

Eleven Angry Men

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Abstract

While many of us would not want to abandon the requirement that a defendant can only be found guilty of a serious criminal offence by a unanimous jury, we should not expect epistemology to give us the resources we need for justifying this requirement. The doubts that might prevent jurors from reaching unanimity do *not* show that, say, the BARD standard has not been met. Even if it were true, as some have suggested, that rationality requires that a jury composed of epistemic peers should coalesce around one view about the defendant's guilt, the failure to reach unanimity might be a good reason to worry about the epistemic failings of some small number of jurors but no reason to worry that we've failed to protect the defendant from an unjustified imposition of, say, the risk against wrongful conviction. The arguments for the unanimity requirement will need to come from outside of epistemology.

0. Introduction

There might be excellent reasons for requiring a unanimous jury verdict in order to convict a defendant in a criminal trial, but we might doubt that ep. It is hard to see any clear epistemological rationale for the view that we need a unanimous jury to meet the BARD standard. If anything, it seems there are powerful reasons for thinking that it's possible to meet that standard without unanimity. My aim is not to argue that it would be wise or reasonable to allow for conviction on the basis of non-unanimous verdicts, but only to argue that the case for the unanimity requirement would most likely need to focus on something that isn't contained in our epistemic principles.

1. Accuracy and Rationality

In keeping with many recent discussions of the standard of proof, I shall assume that the standard of proof is only met if the evidence put before the jury is sufficient to justify belief. If, however, the evidence is sufficient to justify belief in the guilt of the defendant, it is hard to see how it could fail to be sufficient for meeting the BARD standard.

Let me say two things to clarify this discussion. Like Conee and Feldman (2004), I think that we get a good fix on what it is to have justification to believe by thinking about whether we've met what they call the 'criminal standard'. As they see it, we have justification to believe only when the truth of the target proposition is beyond reasonable doubt.¹ This holds generally for all beliefs, they suggest. Our beliefs about defendants are just a special case. I'm not trying to suggest that readers revise their understanding of the BARD standard to fit some philosopher's pet theory of justification. I'm working from the assumption that justified beliefs meet the BARD standard because I'm working from the assumption that one important desideratum on a theory of justification is that it gives us a reasonably good understanding of what it would take to meet the BARD standard.

Note that the kind of belief I have in mind is categorical or outright belief. Obviously, evidence can justify some non-zero degree of belief and fail to meet the BARD standard. How should we understand belief? I think that when we believe something, we're convinced. To believe the defendant to be guilty is to be convinced that the defendant is guilty. It is only when we're convinced that someone has done something, that we can praise or blame them for what we take them to have done. One way to get a fix on belief, then, is to think about the kind of commitment to the truth of a proposition about some agent's deeds that could provide the cognitive basis for reactions like praise and blame.

There are interesting questions about whether we should focus on belief at all in this setting. We don't need to believe that Arsenal will win the match to bet that they will (not if the

¹ They qualify this and say that this holds for the kind of justification necessary for knowledge.

bookie is offering sufficiently attractive odds). We don't need to believe that it will rain in order to take an umbrella (not if we worry that it might rain and are sufficiently averse to the prospect of getting wet). Why does it matter if anyone believes the defendant to be guilty? Why isn't some sufficiently high degree of confidence enough for a finding of guilt or a decision to punish?

Buchak (2013) suggests that this might be because we need beliefs in choice situations where deontic norms are operative. (By contrast, she suggests that we need nothing but credences in situations where consequentialist considerations should determine what to do (e.g., when deciding which bets to place, deciding whether to buy insurance, etc.)) My suggestion is that the finding of guilt is supposed to express blame and that belief is required for reactive attitudes like blame. When it comes to praise and blame, suspicion is not enough. As Adler (2002: 217) observes, the difference between strong and mild resentment is *not* a matter of how confident we are that someone did something offensive or wrong; the difference between strong and mild resentment has everything to do with the seriousness of the offence that we believe was committed. Mild resentment is never a matter of, say, suspecting to some middling degree that someone has done something unspeakably bad. Mild resentment is a matter of believing that someone has done something bad but not awful. My operative assumption that we need evidence that would justify (outright) belief stems from the idea that we need evidence that could (assuming the other elements are in place) warrant blame and that only evidence that warrants belief can do that.

Having said that, while I do think that in thinking about the standard of proof, we have to think about whether the evidence is sufficient to warrant blame and to express condemnation, I appreciate that there are other considerations that we need to bear in mind having to do with the rights of the defendant. In the discussion that follows, I shall defend views about the justification of belief that fit well with a plausible approach to protecting the interests of the defendant against wrongful conviction.

