1. Introduction: By what standard does one measure the success of democratic institutions? This question is of critical importance to democratic theory. On the one hand, assessments of democratic performance purely in terms of citizen preference satisfaction seem inadequate; the “tyranny of the majority,” for example, is only a problem because popular majorities may acquiesce—or even enthusiastically support—violations of minority rights. On the other hand, assessments of democratic performance in terms of criteria external to citizen preference—objective measures such as economic growth—are often criticized as undemocratic. At the very least, it is a matter of contingency whether democracies satisfy such criteria better than non-democracies. (Perhaps a non-democratic, technocratic system of expert rule could generate higher economic growth than a democracy.) The development of a standard of assessment that assigns a special place to democracy, but without merely devolving into citizen preference satisfaction, remains a work in progress.

Drawing upon the work of Jeremy Bentham, the political theorist Jon Elster has forcefully argued that democratic institutional design should be negative, not positive. It should aim to keep baneful influences out of the political process, instead of trying to ensure that the process produces high-quality decisions. In doing so, he hopes to develop an effective measure of democratic institutional performance. Elster stresses very effectively the limits of our current knowledge of how democratic institutions work. He also defends some useful "negative" institutional mechanisms that are compatible with those limits. But his emphasis upon negative institutional design is overstated; such design cannot be coherently carried out without some positive vision of the democratic process, however minimal.

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2. Two Negative Approaches to Institutional Design: Jon Elster takes the title of his book *Securities against Misrule* from an essay by Jeremy Bentham. It is Bentham who provides the animating spirit to the book—in particular, his advice that when it comes to democratic institutional design, “the end is so to speak of a negative character” (emphasis in original; quoted in Elster 2013, p. 1).¹ “I have come to believe,” writes Elster, “that Bentham's negative approach to institutional design—*providing securities against misrule*—is more robust and realistic than the numerous positive approaches proposed in the literature” (emphasis in original; p. ix). Elster's book is devoted to developing this point.

But what does it mean to take a negative approach to democratic institutional design? A theory of institutional design involves at least two components. First, it involves a set of guidelines for the design of institutions. Second, it involves a set of criteria for judging institutional performance. The latter typically provide the foundation for the former; it's hard to give advice on the design of institutions unless you have some idea what those institutions are supposed to do. Bentham, as we will see, took a negative approach to the first of these components, but not the second. Elster, by contrast, wishes to go Bentham one better, and take a negative approach to both. It is this move—this effort to forego any positive story regarding democratic institutional design—that generates serious—arguably fatal—problems for Elster's approach.

Much of *Securities against Misrule* is taken up with the first of these two components—the guidelines (rules, maxims) for democratic institutions. Elster considers three possible “procedural accounts of institutional design,” three possible approaches institutional designers could take (p. 5). First, they could design the institutions so as to “select good decision makers.” Alternatively, they could try to “eliminate bad decision makers.” Third, they may “ask whether decision making by ordinary citizens can be improved by *structuring their relation to the environment*” (emphasis in original; pp. 5-6). Elster wishes to defend the third, and “least ambitious,” of these three alternatives (p. 5). Institutional designers, Elster argues, should focus their efforts upon structuring the

¹ All subsequent references will be to this book unless otherwise indicated.
environment of decision makers so as to eliminate the possibility that they might act on the basis of illegitimate factors.²

Elster defines the performance criteria for decision makers in a manner compatible with this negative approach. In doing so, he adapts three criteria introduced by Bentham. Public officials should display intellectual, moral, and active aptitude (p. 141). In other words, they should be competent, public-spirited, and motivated to exert effort. But for Elster, moral aptitude (for example) is not about finding decision makers who are not tempted to do wrong, or who are tempted yet find the strength to resist. It is about structuring the decision-making environment so as to ensure that the temptations do not arise in the first place. “It is not a question of deputies being motivated by the public good, but of structuring their situation so that self-interest has no purchase on their decision” (emphasis in original; p. 163).

