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# Mistaken for Consensus

## *Hung Juries, the Allen Charge, and the End of Jury Deliberation*

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The declaration of a hung jury is one of the most dramatic moments in the legal process. All of the resources and efforts invested in a trial can be perceived to have been for naught when a jury expected to reach a unanimous verdict (either guilty or not guilty) fails to do so. For the defendant, a hung jury may be celebrated as a brief reprieve—there will be another trial or pressure to plea bargain from the state, but it is significant that a jury of one's peers did not find the evidence adequately convincing. For the prosecution, the hung jury is likely felt as a waste of time and money. The judge often has a more complex perspective, she may understand why the jury failed to reach a consensus but is still disappointed with the outcome of a mistrial (almost always cause for greater official scrutiny of the decisions of the judge). This essay examines when the hung jury should be understood as a mistake—that is, an outcome that reveals a breakdown in the procedures of the trial or undermines the tenets of the adversarial justice system. The hung jury is a sanctioned option within U.S. law so should not be seen as an aberration, but the mixed reactions to it suggest room for interpretation about what it reveals about the jury process and the obstacles to consensus.

The hung jury is also a highly significant outcome for the judge because it results in a mistrial; to prevent such an outcome a judge may issue a version of the Allen charge, a second set of instructions a judge gives to a jury that appears to be struggling to reach unanimity. The judge may address topics such as the expense of the trial, the value of the randomness of the

jury selection process, and the expectations of reasonable doubt in order to motivate the jury to reach a verdict. The Allen charge is one of the more controversial aspects of jury procedure, alternately seen as helpful or coercive depending on the context, and its illegality in twenty-three states attests to this status. An investigation into the Allen charge sharpens the question and clarifies the conditions that would hinder the possibility of a legitimate hung jury and render an entirely different type of mistake.

The conceptual armature of Jürgen Habermas's work on discourse ethics is relevant to the question of hung juries because of the ways in which jury procedure within the U.S. legal system manifests some of Habermas's central philosophical ideals, but it has not been the object of his attention. Written in a more abstract register, Habermas's defense of discourse ethics is meant to generate a means for testing the legitimacy of norms, but his work also gives insight into the conditions that would be desirable for decisions as immediate and pragmatic as jury verdicts. Using his formulations of the Ideal Speech Situation and of the lifeworld as conceptual touchstones allows for an interpretation of the legitimate hung jury as a highly significant outcome and one that can be seen as the opposite of a mistake. Through this lens, the Allen charge also comes into focus as a misguided attempt to offset a potentially erroneous outcome with a coercive intervention.

## The Allen Charge

Led by Chief Justice Fuller, a unanimous decision of the Supreme Court in 1896 decided that the judge's instructions to the jury nearing a deadlock, what would come to be known as the Allen charge, were not improper. The fact that the presiding judge spoke about the purpose of the trial, the resources involved, the integrity of the jurors, and the responsibility of minority jurors to reconsider their position was found to be acceptable and even beneficial to the jury deliberation process. The model charge from the Fifth Circuit that was approved by the court reads:

> Members of the Jury:
>
> I'm going to ask that you continue your deliberations in an effort to reach agreement upon a verdict and dispose of this case; and I have a few additional comments I would like for you to consider as you do so.
>
> This is an important case. The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution. If you should fail to agree upon a verdict, the case will be left open and may have to be tried again. Obviously, another trial would only serve to increase the

cost to both sides, and there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again, and most thoughtfully, whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence; but, after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt the Defendant should have your unanimous verdict of Not Guilty.

You may be as leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.

The tone of the charge is intriguing, and I am drawn to the controversy because of the tension between the judicious and measured language of the charge that appears to treat those in favor and not in favor of a conviction with equanimity, and the palpable feeling that the jury is being scolded for the uncooperative actions of a few. In the contemporary legal landscape, states that allow intervention by the judge in this manner offer charges similar in tone and content. While judges are not expected to read verbatim from the model charge, certain points are to be observed, in part to defend against appellate reversal, and they include asking both majority and minority jurors to listen to the opposing side's argument and ensuring that jurors know that they are not expected to "give up an honest belief."[1] Case law since the time of the Allen decision has codified some of the most controversial aspects of the charge, also known as the "dynamite charge," and it has revealed an oft-repeated set of arguments that dissenting judges use to question its validity.

Representative of their concerns, the Coleman dissent in *Thaggard v. U.S.* (1965) posits the Allen charge as a "plea from the bench for a verdict" and is an elegant appeal to interpret the Sixth Amendment right

to an impartial jury to mean a jury that is free from the interference of a judge clearly invested in a unanimous verdict.[2] From Coleman's perspective, even with the acknowledgment of the responsibilities of the majority and minority jurors, the charge still creates a disproportionate demand on dissenting voters who believe they are in violation of the judge's wishes for unanimity. He is particularly aggrieved with the language used by the lower court judge who told the jury in the course of extrapolating on the Allen charge that the "case must at some time be decided." Coleman suggested that such language effaces the option of a hung jury from the set of legitimate outcomes, even though it is a protected one which is in the spirit of an adversarial system of justice that presumes the innocence of the defendant. The fact that there is a heavy burden of proof on the state for a conviction is not a frustration of the court that should be expressed by the judge and then ameliorated by the jury. Coleman's concerns capture the legal establishment's reasons for withholding support for the Allen charge, despite its claims to efficiency and fairness.[3] The argument elaborated in the rest of the paper dovetails with these concerns, yet it approaches the question of the Allen charge from the perspective of the expectations of deliberative democracy and the conceptual validity of the hung jury.[4]

My interpretation of the jury process has many affinities with Robert Burns's understanding of the trial as an idiosyncratic institution that gives rise to its own particular (and admirable) form of judgment, one that depends on the agonistic struggle of a variety of norms and linguistic practices.[5] The trial is an insular world, not appropriate for translation into other social or political models, and attempts to do so rely on the specious isolation of parts of the process or of desirable forms of reasoning. The jury, in his assessment, must be able to render a decision free of monitoring and quality control by the judge because of the complicated nature of the decision. It is not the contingency of the decision process and the relationship between particulars and the universalism of the law (though that is part of it) that marks the distinctiveness of the jury's responsibility, Burns argues, but the multilayered way in which jurors decide about narrative coherence, social norms, and legal ideals in a manner that exceeds the conventions of deductive reasoning.