My initial line of argument against the idea that we need unanimity to meet the BARD standard assumes that a certain way of thinking about justification is correct. The operative theory of justification draws on recent work on epistemic utility theory.² While much of this work has been concerned with norms for credences, some of it has been concerned with norms for full belief. In both settings, the guiding idea is something like this. We know that some attitudes are better than others. Our theory of epistemic value identifies the features of our doxastic states that are desirable and undesirable and gives us a way to compare them. Once we have a way of evaluating different sets of attitudes and comparing them, we can use some tools imported from decision theory to tell us when it's rational to believe and when it's rational to suspend. We can also use these tools to tell us whether some (putative) norm governs belief. If we discover (say) that some set of attitudes is always dominated by another set of attitudes whenever they violate some (putative) norm, this discovery vindicates the hypothesis that this norm is genuine. If, on the other hand we discover that some (putative) norm requires us to form attitudes that we can see for ourselves are less desirable than some alternative set of attitudes, this would seem to show that the (putative) norm is spurious.

Many epistemologists are attracted to veritism, the view that the fundamental epistemic goods and evils should be understood in terms of accuracy.³ According to the veritist view presented here, all true beliefs are desirable in some way (e.g., desirable from an epistemic point of view), all false beliefs are undesirable, and the desirability or undesirability of these states determines what it would take for it to be rational to believe in any choice situation. What makes it rational to believe is not that some belief would be true if formed. What makes it rational to believe is that believing has at least as much expected epistemic value as suspending.

² For a helpful introduction, see Pettigrew (2016).

³ For defences of veritism, see Goldman (1999) and Joyce (1998).

When we combine the veritist's theory of value with a norm that tells us that we ought to have the attitudes that maximise expected epistemic value, we end up with this view of rational belief:

Lockean View: We ought to believe p iff we ought to have a sufficiently high degree of confidence in p .⁴

Believing as the Lockean view would have us believe ensures that we believe in ways that maximise expected epistemic value (if epistemic value is as the veritist conceives of it). The view, as stated, doesn't tell us what a sufficiently high degree of confidence would be, but it does tell us what determines that threshold. It is determined by comparing the values of true to false belief. If we hold fixed, say, the value of true belief and increase the disvalue of false belief, the threshold increases. If we hold fixed the disvalue of false belief and increase the value of true belief, it decreases. Given the reasonable assumptions that true belief has some non-negligible value, false belief does not have extreme disvalue, and that the magnitude of the disvalue of false belief is greater than that of the value of true belief, we know that the probability that p must meet or exceed for belief to have at least as much expected epistemic value as suspension will lie between .5 and 1. Let's suppose that it's .9. Nothing much turns on this choice, but it will be helpful at various points to have a number.

As suggested earlier, belief can rationalise blame. If Agnes believes that someone has done something unspeakably bad and she independently knows that this agent would be responsible for her deeds and would have no excuse for wrongdoing, blame would be reasonable. Blame would be unreasonable, however, if she could not rationally believe that the agent has done anything wrong. As Adler observed above, mere suspicion is not enough. In our cases, we'll assume that the conditions are such that rational belief and reasonable blame come or go together. As with belief, we probably don't think that it's reasonable to blame if it's not very likely that someone has done something wrong (e.g., if the probability of wrongdoing is less than .5, blame is not reasonable) and we probably don't think that we need absolute certainty for blame (e.g., you can blame someone for wrongdoing even if you're less certain that they've committed a wrong than you are that they either did or didn't commit that wrong).

2. Consistency

Drawing on the account of rational belief and rational blame sketched above, I want to show how we might evaluate proposals about requirements on rational belief and reasonable blame. Let's look at consistency requirements on full belief (requirements which, if genuine, would have implications for when we can and cannot reasonably blame people for their (apparent) misdeeds). This should be illuminating for how we think about unanimity.

Let's suppose that Agnes has spent the last four weeks following 11 trials. In each case, the defendant was found guilty on the basis of evidence that we would agree was more than sufficient. She remembers the important details of each trial and continues to believe afterwards that each of the defendants was indeed guilty. At this stage in the story, we have no real reason to deny that she could know and/or justifiably believe in each case that the defendant was guilty if we assume that they were indeed guilty. Here's where the case gets interesting. An undeniably reliable source tells Agnes in a letter that precisely one of the defendants was innocent. Alas, the part of the letter that revealed the identity of the innocent party missing. What should Agnes believe now? Can she continue to reasonably blame the defendants for their (apparent) misdeeds?