In effect, Elster is channelling the wisdom of the George Washington Plunkett, the notorious Tammany Hall political boss. In Plunkett’s words,

I don’t believe that the government of our cities is any worse, in proportion to opportunities, than it was fifty years ago. I’ll explain what I mean by “in proportion to opportunities.” A half a century ago, our cities were small and poor. There wasn’t many temptations lyin’ around for politicians. There was hardly anything to steal, and hardly any opportunities for even honest graft. A city could count its money every night before goin’ to bed, and if three cents was missin’, all the fire bells would be rung. What credit was there in bein’ honest under them circumstances’? It makes me tired to hear of old codgers back in the thirties or forties boastin’ that they retired from politics without a dollar except what they earned in

² What precisely makes this task the most “negative” of the three? Elster does not explain, but later on in the book he considers the idea that juries should be selected so as to eliminate pre-existing bias. This task might sound quite negative (it is a variant of the second task he considers), as it involves screening certain people out (instead of screening them in), but Elster categorizes this as positive (p. 138). Preventing certain people from attaining office is positive for Elster, whereas preventing people from doing certain things once in office (and only this) counts as negative. This may be because the de-biasing of juries, and similar efforts to screen add bad officials, are subject to a high rate of error. The methods Elster considers to prevent jurors from acting on bias, however, are presumably infallible, at least if implemented properly. Juries, for example, cannot act upon information they do not have; this makes the withholding of facts that may incite prejudice a screening device that cannot fail; this seems to be what makes it properly negative, for Elster. It is also epistemically humble in the right way. (More on this later.)
their profession or business. If they lived today, with all the existin’ opportunities, they would be just the same as twentieth-century politicians. There ain’t any more honest people in the world just now than the convicts in Sing Sing. Not one of them steals anything. Why? Because they can’t.³

If you want politicians to be honest, don’t let them near the money—this is advice in the negative mode advocated by Elster.⁴

But how precisely could institutions be designed to prevent threats to intellectual, moral, and/or active aptitude from arising? Elster identifies three mechanisms—ignorance, secrecy, and publicity (p. 11). Officials can be kept ignorant of the information they need to pursue their self-interest, or that might activate prejudices. Jurors can deliberate in secret, so as to immunize them from outside pressure.⁵ And legislative votes can be made public, so that constituents can hold them accountable for their actions. (The current concern with the unreleased texts of Hilary Clinton’s speeches to large financial interests reflects exactly this view of the beneficial effects of publicity.)

Elster provides many examples of institutional innovations that could (or already do) bring ignorance, secrecy, and publicity to bear in useful ways. He provides a list of such innovations at the end of the book, which includes the following (p. 272):

- Screening jurors and voters from bribes and threats⁶
- Screening constitution-makers from soldiers and crowds
- Separating the constituent and legislative powers
- Publishing the names of abstainers in national elections

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³ https://www.marxists.org/reference/archive/plunkett-george/tammany-hall/. Plunkett is one of the few experts on political institutions not consulted by Elster in Securities against Misrule.
⁴ Indeed, it is very close to Elster’s advice that constitutions should not be written by those who will hold power under them. The same principle holds in reverse; “constituent assemblies ought as far as possible to remove from their agenda issues on which interest has a purchase” (emphasis in original; p. 235).
⁵ Rawls’ veil of ignorance works on the same principle. Elster mentions the veil several times, but without explicitly mentioning Rawls (e.g., pp. 7, n. 22, 203).
⁶ The Australian ballot normally accomplishes this form of secrecy, but absentee ballots do not enjoy such protection. For this reason, efforts to bribe or otherwise suborn votes often focus their attention on obtaining absentee votes. See David Fahrenthold, “Selling Votes Is Common Type of Election Fraud,” Washington Post, October 1, 2012, https://www.washingtonpost.com/politics/decision2012/selling-votes-is-common-type-of-election-fraud/2012/10/01/f8f5045a-071d-11e2-81ba-f6e35a7b6542_story.html (visited April 20, 2016).
• Enforcing a ban on the sale and serving of liquor to jurors and voters
• Seating deputies on benches rather than at desks

And so on. Elster singles out a few institutions for special mention. The practice of random selection plays only a small part in the book, but Elster does note Bentham’s high praise for the practice and the potential contribution it can make to democratic decision making. Random selection provides the sanitizing effect of a process unaffected by reasons. Selecting jurors by lot provides an excellent way of ensuring the “screening from bribes and threat” that Elster wishes to accomplish (Stone 2011).