An investigating into the "mistake" of a hung jury raises the question about the relationship between the judge and jury: Should the judge be understood as the "boss" of the jury insuring that they do their jobs properly? On the one hand, it is the responsibility of the judge to impart her highly specialized knowledge about trial procedure to the jury such that

there are not grounds for a mistrial. There will be times when the proper procedure is counter to both the will and instinct of the jury (such as the desire to talk about the trial with family members or on social media) and they must be instructed that their willingness to follow procedure is not a matter of discretion. The judge is thus a manager with the power to punish and sanction when expectations are not met. On the other hand, the roles of judge and jury change once the jury instructions are given. At this point the judge is less like a boss than an umpire, one who does not have say in the strategy of the game, but upholds a minimum standard of integrity. While the judge may still admonish jurors for violating court procedure, deliberation occurs in a closed room. The fact that the jury has the ultimate authority to decide within the adversarial system is interpreted to mean that the jury should not be monitored, coerced, led, or criticized by the judge or counsel as it is making its decision. The jury has a right to ask the judge questions about its task, but the jurors are no longer under her watchful eye. They are expected to take their responsibility seriously, but the judge cannot tell them that their decision is wrong (Bushell's case famously established this in 1670).[6] The argument below will suggest that the Allen charge should be seen as an inappropriate switch to the boss model of judicial authority. The jury has been entrusted with a task and it is consistent with the other procedures of jury deliberation to let them manifest this trust by giving them the freedom to conduct deliberations in the best way they can. The jury that is unable to reach consensus should not be treated as if they had strayed from their responsibility and needed the supervision of a boss. Yet what if the jury deliberates for only two minutes and returns a guilty verdict? What should the judge do then? It seems plausible to say that in two minutes there would be barely enough time to poll the jury members, let alone "deliberate" about the evidence. Still, I follow Burns in his interpretation of the complex mandate of the jury, one that challenges the received view of the primacy of proceduralism in regard to the letter of the law. The jury must navigate between multiple linguistic and cognitive practices and must be given the latitude by the judge to do it in the best manner they see fit. The Allen charge interrupts the insular world of the jury by implying that sheer will power or improved deductive reasoning will allow the majority to see the viewpoint of the minority, or vice versa. Such an assumption about the deliberation process of the jury flattens it at precisely the moment when the conditions for deliberation must be expansive and move beyond inherited formulas.[7]

## On the Philosophy of Jürgen Habermas

With his attention to conditions that could foster communicative rationality, Habermas, in a remarkably ambitious way, provides a way out of the impasse of cynicism and political impossibility to which critical theory has arguably succumbed. Instead of a perspective that maintains that the political and moral spheres have been irretrievably marred by ideology and the corrosive effects of both liberalism and capitalism, his conception of communicative rationality suggested a redirection of the Enlightenment project away from instrumental rationality and toward ends that are inclusive and mutually beneficial. The ability for individuals to understand each other through everyday language, even if they begin from disparate premises, allows for the possibility of relationships that are not based solely on domination and exploitation.[8] Such communicative rationality also allows for the generation of new moral norms that garner their legitimacy from a much more inclusive process than previously theorized. The legitimacy of moral and political norms should, in his framework, thus be tied to the structural and linguistic conditions of participation in their creation, rather than tradition and an imagined premise of consent based on reason.[9]

The heuristic of the Ideal Speech Situation is Habermas's potent vision of the conditions necessary to have the kind of communicative exchange in which intersubjective recognition is possible and that is capable of generating legitimate norms. It is important to note that Habermas never expected the Ideal Speech Situation to be a blueprint for existing political institutions, nor to serve, as Rousseau's general will, as an empirical fantasy. I follow James Bohman in suggesting that Habermas is adamantly not calling for direct democracy in a new era and does not want to make the mistake that he claims Rousseau to have made—that is, confused his new model of legitimacy with a new model for political engagement.[10] It is thus the *conceptual* preconditions for legitimacy that are of the utmost concern. In placing these conditions in conversation with the jury deliberation process, I am not drawing attention to the procedural reforms that would make them more in line with the Ideal Speech Situation; yet, the concerns he raises about the conditions for deliberation and the opportunities for the distortion of such a process can be brought to bear on thinking about the hung jury.

The Ideal Speech Situation is premised on two conditions. The first

condition (U) is grounded in the assumption of universalization—that is, the assumption that for a norm to be valid, *each* individual would be able to accept it without coercion through the process of a reasonable discourse about its effects and consequences.[11] A norm becomes universalized and universalizable through the fact that its consequences are acceptable to every person and that this acceptance is reached without the coercion that can be the result of vastly unequal positions of power. The fact that each person holds the right to accept independently is central to the moral force of the outcome. The demand for unanimity, with all the challenges it implies, is the proper condition for determining the validity of norms within a system of thought that places intersubjective communication at the core of its political and moral project.

In many other fora, the need for closure is so urgent that majority rule is thought to be the most pragmatic expectation for arriving at a decision. There are many political or administrative issues on which reasonable people disagree, and given this reality, the argument goes, the will of the majority (usually a compromise in itself) must suffice to render a decision and thus make it possible for a governing body to move on to other issues or take action. However, within Habermas's framework for the legitimation of moral norms, the condition that all those who are affected must agree is not a secondary concern. Rather, it is meant to be the site of contestation and should not be obscured by strategic concerns or a type of realist pessimism which suggests that majority agreement is the best outcome one can hope for. It is not correct to equate Habermas's condition of unanimity for the legitimacy of a moral norm with an argument for the strict standard of unanimity in juries. Yet, there are still affinities—there are issues, for Habermas and in the case of juries, that are too important to risk the kind of intellectual exclusion of unpopular positions that majority rule allows. It is important to note that revisability is always in the array of possibilities regarding the legitimation of norms. Forced closure could never be compatible with the normative requirements of the Ideal Speech Situation; the real and the ideal should not be collapsed. If consensus appears only asymptotically in reference to a particular proposal, this is an explicit signal of the need for further consideration. The demand that a jury reach a decision, even one of marked dissensus, is another way in which it is in tension with the Habermasian formulation that relies on the possibility of revision.