Let's split the case into two parts, the time prior to the testimony and the time after. When we think about Agnes's beliefs prior to the testimony, it seems that upon pain of scepticism, we should think that each of her true beliefs could constitute knowledge. Since clear cases of knowledge are plausible cases of rational belief, I'd want to say that her beliefs were rational, too. What changes when the informant tells her that she's made a mistake? My optimistic assessment

⁴ See Dorst (2019) and Easwaran (2016) for epistemic utility arguments for the Lockean View.

is this. She could retain the knowledge she had and come to know one new thing—that one of her beliefs is mistaken. What about the rational status of her beliefs? If clear cases of knowledge are plausible cases of rational belief, a case could be made that 10 of her 11 beliefs about guilt and her belief about the accuracy of these beliefs could be rationally held. What about the one mistaken belief? This belief couldn't constitute knowledge (owing to the factivity of knowledge), but if we stipulate that the cases are sufficiently similar to each other, I'd say that this remaining belief is rational iff the other beliefs were rational. Putting this together, I'd say that she has 12 rational beliefs (11 that pertain to guilt and one that pertains to the accuracy of these beliefs) and that the true ones also constitute knowledge.

That's my take on the issue of consistency. What should we say about blame? Barring extenuating circumstances, it seems that it's reasonable to blame when it's rational to believe that a wrong was committed. The crucial point that I'd want to stress here is that if blame were appropriate *prior* to being told that one mistake was made, it would be appropriate *after* being told that the mistake was made on the assumption that the relevant beliefs remained rational. If Agnes continues to believe, say, that the first defendant pushed his mother down the stairs in the hopes that the fall would kill her, on the assumption that this belief remains rational over some stretch of time in light of what Agnes learns, the blame remains reasonable over this stretch of time, too. If we choose the right contents for the belief, a belief, if rational, makes blame reasonable or appropriate. So, if a set of beliefs known to contain an error might contain only rational beliefs, these beliefs, in spite of their evident imperfection, is an adequate basis for blame. Someone like Agnes could, in reviewing the cases, continue to blame each defendant while knowing that one of them was innocent, provided that she continues to rationally believe each to be guilty of the relevant offence.

In short, we can meet the BARD standard in a collection of cases where it's known that one case involved a wrongful conviction. Readers might want me to defend these verdicts. I see two ways of trying to motivate this idea that it's possible for rational thinkers to be knowingly inconsistent. The first rationale for rejecting the consistency requirement for rational belief appeals to some observations about knowledge. When we think about Agnes's beliefs after she's informed that she's made a mistake, how much could she know about the guilt of the 11 defendants? Optimistically, I think that she could (in principle) continue to know everything that she knew prior to being informed of the mistake. Optimistically, I think that she could (in principle) have known each of the guilty defendants to be guilty. Thus, I think (yes, optimistically) that she could know that she believes 11 defendants to be guilty, know that 10 precisely 10 are guilty, and continue to know in 10 of the 11 cases that the relevant defendant will be guilty. (In one case, she'll falsely believe that an innocent defendant was guilty.) Some readers might do me the favour of just agreeing on this point. If this is right, I think this tells us something important about the rational status of her beliefs. Clear cases of knowledge are plausibly taken to be clear cases of rational belief, so if we have 11 pieces of knowledge here (i.e., 10 pieces of knowledge about the guilt of the defendants and one about the number of mistakes made), we should have at least 11 rational beliefs. I'd add that the 12th belief is probably rational, too. Differences in rational status shouldn't be down to features of the cases that are not salient or accessible to the thinker. I don't think we want to say that the fact that, say, Agnes's belief about the 6th defendant is the false belief makes this belief irrational if the others are rational. (Nor do we want to say that the fact that this belief is false prevents some other belief from constituting knowledge.)

Why should we accept this optimistic view about the scope of Agnes's knowledge? I think because it fits with lots of other things that we think about knowledge generally. I'll give two quick examples. Suppose you take an exam. Your teacher marks it. Upon pain of scepticism, it must have been possible for you to take an exam with N questions where you knew the answers to each of the questions you answered correctly. So, if that were N-2 questions, you would have had N-2 pieces of knowledge. Learning that you made two mistakes need not destroy any of the knowledge you had before you got the exam back from the teacher and I think this is true even if the teacher

was lazy and didn't tell you which questions you got wrong.⁵ If this seems right for the exam setting, remember that this has all the structural features operative in the Agnes example. If $N=12$ or 13, the above points stand. (If you want $N > 50$, I'll just put Agnes in more trials. Make the adjustments and grant my point.) Here's another example. You start to memorise the contents of the phone book. You get to the end and find an errata slip. It says that the book contains a single error. Alas, the slip is torn so you don't know where the error can be found. I still think the phone book is a clear source of knowledge for you. How much can you know by memorising the phone book's contents? I guess you could know each of the true things you memorised about phone numbers and that's true even if you committed the one mistaken entry to memory.

