205)

To the modern reader, Pliny's question might, most probably, sound surprising. It is clear from his story that, from a legal standpoint, those in favour of capital punishment consider the freedmen to be surely guilty of Dexter's death and that those favoring acquittal consider them to be innocent. The ones in favour of banishment occupy a somewhat intermediate position: their judgment oscillates in the interval between guilt and innocence. What Pliny seems to fail to appreciate is that, as far as the decision on punishment goes, deliberation manages to help the undecided to make a decision: those in favour of banishment come to openly accept that the freedmen are guilty. Furthermore, Pliny is unable to see that the deliberative process helps avoiding both the excesses of capital punishment and the laxity of acquittal. In short, Pliny is oblivious of the fact that, through the process of deliberation, 'two heads prove to be better than one'.

Today, it has become a normative commonplace to think that a group's decision is at the same time more informed and more legitimate than that of an individual's. This is allegedly because, unlike an individual, a group is able to engage

in collective deliberation. As this modern normative story goes, deliberation allows individual viewpoints to be refined, errors to be corrected, and additional information to be collected. It is because there is a conversational exchange between individuals that individual positions can change and that, eventually, we might end up in a situation where 'the determinations of two persons [are] only one'. Thus, what Pliny should have noticed is that deliberation allowed those who were in favour of capital punishment to opt for the milder and more humane solution of banishment. Deliberation, on this account, is a way of finding the most convenient middle ground when it comes to group decisions.

More generally, and sketchily put, there are three types of justification for deliberation in matters of collective decision-making. Firstly, there is an *epistemic justification*: a decision that is subject to debate and reasoned conversation is more likely to avoid errors and to reflect a correct judgment. Secondly, there is a *moral justification*: a deliberative decision recognizes the right and the obligation of individual decision-makers to provide and receive publicly acceptable reasons for their preferences and judgments.[1]

Thirdly, deliberation rests on a *political justification*. This justification is, in its turn, threefold. Firstly, deliberation is politically defensible because collective decisions affect the community as a whole – and not just some individuals.[2] Consequently, everyone should have a say when it comes to agreeing to what are to be legally or socially binding decisions.[3] Secondly, deliberation is a way of making citizens sensitive to and responsible of what goes on in public life; additionally, deliberation is a means of holding political representatives accountable for their decisions. From this latter viewpoint, an official's or a government's decision unable to withstand the deliberation of the many is problematic at best and unacceptable at worst.[4] Thirdly, and finally, deliberation is a practice that allows individuals to come to terms with and give substance to their civic identity. People who deliberate are better people, both in terms of participation to and knowledge about the political process.

As I see it, these three justifications of deliberation, and especially the second and the third one, have come to mingle and intimately associate with our conception

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[1] For a more elaborate account of these two justifications, see Manin (2005).

[2] This is the case for criminal convictions as well, since one of the explicitly invoked functions of criminal justice is to protect society from crime, by deterring individuals from engaging in criminal acts.

[3] For the detailed argument, see, in particular, Habermas (1996).

[4] For this line of justification, see Ackerman & Fishkin (2004).

of citizenship. Talk about citizenship massively evolves around the image of an individual who is publicly involved, intellectually flexible and polemically astute. Being a citizen means, for many of us, being able to constantly or at least regularly take part to the public life. Being a *good citizen* means being capable of exchanging arguments in the public forum and contributing to the debate in order to push toward an informed and just collective decision. As a consequence, deliberation has become a *sine qua non* condition of authentic citizenship: an individual who is fully aware of the value of her civic status is a *deliberating citizen*.

In what follows, I want to try and fulfill a double task. The first one is mostly critical, in that I want to insist on the limits of the deliberative argument. Secondly, and less critically, I want to weigh the implications the limits of deliberation carry as far as our civic practices are concerned.

Deliberation is not always the best method of reaching a correct decision. On the contrary, deliberation is sometimes detrimental to arriving at accurate and less error-prone resolutions. In particular, deliberation is problematic when collective decisions bear on matters of fact, as opposed to value judgments. More specifically, and drawing from Amartya Sen (1977), I consider that the advocates of the application of deliberative mechanisms across the political board ignore or, at best, minimize the importance of the distinction between *expressing a preference* and *making a judgement*. The difference between the two is rather straightforward. Expressing a preference, on the one hand, is about raising a sovereign claim. Of course, a person is only entitled to her preference as long as this does not hurt others: one cannot, for example, possibly justify one's preference for killing old people. Rather, a preference is sovereign in that another person's preference cannot serve as a valid argument for changing one's preference: the fact that Albert Einstein was a vegetarian is not a compelling argument for Jonathan Safran Foer to become one as well.

Making a judgment, on the other hand, is not about conveying one's ultimately subjective tastes and preferences; it is about raising a claim as to the truth of one's statement. Truth claims are supposed to 'travel better' than preference claims, in that they rely on a proposition to which any rational individual should adhere. More precisely, one and the same individual cannot, at the same time, hold that a judgment is both granted and not. Disagreeing over a judgment implies that each of the disagreeing parties supposes that one of them, and, for each of them, the other one, is wrong.