The second condition (D), known as the discursive principle, contends that all who are affected by an issue must participate in the reason-giving

and argumentation that precedes a decision. Such a dialogic process, the condition holds, must also rely on language that is accessible to all and not confined to experts or technocrats. While more broadly applicable than (U), (D) still expresses a conception of normative justification in general and cannot be applied to administrative or applied decisions, despite its reliance on informal language. Habermas's emphasis on practical discourse is in distinction to the Kantian model of norm-generation through the Categorical Imperative. With his emphasis on practical discourse, it is the actual concerns and positions of participants that must be engaged and that provide the basis for legitimate outcomes, and not a preoccupation with the logical deduction that emerges from a set of principles, justified by an external standard of universalizability. Taking (D) and (U) together, Habermas presents a high standard for the legitimacy of decisions that embodies the beliefs that relativism and subjectivity will not be the tragic fate of every discussion about principles and that all individuals are able to understand their interests and communicate them in a practical manner without the expectation of philosophical language.[12] (U) and (D) provide benchmarks that do not have easy correlates within the jury system: unanimity for the legitimacy of moral norms is far removed from the reality of unanimity in practical judgment, and the requirement of (D) that all affected parties can participate in the discourse also flounders given the mandate of the jury charge and the exclusion of others impacted by the crime from the process.[13] Still, it is remarkable to note that the distilled procedures for the legitimation of moral norms resemble the basic expectations for jury deliberation in ways that are unmatched by any other political or legal institution.

On the issue of consensus and legitimacy, the Supreme Court has not found the unanimity requirement to be sacrosanct, and the debate over the relative benefits and shortcoming of a unanimous decision rule over a majority one is long-standing.[14] In *Apodaca v. Oregon* the Supreme Court found that the Oregon Court of Appeals did not have rule by unanimous verdict because it is not integral to the fair and proper functioning of a trial. While the Sixth Amendment explicitly mentions jury unanimity as concomitant with the mandate for a jury of one's peers, the Fourteenth Amendment does not insist that all aspects are necessary at the state level.[15] Further, the Court found that there was no reason to believe that racial minorities would be given worse treatment in majority-rule juries than in unanimous ones. In the majority opinion, Justice White also separated the foundation of the unanimity rule from the reasonable doubt standard that crystallized after the Constitution.

Thus the requirement of unanimity is still an open question given the discretion allowed at the state level and the higher standard maintained at the federal one. The argument for unanimity hinges on the burden that it establishes, one fitting for an adversarial system of justice that takes as a hallowed value the presumed innocence of the defendant. It has also been argued that the quality of deliberation is higher when the outcome must be unanimous.[16] All participants are formally included (even if they choose to remain quiet during discussion), and the development of arguments and counterarguments is likely to be more extensive when the entire group must be convinced, not just the majority.[17] Unanimity ensures that when there is a guilty verdict all jury members are jointly responsible for such an act, which authorizes the state to use force and confinement when it would otherwise be unable to do so. If a jury member is unconvinced by the evidence, they must prevent the guilty decision from going forward, whereas in a majority-rule system, a jury member may be able to register her doubt but then rationalize the outcome by saying that she was powerless to stop the guilty verdict.[18]

Habermas's argument about unanimity is not so much an additional valence to these other perspectives, but a restructuring of the argument to make unanimity an essential component for legitimacy in a legal-philosophical system that is grounded in procedure and acutely aware of the systemic forces of capitalism, democratic majoritarianism, and instrumental rationality (even if he does not apply the standard to these types of institutions). The Allen charge can be seen to compromise the ideals of the unanimity, in spirit if not in the exact wording of the charge. Jurors can and should be dismissed for refusal to deliberate, an act that amounts to a refusal to be part of the process of reason-giving and the adjustment of one's own ideas in light of the ideas of others. This issue is particularly salient in the case of a jury that is moving toward congealed disagreement, the kind that precipitates a discussion of the Allen charge. If the majority is in favor of a guilty verdict and one or two jurors believe that not guilty is the appropriate verdict, they must, in the spirit of jury deliberation and Habermasian discursive principles, be willing to defend their position against arguments from the opposing side as well as try to convince others to share their belief.[19] For those in support, the Allen charge is an intervention specifically targeted to deter jurors from giving up on the process of deliberation.

While a refusal to deliberate or an unwillingness to consider the arguments of an opposing faction in the jury room may cause a hung jury,

there may be situations in which a hung jury satisfies a deeply held belief about the fallibility of the legal process and a hope for multiple valid interpretations of an event. Such is the case in the 2001 memoir of D. Graham Burnett, a historian who served as the foreman of a jury in a homicide case in New York City.[20] The case turned on the issue of self-defense; it seemed probable that the defendant killed the victim, but the circumstances surrounding the killing, including the possibility that the defendant feared he would raped, were critical to jury deliberation. During the trial Burnett grew increasingly alienated from the prosecution's case, particularly the tone with which witnesses were questioned, as well as from the judge's manner. Yet, he did not lean toward a not guilty verdict at the beginning of the trial, in part because of his role as foreman and his desire to facilitate discussion, and was instead drawn to the idea of a hung jury as the outcome that would best represent his uncertainty and the inconclusive evidence. He admits that he is not entirely sure why the hung jury presented itself to him as the best option, but attributes it to an academic orientation toward evidence that sees the possibility of many narratives and the necessity of ambiguity in any interpretation. To decide on one narrative (knowing that the action would precipitate sentencing or acquittal) would require from him an amount of certainty that he did not initially believe was possible based on the evidence. Nonetheless, the deliberations ended with a unanimous finding of not guilty, with leadership from Burnett. The jury provided a personalized note to the judge in addition to the decision that indicated the jurors' ambivalence toward the legal choices with which they were presented. The jury was unanimous in their decision, but less certain that the decision fit with an idealized vision of justice; their decision of not guilty did not indicate that they found the defendant entirely free from blame, just that the blame did not warrant a guilty verdict. Burnett's memoir provides an insight into yet another motivation for the hung jury, one that is consistent with the intellectual humility of academic discourse in the humanities, but one that would also be a mistake if it superseded juror responsibility to participate in deliberation about the evidence. A principled commitment to achieving a hung jury (regardless of deliberation) is just as erroneous an orientation as an excision of the option altogether.

