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Citizens with Felony Convictions in the Jury Box: A Peer-Judgment Argument

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Abstract: *Currently, almost all polities that allow for jury trials deprive people with felony convictions of their right to serve as jurors on criminal trials. Against these exclusionary practices, we contend that there are epistemic and political reasons to enable (and not merely allow) convicted felony defendants to serve as jurors. These reasons are derived from the ideal of peer judgment, which we take to be deeply ingrained in and relevant for ensuring fair jury-judgment practices. In this article, we construct an account of peer judgment understood as equal subjection to coercive law, spell out the epistemic dimension of this account, and use it to argue that there are stronger reasons for having people with felony convictions serve as jurors, as compared to average, noncriminalized citizens. Our peer-judgment argument is meant to both weaken and outweigh current justifications for excluding people with felony convictions from jury service.*

Almost all contemporary democracies deprive citizens with criminal convictions of their jury service rights. Jury exclusion laws invariably target people with felony convictions (hereafter, PFC).[1] Like voter disenfranchisement, jury disenfranchisement seems democratically objectionable. Indeed, the objection appears more compelling for jury exclusions, not least because, for polities that allow for jury trials, relatively *more* PFC are denied jury participation than they are voting rights.

However, while democratic theory is replete with increasingly sophisticated views as to why voter disenfranchisement is unjustified, there is little to no principled democratic argument as to whether and, if so, why and how excluding PFC from jury service is problematic.[2] This justificatory asymmetry between the attention given to PFCs' right to vote and their jury service rights is surprising, as the grounds for the right to vote and the right to serve on juries are deeply connected, both politically and doctrinally, and recent reenfranchisement movements are concurrently reclaiming voting and jury rights for PFC.[3]

To address the asymmetry, we could try to extend some of the democratic arguments against voter disenfranchisement to juror disenfranchisement policies. But since we cannot easily move from available views about the distinctive value of voting to arguments about the value of jury service, such an extrapolatory strategy seems cumbersome.

Moreover, the asymmetry might be warranted by a prima facie defensible worry—viz., that, more than voting rights, jury service rights depend on a good judgment presumption rebutted by the very felonies PFC have been convicted for. Call this the *good judgment worry*. The

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[1]The only jurisdiction in the world that does *not* exclude PFC is Maine (for detailed statistics, see https://niccc.national243reentryresourcecenter.org).

[2]See especially Whitt (2017), Daniels (2017), and Poama and Theuns (2019).

[3]On this connection, see Amar (1994). For a firsthand account of Florida's movement to restore PFCs' civil and political rights, see Meade (2020).

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worry lacks a systematic formulation, but it persists in both jurisprudence and jury practice, where it most often appears as the claim that PFCs' judgment would be biased against the state or as the related claim that their judgments would impair the integrity of the jury adjudication process.

The worry is most clearly articulated by Judge Mosk in *Rubio v. The Superior Court of San Joaquin County* (1979), where the PFC's alleged "continuing resentment against 'the system' that punished [them] and an equally unthinking bias in favor of the defendant" is explicitly linked to the possibility of "such prejudice infecting the trial." Concerns about PFCs' biases have been expressed by other jurisdictions as well—for instance, to assert that "former conviction and imprisonment would ordinarily incline [PFC] to compassion for others accused of crime" (*State v. Baxter* 1978) or note that "a reasonable qualification to ensure lack of partiality, bias or prejudice in the trial of a criminal case" warrants statutory exclusions (*State v. Haynes* 1987). More recently, Judge Lavin argued that the defendant's claim to be judged fairly is "prejudiced by a juror whose presence created the appearance of a potential bias" because of the latter's felony conviction status (*People v. Miller* 2008).

These formulations capture both the epistemic and political dimension of the good judgment worry—viz., epistemically, the worry highlights PFCs' incapacity to soundly judge those who stand jury trials; politically, it resists giving potentially bad judges substantial power to influence and, given their supposed biases, distort other jurors' judgments.

This article casts doubt on the good judgment worry.[4] It does so indirectly, by arguing that the ideal of peer judgment, which we take to be ingrained in jury trial practice, recommends allowing *and* enabling PFC to serve as jurors. To anticipate, our argument is that, since peerhood should be construed in terms of equal subjection to coercive law, we have *stronger* reasons to think that PFC are defendants' peers, as compared to ordinary citizens who tend to be substantially less subject to coercive law.[5] Our understanding of peerhood has epistemic dimensions, as it highlights a connection between equal subjection and some epistemic privileges that equally subject citizens have relative to those who are substantially less subject.

Specifically, we argue that, *qua* equally subject, PFC are better placed to grasp the defendants' position and can thereby improve the prospects of good jury judgments. On this view, PFC exclusions directly wrong the citizens who stand trial, since they gratuitously undermine their right to peer judgment, but they also deprive PFC from acting on their epistemic advantages and prevent other jurors and criminal justice institutions from benefiting from their judgments.[6]

Our argument unfolds as follows. In the first section, we outline a genealogy of peer judgment (*judicium parium*) and use it to show that accounts of peerhood should attend to two central questions: an equality question (between jurors and defendants) and a judgment question (of defendants by jurors), and to suggest that equal subjection offers a historically plausible specification of peerhood. In the next section, we unpack our equal subjection account and clarify its epistemic import for good jury judgment practices. In the following section, we examine two distinct epistemic advantages that PFC hold *qua* defendants' equal subjects. Finally, we conclude with a discussion of some policy reforms supported by our argument.

By way of preliminary clarification, note that, like the good judgment worry it targets, our argument is both political and epistemic. Politically, it holds that, in societies where legal coercion tends to be unevenly distributed, the right to peer judgment is violated when citizens who stand trial are judged *only* by citizens who tend to be significantly less subject to coercive law. Epistemically, it argues that, compared to average noncriminalized citizens, those who are more subject to legal coercion are ceteris paribus better situated to judge defendants well.