Elster recognizes that the application of his approach is not always easy. Sometimes, protecting against one negative factor in decision making may enable another. Again, Elster provides many examples (p 285):

Whereas publicity will drive interest underground, it will provide a fertile breeding ground for passion. Secrecy tends to have the opposite effect. Although I claimed that in the special case of constituent assemblies this dilemma is attenuated if the decision makers focus on issues on which interest has no purchase, this solution is not available to ordinary legislatures.

Whereas rotation of officials and term limits of deputies may reduce the risk of capture by interest groups, these measures will have a negative impact on their knowledge of the issues.

Whereas the selection of jurors who are ignorant about a high-profile case they are to decide will eliminate bias caused by pre-trial publicity, jurors who do not read newspapers or watch TV are likely to be lacking in intellectual or active aptitude.

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8 “In the British practice, the fundamental principle is equality: and here, in prescribing equality, public utility concurs, as we have seen, with justice. In the particular course taken to enforce and apply the principle, injustice, or at least the danger or appearance of it, as we shall see hereafter, have insinuated themselves. But under the greatest practicable degree of injustice, its efficacy on this head can never fail of meeting with a powerful control in the influence of chance—that incorruptible power, which in this, as in so many other instances, is the best guardian and firmest protector that equality can have” (emphasis in original; quoted p. 159).
9 Random selection can do more than this. It can also ensure that no powerful interests are able to control the selection process for their own ends. It thus provides a valuable check against corruption and domination (Delannoi, Dowlen, and Stone 2013). I have trouble seeing how this service performed by lotteries can be fitted into Elster’s tripartite scheme of ignorance, secrecy, and publicity, but it seems to work in the “negative” spirit that Elster has in mind. And at one point Elster does list randomization and rotation alongside these three approaches (p. 12).
And so on. Again, random selection provides a good example. If jurors are selected by lot, then there is no possibility of discrimination against potential jurors based on race, religion, gender, or political affiliation; there is also no possibility of “discriminating” against the ignorant, the racist, the lazy, or the just plain stupid. One could combine a random selection process with a pre-screening process of some sort; indeed, that’s usually what happens with random selection. But the more intense the screening process, the less sanitization takes place, with correspondingly greater chances of racism or other forms of bias creeping into the overall selection process.

And so institutional design will almost invariably represent a compromise between competing considerations. Just how much benefit can be obtained from ignorance, secrecy, and/or publicity before the costs become too great? In general, there will be no magic formula—indeed, Elster resists the very idea that such a formula could be possible (p. 13). There will thus be no way of avoiding some very difficult judgment calls.

Elster resists any effort to recommend any principles of democratic institutional design that go beyond the mechanisms he describes—any effort at positive, as opposed to negative, institutional design. His reasons for this are epistemic. Political affairs are simply too complicated for anyone to be able to predict in advance just what a particular set of institutions, at a particular point in space and time, will do, at least in any detail. “The idea,” for example, “of adopting electoral procedures that would favor the choice or the emergence of wise characters is more attractive than the idea of relying on publicity to induce wise actions by average or ordinary characters, but also, I think, more fragile” (emphasis in original; p. 88).

Elster’s most sustained example of this argument concerns the idea of cross-voting, a

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10 “I know of no instance of social lotteries without some preselection or postselection scrutiny on the basis of need, merit, and the like” (Elster 1989b, pp. 67-68).
11 Again, this is a usage of lotteries that is similar, though not identical, to the negative practices Elster advocates.
12 Adrian Vermeule makes a similar argument in defending his theory of “optimizing constitutionalism” (Vermeule 2013). Unfortunately, without any guidance as to how tradeoffs of this sort are to be made, there is little choice but to fall back on vague ideas about the public interest or the general welfare. On the dangers posed by this, see Stone (2015).
13 Elster sees Securities against Misrule Elster sees this book as a “companion volume” to his earlier book Explaining Social Behavior (2007). The latter work argues, “in a skeptical vein, against the excessive explanatory ambitions of much of recent social science.” Securities against Misrule continues this argument, by making the case “against the excessive ambitions of normative political theory” (Elster 2013, p. x).
practice to which he devotes an entire chapter. Cross-voting is “an electoral device...intended to prevent the election of extremists and favor that of moderate candidates.” Under cross-voting, “members of group A may designate to another group B the power or some of the power to choose the representatives of group A.” (More complicated variations are possible, of course.) Cross-voting is designed to promote “what Bentham called ‘moral aptitude’ in deputies,” and to do so by ensuring that moderate representatives get selected, or at least that extremist representatives do not get elected. Such a procedure thus “would provide an instance of positive institutional engineering;” if it worked as intended, it would serve as “a counterexample to the Benthamite thesis” that Elster defends (emphasis in original; p. 236).