The possibility of disagreement is given by a common reference point for any two judgments, i.e. the existence of an objective, pre-existing fact of the matter that the judgment has to reflect. A judgment is about uniquely given facts. The same is not the case for preferences: persons trying to make a collective choice based on preferences can consistently acknowledge the irreducible plurality of individual preferences, while at the same time accepting that not all of these preferences can be collectively fulfilled.

This distinction between preferences and judgments weighs in an important manner on the way one reaches a collective decision. In order for an aggregation mechanism to lead to accurate decisions, one should constantly ask whether one is dealing with preferences and interests or with judgments. This is because the *object* of the aggregation affects the *method* of aggregation (Sen 1977). In particular, discussion and deliberation between individuals are needed when it comes to aggregating preferences: this is because, given their unavoidable plurality, preferences have to be hierarchically ordered if a collective choice is to be made. To this extent, deliberation is a way of legitimately sacrificing some of the individual preferences for the sake of others. Deliberation, at this level, is not meant to convince some individuals that their preferences *as such* are somehow worse than those of the majority. Rather, deliberation is a method aimed at convincing the others that some preferences are *collectively* more urgent or more meaningful than others. Thus, deliberation comes as a preference selection mechanism.

Things are, however, different when it comes to aggregating judgments. Indeed, those who champion deliberation across the political board argue that deliberation is a way of minimizing judgment errors. I call this form of optimism in the epistemic virtues of deliberation *deliberational extensionism.* The basic claim of extensionists is that deliberation can always serve as an epistemic supplement that increases the probability of reaching a correct decision. What extensionists conveniently ignore, however, is that the technical requirements for aggregating judgments are not the same as those for aggregating preferences. When it comes to aggregating preferences, a collective debate is useful to the extent that it might provide ways of (peacefully) realizing as many individual or sub-group preferences as possible at the collective level. Deliberation, to this extent, is an exercise in imagination and negotiation.

Individual judgments, on the other hand, are different from preference expressions, in that, when a collective judgment has to be reached, there is nothing *valid* about what should be left behind. Good judgments are judgments that manage to leave errors behind and take into account as much sound information as possible. If judgments are about facts and if what one wants is to increase the probability that the collective judgment will be a correct one, then deliberation is not the most appropriate method for reaching an accurate collective judgment. This is because of Condorcet's famous jury theorem. The theorem states that if each member of a jury is more likely to be right than wrong in his judgment, then the majority formed by the jury members is also more likely to be right than wrong. In short, the probability of a jury reaching a correct collective judgment is a function of the size of the jury, given a minimal level of the competence of individual jurors.

One of the fundamental conditions for Condorcet's jury theorem to hold is the *independence condition*: individual judgments should be articulated independently of one another. This implies that, if the probability of a jury's judgment – let us call it a *verdict* – to be correct is to be maximized, then deliberation should be forbidden at the moment when collective judgment has to be reached. Jurors' deliberating about their individual judgments violates Condorcet's independence condition.

Hence, I argue that we should *sacrifice deliberation if the accuracy of jury judgments is to be preserved*. In a way, this is exactly what Pliny was asking for when he was denouncing the 'temporary feint of unanimity' between the partisans of capital punishment and those of banishment in their opposition to those who were in favour of acquittal. Arguably, those in favour of acquittal were advancing a judgment as to the innocence of the freedmen: they might have helped Afranius Dexter, but Dexter had most probably killed himself. The position of those in favour of banishment was not as clear-cut: they hesitated as to whether they should have considered the freedmen entirely innocent. But they also had their doubts as to whether the freedmen actually killed Dexter, thus committing murder; were they convinced of the freedmen being guilty of murder, they would have sentenced them to capital punishment. To this extent, those in favour of banishment unnaturally join the ranks of those who are convinced that the freedmen are guilty of murder. In this, the coalition between the two groups amounts to a 'feint unanimity': the agreement on preferring the same conviction hides an irreducible divergence concerning a factual judgment. Moreover, the cause of this false – i.e. factually inaccurate – unanimity, according to Pliny the

Younger, lies in the senators' appetite for discussion and deliberation. When it comes to factual judgements about guilt or innocence, deliberation proves to be pernicious.

One does not have to go as far back as the I^st^ century in order to make a case against deliberation when it comes to juries making factual judgments. More recently, Lynn Sanders (1997) has argued against deliberation. One of her main points of criticism is that deliberation 'carries conservative or antidemocratic connotations usually overlooked by well-intentioned theorists' (347). By all means, this critical assessment needs to be developed and nuanced. Thus, in Part I, I try to refine and add to Sanders's critique of deliberation.

Part II is more succinct and less 'negative'. After having argued that deliberation is unwarranted when it comes to juries' decisions on matters of fact, I will argue that the idea of citizenship does not irremediably lose its content in the absence of deliberative practice. The main idea here is that being part of a jury and having to decide on a criminal or, less often, a civil matter, represents a civic act as such.[5] An individual that is aware of the importance of rendering an accurate judgment is also a citizen that, given the jury situation, assigns priority to truth – and not to solidarity – as the primary political value.[6] This is because a punitive institution (such as the jury) that would set a higher price on the conversational solidarity between the decision makers, as compared to the concern for truth finding, would be an institution most liberal democrats would abhor. Such an institution could only be a source of individual injustice and a mechanism for fostering and enhancing a collective sense of insecurity.