[4]Following Kalt (2003) and Binnall (2021, 20ff.), there are three types of views standardly given for PFC jury exclusions: the first emphasizes PFCs' "inherent bias," the second is that PFC threaten the "probity" of jury decisions, and the third contends that PFC forfeited their political rights *via* social contract violations. We agree with Kalt and Binnall that the third view has little to no normative weight, and that probity views are "under- or over-inclusive to a troubling degree" (Kalt 2003, 74) *unless* specified in terms of PFCs' threat of distorting jury judgments. Consequently, the bad judgment worry addressed here covers the best available views for PFC exclusions—viz., the inherent bias and the judgment-distortion concerns.

[5]Importantly, strength of reasons here is both *normative*—viz., the reasons for thinking that PFC are equally subject are as strong as the reasons for thinking that other, ascriptively identifiable citizens are equally subject *and* more robustly resistant to countervailing reasons—and *pragmatic*—compared to others who are equally subject, it is practically easier to identify PFC who are equally subject (i.e., the risk of selecting jurors who are not equally subject in the specified sense is lower).

[6]Thus presented, our argument supplements without supplanting potential epistemic arguments that could use Landemore (2012) to argue that PFC would increase jury group diversity, and, with it, the likelihood of correct trial decisions, and political arguments that draw on Gastil et al. (2010) to contend that jury participation would civically empower PFC themselves (Binnall 2018).

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Given its political-cum-epistemic nature, the argument aims to more broadly contribute to an emerging current in contemporary epistemic democracy debates—viz., one that Melissa Schwartzberg (2015, 2018a) presents as "judgment democracy." Schwartzberg draws on the history of jury practice to argue that political rights—in particular, the right to vote—display "epistemic respect" for citizens' equal capacity to judge their "own interests as members of a wider community" (2018a, 190) and signal that they are "epistemically well positioned to judge certain questions" (3). Schwartzberg relatedly contends that respect for individuals' judgment capacities has political implications—viz., it demands that we build "institutions to elicit, inform, and test these judgments" (Schwartzberg 2015, 201).

We share Schwartzberg's view that democracy is premised on respect for people's capacity to judge but contend that judgment democracy can have different implications for jury service, as compared to voting. In particular, in contexts where law enforcement is unequal and tends to target some groups significantly more than others, the members of the former groups are ceteris paribus better positioned to judge the defendant well, relative to individuals who do not belong to these groups.

Put differently, claims to epistemic respect and the corresponding right to judge defendants *as peers* differ in the jury context, as compared to the electoral one: they are not based on people's capacity to judge their *own* individual situation, but on their capacity to judge the *defendant's* situation that they presumably share in some relevant sense. Since equal legal subjection offers an adequate specification of this latter situation, claims to epistemic respect and to the right to peer judgment are stronger for those who are equally subject, relative to the defendant.

Our argument is thus *situatedly* egalitarian—viz., it is premised on a situated equality relation between defendants and potential jurors—and plausibly animates both early and more recent accounts of the right to be judged by one's peers.[7] Furthermore, the argument has practical purchase: since only some citizens are the defendant's equals in this situated sense, the right to be judged by one's peers requires policies that *enable*, rather than merely *allow* them to serve on juries.[8]

Judicium Parium: A Genealogy

Here we offer a brief genealogy of peer judgment, meant to offer a historically plausible specification of what it means to qualify as the defendant's equal in the peerhood sense (the equality question), and to clarify why, thus specified, equality matters for good judgment in jury trial contexts (the judgment question). To anticipate, our claim is that peerhood covers a concern for equal legal subjection relations between jurors and defendants. This concern, we further suggest, is still relevant for democratic polities where citizens are de jure, but not de facto equally subject to the law.

The "jury of one's peers" remains widely used in scholarship, jurisprudence, and popular culture. Despite its pervasiveness, its meaning remains unclear. This is illustrated by the US Supreme Court in *Strauder v. West Virginia* (1880), which defines a jury as "a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine" and defining a "peer" as someone among the defendant's "neighbors, fellows, associates, *persons having the same legal status in society as that which he holds*" (emphasis added). This dictum identifies some of the core concepts typically encoded in "peerhood," including shared formal equality and civic life, but underspecifies what peerhood means in the jury context. Currently, all democratic citizens occupy the "same legal status in society," making for a definition of "a peer or equal" that is too broad to guide action in such high-stakes circumstances.

This challenge arises, in part, from the concept's genealogy: it emerged under circumstances of formal political and legal hierarchy. The jury of peers can be traced to the *judicium parium* of the Magna Carta.[9] The Magna Carta specifies provisions applying to "free men" because much of the English population at that time was legally unfree. Similarly, when *Strauder* was decided, the American South remained under Jim Crow, a regime premised on white supremacy and inimical to democratic equality. In sum, the earliest history of the peer judgment does not offer great promise for viewing it as a democratic arrangement. As Pollock and Maitland noted, the forerunners of English jurors served as informers for the King, reporting on the holdings of their propertied neighbors

[7] For similar situated views of peerhood, see Schwartzberg's (2014) discussion of the vicinage conception, Massaro's (1986) and Davies and Edwards (2004) view that peerhood is predicated on shared (e.g., race, gender, socioeconomic, language) group membership, and Chakravarti's (2021) argument that people are peers in virtue of sharing "an experience of felt power" (13). As discussed in the second section, our conception of peerhood overlaps with these other views.

[8] We outline some of these policies in the conclusion.

[9] Clause 39 of the Magna Carta.