But the case for cross-voting is fragile, Elster contends. It depends upon voters responding to incentives in very specific ways. Without such incentive responsiveness, the entire process could go badly wrong. Incentive systems are fragile in multiple ways. They can, for example, “create multiple incentives, some for desirable and others for undesirable behaviors.” Alternatively, they “may fail if agents are subject to one of the numerous forms of irrationality uncovered by behavioral economists.” Voters, in other words, might not be rational enough to respond to incentives, and even if they are rational the system might not unambiguously provide them with reasons to do what the institutional designer wants (p. 270). Elster concludes from this that “Benthamite schemes are more robust, since they are based on removing opportunities to do mischief rather than on creating incentives to behave in socially desirable ways” (emphasis in original; p. 267).

3. Impure Procedural Justice?: As noted before, a democratic theorist concerned with institutional design requires both a set of guidelines for designing institutions and a set of criteria for judging institutional performance. The first provides recommendations for how institutions should be designed; the second provides a yardstick for judging whether the recommendations have succeeded or failed. Much of Securities against Misrule is taken up with the first of these two problems. But Elster cannot avoid the second problem entirely; he must, after all, explain why secrecy et al. are
supposed to be good things, and why institutions which incorporate these mechanisms are better than those without (and in what sense they are better). Elster argues for a solution to the second problem that, like his solution to the first problem, is essentially negative. (As noted before, Elster does not clearly distinguish between these two problems.) It is arguable that he could make the case (on epistemic grounds) for the first negative position. But can he do so for the second?

As noted right at the start, Jeremy Bentham is the “guiding spirit” of Securities against Misrule (p. 140). Elster relies heavily upon Bentham’s tripartite scheme of ignorance, secrecy, and publicity. And he also borrows Bentham’s distinction between intellectual, moral, and active aptitudes. He even devotes one chapter specifically to Bentham, whom he ranks with Madison and Condorcet as the three “major political thinkers of the late 18th century” (p. 187). But Elster is no orthodox Benthamite, and makes no claim to be identifying with Bentham’s overall approach. “I am,” he writes, “self-consciously and unapologetically engaged in cherry-picking, not intellectual history” (p. 140).

What is the significance of this cherry-picking? From what part of Bentham’s project does Elster wish to distance himself? At the very start of the book Elster promises a “normative theory of collective decision making, inspired by Jeremy Bentham but not including his utilitarian philosophy” (my emphasis; p. i). Bentham without utilitarianism might sound a bit like Marx without class struggle (and I doubt that the author of Making Sense of Marx (1985) would reject the comparison). But what does Elster propose to put in place of utilitarianism? Apparently, nothing. “Although Bentham thought that properly organized majority voting would track independently defined good outcomes, we need not, and should not, follow him on this point. Instead we should just focus on the proper organization of political institutions, without expecting them to track anything” (my emphasis; p. 188).

This is a radical claim, and Elster does not adhere to it consistently throughout the book. At one point, he announces an intention to

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14 Cherry-picking is a characteristic feature of Elster’s books. The name “Elster,” in German, means “‘magpie,’ someone who steals other people’s silver” (Elster 1989a, p. viii).
discuss good decisions and good decision-making procedures within the framework of existing theories of preference aggregation, judgment aggregation, and belief aggregation. Although I try to some extent to assess the theories as more or less adequate, this is somewhat marginal to my main concern, which is to argue that, \textit{whichever theory we adopt}, its aim will be better realized within the Benthamite framework” (emphasis in original; p. 36).