The reason for a jury's existence is to come up with a correct decision, not to emancipate itself while rendering a judgment. What is more, we should probably allow ourselves to think that what gives value to citizenship is not only the citizens' participation to public debates about policy projects and laws. There is also a more punctual – and, indeed, less visible – form of citizenship. Coming up with a correct verdict concerning an individual case is also reflective of our sense of what it means to be a good citizen.

Citizenship, on this account, might be considered along two axes. On the one hand, when it comes to policy and legislation, citizenship is linked to the ordering of

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[5] The difference here is between the European juries (concerned with criminal cases only) and the US one (concerned with criminal and civil cases).
[6] The allusion is, of course, to Rorty (1990).

our normative preferences as a result of a deliberative process. This is what might be plausibly called *deliberative citizenship*. On the other hand, when it comes to jury participation, citizenship is more about truth finding and working out accurate judgments in individual cases.[7] I suggest that we call this latter form of civic commitment *verdict citizenship*. As etymology indicates it, a verdict's rationale (*verumdictum*) lies in its establishing the truth about a matter of fact, such as the guilt or innocence of a specific person. Normatively, a verdict is less, and only secondarily so, about the impact it might arguably have on the intellectual abilities or the political competence of those who have reached it.

More generally, I propose that we see the verdict citizen as one of the close 'conceptual relatives' of what Bruce Ackerman (1991) calls the private citizen, as doubly opposed to the perfect privatist and to the public citizen. I will come back to this point toward the end of my paper.

I. Reconsidering the Case Against Deliberation

As indicated, my objective is to develop Sanders's (1997) argument against deliberation. I do this in a limited way, in that my criticism is not directed against deliberation in general, but against the application of deliberation to juries concerned with factual verdicts, such as verdicts which have to discriminate and decide between innocence and guilty. Once again, my target is *deliberational extensionism*, i.e. the conception according to which deliberation is a normatively desirable ideal across the political board and not deliberation *qua* deliberation. There are, as far as I can see it, no Schmittian undertones hidden in my case against deliberation.

A preliminary remark is in order. The conceptual distinction between expressions of preferences and factual judgments was not meant to imply that preferences − whether aesthetic or ethical ones − are completely excluded from the judgment-making process. The idea, rather, is that, although normatively non-neutral and, to a certain extent, subject-dependent, factual judgments draw their value from the way they reflect the informational basis contained in the case that has to be

[7] I am, without a doubt, referring to juries from an exclusively *judicial perspective*. This means that I am not interested in focus groups or other groups that are meant to test or evaluate individual preferences. These latter groups are, as I see it, only metonymically called juries.

decided. Good judgments are judgments that include as much relevant information about the case as possible: the circumstances of the crime, the alibi of the defendant, the relation between the victim and the accused, the cogency of criminal expertise, etc.[8] To this extent, a good factual judgment is a judgment that takes into account as *much and as good information as possible*, given the practical conditions of the tried case.

Bearing this theoretical point in mind, I now move to my critique of deliberation. My critique is threefold: conceptual, epistemic and normative. Though analytically distinct, the content of these three types of criticism blends from time to time: the conceptual touches upon the epistemic and the normative; also, the frontier between the normative and the empirical is a rather porous one.

I.1. The Conceptual Critique

My conceptual critique of deliberation as extended to juries concerned with factual verdicts is fourfold. Firstly, I want to argue that what one could plausibly call the *logical grammar of deliberation* is essentially different from the *logical grammar of judgment* or of factual resolutions. The idea is simple: when it comes to judgment making, what we are looking for are facts that would tend to articulate and, passed a certain point, confirm our judgments. The logic of judgments is, following Benjamin Mayo (1956), an inquisitive one: what one looks for is more knowledge in order to be able to form better judgments.

The logic of deliberation, on the other hand, is a moral or a practical one: we do not, properly speaking, deliberate about facts; we deliberate on whether or on how we should *do* something or not. Thus, when it comes to deliberation, we are looking for imperatives and not for knowledge. The point of deliberation is whether and, if so, in what way one should morally or practically adhere to the facts, given the facts. It might be that one cannot follow an imperative because one considers that her informational basis is insufficient to do so. Even so, what deliberation, logically speaking, is after, are moral or practical imperatives, *given* the facts. In short, imperatives draw on practical reason, while judgments follow the lead of theoretical reason. To speak like Mayo: 'deliberative questions, and their answers (…) operate in

[8] I am referring less to civil cases, since juries are called to decide more on criminal than on civil cases.

the same field, and, together with certain related activities, hang on a common imperative hook' (63).

The quite obvious consequence of this conceptual distinction is that, to the extent that the objective of juries is to come up with a factual judgment, deliberation cannot be their matter of concern. Jury nullification cases aside, juries should not be concerned with identifying the imperatives they should follow when it comes to judging whether a person is guilty or not. The imperatives are, as it were, already there, as set up by the general social norms, by the juridical framework of the trial, by the preliminary instructions they receive from the judge, etc. Consequently, the argument in favour of deliberation when it comes to factual jury judgments is, at best, an ambiguous one: it is not clear what one is arguing for exactly.