In sum, I think paradigmatic sources of knowledge (e.g., phone books) might be inconsistent and that an inconsistent set of beliefs (e.g., the beliefs you have if you continue to believe each of your answers while believing your teacher that a mistake was made) might include quite a lot of knowledge. So, assuming that clear cases of knowledge are clear cases of rational belief and beliefs that are subjectively similar to clear cases of knowledge are also rational, Agnes might rationally believe an inconsistent set of propositions.

There's a second rationale for rejecting the consistency requirement that draws on the resources of the veritist's ideas from above. Let's suppose that our theory of rational belief encodes an epistemic preferability relation, one that tells us which attitudes are preferred to others in different epistemic situations. If our theory includes a consistency requirement, for example, the in situations where a set of equally well-supported beliefs is known to be inconsistent, suspension would be strongly preferred to belief for each of these propositions. So, for example, once a thinker learns that, say, her only 19 of her 20 beliefs corresponding to her answers to exam questions were correct, insofar as each belief is equally well supported, she would have to suspend on something. We can stipulate that the belief that there's a mistake in the set is better supported than the others, so it seems that she would have to drop some or all of the beliefs corresponding to her answers. To drop some but not others when the support for these propositions is equally good seems arbitrary. To drop all, however, seems overly sceptical. At any rate, that's how it strikes me. Others disagree. Smith, for example, defends the principle of differential defeat:

Differential Defeat: If one learns $\sim p_1 \vee \sim p_2 \vee \dots \vee \sim p_n$ then this will defeat one's justification for all and only those propositions in $\{p_1, p_2, \dots, p_n\}$ that were the least justified, prior to the discovery (forthcoming: 6).

As we'll see, there is a straightforward epistemic utility argument against Differential Defeat.

Think about how the veritist's epistemic preferability relation would handle these of cases:

- a. Agnes has 100 beliefs about X and she discovers that one of these beliefs is mistaken;
- b. Agnes has 100 beliefs about X and she discovers that there's a .5 chance that two of her beliefs are mistaken;
- c. Agnes has 100 beliefs about X and she discovers that there's a .25 chance that four of her beliefs are mistaken.

We can stipulate that in each case, Agnes's beliefs are equally well supported so that Differential Defeat would say that in (a) she would lose justification for each of her 100 beliefs. The veritist would then point out that the expected number of errors is the same in (a)-(c), so if it's rationally forbidden for Agnes to continue believing what she does in (a), this would hold for (b), (c), and any other case in which the expected number of errors is at least 1. In turn, this would mean that rationality would only permit Agnes to believe if her credence in the target proposition were greater than .99. We could push that number up if (a) involved a greater number of beliefs and the result would be that rational belief would require a risk of error that approached 0. The sceptical implications of such a view are obvious and would imply that it's not rational to believe a defendant

⁵ If it helps, imagine that each of the questions was about some diverse subject matter

to be guilty under any conditions. Veritists would ask what possible assignments of epistemic value to true and false belief could justify such risk aversion and it's hard to imagine an answer since paradigmatic sources of knowledge have non-zero error rates.⁶

My hunch is that people sometimes think consistency is required for rational belief because they register (correctly) that a set of beliefs known to contain a falsehood is imperfect. They somehow think that this is a sign of rational imperfection, but it's only a sign of rational imperfection if there are superior alternatives to the imperfect collection of attitudes. Principles like Differential Defeat direct us to alternatives that are clearly inferior—we rid ourselves of something undesirable at the expense of a massive number of desirable states. When we do that, we have to bear in mind the (opportunity) costs of abandoning large numbers of desirable belief states that comes with trying to rid ourselves of one bad one.

3. From Inconsistency to Non-unanimity

Just as there is disagreement about whether we can have rational beliefs that are known to be inconsistent, there is disagreement about the epistemological significance of unanimity. What I would like to do is draw on the same kinds of resources from above to argue that non-unanimity is akin to inconsistency. Inconsistency is a sure indication that a collection of attitudes deviates from some sort of objective ideal, but it gives us no real reason to think rationality requires us to refrain from believing what we do. Non-unanimity might also be a sure indication that a collection of attitudes deviates from some kind of objective ideal, but it also might give us no reason to think rationality requires us to refrain from concluding that a defendant's guilt is beyond reasonable doubt.