Here Elster appears to be appealing to something like Cass Sunstein’s notion of “incompletely theorized agreements” (Sunstein 1995). The idea seems to be that, whatever we think democracy ought to accomplish, we’re better off controlling for corrupting factors (interest, prejudice, etc.) using the techniques advocated by Bentham.\textsuperscript{15} But more typically, Elster goes much further than this. He contends, not that there are multiple plausible things that democracy might aim to accomplish, but that democracy ought not to aim at accomplishing anything in particular. Elster could not be clearer on this point: “The central proposal is that in designing democratic institutions one should reduce as much as possible the impact of self-interest, passion, prejudice, and bias on the decision makers, and then let the chips fall where they may. There is no independently defined good outcome that institutions can track, nor is there any way of reliably selecting good decision makers” (Elster 2013, p. i).

Elster is thus taking Bentham’s negative approach to democratic institutional design and taking it to an entirely new level. Where Bentham offers negative guidance on institutions, Elster offers negative guidance on the very criteria for judging those institutions. “At the collective level,” Elster writes, “Bentham thought that majority voting would track what he somewhat misleadingly called the greatest happiness for the greatest number.” But “Bentham’s claim cannot be defended. The approach I shall propose is substantially weaker, and negative rather than positive” (p. 17).

Elster clarifies the criteria he would use for institutional evaluation using a tripartite

\textsuperscript{15}Cf. p. 84: “I shall not advocate any specific procedures (arguing, voting, or bargaining), nor—apart from truth seeking—any particular criterion for the goodness of outcomes (Pareto-optimality, utility maximization, fairness). Rather, I shall try to identify causal factors that can have a distorting influence on decisions reached by \textit{any} procedure and judged by \textit{any} criterion, and discuss how one might reduce their impact by institutional design” (emphasis in original).
distinction drawn by John Rawls in *A Theory of Justice* (1999). Rawls distinguishes between *pure procedural justice, perfect procedural justice, and imperfect procedural justice*. A principle of pure procedural justice holds that the justice of a distributive practice depends entirely upon the procedure employed; whatever results from the procedure is just by definition. Rawls uses the example of allocating something via coin toss; whoever wins the toss should get the good, period.\(^{16}\) A principle of perfect procedural justice holds that 1) there is an independent standard for judging the distribution of a good, and 2) there exists a distributive practice that can infallibly realize the standard. Rawls offers the example of the problem of dividing a cake between two people, and the solution made famous by James Harrington—one cuts, the other chooses.\(^{17}\) A principle of imperfect procedural justice holds that 1) there is an independent standard for judging the distribution of a good, and 2) there exists no infallible way of realizing that standard. Not coincidentally, Rawls uses the example of a jury here; the purposes of a jury is to convict the guilty and acquit the innocent, but juries can (and do) make mistakes.

Elster quickly (and reasonably) dismisses the idea that democratic institutional design could be a matter of perfect procedural justice. Whatever aims democratic institutions are supposed to achieve, there is absolutely no reason to believe they could ever be infallible at this task.\(^{18}\) But Elster also dismisses the idea of thinking in terms of imperfect procedural justice. (I will consider the reasons for this dismissal shortly.) “It might then,” he writes, “seem more appropriate to characterize good collective decision making in terms of *pure procedural justice*.” But this is “still too demanding.” Sometimes,” he concludes, “the best we can do is to pursue *impure procedural justice*” (emphasis in original; pp. 17-18).

In suggesting we should think of democracy in terms of impure procedural justice (a concept Rawls never employs), I suspect Rawls is articulating an idea that many democratic theorists have had before. On the one hand, many democratic theorists are resistant to the idea (promoted by

\(^{16}\) It is difficult to come up with another clear case of pure procedural justice.

\(^{17}\) The cake-cutting solution assumes that neither the cutter nor the chooser makes any kind of mistake. But if a mistake causes either party to lose out, that party presumably has no one to blame but herself.