Secondly, the obstacle to applying deliberative mechanisms to juries lies in the specificity of what might be called the *reiterative structure* of deliberation. By this, I mean that deliberation, as ideally advocated by most political theorists, is construed as a process that can – and indeed should – be indefinitely reiterated. Because deliberation was initially devised as a method for thinking about and justifying constitutional matters, deliberation should be, in principle, initiated anew when this proves to be politically needed. As Gerald Postema puts it:

> 'since participants regard any genuinely public dispute to be a disagreement about that which is common to them, when they are face with disagreement, they will persist in the commitment to continue in good faith the process of discussion aimed at resolving the disagreement. *Public discussion must remain open until common conviction is reached*. At the same time, however, they recognize that the demands of daily life may force to close off discussion despite lack of consensus. Thus, they accept conditional, temporary, pragmatic, closure of the debate.' (1995: Ch. 12)

This indefinite reiterative structure of deliberation cannot possibly apply to questions of factual verdicts. Of course, verdicts can be revised and their factual value contested – people are, after all, wrongly convicted every now and then. However, the structure of verdict revision is a definite one and it ends at the highest level of appellate jurisdictions. One cannot endlessly deliberate about the justification of factual verdicts. In addition, once an individual is acquitted, we do not come back to deliberate on whether we should accuse him of the same crime. To quote Michael Walzer on this issue:

> 'We protect criminals against second prosecutions for the same crime, but we don't protect politicians against repeated challenges on the same issue. Permanent settlements are rare in political life precisely because we have no way of reaching anything like a verdict on contested issues. Passions fade; men and women disengage from particular commitments; interest groups form new alignments; the world turns.' (1999: 66)

Thirdly, if deliberation as an ideally formulated and constitutionally applied method is not pertinent when it comes to factual verdicts, it is not at all clear what the justification of jury deliberation actually refers to. This is because the semantics of deliberation is so diverse, that the very notion of jury deliberation is, at best, a vague one. There is no single idea or unique definition of deliberation (Mendelberg 2002: 153); as a consequence, it is not at all clear what one means when one advocates in favour of jury deliberation. Additionally, deliberation varies at the individual level as well:

> 'Across any group of people, understanding of what deliberation is, and what it is for, will vary. Individuals will come to the practice with different senses of how to identify good and bad deliberators; they will have different ideas about what counts as deliberation and what does not. As yet, there are no markers of status or distinction within deliberative practice, and so no stakes for individuals to invest themselves in.' (Ryfe 2007: 9)

Deliberation, then, seems to be a theoretically and practically unstable category. An universal concept of deliberation does not exist. Consequently, the case for deliberation locally loses in strength: given the diversity of deliberation, one cannot argue for jury deliberation while relying a common idea of deliberation.

Fourthly, and finally, if there is any general normative value in deliberation, it does not seem to lie in its providing us with informationally more accurate judgments, but in its potential for mutual criticism. Once again, the idea of the logical grammar of deliberation comes to the fore. The object of deliberation, properly speaking, is normative consensus on a factually given position; it is less the aggregation of information in order to form a factually accurate judgment. Thus, pace Manin (2005):

> 'The mechanism driving the Condorcet Jury Theorem is (…) pooling individual probabilities of finding the truth. The epistemic value of deliberation rests on an entirely different mechanism. It should be noted that in his famous argument about the wisdom of the many, Aristotle does *not* employ the notion of deliberation (*sumbouleuein*). In fact, when we collectively deliberate, advancing arguments for or against a given action, we are likely to

> *suppress* some of the information we have. We suppress the part that is not in line with our position in the discussion. After reviewing and weighing for ourselves the reasons for and against a given action, we come to a conclusion. We then take a position. However, when we speak in public in the course of deliberation, we share only the part of information that supports our position. Suffice it to mention the experience of deliberation in recruitment committees.' (16)

To this extent, deliberation is directly detrimental to the goal of factual judgments, i.e. reaching statements as informationally accurate as possible. Arguing in favour of jury deliberation, therefore, becomes a self-defeating strategy: judgments that are subject to collective deliberation are, in all probability, judgments that are less comprehensive from an informational standpoint.

I.2. The Epistemic Critique

I now move to the epistemic critique of jury deliberation. I will be addressing three different, although closely linked, points of criticism. Firstly, deliberation does not guarantee – nor does it substantively enhance – informational surplus. Collective deliberation is informationally negligible as compared to what might be figuratively be called 'internal deliberation'. Robert E. Goodin and Simon J. Niemeyer (2003) have shown that, in the case of an Australian jury having to take a decision on environmental issues, jurors are significantly more responsive to the initial informational phase of the proceedings than to the cues they get from the formal deliberation stage.

The impact of deliberation on filling memory lacunae and error correction seems to be negligible at best, as shown by Pritchard *et al.* (2002). The main reasons for this is that jurors were unaware of or inattentive to their possible memory gaps, thus failing to use deliberation for memory improvement purposes. Also, the jurors who most frequently controlled the deliberative process were not the ones with the best memories; neither were the jurors who were most likely to influence the verdict.

In addition, research has proven uncertain as to whether deliberation helps disregarding inconclusive evidence (London & Nunez 2000). Thus, some juries follow the instructions and disregard inadmissible evidence and some juries do not. The basic idea is that deliberation does not make a difference between these two types of juries.