Once we see how we can use the accuracy framework to evaluate multiple attitudes held by one person, it should be easy enough to extend the accuracy framework to evaluate attitudes held by multiple individuals. As we saw earlier, the veritist buys into this idea that what makes an epistemic state like belief rational has to do with the way that a believer manages certain risks. One risk is the risk of error, believing what isn't true. The second is akin to the risk of ignorance, failing to believe what is true. When we shift from thinking about beliefs that an individual holds to thinking about the beliefs that a group holds, it seems that our focus should continue to be on these risks. Suppose Agnes meets up with three friends and they head to the pub for quiz night. The quiz will have 100 questions covering four topics (e.g., sports, music, history, current events) and each member of the team will tackle on these areas. We can ask, in keeping with veritism, which situation would be preferable?

- For each answer, the relevant expert is .9 confident that the answers they're giving are correct (and this is the rational degree of confidence to have);
- For half the answers, the relevant expert is .95 confident that the answers they're giving are correct and for the other half of the answers the relevant expert is .89 confident that the answers are correct (and these are the rational degrees of confidence to have).

When it comes to the epistemic basis for these answers, it seems clear that the second situation would be preferable to the first. While, the relevant experts might not believe half the answers they

⁶ For further discussion of consistency requirements on rational belief and arguments against collective defeat, see Dutant and Littlejohn (2021, forthcoming). Smith is not unaware of these considerations. He rejects the idea that justification is a matter of minimising risk. See Smith (2016). Our arguments against Differential Defeat do not all assume the risk-minimising picture that Smith rejects. They also do not support that picture. We think the view that best accounts for the relevant range of intuitions and principles is one that tells us believe in ways that balances the risk of believing without knowing and the risk of failing to believe what we can know.

give in the second situation, the expected inaccuracy in that situation is less than the expected inaccuracy of the first.

Once we see how we can use the accuracy framework to evaluate multiple non-overlapping attitudes held by multiple people, it shouldn't be hard to see how we might use it to evaluate the attitudes in a setting where we have multiple people. Let's consider two juries. In the first, Jury A, each juror believes the defendant to be guilty where each has a credence of .9. On the assumption that each belief is rationally held, we're assuming that this would be sufficient for satisfying the unanimity requirement and the BARD standard. (That is, we're assuming that *if* the Lockean theory of rational belief is correct, each juror justifiably believes the defendant to be guilty. We're assuming also that this ensures that the BARD standard is met.) We're assuming that if it's ever appropriate to convict, this is the case.

We'll contrast this with a second jury, Jury B, where only 11 of the 12 jurors believe the defendant to be guilty where each of the 11 jurors has a credence of .95. The 12th juror strongly suspects the defendant to be guilty, but she has a credence of .8. Given our operative assumptions about the credence-belief link, this juror does not believe the defendant to be guilty. The unanimity requirement is not met. If we held that meeting the unanimity requirement is necessary for meeting the BARD standard, it's satisfied in Jury A's trial, but not Jury B's trial.

Compare the epistemic basis for conviction for Jury A and Jury B. We can see that there is less total doubt in the case of Jury B than there is in the case of Jury A and we face the same sort of pressure from before. If we say that the epistemic state that obtains in the case of Jury A is adequate, we'll be hard-pressed to explain why it's not adequate in the case of Jury B since there is less total doubt. If, however, we insisted that the jury could not convict unless they were unanimous in the belief that the defendant was guilty, we would seem to prefer to convict on the weaker epistemic basis when we insist that the stronger basis is not adequate for conviction. This is a puzzling position to defend. If the defendant is guilty, Jury B is closer to the (objectively) ideal epistemic state than Jury A would be.⁷

There is some additional oddity here to consider. What if the same defendant had been tried by both juries for the same offence? In the American legal system, the same defendant could have been tried in front of these juries on the basis of the same evidence. The function of the unanimity rule would be that if, say, Jury B had gone first and Jury A second, the defendant could have been convicted, everyone would agree that the BARD standard had been met, and that's so even if there had been an additional jury, Jury C, that had preceded both where a greater number of jurors did not believe the defendant to be guilty. When we think about the (apparent) epistemic virtues of requiring a unanimous jury for conviction on the grounds that this is necessary for meeting the BARD standard, it's incredible to think that this standard is met by virtue of these facts about the attitudes of the members of Jury A in spite of the doubts in the minds of further juries.⁸

Now, it might be said, quite rightly, that there is something wrong with the current system in which a defendant can be tried repeatedly with the same evidence presented against them, but

⁷ It's true that if the defendant is not guilty, Jury B is farther from that state than Jury A would be, but the point to remember is that we've already endorsed in Jury A's case proceeding *as if* we're in the condition where the defendant is guilty, so it's not clear why this fact about distance from the ideal in the situation we're assuming doesn't obtain matters.