\(^{18}\) Again, it is difficult to come up with an example of perfect procedural justice outside of the cake-cutting example.
epistemic democrats, for example) that there might be standards for judging democratic procedures external to the procedures themselves. With the socialist Eduard Bernstein, these theorists want to hold that the end goal is nothing, and the movement is everything. But not quite—these theorists simply cannot give up on the (rather obvious) idea that a democratic procedure might go badly wrong. The problem is that without some sort of standard, it is difficult to see what “wrong” could even mean. Elster’s argument suffers from exactly this problem.19

“I have asserted,” Elster writes, “that once we have done our best to minimize passion, interest, bias, and prejudice, using the tools of ignorance, secrecy, publicity, randomization, and rotation, we should let the chips fall where they may” (p. 12). But if democracy is all about impure procedural justice, what could it even mean to speak of “bias,” “prejudice,” “passion,” or even “interest?” In statistics, an unbiased estimator for a parameter is an estimator that, on average, is exactly equal to that parameter. A biased estimator is one that systematically deviates from that which it is trying to estimate. But here the entire notion of bias is dependent upon the idea that the estimator is supposed to be tracking something. If a statistical estimator tracked absolutely nothing, in what sense could it count as “biased” or “unbiased?” Indeed, in what sense could it even be called an estimator at all?

Similarly, the usual understanding of the dangers of “passion, interest, bias, and prejudice” is that these factors may lead an agent into a distorted judgment on some question. Factors such as these cloud the agent’s mind, and lead her to do…what? To take an action that she would not take if these factors did not interfere. Distortions only count as distortions, after all, if they alter a picture in undesirable ways. Remove the distortions, and the picture becomes clear. In arguing for democracy in terms of impure procedural justice, Elster wants to keep removing distortions even after the picture has disappeared.

Why does Elster believe we must speak of democracy in terms of impure procedural justice?

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19 One could try to defend the idea that a democracy could work in such a way as to produce outcomes that are objectionable, on grounds unrelated to democracy, even while working perfectly as a democracy. Elster does not consider this possibility.
Why does he reject, for example, thinking in terms of imperfect procedural justice, an option that epistemic democrats (for example) would readily accept? Alternatively, why doesn’t he simply bite the bullet and assimilate democracy to pure procedural justice. Elster provides a number of reasons, but he is not always consistent. At one point, for example, he argues that impure procedural justice is “impure because complete removal of distorting factors will never be possible.” He then goes on to examine what democracy might require if the remaining distorting factors are serious enough to “justify some kind of overriding mechanism” (p. 281). The idea seems to be that, if all forms of passion, interest, etc. could be removed from the process, then whatever the democracy decided would be right be definition, but this removal can never be effected perfectly. The problem with this argument is that its implications are unclear. It’s all well and good to say that a procedure X, if it were perfectly followed, ought to be respected, whatever outcomes it may produce. It is quite another to suggest that one ought to respect a procedure Y, whatever outcomes it may produce, where Y is an imperfectly-applied version of X. One cannot say that X has most likely attained the same outcome as Y; that would defeat the entire purpose of the pure procedural approach, according to which outcomes simply don’t matter. But if the sole ground for respecting Y is its procedural properties, it is far from clear that X is of any use as a substitute. A biased coin toss may be worse than no coin toss at all.

But Elster’s embrace of impure procedural justice does not always depend upon the idea that the “impurities” of the process can never be fully eliminated. Elsewhere, he writes,

Even if (per impossible) all systematic biases, prejudices, and the like were removed, jury deliberations could still contain random idiosyncratic components that might cause one jury to award higher damages than what might be awarded by another equally unbiased jury in an identical case. The generally accepted principle that jurors should be chosen by lot might in one case produce an all-male and in another an all-female jury. Although the awards might

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20 Cf. p. 12: I have asserted that once we have done our best to minimize passion, interest, bias, and prejudice...we should let the chips fall where they may. The problem is that our best may not be very good.” Again, the suggestion is that procedural democracy is not “pure” only because we cannot distil out a sufficient quantity of passion et al.

21 Elster seems to be falling victim here to the “principle of second-best” which he has elsewhere criticized.
differ, neither plaintiff would have grounds for complaints (pp. 17-18).