Secondly, not only does deliberation fail to provide judgments with an informational surplus, it accentuates their informational bias. This means, in short, that deliberation bars the way to new information updating the factual accuracy of jury verdicts. This information bias takes place in several ways. On the one hand, as Judith Fordham (2009) has argued, there is no need for deliberation for jurors to rigorously apply themselves to the task of truth finding, i.e. coming up with correct verdicts. Jurors constantly try to minimize the effect of their own, self-identified prejudice on their judgments and strive to concentrate on the facts. Thus, 51% of the jurors indicated that their verdict was the right one. Deliberation, then, seems to be informationally sterile. If anything, deliberation represents an obstacle to informationally accurate judgments, to the extent that the mere fact of deliberating increases the probability of jurors wanting to 'go home', and thus inclining them to come up with a quick verdict.

Additionally, the content of the deliberative arguments is not always epistemically valuable. Although there is some recent research to the contrary, studies have shown (Reed 1965) that, when deliberating, jurors spend a considerable amount of time 'talking about their personal experiences or other irrelevant topics'. To this extent, deliberation deflects the attention from the goal of verdict formation. Also, research indicates that deliberation is most often verdict-driven, as opposed to evidence-driven. Thus, following Devine's (2001) meta-analysis:

> 'Deliberation style refers to the manner in which juries approach their task of reaching a verdict, particularly the initial stages (Hastie et al., 1983). In the first study on the topic, Hastie et al. (1983) found that 28% of juries took an immediate vote on entering the deliberation room and then focused their discussion around the verdict options (verdict-driven), 35% postponed the first vote until after extensive discussion had taken place and structured their discussion around systematic evaluation of the evidence (evidence-driven), and 38% displayed a mixed style.'

What is more, collective deliberation tends to set aside information that is not common to most of the jury members. This is what social psychologists call the 'confirmatory bias'. In short, the idea is that groups, when engaged in a deliberative process, are more resistant to including new information in their verdicts than individuals that weigh the information on their own. Bernard Manin (2005) efficaciously summarizes the main point of this confirmatory bias literature:

> 'groups mainly discuss and make use of information that was available to all group members before the start of the discussion. People primarily discuss "shared information". They partly fail in gathering and discussing information that was accessible to only one or a few members before the discussion. Shared information seems more valid and stands a better chance of being mentioned, and therefore remembered, during group discussion than unshared information (Stasser and Titus, 1985; Gigone and Hastie, 1993; Stewart and Stasser, 1998). Further, information conforming to the group's preferred alternative is more likely to enter the discussion than information opposing this alternative (Stasser and Titus, 1985; 1470). If this is so, group discussion will generate a disproportionate amount of information and arguments reinforcing the already prevailing belief. When we advocate deliberation, we certainly do not expect it to reinforce the pre-existing dominant belief, whatever it happened to be.' (11)

From this viewpoint, those who support the epistemic virtues of deliberation for jury verdicts seem to rest on a *non sequitur.* If deliberation, as practiced, reduces the probability of additional information getting incorporated into the jury's judgment and if the accuracy of a factual judgement is determined by its incorporating as much relevant information as possible, then deliberation cannot possibly increase the accuracy of a jury's judgment.

Thirdly, and in accordance with Elster's previously indicated conceptual distinction, deliberation seems to be less of a cognitive process and more of a normative one. Kameda et *al.* (1997) have shown that what matters in deliberation in terms of informational asset is not the epistemic argument as such, as its position within the web of arguments that are exchanged throughout the deliberative process. More precisely, they have conducted research on groups of three persons having to decide by consensus whether the accused should be convicted to the death penalty or not. They found that people who influenced the verdict in the most significant way were those individuals who were holding a larger than average number of arguments in common with the other members of the group. In particular, it is important to emphasize that the influence of these individuals on the final verdict did not rest on their competence or on the quality of their arguments, but simply – and exclusively – on their cognitively central position within the web of deliberatively exchanged arguments. Thus, as a result of this 'cognitive centrality' effect, it seems quite unlikely that deliberation will help presenting the jury with new information.

I.3. The Normative Critique

The fact that deliberation is more of a normative process than an epistemically valuable one does not, however, imply that deliberation is normatively desirable as far as jury verdicts are concerned. The reasons for this are, in their turn, threefold. Firstly, deliberation restrains the probability of the individual revising her judgment throughout the decision-making process. Face-to-face deliberation engages the individual to abide by her initial epistemic standpoint. As Kerr and Macoun have shown (1985), 'being publicly identified with a position may force *early* commitment to that position and make it difficult to change one's position without appearing inconsistent or irresolute' (352). In more general sociological terms, deliberation as a group process increases the probability of an individual rigidly sticking to her opening factual judgment for fear of 'losing her face' (Goffman 1955: 213) as a result of changing it throughout the deliberative process.