In addition to the logic of unanimity, the condition of (D) introduces a different way of thinking about the legitimacy of consensus that can also be applied to the Allen charge. In explaining the motivation for the Ideal Speech Situation, Habermas is animated by the possibility of creating

space for political deliberation that is not primarily determined by strategic calculation. The expectation of practical discourse is in part to stave off technocratic language that acts as a veil for strategic posturing and the possibility that outcomes benefiting the few can appear to be benefiting the many. The attention to the consequences of a norm and its effect on each individual also protects against provisional acceptance of an action for future strategic play. Habermas is particularly attuned to the way in which the procedural aspects of the Ideal Speech Situation could be reduced to the bartering and domination that permeate other spheres of liberal capitalism, and the demand of consensus for democratic legitimacy is a necessary antidote. The nature of jury deliberation does not encounter the long-term strategic calculations of policy debates with which Habermas is concerned, but there are incentives for jurors to act in a strategic way in order to expedite the process or increase their status in the eyes of the judge or fellow jurors. Drawing attention to the economic incentives to end deliberation with the Allen charge gives power to the majority that is extraneous to debates about the evidence. Habermas's attention to (U) and (D) thus, through its signaling of important preconditions for discourse, suggests that the Allen charge intercepts the trajectory of fair and impartial deliberation at a particularly vulnerable place—that of a moment where the jury may be wavering between strategic and nonstrategic deliberation. The Allen charge introduces an element of strategic calculation into jury deliberation at a highly sensitive time, when jurors are fatigued and potentially frustrated. Pressure for closure and a unanimous verdict can cause a default to the normal conditions of politics in which traditional dominant groups further exert their dominance.[21] Thus, thinking with Habermas about a schematic for legitimate decision-making provides fodder for thinking about the Allen charge as a misguided convention: one cannot justify, in the name of efficacy or closure, an intervention that threatens the standard of unanimity and the premise that all jurors have standing to participate in the process in a commensurate way. To do so would be to undermine one of the conditions that provides the greatest basis for legitimacy in the jury process.

The question of strategic discourse is not the only way discourse can be corrupted for juries; another type of distortion can emerge from restrictions on what is considered acceptable for deliberation. This is a topic where critics of Habermas, rather than Habermas himself, have made interventions that could be productively applied to the jury process. Iris Marion Young notably critiqued Habermas for his elevation of the

impartial point of view over a lived, embodied, and affective one as the best perspective for reaching consensus. She sees potential in the conditions for communicative rationality but argues that Habermas's model "abstracts from the rhetorical dimensions of communication, that is, the evocative terms, metaphors, dramatic elements of the speaking, by which a speaker addresses himself or herself to this particular audience. When people converse in concrete speaking situation, when they give and receive reasons from one another with the aim of reaching understanding, gesture, facial expression, tone of voice, as well as evocative metaphors and dramatic emphasis, are crucial aspects of their communication."[22] The openness to metaphor and contextual understanding may be more important in the cases of dramatic lifeworld differences, described below, than Habermas allows for within the context of (D) and (U).

## On the Lifeworld

In addition to the centrality of (U) and (D), the Habermasian concept of the lifeworld can be persuasively enlisted for the defense of the hung jury as a legitimate and necessary outcome that deserves protection from the intervention of the Allen charge. For Habermas, the lifeworld is the inherited world of meaning, norms, and interpretation that one gets from society and culture and that intersects with the contingencies of personality.[23] The lifeworld encompasses how one views oneself in relation to the institutions of the family, law, and the state, and it shapes intuitions about how to evaluate worth, trustworthiness, and the burden of moral action in ways that are difficult for an individual to parse. The lifeworld is one of various influences on cognitive processes, and it is difficult for an individual to know just how strong the influence is. Habermas builds upon the concept of lifeworld to make two important distinctions: the first is between lifeworld and system, where the system refers to the forces of the market that impose an instrumental rationality motivated by concerns of wealth and political domination on the inherited interpretations of the lifeworld. The second distinction, of particular relevance to the deliberative process, is between the lifeworld participants already hold and bring to the process and the one they come to agree upon with their fellow jurors. He writes:

> On the one side we have the horizon of unquestioned, intersubjectively shared, nonthematized certitudes that participants in communication have "at their backs." On the other side, participants in communication face the

> communicative contents constituted within a world: objects that they perceive and manipulate, norms that they observe or violate, and lived experiences to which they have privileged access and which they can express. To the extent to which participants in communication can conceive of what they reach agreement on as something in a world, something detached from the lifeworld background from which it emerged, what is explicitly known comes to be distinguished from what is implicitly certain.[24]

Thus the lifeworld is foundationally important for the process of deliberation, but successful agreement requires surrender from its deterministic aspects and the pull of tradition, culture, and the comfort of previously held coherent positions. The lifeworld for participants is what exists "at their back," yet as comprehensive as the lifeworld is, it does not prohibit communication in its fullest sense; they are able to detach the lifeworld and come to a shared understanding of the issue at hand. With this detachment comes the constructive project of explicitly creating new norms and being bound in a different way to fellow citizens. In the jury context, how jurors perceive the law and the criminal justice system, as well as their understanding of how bias and prejudice affect the law, is part of the background implied by the lifeworld. Yet it is their belief in the integrity of the court and of the procedures in place for jury deliberation that creates the cognitive environment that enables them to decide on the facts of the case and create a shared reality distinct from the lifeworld. This is the trajectory for consensus, but *dissensus,* the less desirable outcome for both Habermas and juries, can also be seen through the lens of lifeworld. When jurors are selected, they are asked questions to determine whether they can accept the terms of the court despite the inherited forms of knowledge and assumptions that are embedded in their lifeworlds. One cannot be assumed to have abandoned previous conceptions, as the quotation above affirms, but the possibility of agreement with others within the procedural expectations of the court must be salient. In such a situation, jurors form a shared lifeworld through immersive experience of the trial and then attempt to agree on a shared decision. They may also disagree even though they have a shared lifeworld.[25] However, given that one's lifeworld can exert a profound hold on how one understands issues such as criminality, poverty, punishment, and prejudice, it may make detachment for the sake of a shared lifeworld impossible in a given case. To put it another way, there may be cases in which differences in lifeworlds, through no fault of the court or the jurors per se, come to bear on the evidence in such a way that consensus cannot be reached.