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and on the performance of the King's lieutenants (Pollock and Maitland 1898, I.152).

Importing an idea from the thirteenth century poses difficulties. Translating "*pares*" into "peers" raises the first: this interpretation is not universal. Coke, for instance, translates it as "peers" at some points in his *Institutes* (1642/1817, 48), as "equals" at others (II: 28), and as "nobility" at still others (50). Regardless, Coke specifies that "equals" and "peers" are people of one's "own condition" (46). In the thirteenth century, as in Coke's day, these terms would have been recognized as referring to formal differences in station. The Magna Carta and Coke's *Institutes* are products of rigidly hierarchical orders premised on inherited inequalities. Given such origins, it is hardly surprising that more egalitarian orders have struggled to define exactly what "peerhood" means.

The *pares* of clause 39 were all vassals of the King or of the same lord (Keeney 1949, 9), suggesting that peerhood applied only to nobles—peerhood, in this sense, is peerage, restricting peer equality to people of a high rank. Pace Blackstone, it implies that *judicium parium* did not apply to "every Englishman," but to a select group of nobles who were concerned "about their own class and their sufferings from the illegal and extra-legal action of the king" (Adams 1919, 452). This early demand for peer judgment, then, appears to be a simple bid on the part of the barons to protect their inherited privileges—hardly the foundation for a democratically justified right.

But reducing peerhood to feudal peerage would be too hasty. Historically, peer judgment was a right also enjoyed by more low-born groups residing in the realm. A well-known example is the right to a jury of *medietate linguae*, or mixed jury (Howlin 2010). Codified in 1353, the right to a mixed jury gave groups of "outsiders"—generally foreigners and Jewish merchants, who were not admitted to full citizenship—the opportunity to be judged by a jury including members of their own communities.[10]

The right to peer judgment also applied to people without rank—including "men of such mean condition that they could be claimed as villains" (Keeney 1949, 59). These applications were typically based on vicinage requirements. As Schwartzberg shows, being the defendant's *vicinus* was taken to offer important epistemic advantages. Unlike distant strangers, neighbors could rely on their "experience of a particular location" (2014, 204) and on firsthand knowledge about local authority practices to gain potentially relevant insights for verdict decisions.

These different instantiations of *judicium parium* suggest that peerhood is not reducible to peerage, but that it captures the recognition that various groups are differently situated in their relationship to the law and to the authorities enforcing it. This seems particularly plausible in the context of medieval societies where laws differed in origin, scope, and application across various groups—viz., the laws that nobles, merchants, and villains experienced could vary significantly, both de jure and de facto, such that only members of those groups would be subject to and experience the same set of legal strictures.[11]

This interpretation of peerhood resonates with Blackstone's remarks on the greater "danger" posed by "the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another" (1979, 343). He continues:

> [T]he founders of the English law have… contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects… and that the truth of every accusation… should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to suspicion. (343)

To be a peer, on this reading, is to be a fellow subject—viz., someone who, in virtue of living in the same place or of occupying a socially similar position—shares the defendant's situation of being ruled. This makes up, in part, what Coke terms the defendant's "own condition."

While nobles can be seen as peers because they inhabited the same position in the social hierarchy, it is important to note that this typically entailed a set of legal and political subjection relations not shared with other subjects or the king. Specifically, nobles experienced a common level of vulnerability to the king's will.

[10]Constable shows that, at least until the sixteenth and seventeenth centuries, shared language is "a plausible proxy for community, when community boundaries were vague" (1994, 115).

[11]This understanding of peer judgment is particularly plausible in early middle ages, when law was personal rather than territorial, such that people living in the same territory could be subject to different laws. As Tamanaha notes, "in the early medieval period the first question that defendants had to answer when they were sued in courts was 'Quale lege vivis? What is your law?' Recognition of personal law even included criminal law: 'If he is condemned he shall suffer the penalty which is indicated in the law of his country and not what is prescribed by the law of the Ripuarians'" (2021, 24).

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The same is true about other groups who successfully reclaimed the right to be judged by their peers—viz., foreign merchants to be judged by fellow subject merchants and inhabitants of the realm to be judged by their neighbors who lived under the same laws or legally sanctioned customs.

Taking stock, peerhood captures a concern for equal subjection that seemed especially relevant in trial contexts where individuals were particularly exposed to sovereign power. Furthermore, equal subjection offers a historically plausible answer to the equality question—viz., it specifies the sense in which the defendants' peers were their equals in ways that other individuals were not—and to the judgment question—viz., it explains why, thus specified, equality mattered for good jury judgments.

Put differently, understanding peerhood as equal subjection has both epistemic and political import. Epistemically, the defendant's equal subjects were more likely to have better insights and information that mattered for verdict decisions. Politically, as Blackstone noticed, peer judgment reduced the risk of people perceiving trials—in particular, those that opposed the monarch and its subjects—as the mere expression of the monarch's arbitrary will and thereby arguably reduced the risk of contested trial decisions.

Today, citizens living in democratic polities possess the same formal substantive and due process rights when interacting with the criminal legal system. However, it is well established that certain groups face systemic targeting for investigation and overenforcement, in addition to greater likelihood of punishment and disproportionately harsh sentencing. For instance, in the United States, ethnic minority members are far more likely to suffer from these inequities, as are people with disabilities and LGBTQ+ people, in complex and intersecting ways. Thus, although all citizens occupy the same formal legal position, there is substantial, patterned, and unequal variation in how the same laws are applied. In short, unlike the polities that produced the right to *judicium parium*, contemporary democratic polities generally ensure equal legal subjection as a matter of formal law (de jure) but, like them, do not secure it as a matter of legal practice (de facto). As we argue in the following section, this variation lies at the core of subjection to the law in the era of formal equality and bears on citizens' right to peer judgment.