Secondly, jury deliberation is conducive to what Iris Marion Young calls 'internal exclusion'. This means that groups tend to privilege the views of some group members as opposed to others. It is no sociological secret that, as Young puts it,

> 'There are a whole set of practical norms about what "proper" speaking involves that are biased against people with accents, not to mention people who don't speak the dominant language—and biased against people who speak in a high voice or softly, biased against people who express them- selves emotionally or haltingly, and so on. These biases tend to correlate with gender, race, and class. The content of deliberations, moreover, more often than not reflects the interests and perspectives of the more socially powerful people in the room, unless explicit measures are taken to counter this tendency.' (Fung 2004: 49)

Worse still, this 'internal exclusion' effect seems to have structural roots. As Waller et *al.* (2011) have managed to prove, any conversation going on in groups that are larger than four members will implicitly exclude those members unable to immediately join 'the spontaneously forming discursive subgroup' (835). Extrapolating, this means that the arguments otherwise decisive for judgment formation belong to and come from only a third of the jurors. Indeed, empirical studies such as the one recently conducted by Nicole L. Waters and Valerie P. Hands (2009), have suggested that one third of the jurors would have privately voted against what was the jury's final verdict (513). Moreover, following Mendelberg's (2002) meta-analysis:

> 'Typically, in a jury of twelve, three members contribute over half of the statements (Strodtbeck et *al.*, 1957), and over 20% of jurors are virtually silent (Hastie et *al.*, 1983, pp. 28, 92). Studies of juries find that higher-status jury members (those with more prestigious occupations, more income, more education, etc.) tend to speak more, to offer more suggestions, and to be perceived as more accurate in their judgments (Hastie et al., 1983; Strodtbeck et *al.*, 1957).' (165)

Thirdly, and in addition to its exclusionary effects, deliberation also seems to perform rather modestly when it comes to bolstering the jurors' civic competence. The classical, republican-inspired argument in favour of deliberation was that deliberation makes 'better citizens'. This was meant to say that deliberation increases the probability of electoral participation, on the one hand and that, on the other hand, it improves the quality of the jurors' knowledge about the political process. And yet, the impact of deliberating jurors on their subsequent political participation is not that substantive. Even Gastil et *al.*'s (2011) very optimist case in favour of deliberation cannot afford ignoring that deliberation, as practiced today, is unable to increase the likelihood of electoral participation with more than 5%. Furthermore, as Mendelberg has critically observed (2002), it is not at all clear whether deliberation is really the independent variable in this causal narrative.

Alternatively, it might be that the 'associated information and attention' (173) that accompany the process of deliberation, but are constitutively independent of it, carry more causal weight than deliberation *per se*. This is all the more plausible, given that Gastil et *al.*'s (2002) previous work on the civic impact of deliberation only controls for jurors' prior electoral history, the number of charges that have to be decided on and the effective duration of the trial, failing to take into consideration the jurors' epistemic involvement, as distinct from their deliberative contribution.

In addition, and more importantly still, the argument according to which jury deliberation is normatively required because it has desirable civic consequences can only be strategically self-defeating at best and morally doubtful at worst. The typical Tocquevillian statement according to which deliberation is useful to the jurors themselves is strategically self-defeating because, as Elster (2010) argues, 'this assertion cannot be made *publicly* as a defense of the jury system' (3). The reason for this is that 'motivation might suffer if the jurors were told that the main reason for relying on lay jurors rather than on professional judges was the character-building effect on the

jurors' (5). In other words, if explicitly and openly stated, the argument that deliberation improves civic competence reverses the normative priorities of judgment formation. In particular, it risks deflecting the jurors from their primary goal, i.e. reaching a factually accurate verdict, while at the same time privileging the civic imperative.

The competence argument is morally doubtful, to the extent that one cannot possibly argue that the justification of jurors' activity in matters of verdict formation resides in their becoming more civically competent. In other words, competence improvement cannot serve as the final rationale for the jurors' activity, since this would be like saying that the jury's judgment is justified by their subsequent intellectual and political flourishing, and not by the accuracy of their verdict. This line of reasoning implies that, were it to stand alone, the civic competence argument would automatically become a *non sequitur*. Furthermore, to the extent that it depends on the factual accuracy rationale, the strength of this argument, as indicated, is both contingent and minimal.

These three broad types of critique were meant to show that deliberation is no longer a conceptually, epistemically or normatively justified option for the process of verdict formation by jurors. Before moving to the consequences of a deliberation-free jury activity for the idea and practice of citizenship, I would like to consider two possible points of criticism.

On the one hand, one might argue that the case against deliberation depends on the assumption of the Condorcet jury theorem that jurors have a higher than 50% probability of reaching the correct verdict. Arguably, this assumption could be contested as being unrealistic: there is no *a priori* compelling case for such optimism regarding jurors' epistemic competence. To this criticism, I think one might answer in any of the following ways. Neither of the answers is sufficient by itself, but I think that, taken together, they might offer a somewhat satisfying reply. Firstly, there is an empirical answer: although quite scarce, empirical research has indicated that, overall, the probability of juries coming up with 'veridical verdicts' is, on average, considerably higher than 50%. Indeed, the average jury error rate seems to be situated around no approximately 10% (Spencer 2007: 305). This means that, in 90% of the cases, jurors are more likely to reach the correct verdict than not.

Secondly, it has been formally proven that the Condorcet jury theorem equally applies when the mean juror has an above-half probability of reaching the

correct verdict (Grofman & Feld 1983; Borland 1989). This implies that not every juror has to have this same probability in order for the jury to reach a correct verdict: some jurors may be, on this account, less likely to find the truth.