## A Conflict of Lifeworlds

It has been asserted in the secondary literature that Habermas pays inadequate attention to theorizing the conditions when conflict cannot be transcended through consensus achieved by the procedural conditions of discourse ethics.[26] Habermas reflected on civil disobedience in the context of protests against the building of a nuclear plant and the installation of cruise and Pershing missiles in Germany in 1981, and his position suggests parallels with the lifeworld differences I see as possible in juries.[27] Like the hung jury, civil disobedience is the last resort after all other legitimate (or in the case of juries, more highly desirable) actions have been exhausted; they can never become the default course of action if the functions of the institutions (that of the trial or the rule of law) are to be preserved. In his one speech on the topic, Habermas suggests that civil disobedience in the context of nuclear disarmament must be seen as essentially symbolic in its undermining of the legitimacy of a particular political will and thus neither a fundamental threat to the stability provided by law nor the instantiation of a viable alternative legal order. It is interesting to note that a symbolic interpretation of a hung jury would be highly problematic, even for those who want to protect their legitimacy. The jury must decide on one case and one case alone. No juror should use the case at hand in order to make a larger point about the criminal justice system or about the law itself (the exception of nullification notwithstanding). A jury that hangs to make a symbolic point would rankle the officers of the court and would represent just the type of mistake that proponents of the Allen charge want to avoid.

Returning to the issue of dissensus, Habermas understood civil disobedience to be the result of two different interpretations of the lifeworld. Those who opposed the creation of the nuclear plan believed that the abuse of the environment, the closed process of decision-making leading up to the policy, and the impact of the capitalist market were all systemic threats to the values of their lifeworld. Achieving a consensus with those who represented this alternate set of commitments would be akin to abandoning the foundational aspects of the protesters' own lifeworld. These are the conditions, Habermas suggests, that call for civil disobedience and should engender a legitimate challenge to particular laws through direct action: "The dissensus which gains expression in this complex 'no' aims not at this or that measure or policy; it is rooted in the rejection of a

life-form—namely, that life-form which has been stylized as the normal prototype—which is tailored to the needs of a capitalism modernization process, programmed for possessive individualism, for values of material security, and for the striving of competition and production, and which rests on the repression of both fear and the experience of death."[28] In such situations, saying "no" to the law and to the ideal of consensus itself emerges for Habermas as a necessary step for the further maturation of democracy and for the moral integrity of the individual who disagrees with a certain policy. A similar impasse can emerge in the jury room, where the lifeworlds of a subset of jurors converge to reject the reasoning and interpretation offered by another subset.

The conditions of universality and respect for the moral equality of each person continue to be, for Habermas, the most important checks against coercion. White and Farr highlight moral equality as the linchpin that holds Habermas's theory of civil disobedience together.[29] Without the concept of moral equality, the mandate for consensus could lead the majority to insist upon compromise as evidence of good-faith deliberation. A genuine desire by the majority of jurors for the legitimacy that consensus would entail (and a belief in the reasonableness of their position) could inadvertently compromise the condition of the equality of each participation. Subsequently, the line between compromise and coercion becomes difficult to decipher. They write: "In our unorthodox account, this no-saying is not directly connected with the expectation of redemption through the achievement of rational consensus; rather, it is connected only to the expectation of some significant moral-political space being available that honors this value of the morally equal voice of each. Without this qualification, an appeal to compromises does not necessarily provide much improvement over situations of pure coercion: I agree not to shoot you, if you agree to hand over your wallet. The concept of a 'presumptively just compromise' may only be a rough standard, but it clearly disavows 'agreements' of this sort."[30] Thus the justness of an outcome, whether in compromise or dissensus, is fixed with regard to the treatment of each participant as a moral equal and one not expected to be subsumed by the desire for consensus. Were the normative weight on unanimity less, there would be greater latitude for compromises that activated strategic concerns or leveraged implicit hierarchies. Instead, to respect the morally equal voice of each, the possibility of legitimate dissensus as it emerges from irreconcilable lifeworlds must be recognized.

Lasse Thomassen further highlights that the ability to say "no" in

Habermas's model is a constitutive part of understanding what it means to say "yes" in the context of consensus.[31] He extrapolates that within Habermas's discursive model "one must interrogate the norms that constitute the 'moral-political space' of equality to find out if what appear as noise, silence, or even a 'yes' may in fact be 'no.'"[32] Similar to the point above regarding the need for heightened attention to deliberative coercion that masquerades as compromise, Thomassen suggests that there are oblique ways in which disagreement may be registered even under favorable discursive conditions. Habermas's careful elucidation of the ideal conditions for deliberation thereby provides reasons for even greater scrutiny of such phenomenon and for skepticism regarding interventions such as the Allen charge which suggest that "noise" can be ameliorated with repeated instructions. Instead, the noise and the silence to which Thomassen refers may be better understood as nascent markers of significant lifeworld differences when they appear during jury deliberation. These differences may be activated by the particularities of the case and the same jury on a different case may not see these differences manifest, but the Habermasian insight here is the importance of deferring an interpretation until the jury itself is ready to make one. Differences in perceptions of law enforcement, the purpose of punishment, and the relationship between poverty and crime, all stemming from the lifeworlds of jurors, can be fundamental in the interpretation of evidence in a particular case, and even the best faith attempts at deliberation cannot transcend them.[33]

## The Legitimate Hung Jury

Although hung juries do not usually divide along race, it is fruitful to consider race as a factor that strongly influences one's lifeworld and could thus be significant in juries that cannot reach an agreement.[34] Judith Butler's interpretation of the Rodney King verdict provides a case study in which differences in lifeworld could have been persuasive as reasons for a hung jury. In her reflections on the case, Butler questions how a white jury would interpret the video footage of police officers beating Rodney King fifty-three times with a baton as a legitimate use of force by the officers, and she expresses her disbelief that one juror saw King as the aggressor in the situation and "in control."[35] When the jury returns a verdict of not guilty, a decision that would spark riots in Los Angeles, Butler asserts that it is not just a matter of differences in interpretation between the jurors and others who saw the incident as embedded in racist motivations and institutional legacies. She writes:

> It is not, then, a question of negotiating between what is "seen," on the one hand, and a "reading" which is imposed upon the visual evidence, on the other. In a sense, the problem is even worse: to the extent that there is a racist organization and disposition of the visible, it will work to circumscribe what qualifies as visual evidence, such that it is in some cases impossible to establish the "truth" of racist brutality through recourse to visual evidence. For when the visual is fully schematized by racism, the "visual evidence" to which one refers will always and only refute conditions based upon it; for it is possible within this racism episteme that no black person can seek recourse to the visible as the sure ground of evidence.[36]

In the language of the lifeworld, the differences between a lifeworld that perpetually (and perhaps unconsciously) sees the black male body as a source of threat and one that does not are not differences in interpretation of the evidence (or the part of discussion that relies on persuasion and reason-giving in a Habermasian system), but rather they emerge from the act of seeing itself. The lifeworld cannot be detached from agreement in the way Habermas suggests because it is constitutive of perception itself and consensus cannot be wrung from even the best of deliberative conditions. The Rodney King verdict shows how racial prejudices can deeply affect deliberation from the beginning and do so in ways that evade the formal protections that the jury system sets up. A hung jury in such a situation would perhaps have been a desirable outcome because it would have shown the presence of an alternative lifeworld in the jury room—one that interpreted the evidence differently and might have persuaded the other jurors or precipitated a mistrial. Even if such a juror were not able to persuade the others, the inability to reach consensus would have allowed for more time to be devoted to the case and would have perhaps involved the service of a more diverse group of jurors in another trial.

The language Butler employs when she asserts that a racist episteme can be fully determinative of how one interprets evidence is arguably the type of reasoning and strategic posturing that Habermas wants to mitigate with the right conditions for discourse. Taking the idea even further, if epistemes were all as rigid as Butler suggests consensus would never be possible, since the entire premise of jury deliberation would be reduced to whether there is enough demographic compatibility to achieve unanimity. Hierarchies of power and audibility are real, and formal protections of unanimity and practical discourse will not be enough. It is in situations like this where the ideals Young has laid out (such as the possibilities of metaphors and embodied affect for communication) may be more

effective than the discursive principles Habermas suggests.[37] Consensus will not come from direct argumentation perhaps, but more subtle shifts in understanding the worldviews of others. Habermas's understanding of the potential for agreement despite lifeworld differences is persuasive as a way to think about juries because of the jurors' commitment to the institution of the trial, the integrity of its procedures, and the gravity that comes with their ultimate decision-making authority—all of these may be synthesized into a lifeworld and decision-making process that resonates with all. Yet Butler's sharp assessment of the proceedings of the Rodney King trial draws much-needed attention to the potential legitimacy of disagreement in the jury box and the ways formal protections of the deliberative process can be impotent in the face of injustice, bias, and coercion.

The language of *belief* in the Allen charge, as well as the suggestion that holdout jurors are not cooperating in the deliberative process, suggests that it is a matter of conscience that is preventing a juror from being convinced, and this is not always accurate or desirable. Drawing upon Habermas's understanding of the lifeworld and Butler's language of the racial episteme points to something more systematic than a discrete belief in the mind of a holdout juror. The inability to achieve consensus with other jurors may not be because an individual cannot shake a doubt that exceeds what is reasonable; it may be the result of a more comprehensive difference in how she views and interprets evidence and the pressures that motivate citizens and law enforcement.[38]

The fact that Habermas has been accused of not giving adequate attention to legitimate conflict is related to an additional critique that he fails to consider specific issues that arise in the formation of the lifeworld for marginal members of the citizenry, those who do not fit into dominant conceptions of gender or race, for example. Nancy Fraser's critique of Habermas for his lack of attention to the ways in which women's consent during deliberation is misunderstood and misconstrued in both the public and private spheres is meant to point to the fragility of the deliberative space from the perspective of women, despite the fact that they are necessary for the "universalization" Habermas desires.[39] Fraser writes that the consent women give, in sexual situations and others, can be willfully and violently misread, such that an agentic act becomes a passive one (for example, when "no" is interpreted to mean "yes"), and her critique can be broadened to include the dangers of formal proceduralism obscuring the dynamics of power within jury deliberation. Fraser's critique suggests that racial minority jurors who also make up the minority on the jury

decision are even more vulnerable to having their perspectives obscured in light of the desire for consensus. The very fact that each juror must register an opinion, not just give tacit consent or remain neutral, is a worthy protection against the problems of traditionally marginalized voiced within Habermas's model.

Furthermore, Fraser's concern about the incorporation of the perspective of women within the Ideal Speech Situation also centers on the distinction Habermas draws between the system and lifeworld with concerns of the material world and the labor of the household falling under the rubric of system. Fraser suggests that for traditionally marginalized groups such a distinction is incongruous, and their relationship to labor is the basis for lifeworld, not an oppositional force within it. Following from this, we can surmise that the way the lifeworld influences decisions in the context of a jury may not always follow the stark demarcation that Habermas would like. The interlocking concerns of system and lifeworld, especially in the case of certain groups, can become salient in jury deliberation and be a factor in divergent lifeworlds. Recognition of the validity of such an impasse is also a constructive response to the reality that power relations in society can be replicated within the jury room and require a heightened degree of protection to maintain the conditions of deliberation.