Peer Equality as Equal Subjection

The answer to the equality question supported by our genealogical inquiry is *equal subjection*. The principle of equal subjection typically comes up in rule of law debates. Since Dicey, many use it to refer to a specific feature of legal systems where "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals" (1885/2013, 100). Here, equal legal subjection captures one core dimension of the rule of law—viz., "legal equality," which is that no one, no matter their social, political, or economic position, should be de jure immune to coercive laws. In particular, it posits that all citizens be equally subject to penal or civil sanctions.[12] It requires that no exception be built into the law such that specific categories of the population can escape or be less exposed to legal coercion.

As a principle for lawmaking, de jure equal subjection is intrinsically valuable: it reflects an ideal whereby individuals are ruled by general laws, not by particular people. But equal subjection is also instrumentally valuable: in a nonideal world, it increases the chances that legislators track their constituents' interests when they legislate. As a legislator, knowing that I am equally subject to the laws I support makes me care about their content. Properly observed, equal subjection helps align legislators' interests with those of ordinary citizens: if everyone is equally subject to the law, everyone has just as much to lose from excessive, inconsistent, or otherwise arbitrary laws, at least as a matter of possibility.

However, not everyone is de facto equally subject to legal coercion. Even supposing that laws are formulated such that no one is immune to them, there are other facts—for instance, uneven political and economic positions, socially biased judgments, or luck—whereby some groups are systematically more exposed to legal coercion than others. When envisaged along its de facto dimension, equal subjection is often predicated about specific groups within a population, not about the population as a whole—viz., for any one citizen, there are only some other citizens who are de facto equally subject to the law's coercive power. Given this, and assuming we care about factual, not just formal subjection, an adequate view of equal subjection should be able to discern the legally relevant de facto realities of subjection.

Consequently, our working conception of legal subjection is a conjunctive one that includes both its de jure and de facto dimension. Specifically, we take de jure subjection to pertain to *whether* one is legally obligated by the law-in-books, and de facto subjection to refer to *how much* coercion a citizen tends to incur through

[12] Importantly, our focus on subjection to the law's coerciveness does not imply that the law's *definiens* is reducible to it. We take coercion to be a typical manifestation of legal subjection, not its defining feature.

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law-in-action.[13] Coercion typically takes two forms: *coercive actions*, whereby people are directly forced to commit actions or accept certain modes of treatment they do not voluntarily initiate, and *coercive threats*, whereby people are pressured to act out of fear of incurring coercive actions.[14] For instance, in the realm of criminal law, being stopped, interrogated, searched, and arrested by police officers, being prosecuted, being tried, convicted, and sentenced are coercive actions; running away from a police officer, being excessively deferential to a judge, or pleading guilty are typical instances of behavior one adopts as a result of coercive threats.

While citizens living in democratic polities where our argument applies are generally de jure equally legally subject, not all are de facto equally subject to the law. When it comes to criminal law, citizens from some disadvantaged groups tend to be more policed, prosecuted, and punished than citizens who belong to nondisadvantaged ones. This is uncontroversially true in the United States, where people in poverty and members of certain racial groups (e.g., African American and LatinX) are disproportionately policed and hyperincarcerated as compared to white, well-off individuals (Roberts 2013), but similar, albeit less pronounced, patterns exist in many European democracies as well.[15] Consequently, on our conjunctive account of subjection, de facto inequalities in the distribution of legal coercion mean that not all citizens are equal subjects.

Though Dicey's view and ours differ in their specification of equal subjection, they overlap to some extent. Equal subjection in Dicey's sense is instrumentally valuable: knowing that they will be equally subject to legal coercion motivates lawmakers to align their interests with their constituents' interests and thus overall improves the quality of *lawmaking*. On our conception, de facto equal subjection is instrumentally valuable for *law implementation* purposes: since people who experience legal coercion firsthand have access to epistemic resources that significantly less coerced people lack, involving the former in law implementation practices allows state institutions to retrieve and use these resources to improve the quality of implementative decisions. As suggested in the previous section, the use here is both epistemic—viz., de facto subjection can enhance the quality of law implementation decisions—and political—viz., having law implementation decisions be jointly taken by those subject to similar decisions in the past can improve the prospects for legal compliance and reduce the risk of contestation in the future.[16]

Taking stock, the account of equal subjection outlined here is conjunctive: it includes both de jure relations posited by formal law and de facto relations evidenced by law implementation practices. This account offers a historically plausible answer to the equality question raised by the peerhood ideal. On this reading, people are peers if they are both de jure and de facto equally subject to the law. Additionally, the de facto component gives epistemic import to our account, as it identifies a tenable connection between equal subjection and good judgment: it holds that those who are significantly more subject to legal coercion gain epistemic advantages that matter for judging the defendant's situation.

Thus presented, our account resonates with popular understandings of peers as persons able to "put themselves in the defendant's shoes" and is consistent with earlier views that equate peerhood with vicinage—viz., holding that neighbors are better judges because they know firsthand how the law is locally applied (Schwartzberg 2014)—and more recent arguments that jurors are the defendant's peers if they share an "experience of felt power" (Chakravarti 2021, 13) or if, in cases where defendants come from socially disadvantaged and politically dominated groups, jurors belong to the same groups (Davies and Edwards 2004; Massaro 1986; LaRue 1976).

Admittedly, the epistemic advantages one gains as a neighbor or comember of a disadvantaged group can differ, but the background contention remains the same—viz., that peer judgment is predicated on advantages attached to an equal de facto subjection situation that peers

[13]For a typology of subjection conceptions, see Abizadeh (2021). Unlike the alternatives, the conjunctive one can ground the normative relevance of citizens' de facto unequal subjection and rely on its de jure dimension to avoid some overinclusiveness objections.