Thirdly, from a normative standpoint, the very idea that the individual juror would, on average, be less likely to come up with a true verdict than not would not only be critical of the jury institution, but, more generally, of judgment as a form of decision-making process. Contesting the juror's competence amounts, on this account, to disputing the epistemic value of judgment in general. One cannot, at the same time, coherently criticize the juror's competence and accept the *type* of decision-making processes that go on in our contemporary justice systems.

This third argument needs further specification. The upshot is the following: it is not clear what is the normative standpoint that would allow one to critically assess the jurors' epistemic competence. This is because there is arguably no external epistemic reference system according to which one could plausibly assess the civic competence of the juror. In matters of judgment, Laplace's demon is not an option. To this extent, one can only relatively assess the accuracy of jury verdicts, i.e. by comparing them with other judgments on the same cases and, in particular, with the judgments issued by judges. In this respect, Kalven and Zeisel (1966) and Einsenberg et *al.*'s (2004) have shown that the agreement rate between judges and juries varies between 75% and 78%. This indicates that, on a relative basis, the jurors' epistemic competence is substantively superior to the required 50% threshold.

Fourthly, there seems to be no better *technical* alternative to judgment: the recent developments of fMRI, for example, remain epistemically contestable. Furthermore, it is unlikely that we would accept to entirely renounce our responsibility of judging the accused and delegate it to machines. Given our current moral and political commitments, we want to control and take responsibility for those of our decisions that affect other individuals. Giving up on judgment would amount to giving up our human and civic responsibilities to our fellow citizens.

On the other hand, one might criticize the all-too negative tone of the assessment of deliberative procedures in matters of jury verdict formation. If jury deliberation is no longer an option, then what is? This is a pertinent question. While there is no space for me to develop an answer here, I think that one can think of an alternative technique that would allow the jurors to pool their information, while at the same time avoid deliberation.

The idea would be to allow jurors to anonymously list a series of facts that they take to be compelling about the case, without at the same time expressing their judgment as to the guilt or innocence of the defendant. This list of facts would be distributed to the other jurors, giving them the possibility to make factual remarks on the information initially given. This anonymously amended list would then be again distributed to the jurors. It remains to be seen how many 'correction stages' would be appropriate for an accurate collective judgment. The decision-making process would be, like today, coordinated by a foreperson. The difference is that the foreperson would have no right to vote or to amend the list of factual information: her only function would be to indicate, at the stage of verdict giving, whether there exists a sufficient number of jurors for a verdict to be reached or not. The jurors would then have to decide if they are satisfied with the situation or if they want to go back to the informational exchange stage. Of course, this alternative would have to be thought of in detail. Communication theory would, most probably, be the domain to look for such a technical solution.

II. Truth, Not Solidarity: Proposal for a Concept of Verdict Citizenship

As I see it, one of the main ideas that have come across the critique of deliberation is that there are forms of collective decision-making processes that do not have solidarity as an objective, but truth. Pragmatic philosophy has used us to thinking that what gives value to our living in political communities is solidarity, not truth. As Richard Rorty (1990) cogently puts it:

> 'There are two principal ways in which reflective human beings try, by placing their lives in a larger context, to give sense to those lives. The first is by telling the story of their contribution to a community. This community may be the actual historical one in which they live, or another actual one, distant in time or place, or a quite imaginary one, consisting perhaps of a dozen heroes and heroines selected from history or fiction or both. The second is to describe themselves as standing in immediate relation to a nonhuman reality. This relation is immediate in the sense that it does not derive from the relation between such a reality and their tribe, or their nation, or their imagined band of comrades. I shall say that stories of the former kind exemplify the desire for solidarity, and that stories of the latter kind exemplify the desire for objectivity. Insofar as person is seeking solidarity, she does not ask about the relation between the practices of the chosen community and something outside that community. Insofar as she is seeking objectivity, she distances herself from the

> actual persons around her not by thinking of herself as a member of some other real or imaginary group, but rather by attaching herself to something that can be described without reference to any particular human beings.' (21)

The search for objectivity, pace Rorty, is also the quest for truth. Rorty further argues that one should, as far as political communities are concerned, privilege solidarity over truth. One of the reasons for this is that truth construed as correspondence to the facts is both epistemically dubious, because operationally sterile, and politically crippling, because insensitive to the vagaries of social life. As it is, my broad philosophical preferences are in favour of solidarity and not in favour of the correspondentist ideal of truth. Even so, I think that Rorty's point is far too general to be consistently generalized across the political board. Indeed, as I have suggested, there are domains where political practice should be more attentive to truth than to solidarity.

The formation of verdicts by juries is a case in point. As indicated in my normative critique of deliberation, the guarantee of the justice of jury verdicts does not lie in and is not justified by an ensuing sense of solidarity between the jurors. Rather, what gives value to jury verdicts is their probability of approximating truth, given the facts of the case they are presented with. It is the judicial truth, not the jurors' solidarity, which gives value to verdicts. The source of this truth lies partly in the juror's competence of rendering a judgment that is adequate to the facts and partly in the probabilistic tendency of juries to approximate truth better than individual jurors. Thus, the value of verdicts cannot be entirely severed from a correspondentist theory of truth.