⁸ For discussion of retrial and unanimity, see Leib (2005). It is also helpful, I think, to think about mixtures of juries to see whether anything of great normative significance is protected by a rule that forbids us from convicting a defendant found guilty by 11 of 12 jurors in three trials when 'reshuffling' the jurors at random would have quite likely resulted in a unanimous guilty verdict that all parties would agree meant the BARD standard had been met. The idea that BARD is met if we reshuffle to get unanimity but wouldn't be met if we had any number of trials in which 11 of 12 jurors agreed the defendant was guilty seems quite strange to me.

it's bizarre to think that the distribution of doubt within a jury (e.g., Jury B) might be such that it presents us with a decisive reason not to convict when a greater amount of doubt within a jury (e.g., Jury A) presents us with no such reason if we also agree that no amount of disagreement between members of different juries gives us any sort of reason at all not to convict. It seems that the defenders of the unanimity requirement should be seriously concerned about current practice concerning retrials after hung juries.⁹

When it comes to identifying the motivations for the operative epistemic standards in the criminal trial, it seems that we should attend to the idea that the procedure should be run in such a way as to properly manage the risk of a wrongful conviction. It is hard to believe that we're doing well with respect to this consideration if we have a system that approves of riskier guilty verdicts and forbids less risky verdicts. This is inevitable, however, if we have a system that doesn't forbid us from ever reaching a guilty verdict but doesn't allow us to reach a guilty verdict non-unanimously. This becomes evident when we think about the possible ways that some quantity of doubt might be distributed across the different jurors making up a jury. Presumably we're willing to take *some* risk of wrongful conviction because we think the trial potentially furthers some good that justifies imposing this risk on the defendant, but I can't think of any good that would justify imposing the greater risk upon the defendant if it couldn't justify imposing a lesser risk.

A system that tells us that the process should be sensitive to aggregate doubts of the jurors and tells us to refrain from convicting if their aggregate doubts are too great does better in terms of accuracy than a system that imposes an unanimity requirement and that seems like a powerful epistemic reason to think that the BARD standard would *not* require unanimity.

4. Objections and Replies

In the previous section, I've argued that *if* we accept a veritist approach to epistemic value, it's hard to see any compelling epistemic reason to prefer a system that requires unanimity from a jury to reach a guilty verdict to one that drops this requirement. In setting out this argument, I've not discussed the considerations that have been offered in support of the unanimity requirement. I've also appealed to a controversial picture of justification. I'll now address these concerns.

4.1 Justification and Risk-Minimisation

The idea that what a juror ought to believe about a defendant is determined by the juror's degree of confidence in the defendant's guilt is highly controversial.¹⁰ It seems that my argument assumes that this is the right way to think about justification. And this seems to be the wrong way to think about justification, as evidenced by the fact that we shouldn't believe a defendant to be guilty on the basis of naked statistical evidence. So, isn't there an obvious problem with the argument sketched above?

I think that there is. I agree, for example, that we shouldn't believe a defendant to be guilty on the basis of naked statistical evidence since it's obvious that we cannot come to know a defendant to be guilty on such a basis. My own view is that blame is objectively suitable only when we know that someone has engaged in wrongdoing.¹¹ Blame is subjectively suitable when the

⁹ See also Sridharan (MSa) for a challenge to the defenders of unanimity having to do with jury size. The size of a jury seems to be determined by convention (or numerology) and it has a significant bearing on the probability of securing unanimity. This might worry us about the unanimity requirement's rational standing.

¹⁰ For recent sympathetic discussions of the idea that high probability of guilt should be sufficient for conviction, see Hedden and Colyvan (2019), Papineau (forthcoming), and Ross (forthcoming). For dissenting views, see Gardiner (2019).

¹¹ In a way, I agree with Moss (2018) that we only prove the defendant's guilt beyond a reasonable doubt when we know. In Littlejohn (2020), my concern was mainly with what we subjectively ought to do in light of the evidence, not what we objectively ought to do. For reasons set out in

probability that we're in a position to know that the relevant agent has committed a wrong is sufficiently high. For the most part, the differences between the view that we're rational to believe when it's sufficiently likely that we're in a position to know and the Lockean View that says that it's rational to believe when the probability of the target proposition is sufficiently high won't concern us because the view's verdicts will largely coincide so long as we focus on cases where the evidence under consideration is the kind of evidence that would, in fortunate circumstances, provide us with knowledge. Naked statistical evidence doesn't do that, but many other kinds of evidence do. This knowledge-centred view of rational belief, like the Lockean View, delivers the verdict that we can (if the set of propositions is sufficiently large) rationally believe a set of things we know to be inconsistent. We can dispense with the Lockean View and say that if either the high probability of truth or the high probability of being able to know is sufficient for rational belief, the arguments above should work equally well.