[14]See, in particular, Held (1972) and Anderson (2016). This concept of coercion recognizes "a useful distinction to be drawn between physical and psychological coercion [as] a distinction among the mechanics or techniques of coercion" (Anderson 2016, 528) and thereby grounds both quantitative and qualitative estimates of coercion. Qualitative measures—most notably, survey questionnaires—are current in healthcare and/or administrative settings (e.g., Steadman and Redlich 2006), but, as Lerman and Weaver's (2014) custodial account of state coercion suggests, they can be validly applied to criminal justice practices.

[15]See fn. 7.

[16]This understanding of de facto subjection as a basis for allocating rights to participate in implementing laws resonates with Schwartzberg's claim that jury rights historically emerged as arrangements whereby states gained some of the knowledge needed for governing effectively and ordinary subjects got some of the political power these rights conferred. Specifically, jury rights' "instrumental value depends upon the presumptive competence of ordinary citizens to rely on their local knowledge to render just verdicts and identify their own interests" (Schwartzberg 2018b, 12).

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share with the defendant, but not with *all* other potential jurors. If equal subjection can be thus multiply specified—viz., one is equally subject if one experiences the practices of the same local authorities *or* if one belongs to a similarly dominated group *or* if one has been subject to a similar criminal justice process—the related epistemic contention can also be multiply specified in terms of a cluster of epistemic advantages that correspond to these specifications.[17]

In the following section, we argue that, if we specify equal subjection in terms of de facto shared experience of the criminal process, PCF count as the defendant's peers and, as such, they have distinctive epistemic advantages that average, noncriminalized citizens lack. This argument is compatible with other equally subject citizens having different, potentially complementary epistemic advantages.

Good Judgment

This section examines the epistemic advantages to be gained from having PFC serve on criminal juries. We focus on two distinct advantages that the experience of being similarly subject to criminal justice proceedings—for example, being under official suspicion, arraigned, and tried, but also convicted and sentenced—gives PFC, relative to noncriminalized citizens. We term these advantages *intelligibility*—viz., the ability to understand and discern the information presented during trial proceedings—and *stakes sensitivity*—viz., the ability to grasp the potentially grave consequences of one's decision.

Before examining these advantages, we want to address two preliminary objections. The first is an overinclusiveness concern—viz., that, given their diverse backgrounds, not all PFC will understand trial dynamics and penal stakes better than noncriminalized citizens. This objection would succeed if our argument hinged on universal empirical statements about PFCs' epistemic performances. It does not. Rather, the argument states that equal subjection creates *opportunities* for developing good juror judgments in ways not structurally accessible to noncriminalized citizens.[18] Thus stated, the argument broadly assumes the cogency of two persistent theses in social epistemology (MacKinnon 1989; Toole 2019, 2022)—viz., first, that positions of vulnerability to power offer epistemic opportunities that are either absent or reduced outside these positions (*epistemic privilege thesis*) and, second, that these opportunities require their occupants to actively generate the knowledge they enable (*epistemic achievement thesis*).[19] In short, epistemic success is not given but made.

Applied to our argument, these two theses grant that not all PFC will make good on the privileges generated by their equal subjection situation. But the possibility of turning privileges into achievements also creates normative space for politically meaningful action—for instance, by motivating PFC and their fellow citizens or political representatives to collectively reclaim the resources needed for achieving these privileges. This can take the form of campaigns for jury reenfranchisement and other jury reform policies that enable PFC to fulfill their epistemic potential or of programs that include more involved participatory roles for PFC in criminal justice administration.[20]

The second objection is an underinclusiveness one, to the effect that our argument also applies to other people previously subject to criminal justice proceedings—most notably, acquitted and wrongfully convicted defendants—who have access to some of the same epistemic advantages but are not PFC. Arguably, stakes sensitivity is available to wrongfully convicted defendants and intelligibility to both wrongfully convicted and acquitted ones.

This objection is compelling but overlooks that our full argument is not strictly pro tanto. As indicated, peerhood judgment is a normatively and pragmatically *stronger* reason for having PFC serve as jurors, relative to other citizen categories.[21] Pragmatically, criminal records and postrelease programs make it easier to identify PFC than acquitted defendants, and many wrongful convictions remain either undetected or dismissed and, if detected and recognized, are too few for our argument to hold much practical bearing. Normatively, acquitted and wrongfully convicted defendants have reasons to refuse serving a state that put them on trial despite their innocence and can thus outweigh or weaken our peer

[17]We do not argue that other situated accounts of peerhood are reducible to ours; more modestly, we point to fruitful overlaps.

[18]Note such a generalization could not be supported, given the scarce evidence about PFC performance that is triggered by their exclusion.

[19]The terms *privilege* and *achievement* are taken from Toole (2019).

[20]On campaigning, see Meade (2020); on other participatory roles, see Dzur (2012). The role of political action for securing good judgment resonates with the position defended by judgment democrats—viz., that states should use political rights and political participation practices to recognize their citizens' judgment capacities and to "design institutions to elicit, inform, and test these judgments" (Schwartzberg 2015: 201).

[21]See fn. 5.

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judgment argument.[22] Such reasons are not straightforwardly available to PFC, and so our argument has distinctly more conclusive force when applied to them.[23]

Intelligibility

Criminal juries are meant to decide matters of fact about the past: what happened, who took which actions, and whether specific events constitute legal violations. The information they use to decide this includes evidence of the defendant's past actions and words, gathered during the investigation and interrogation phases, in addition to witness and, sometimes, experts' testimony. In practice, juries also use information that is neither evidence nor testimony—most notably, observations they make informally during the trial. Put differently, the presentational dynamic of a criminal trial—its enacted procedures, the participants' posture or demeanor, their tone and interactions—can decisively influence the jurors' decisions.