Elster gives this as a reason to believe that it is “still too demanding” to think of democracy in terms of pure procedural justice (p. 17). But this is simply a non sequitur. Yes, a democratic procedure might yield different outcomes at different times in accordance with “random idiosyncratic components” of the process. But that would only be an objection to the procedure if the procedure was supposed to produce a determinate type of outcome. If the procedure is to be judged entirely by itself, however, then to say that the procedure does different things at different times is simply to say that the outcome is irrelevant, which is exactly what the pure procedural approach asserts. The quintessential example of pure procedural justice is a coin toss, which most assuredly does not generate the same outcome each time. If the random component of a coin toss does not defeat it as an example of pure procedural justice, why should the “random idiosyncratic components” of democracy render it impure?

But the principle argument Elster offers in defense of impure procedural justice is a critique of imperfect procedural justice. One cannot, Elster contends, think of democracy in terms of imperfect procedural justice because “the existence of an independent criterion is irrelevant in the absence of an independent procedure for determining how often it is satisfied.”22 “I shall not,” he contends, “claim that we can establish an empirical correlation between features of the decision-making process and the quality of the outcome, since we usually have no independent measure of the latter. There is no way to measure, for instance, rates of false acquittals and false convictions. If we could, there would be no need for juries” (emphasis in original; p. 17).

The use of juries as an example, however, produces a virtual reduction ad absurdum of Elster’s position. “Whereas with the passage of time,” Elster writes, “we can learn whether predictions about recidivism or academic success turn out to be correct, no similar procedure (barring cases of DNA-based reassessment or a compelling later confession by the real culprit) can

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22 Elster adds that “some juries have the task of sentencing in criminal cases and of awarding damages in civil cases. In these cases, there is not even an independent criterion for the correct outcome, no fact of the matter” (p. 17). This is simply a denial, without argument, of the epistemic democracy position.
tell us whether a jury decision was correct” (emphasis in original; p. 100, n. 13). There is a practical and a theoretical objection to this argument, both of which strike me as fatal to the argument. On a practical level, Elster is attempting to offer meaningful advice to the public at large on the proper design of democratic institutions, including the jury. How seriously, however, could the public take the advice that it should give up striving to empanel juries who acquit the innocent and convict the guilty? The purpose of the jury is rather set in stone (setting aside complicating factors such as jury nullification); anyone who proposed abandoning it would surely be accused of failing to appreciate why juries exist.

On a theoretical level, what Elster seems to want for juries—and moreso, for democratic institutions as a whole—is unrealistic, and a bit silly. According to Elster, it is a waste of time to assign juries the task of acquitting the innocent and convicting the guilty unless there exists an independent measure of innocence or guilty. (And the existence of such a measure, as Elster notes, would invalidate the need for juries in the first place—a fact that should have suggested to Elster that his argument had gone wrong somewhere.) I do not know what this could mean except a message from God or the like confirming who is guilty and who is not. But human beings never get messages like that, either from God or from anyone else, with regard to any truth claims they can make. All people can do is appeal to the best methods they have available to try and ascertain the truth. If one wants to see if those methods are working, there is no additional set of methods available—all one can do is get another group of people to try the methods again and see if mistakes have been made or vital information overlooked. In the world of politics, there are no appeals to methods outside of that world. Either one accepts the conclusion that this eliminates talk of truth from politics entirely, or one accepts that many truth claims will always be contentious, without thereby eliminating the need to make those claims.

If this argument is correct, it provides good reason for believing that democratic institutional design cannot be negative all the way down. (This still leaves open the possibility that it may be negative in certain respects, as Bentham held.) But the argument also provides an indirect defence
of epistemic democracy. I mentioned before that in launching a defense of democracy-as-impure-procedural-justice, Elster was most likely articulating a position that has a natural appeal to many democratic theorists. In rejecting the idea of democracy-as-imperfect-procedural-justice, he is performing a similar task. In wishing for a set of independent criteria for judging democratic institutional performance, Elster is articulating a worry about epistemic democracy that many democratic theorists, with varying degrees of clarity, share. But to the extent that this worry is unjustified—to the extent that Elster’s objection fails—to that extent epistemic democracy is on firmer ground.

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