One might counter that the Allen charge is merely restating expectations that were given in the original jury charge. If the language of the charge suggests the need for consideration of the strategic values of expediency and the expectation that the jury follow certain procedures for deliberation and these guidelines are coercive, this is a problem with the original charge itself, and broader reforms should be made to the jury system. The Allen charge, the argument might go, is only a reminder at a critical time of the accepted responsibilities of the jury. If it encourages further debate toward the end of consensus, this is a net gain. If not, the jury is not worse off than when they approached the judge or were otherwise perceived to be on the cusp of deadlock. Yet, what Habermas's theory reveals is the need to protect the conditions of deliberation at each stage, particularly against the corruption of the goals of the process and in the service of the equal respect that is granted to each participant. The fact that there are obstacles toward achieving the Habermasian ideals of unanimity and equal participation does not mean they are irrelevant or in need of replacement. Rather, his philosophical defense of discourse ethics alongside his understanding of the reality of lifeworld differences provides a way to understand the significance of the hung jury (and the

error of the Allen charge). It is interesting to note that in simulated jury studies, majority jurors were more likely to exercise influence in the jury room after an Allen charge and were emboldened to assert the veracity of their position. Even though all jurors were equally advised to reconsider their positions, the intervention of the judge through the Allen charge fortified the majority position and gave the majority the impression that had the support of the judge in moving to consensus.[40] This was especially true when the case hinged on issues of values and judgments, rather than technical concerns. Specifically, Smith and Kassin found that normative pressures from the majority predominated in juries that were discussing questions of values and personal standards, whereas information influence was more important in juries that decided on issues of fact.[41] Their research found that juries "in cases that involve community and moral standards (e.g. those that involve obscenity, abortion, police brutality, euthanasia or political dissent)" may be more susceptible to the influence of the Allen charge.[42] While Habermas would be hopeful that consensus could be achieved even in these types of cases through fair and impartial deliberation (and in even broader situations of norm legitimation than is generally sought through jury decisions), I have argued that cases that fail to reach consensus may sometimes be grounded in these types of lifeworld differences, not on a willful failure to deliberate or an incompetence regarding the evidence (though the confidentiality of jury deliberation makes it hard to know). Thus the Allen charge empowers majority jurors to exert further normative influence in precisely the types of cases that are likely to activate different understandings of the lifeworld. The Rodney King case did not turn on the issue of an Allen charge, but I invoke it to show how fragile lifeworld positions in the jury might be when there is an overwhelming alternative (especially a prejudiced one). Juries that have reached an impasse are not the cases that should have their deliberation hastened for the sake of efficiency; these are the cases likely to be manifestations of a legitimate hung jury and not the mistake.

The controversy over the Allen charge can be seen as the dueling dangers of two types of mistakes. The first is the mistake of a coercive action by the court that upsets the delicate balance of the jury deliberation process for the sake of a unanimous verdict. The second mistake in question is that of the hung jury. The hung jury results in a mistrial and prolongs the criminal justice process such that it may extend to another trial or plea-bargaining. From the perspective of efficiency, a hung jury is suboptimal and arguably a "mistake" precipitated by the actions of the judge

or attorneys. A hung jury can also be seen as a mistake if jurors refuse to partake in the work of argument, interpretation, and persuasion on the questions of evidence and the burden of proof. This is not the case in juries that are divided because of substantial lifeworld differences that make shared interpretation of the evidence impossible. Jurors in cases like these cannot step away from their lifeworld interpretation in order to achieve consensus. To be true to their understanding of the case and their responsibilities as jurors, they must risk being seen by others as the holdouts who contribute to a mistrial. In addition, from the perspective of justice *writ* large, I suggest that the hung jury should also be seen as a hand-brake on the punishment component of the criminal justice system, a component widely documented to be vexed by racial and socioeconomic inequality. When a system is as flawed as the U.S. criminal justice system, an outcome that may at first seem like a mistake of inefficiency (and worthy of explicit remedy such as the Allen charge) might better be thought of as a type of immanent resistance delivered at precisely the moment the state has the greatest leverage over the defendant—the moment of the guilty verdict.

## NOTES

1. In contrast to the secrecy surrounding the power of the jury to nullify, the recitation of the Allen charge is meant to give jurors an even more potent sense of their power. When a judge says, "No other twelve people can do a better job than you," jurors realize how critical each of their voices is and the authority of their decision. The fears of anarchy, so present in fears surrounding jury nullification, are not present in concerns regarding the Allen charge or the concerns raised by a hung jury. Nancy Marder, "The Myth of the Nullifying Jury," *Northwestern University Law Review* 877 (1999). Alan W. Scheflin, "Jury Nullification: The Right to Say No," *Southern California Law Review* 168 (1972). Christopher C. Schwan, "Right up to the Line: The Ethics of Advancing Nullification Arguments to the Jury," *Journal of the Legal Profession* 29 (2004–5).

2. *Thaggard v. United States,* 354 F.2d 735 (1965).

3. Mark Lanier and Cloud Miller III, "The Allen Charge: Expedient Justice or Coercion?" *American Journal of Criminal Justice* 25, no. 1 (2000).

4. For the American Bar Association's concerns surrounding the Allen charge, see American Bar Association, "The Allen Charge Dilemma," *American Criminal Law Review* 10 (1972).

5. I also share with Burns the tone of my analysis: it is explicitly interpretive and normative, and not meant as an account of the law as understood by its practitioners or in the case law. Robert Burns, *A Theory of the Trial* (Princeton: Princeton University Press, 1999).

6. Gary J. Jacobsohn, "The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland," *Washington University Law Review* 4(1976): 572.

7. I agree with Martha Merrill Umphrey's critique that Burns underestimates the fragility of such an idealized interpretation of the trial. Yet, I still suggest that an appreciation of the legitimacy of the hung jury decision and of the conditions that threaten it highlight the fragility of jury decisions, while preserving a complex understanding of their judging power. Martha Merrill Umphrey, "Fragile Performances: The Dialogics of Judgment in a Theory of the Trial," *Law and Social Inquiry* 28, no. 2 (2003).

8. The impossibility of consensus on a variety of central issues of concern, especially to those of the good life, leads critics like Moon to prefer bracketing them as well as paying attention only to those who are affected by a particular issue. Habermas himself makes the distinction between moral and political questions more defined in his later work. J. Donald Moon, "Practical Discourse and Communicative Ethics," in *Cambridge Companion to Habermas,* ed. Stephen K. White (Cambridge: Cambridge University Press, 2006).

9. Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge: MIT Press, 2001); *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1998).

10. James Bohman, "Critical Theory and Democracy," in *Handbook of Critical Theory,* ed. David M. Rasmussen (Oxford: Blackwell, 1996), 203.

11. Habermas, *Moral Consciousness and Communicative Action,* 66.

12. For a discussion on jurors' ability to understand highly technical subject matter, see Neil Vidmar and Valerie P. Hans, *American Juries: The Verdict* (Amherst, NY: Prometheus Books, 2007), 153.