4.2 Norms for Disagreement

Let's think about Jury B and the disagreement between the jurors. Lee (2017) and Stein (2018) might say that I've left something important out of the discussion by failing to take account of the norms that govern disagreement and the way that their directives bear on questions about reasonable doubt. Lee suggests that if the equal weight view is correct and peers ought to give the opinions of disagreeing peers equal weight, the rational thing for jurors to do would be to shift their opinions to reduce the distance between them. A simple way to do this would be, for example, for each juror to change their confidence (after suitable deliberation) to fit an average. The members of Jury B, recall, were such that 11 were .95 confident of the defendant's guilt and the 12th juror was only .8 confident of this guilt. The 11 should reduce their confidence slightly and the 12th should increase her confidence significantly. Were they to do so, they would each have a degree of confidence greater than .9. They would have unanimity and could each agree about the defendant's guilt.

One might object to the suggestion that the equal weight view supports the unanimity requirement on the grounds that the equal weight view itself is mistaken. Someone might argue, for example, that rational thinkers can be given the same body of evidence but rationally end up with different attitudes and differing levels of confidence, denying that there is some single unique rationally permissible response to every possible body of evidence.¹² If that's right, it's not clear why we should say that rationality requires our jurors to shift their opinions closer to the opinions of other jurors in such a way that they either all have sufficient confidence to judge that the defendant is guilty or lack it. I have some sympathy for this response. Additionally, I have some sympathy for the response that says, in effect, that jurors are not rationally required to regard each other as peers. Even if there are reasons for the court to defer to the judgments of jurors, it's not clear that jurors themselves need to show such deference to each other if it strikes them that other members of the jury are either too certain or insufficiently certain of the defendant's guilt. I have some sympathy for this response, too. My main concern, however, is about the relevance of these disagreement norms to debates about unanimity.

Let's suppose, in keeping with one motivation for conciliatory approaches to disagreement, that some sort of interpersonal uniqueness thesis is true and that there is one and only one rational response to any given body of evidence, one that the jurors would have to coalesce around if they were each to respond to the evidence presented in trial rationally. And let's further suppose that the jurors should think of each other as peers. This suggests that if the members of a jury are truly

Littlejohn (2012), I do think we want to say that there's at least some sense in which we shouldn't believe a defendant to be guilty and punish them if they are innocent, but I don't wish to wade into discussions about different readings of 'ought' here.

¹² For helpful discussions of the uniqueness thesis, see Kopec and Titelbaum (2016) and Pettigrew (MS).

deadlocked and have different degrees of confidence in the defendant's guilt in spite of their deliberations, the attitudes of our jurors do not align perfectly with the requirements of rationality.

Let's consider two ways that Jury B could have ended up after deliberation given the initial credence distribution from above. They might have remained with 11 jurors with a credence of .95 in guilt and one at .8. In so doing, they presumably would have violated the directives of the equal weight view as neither side budged. Alternatively, they might have evolved over time so that the members of Jury B* split the difference and each juror ended up with a credence of .9375 in the defendant's guilt. Presumably, the defenders of unanimity will say that we meet the BARD standard in the case of Jury B*, not Jury B. To see if there's a reasonable complaint against Jury B following the lead of Jury B* in finding the defendant guilty, let's compare their attitudes for accuracy. We'll focus on the case in which the defendant is guilty as the objection to Jury B finding the defendant to be guilty is not that the defendant is innocent but that the epistemic basis for finding the defendant guilty is somehow insufficient.

If we're worried about whether the jury is discharging their obligation to serve as a buffer against wrongful conviction, it would make sense to consider the total inaccuracy of the attitudes of the two juries. I'll use the Brier Score to represent the inaccuracy of each juror and then sum to represent the total inaccuracy of the jury. As it happens, Jury B* does score better than Jury B. If the defendant is guilty, Jury B* is closer to the ideal of accuracy than Jury B.¹³ That might seem to suggest that there's something important about disagreeing peers adjusting their opinions to minimise disagreement.

So far, so good. It seems that the jury might be better off if it is composed of jurors who conciliate. The thing that I want to note, however, is that even if there is an argument to be made that under some conditions, modifying our attitudes in light of peer disagreement might make them *more* accurate, the question that interests us is whether these rationally imperfect attitudes might be *sufficiently* accurate. We should compare Jury B to Jury A. We've assumed that Jury A was in an epistemic state that was sufficient for meeting the BARD standard, but Jury A's total inaccuracy (.12) is worse than Jury B's. Insofar as we think that the jurors should pursue the truth and try to avoid error in coming to their decision about the defendant's guilt, any rule that forbids Jury B from finding guilt while allowing Jury A will strike the wrong balance as it tells us that we should prefer going with a hung jury when we're rationally more confident of the defendant's guilt and a conviction when we're rationally less confident of the defendant's guilt.