Given their absent or scant involvement with criminal-justice authorities, most jurors confront this presentational dynamic of criminal justice proceedings as relatively naïve outsiders (Johnson 2016). As a result, felony defendants are *typically* judged by citizens who lack or are in a practically more difficult position to understand their position.

Such exclusions deprive felony defendants, jurors, and criminal justice authoritiesauthorities more generally, from the possibility of benefiting from the experience of and acquaintance with criminal justice dynamics that PFC have firsthand. In short, PFC are well situated to recognize and appreciate the potential effects that being investigated, questioned, detained, prosecuted, and judged and to translate these for the rest of the jury.

This is a particularly important consideration in criminal trials where the jury encounters a person who is not simply involved with or affected by the criminal justice system, but deeply mired within it. In theory, jurors make their judgments only based on past events. In practice, however, what jurors witness during the trial also shapes their judgment (Antonio 2006). The greater challenge originates in courtroom observations that are not easily dismissed as irrelevant to the trial, such as the defendant's demeanor in the courtroom or their behavior in recorded interrogations (Denault 2020; Jehle, Miller, and Kemmelmeier 2008). Jury interpretations of the defendant's demeanor and behavior in the courtroom can profoundly affect the life prospects of the accused (Antonio 2006; Denault 2020). Often framed as indicators of truthfulness, credibility, or, more worryingly, innocence or guilt, defendants' nonverbal cues and facial expressions routinely enter into the body of informal, if inadmissible evidence that is nonetheless weighed by jurors in their actual decisions.[24]

When we consider this, the dangers posed by the experiential gulf between defendant and jury become clear. In the courtroom, the attorneys, judge, and other personnel are familiar with the routines and scripts that typically shape the trial—they often see defendants led to their seats in handcuffs, they hear the common rhetorical tropes used by both prosecution and defense, and they recognize the ways in which bureaucratic constraints and legal rules shape the narrative of the trial. Only the defendant, witnesses, and the jury experience this trial as wholly novel and unique. As such, the jury, as currently constituted, is at an interpretive disadvantage. Jurors lack the background experience to contextualize what is normal or acceptable for the courtroom, and so they are not prepared to distinguish its typical goings-on from the distinctive and meaningful features of the particular defendant and case before them or to disentangle common narrative framings from unique facts.

The average, noncriminalized juror might not merely lack knowledge of what it means to be subject to the strictures of the criminal legal system. Given media influence—in particular, sensationalized news reports and fictionalized crime stories—they might actually hold dramatically misinformed ideas about the reality of criminal legal institutions and, consequently, the implications of their own decisions.[25]

People who are de facto subject to coercive criminal justice interventions are particularly well-situated to resist such distorted judgments. Binnall's study of jury deliberations in Maine highlights their concern with avoiding stereotyping defendants. Consider, for instance, the remarks of "felon juror 1," who describes how "watching a newscast and (seeing) how somebody gets arrested for a crime, regardless of what crime it is, and as law-abiding

[22]Citizens who fall under other specifications of equal subjection—for instance, those who belong to overpoliced, but never tried or convicted, racial and socioeconomic minorities—might raise a similar objection. But the objection remains relatively stronger for those who are acquitted or wrongfully convicted, especially when they belong to the same minorities.

[23]We thank R2 for pressing this point.

[24]These cues can be particularly pernicious when jurors and defendants are socially or situationally dissimilar. For a review and analysis of how dissimilarities distort mens rea ascriptions and thereby increase the likelihood of wrongful convictions, see Heller (2009).

[25]For a review of these media effects, see Groscup (2018).

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citizens, we immediately think that they must be guilty because they were arrested" (2021, 89). Of course, not all jurors are like "felon juror 1." Nonetheless, having been in the defendant's position offers PFC a better opportunity to grasp the dangers of stereotyping or otherwise dehumanizing those who are subject to penal institutions.[26]

The intelligibility claim is somewhat analogous to claims that jurors' socioeconomic position or identity can enhance the epistemic quality of their judgments. For instance, it has been argued that being a woman or being African American offers an epistemic advantage when judging women or African American defendants (Angel 1995; Ramirez 1994). Similarly, supporters of the vicinage view of jury peerhood used to argue that, given their familiarity with the defendant's life circumstances, neighbors were more likely to make for better judges (Constable 1994; Schwartzberg 2014). The intelligibility claim, then, is consistent with, but distinct from, these other claims, as it identifies an additional source of epistemic advantage that cuts across these socioeconomic descriptors or ascriptors—viz., a firsthand appreciation of the potentially distortive effects that the set-up and dynamics of trial proceedings can have on jurors' judgments.

Stakes Sensitivity

In *Tanner v. United State*s (1987), the US Supreme Court refused to overturn a criminal verdict, despite a juror reporting that members of the jury drank alcohol to excess and used drugs during the trial. While this case reaffirms the long-established common-law principle protecting jury deliberations from review, it also offers a clear example of jury insensitivity to the gravity of their decision.

We might infer from this case that jurors failed to recognize the significance of their task—viz., determining a person's freedom and future—and the power that comes with it. Fortunately, jury studies indicate that citizens generally take their responsibilities seriously (Devine et al. 2001, 2007). This point matters for deciding whether to give PFC jury service rights. In Binnall's study of PFC allowed to serve in Maine, interviewees expressed a keen awareness of this responsibility. One juror ("Mike") stated:

> "When you're sitting on the legal side of it, you know, wow! It's like, I can't believe I was sitting on that side and now I'm over here, you know, deciding someone else's fate." (2018, 10)

Other interviewees expressed trepidation at the prospect of taking on jury duty (Binnall 2018, 10). Having been "on that side," meaning occupying the position of "criminal defendant," Binnall's interviewees gained insight into exactly how high the stakes of conviction were, knowledge that would, presumably, motivate any responsible juror to deliberate carefully.