But this does not mean that the truth of verdicts does not have a political value. As I indicated in the introduction, truth is more politically valuable than solidarity when it comes to verdicts. This is because we want a judicial institution that is able to correctly assess the facts of the matter before deciding whether a defendant is guilty or not. Otherwise, judicial institutions would be more a source of arbitrariness than of justice. Juries should be places for finding the truth, not clubs for political socialization. What happens between the jurors as far as civic competence is concerned is, from this perspective, only a secondary matter.

By giving up on deliberation, juries will probably be even less conducive to civic solidarity. But this does not mean that solidarity will be irremediably or massively

abandoned. There are other sites where political solidarity can be more appropriately realized: assemblies, forums, rallies, online networks, etc.

My second, and final, point is that giving up on deliberation does not mean that jurors will become some kind of epistemic automats and that their research for truth will be entirely irrelevant as far as the idea of individuals living together, i.e. of citizenship is concerned. Non-deliberating jurors are not apolitical creatures. They are not, in other words, what the ancient Greeks called idiots. One can still be a citizen and not participate in a visible way to the public political life of the community. No need to engage in political deliberation in order to be a citizen.

As I see it, citizenship is about giving value to the being together of individuals within communities, i.e. about contributing to the social and political glue of these communities. With this citizenship criterion in mind, one can reasonably argue that one can go on being a citizen without directly or publicly taking part to the political life.

This rather thin indication of what it means to be a citizen allows me to argue in favour of a *differential conception of citizenship*. In particular, my argument is that we have to learn that we can ask for different things for citizens. Public deliberation and electoral participation are not all that citizens have to offer. The idea of the good citizen as a public, enlightened deliberator that substantively and systematically contributes to the political life is too unilateral to be realistic.

Rather, following Bruce Ackerman's (1991) typology, we should probably think of citizenship in a more flexible way. There are, on the one hand, those who equate the figure of the citizen with that of the public citizen:

> 'They call upon us to look upon citizenship as a higher calling, the source of the deepest values to which men and women can ordinarily aspire. Rather than trimming down the demands of citizenship to meet our more humdrum needs for personal satisfaction, we must learn to put the private sphere in its place. Compared with public citizenship, private life represents an inferior plane of existence.' (232)

The advocates of deliberation across the political board are, arguably, part of those who conflate the idea of citizenship in general with that of *public* citizenship. What characterizes good citizenship, from this point of view, is the ability and the fact of constantly or at least regularly engaging in the public deliberative process.

There is, on the other hand, a practice of citizenship which, although less spectacular, is, sociologically, more spread and more diverse than the public one. This is what Ackerman calls *private* citizenship. The private, as opposed to the public citizen,

> 'is a political animal who seeks to *modulate his commitments* to the public and private good over time – sometimes choosing self-interest, and sometimes sacrificing it to the public good. Of course, different private citizens disagree about how much, and when, to sacrifice self-interest. But this is a debate within the family: so long as you believe that you should sometimes opt for the public interest and sometimes for self-interest, you have eluded the conceptual simplicities of perfect privatism and public citizenship. You have located yourself firmly in the conceptual territory of private citizenship.' (Ackerman & Fishkin 2004: 174)

Granted that Ackerman's distinction between the public and the private citizen is a useful one, I want to end this paper by suggesting that one could think of the juror as one of the multiple positions the private citizen is likely to occupy and as one of the diverse commitments he is bound to hold at some point in time. Just like the private citizen, what might be called the verdict citizen is situated mid-way between his private life – his education, his family background, his close social group influences, his personal views, etc. – and his public engagements. Just like the private citizen, the verdict citizen is not ready to give up on his private life in order to dedicate herself to the reform or promotion of the public institution she is momentarily serving. Verdict formation is not a limitless process: there is a point in time when the juror wants to step back from his responsibilities. Also, just like the private citizen, the verdict citizen is attached more to her own privately attained convictions than to generally valid social or political imperatives. Just like the private citizen, the presence of the verdict citizen within the political process is only an intermittent and a discrete one. Finally, just like the private citizen, the verdict citizen is aware of the impact of her individual decisions on the life of others, even if these decisions are not publicly available to his other fellow citizens.

This list of attributes brings me back to Pliny the Younger's contention. In the end, what Pliny was criticizing was the idea that some kind of epistemic metamorphosis should take place on the way from the individual to the collective judgment. Contrary to this conception, Pliny suggested that, in order for a *collective* verdict to be accurate, one would have to confront each of the contending views

individually and avoid conflating what are only superficially concurring judgments. The strength of an individual judgment on factual matters thus depends on its being protected from influences that have no proper epistemic weight: the number of opposing individual judgments, the political or social status of those with contending views, the deliberating passions that flow from face-to-face confrontation, etc. Put differently, collective verdicts can keep their accuracy only if individual ones remain independent of each other, that is, if they remain *private*.

Similarly, and somewhat correlatively, the practice of private citizenship in general, and that of verdict citizenship in particular, can only retain their value if they are kept away from the imperatives of public citizenship and, more importantly still, from their extensionist consequences regarding the virtues of public deliberation and direct political participation.

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