The fans of unanimity might concede that from the point of view of accuracy and epistemic value, the attitudes of the jurors in Jury B have a certain virtue or desirable feature missing that makes them preferable in some respect to the attitudes of the jurors serving on Jury A, but I can see fans of the unanimity rule saying two things in response to the suggestion that we should contemplate convicting without unanimity. First, they might argue that we shouldn't convict when it's clear that there's a kind of irrationality exhibited by the jury's attitudes. We get that with Jury B, not with Jury A. Second, they might argue that the accuracy considerations shouldn't be decisive since it's clear that enforcing the unanimity rule can be expected to reduce the rate of false convictions. Let me address these concerns.

¹³ To determine the inaccuracy of a juror on the assumption that the defendant is guilty, we can represent their inaccuracy using the Brier Score by identifying the ideal credence to have given that the defendant is guilty (i.e., 1), subtract the juror's actual degree of confidence from this number and square that. To get the total inaccuracy of the jury, we just sum up each of these scores. Each juror that is .95 confident in the defendant's guilt gets a score of .0025, a juror that is .8 confident would get a score of .04, so Jury B's total inaccuracy would be .0675. Jury B*'s score would be .046875. Lower scores are closer to the ideal (e.g., the ideal is at 0-distance from itself, so if we had maximal credence in the defendant's guilt and the defendant were guilty, we'd have a Brier Score of 0). For a helpful discussion of accuracy and disagreement, see Lam (2011).

First, if I were to agree that something like the equal weight view were the right way to think about rational responses to disagreement and were to grant that jurors should see each other as peers (or, perhaps, that we should all adopt the fiction that they are insofar as they've been assigned to a jury), I'd have to admit that there's a kind of irrationality manifested by Jury B that's not manifested by Jury B* or Jury A by virtue of the fact that the jurors on those juries don't disagree after deliberation. The thing that I'd want to say, however, is that I don't see why conviction should require that it's rational to assume that the juror's attitudes are rational. When we have a situation where there's 11 jurors who believe the defendant to be guilty and one who doesn't but has sufficient confidence that the aggregate doubt is less than the aggregate doubt harboured by Jury A, it seems we have excellent reason to believe that the rational failure can properly be ignored. Why? Because we can see that if it's remedied (i.e., Jury B's attitudes more closely resemble Jury B*'s attitudes), there's a case for finding the defendant guilty. That's a clear indicator that the irrationality that's manifested by their attitudes skews things unreasonably in favour of the defendant, not against the defendant. And when it's clear that things have been skewed unreasonably in that direction, it seems odd that we would decide that that's a decisive reason to say that the defendant cannot be found guilty.¹⁴

Second, Lee is right when he notes that the effect of imposing the unanimity rule will be that we get fewer convictions and thus should expect to have fewer convictions of the innocent. This is a good thing, but we also get fewer convictions of the guilty. Isn't this a bad thing? Undoubtedly, Thomson (1986) is right the loss that we suffer from failing to convict the guilty is less than that of the loss suffered by the innocent person we convict, but we need to properly balance these considerations. There must be some reasons that are reasons to take the risk of convicting the innocent and some way to balance these against reasons not to convict the innocent. The issue is really whether the unanimity rule helps us properly balance these considerations. I think that it doesn't. Why not? Because we properly balance these considerations by thinking about how desirable or undesirable the possible outcomes are and use that to determine a threshold at which the expected value of conviction matches that of not convicting the defendant. We know that the unanimity rule will prevent us from convicting in ways that will maximise expected value because we've already seen that it forbids us from convicting a defendant in spite of the fact that there's less doubt about this defendant's guilt than one that our system tells us to convict.

Conclusion

I have argued that we have good epistemological reasons to be sceptical of the idea that we need a unanimous jury to meet the BARD standard. Even when jurors cannot agree on the defendant's guilt, their attitudes concerning guilt should provide a sufficient basis for finding the defendant guilty if there could be a jury composed of rational members who meet the unanimity requirement but have as much or greater aggregate uncertainty about the defendant's guilt. That being said, while I do not support the unanimity requirement, I find no clear epistemological rationale for it.

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¹⁴ This goes beyond the scope of this discussion, but Sridharan (MSb) makes a case for relaxing unanimity requirements on acquittal that I find compelling for the sorts of reasons discussed here.

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