While it is true that in most jurisdictions, jurors are tasked with rendering a verdict only, knowledge of the consequences of that verdict remains relevant (Bellin 2010). As indicated by Mike's statement, realizing the gravity of the decision can motivate jurors to make more careful judgments. Similarly, when juries are faced with a range of possible charges to consider, recognizing the difference in experience between a five-year sentence and a 10-year sentence can make a crucial difference in assessing fairness and proportionality.[27]

Excluding people who have directly experienced punishment neglects another important aspect of reasoning: interest. While "motivated reasoning" is often dismissed as simple partiality, accepting this dismissal leaves us with an impoverished concept of "reason," one that neglects the importance of a deliberator's investment in deliberating well. A person who has had a brush with state punishment is better situated to recognize that they, too, could find themselves subject to punishment than a person who lacks this experience. Recognition of that position offers a concrete incentive for the juror to take appropriate care in arriving at a decision.

Finally, having a juror in the room who has a firsthand understanding of state punishment could serve as a bulwark against ignorant or flippant assessments of what a prison sentence actually is like (and, equally importantly, what it is *not* like). Consider the tragic case of Charles Rhines, who was executed by the state of South Dakota in 2019. Rhines' attorney appealed his death sentence upon learning that jurors had made their decision, in part, on the basis of Rhines' sexuality and their own grossly misguided perceptions of what serving a prison sentence would mean. Juror Frances Cersosimo's statement reflects this ignorance:

[26] Given the distinction between epistemic privileges and epistemic achievements discussed at the beginning of this section, PFCs' experiences with criminal justice institutions do not *guarantee* that they actually approach their deliberative and decision-making tasks free of bias or that they invariably see the trial from the defendants' perspective. This emerges in Binnall's interviews with PFC called for jury service in Maine. Asked about his jury experience, Jack, a PFC, replies: "I could really care less if I [was] called to jury or whatever . . . it's not really important to me to be selected for jury duty. Um, I mean I don't think it's really important, but it is good that they do [include convicted felons] *because they've gone through the court system, they know what happens on the inside, and, you know, so they have a good understanding*" (2018, 17–18).

[27] For a boarder analysis of the epistemically and practically transformative potential of punishment, see Lackey (2020).

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> "Our responsibility was profound and we took it seriously…. One juror said it would be a deterrent to other criminals if Charles received a death sentence. After discussing this, we agreed the death penalty served no deterrent purpose. One juror made a comment that if he's gay, we'd be sending him where he wants to go if we voted for LWOP [life without parole] … I think we made the right decision." (*Rhines v. Young, Exhibit* 2)

Cersosimo's statement is particularly telling. She appears to have reflected on the seriousness of her decision and so was not engaging in the same variety of deliberative irresponsibility as the Tanner jurors; however, this conscientiousness did not insulate her from making an egregiously unjust decision in sending Rhines to death rather than "sending him where he wants." Cersosimo and the other jurors' ignorance regarding the reality of imprisonment (combined with their homophobic bigotry and reliance on stereotypes) led them to conclude that it would not be a punitive experience for a homosexual man like Rhines.

The exclusion of previously justice-involved citizens from juries opens a gulf between the people who send the convicted defendant to be punished, for whom the prospective sentence is an abstraction, and the experience of the convict, for whom it is very real. The realities of prison and other forms of state punishment are largely alien to citizens who have not had direct contact with the criminal legal system. This leaves the overwhelming majority of the population from which juries are drawn with only vague ideas about the punishment they are imposing. Many of these ideas are drawn from popular-culture representations, like television, film, and the nonfiction true-crime genre—all heavily mediated engagements with state punishment (Bennett and Knight 2021; Cecil 2015; Foss 2018; Greer and Reiner 2012; Harmes, Harmes, and Harmes 2020; Monteiro and Frost 2017).

While noncriminalized jurors can imagine the experience of punishment, their interpretive resources are limited and tend toward what Ross (2015) terms "prison voyeurism"—a danger illustrated in the Rhines case. This presents a threat to the quality of judgments rendered by juries, who inevitably make their decisions within a framework that is missing a key piece—the likely consequences of their decision. Ultimately, even if we adopt an optimistic view about the perspective-taking power of imagination (Kind 2021), access to the standpoint of a person subject to criminal legal system is more straightforwardly available by expanding the jury pool to include PFC.[28]

Conclusion

We argued that jury peerhood should be construed in terms of equal subjection, and that, under this view, peerhood has epistemic import. Based on this, we pointed out that there are stronger reasons to consider PFC as the defendant's peers in the equal subjection sense, relative to ordinary, noncriminalized citizens.

This argument does not only give the peer-judgment ideal a principled formulation; it also has practical bite. Specifically, the claim that there are stronger reasons to consider PFC as the defendant's peers recommends a set of policy measures which, taken together, can improve the prospects of defendants being judged by their peers. Here, we outline three such tentative measures. First, our argument requires that all existing felon jury disenfranchisement laws be repealed, such that all PFC should be eligible to serve on juries. To achieve this, all but one jurisdiction that allow for jury trials need to modify their jury qualifications.

Second, the argument calls for reforming the jury venire selection process. Currently, most jurisdictions allow or mandate either one or a combination of voter registration rolls, licensed driver lists, state or local tax rolls, unemployment compensation or public assistance directories to select prospective jurors. Even supposing that all felon jury exclusion laws are abrogated, other collateral legal consequences attached to felony convictions—for instance, suspensions of driving license and welfare benefits—and the de facto electoral disenfranchisement dynamics triggered by state punishment would disproportionately reduce the chances for PFC to appear on jury rolls, relative to citizens without felony convictions.[29]

To remedy this, states could use felony conviction records to add PFCs' names to the *mandated* lists from which the jury venire gets drawn. The nondiscretionary nature of this measure would guarantee that PFC are effectively, not just formally, eligible for jury service. The measure would also ensure that, in overcriminalizing

[28]The stakes sensitivity consideration is even stronger in those few jurisdictions where jurors are *also* tasked with sentencing. For a discussion and defense of jurors' sentencing powers, see Hoffman (2002).

[29]For a detailed analyses of de facto disenfranchisement, see Lerman and Weaver (2014); for collateral consequences, see McGinnis (2017) and Hoskins (2019).

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jurisdictions where exceedingly many citizens are convicted on felony charges, the chances for PFC to appear on jury rolls would increase proportionally with felony conviction rates. Moreover, if suitably designed, the measure has expressive force: it signals that we have strong reasons to think that PFCs' jury participation is distinctly valuable and does so by turning a democratically exclusionary instrument into an inclusionary one.[30]

Third, our argument supports more robust protections for PFC during voir dire hearings. Most significantly, it offers reasons for barring challenging PFC for cause on bad-judgment grounds. The epistemic advantages examined in the previous section do more than undermine claims that PFC are biased against the state. They offer *additional* epistemic reasons that are strong enough to outweigh at least some biased judgment concerns, should these concerns turn out to be somewhat corroborated.[31]

Furthermore, the argument recommends creating special challenges to cover felony record protections in addition to those currently offered in some jurisdictions on grounds of race and gender.[32] This would again signal the distinctive value of having PFC serve on juries. Concretely, the proposal would allow objections to peremptory challenges which seemingly exhibit a bias against PFC. Here, we are more generally committed to reforming peremptory challenge practices, instead of abolishing them.[33]

Taken together, these three policy measures do not guarantee that PFC will serve on all juries. But they increase their jury participation chances beyond those of ordinary, noncriminalized citizens and reflect the argument that we have stronger reasons to think that PFC are the defendant's peers in the relevant sense.

More generally, our proposals resonate with increasingly widespread programs whereby PFC and citizens with less serious criminal convictions are invited to offer assistance and support to citizens facing drug courts (Dzur 2012). They are also consistent with the longer-established practice of teen courts whereby juveniles with criminal convictions are called to sentence their delinquent peers (Cotter and Evans 2018) and with more recent "indigenous jury" initiatives—for instance, in Argentina—that summon individuals from historically oppressed groups to serve as jurors when either the defendant or victim belong to those groups (Hans 2017).

Finally, our argument is particularly relevant for polities where felony convictions are sufficiently frequent and unequally distributed across society. Such is currently the case of the United States and many European democracies, where a disproportionate number of PFC come from groups that are already disadvantaged across race, class, and gender lines.[34] Within these polities, it is plausible that the epistemic advantages prompted by legal coercion are generally uneven across the *demos* and more heavily prevalent within disadvantaged groups. Given this, felony-based jury exclusions do not only contribute to the marginalization of individual citizens; they also compound the political underrepresentation of the broader communities to which these citizens often belong. If persuasive, our argument thus points to a normatively underexamined relation between the democratic quality of a polity and the quality of its judgments on criminal justice matters.[35]

[30] Importantly, this measure would need to be accompanied by robust labor protections sensitive to PFCs' precarious employment situations. Failing this, a politically more feasible proposal would be to extend jury rolls to include the names of people with (nonfelony) criminal convictions who are *not* jury disenfranchised.

[31] Binnall (2021) shows that the evidence of an antistate bias among PFC is statistically very weak at best and, given large data variance, not indicative of any patterned trends among PFC.

[32] *Batson v. Kentucky* (1986) was meant to allow objections to curb peremptory challenges of people belonging to constitutionally protected categories. These objections are largely ineffective at trial, but, as Abel (2018) argues, they offer an effective appellate tool for postconviction challenges.

[33] As Leak (2021) argues, fairness requires *some* peremptory challenge provisions.

[34] For a general discussion, see Wacquant (2009) and Reiman and Leighton (2015). Statistics are not always systematic, but they consistently point in the same direction. For instance, in the United States, 8% of all adults in the United States and 33% of the African American male population hold a felony conviction (Shannon et al. 2017). Other estimates indicate that US-based LGB individuals are 2.25 more likely to be arrested, compared to self-identified heterosexuals (see https://www.prisonpolicy.org/blog/2021/03/02/lgbtq/), and that young male individuals born in the bottom 10% of the income distribution are 20 times more likely to be imprisoned in their early 30s, relative to individuals born in the top 10% (see Looney and Turner 2018).

[35] One might argue that, since unequal coercion engenders additional and qualitatively different epistemic opportunities for people from disadvantaged groups—for instance, firsthand knowledge of racist, classist, and sexist biases at play in criminal justice practices—the wrong of excluding PFCs is reducible to the wrong of underrepresenting the disadvantaged groups to which they belong. However, the epistemic opportunities that we examine in this article—viz., intelligibility and stake sensitivity—are, if more prevalent among disadvantaged groups, not necessarily limited to them. The recent convict criminology literature (Earle 2016; Ross and Vianello 2021) highlights that experiencing a criminal conviction has epistemic import that can be qualitatively affected by but is independent from other ascriptively patterned experiences. More pragmatically, Meade (2020) argues that there are strategic benefits to rallying postfelony reenfranchisement campaigns around the experience of being a PFC *simpliciter* rather than being a PFC belonging to an ascriptively predefined group.

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