13. Wellmer has critiqued Habermas for suggesting that the formal requirements of the Ideal Speech Situation are erroneously posited as resulting in truth (and captured by the consensus theory of truth). I am sympathetic to these concerns and they are picked up in a different guise with proponents of a revised majority decision rule for juries, but the concerns do not derail the more important legitimizing function of Habermas's framework. Fundamentally, it is not some abstract truth that is sought through jury deliberation, but an adjudication of the evidence relevant to the charge at hand as the basis for the state's suspension of the rights of the defendant. How a jury of one's peers contingently determines justice in a particular situation is more important than confidence in the consensus theory of truth. Allbrecht Wellmer, "Ethics and Dialogue," in *The Persistence of Modernity: Essays on Aesthetics, Ethics and Postmodernism* (Cambridge: Polity Press, 1991).

14. Compare *Apodaca v. Oregon,* 406 U.S. 404 (1972). *Johnson v. Louisiana* 400 U.S. 356 (1972). Unanimous juries do, however, need at least six jurors. *Ballew v. Georgia,* 435 U.S. 223 (1978).

15. Gary J. Jacobsohn, "The Unanimous Verdict: Politics and the Jury Trial," *Washington University Law Quarterly* 39 (1977). Michael Saks, "The Smaller the Jury, the Greater the Unpredictability," *Judicature* 79 (1996).

16. Peter J. Coughlan, "In Defense of Unanimous Jury Verdicts: Mistrials, Communication, and Strategic Voting," *American Political Science Review* 94, no. 2 (2000).

17. "Juries required to reach unanimity deliberating longer and in more ideal fashion than juries that were not required to reach complete agreement. Specifically, unanimous juries discussed key facts to a greater extent, touched on more case facts than two-thirds quorum juries, corrected mistaken assertions by members more often, elicited the participation of minority-view jurors to a greater extent, and ultimately produced a higher level of member satisfaction." Dennis D. Devine, *Jury Decision-Making: The State of the Science* (New York: NYU Press, 2012), 45.

18. It is reported that 10 percent of trials result in a verdict that is the opposite of a jury's original preferences, and this suggests the substantial influence of the process of

deliberation on assessments jurors had made individually during the trial. For discussion of the implications of a verdict-driven jury style versus an evidence-driven one, see John Gastil et al., *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation* (New York: Oxford University Press, 2010), 95.

19. I acknowledge that a Habermasian dissent based on (U) would assert that the proposal in question does not advance the interests of all and the interest of the speaker, and this standard is at odds with what juries are asked to do.

20. D. Graham Burnett, *A Trial by Jury* (New York: Alfred A. Knopf, 2001).

21. Chambers suggest that the demand for closure, in the form of a vote, formal decision, and so forth, always dramatically reduces the opportunity for nonstrategic deliberation. She does not see any way to bridge the gap but rather suggests that a balance be struck between deliberation and closure. Simone Chambers, "Discourse and Democratic Practices," in *Cambridge Companion to Habermas,* ed. Stephen K. White (Cambridge: Cambridge University Press, 2006).

22. Iris Marion Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory," *Praxis International* 5, no. 4 (1986): 394.

23. William Rehg, "Habermas's Discourse Theory of Law and Democracy: An Overview of the Argument," in *Handbook of Critical Theory,* ed. David M. Rasmussen (Oxford: Blackwell, 1996). Stephen K. White, *Recent Work of Jurgen Habermas: Reason, Justice and Modernity* (Cambridge: Cambridge University Press, 1988). James Bohman, ""System" and "Lifeworld": Habermas and the Problem of Holism," *Philosophy & Social Criticism* 15 (1989).

24. Habermas, *Moral Consciousness and Communicative Action,* 138.

25. The situation of disagreement when there are shared lifeworlds is a liminal case for the interpretation I am suggesting. It may not be a mistake in the sense of failed good-faith deliberation, nor a politically significant impasse (because of lifeworld conflict), but rather a situation where reasonable jurors disagree on how to weight the evidence or to index the different norms.

26. Nicholas Rescher, *Pluralism: Against the Demand for Consensus* (Oxford: Oxford University Press, 1995). Lynn Sanders, "Against Deliberation," *Political Theory* 25, no. 3 (1997). Seyla Benhabib, *Situating the Self* (Cambridge: Polity Press, 1992).

27. Jürgen Habermas, "Civil Disobedience: Litmus Test for the Democratic Constitutional State," *Berkeley Journal of Sociology* 30 (1985).

28. Ibid.

29. Stephen K. White and Evan Robert Farr, "'No-Saying' in Habermas," *Political Theory* 40, no. 1 (2012).

30. Ibid., 51.

31. Lasse Thomassen, "Communicative Reason, Deconstruction and Foundationalism: A Response to White and Farr," *Political Theory* 41, no. 3 (2013).

32. Ibid., 486.

33. In her writing about jury sentencing, Iontcheva sees great value in the Habermasian deliberative model for thinking about the purposes of punishment. While decisions about guilt, she argues, are more technocratic in how they expect jurors to line up evidence with legal calculations about doubt, the purpose of punishment and its manifestation in sentencing requires much more of a juror's individual worldview, or in my application of Habermasian language, the inherited and imbibed perspectives of a particular lifeworld that speak to rehabilitation and retribution. Jenia Iontcheva, "Jury Sentencing as Democratic Practice," *Virginia Law Review* 89, no. 2 (2003).

34. Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (Cambridge: Harvard University Press, 2000), xi.

35. Judith Butler, "Endangered/Endangering: Schematic Racism and White Paranoia," in *Reading Rodney King/Reading Urban Uprising,* ed. Robert Gooding-Williams (New York: Routledge, 1993).

36. Ibid., 19.

37. Young, "Impartiality and the Civic Public."

38. Burns might be skeptical about the direct relationship I am asserting between lifeworld and juror decisions in the case of a hung jury. His interpretation suggests that there are many other areas of consideration before a juror makes a decision, not to mention the fact that experiencing the trial in all of its complexity challenges the lifeworlds of jurors in a multiplicity of ways. However, Burns highlights that part of a juror's role is to decide between competing norms and ways of judging, and it is plausible to see how jurors might disagree on this because of lifeworld expectations. Burns, *A Theory of the Trial.*

39. Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Habermas and the Public Sphere,* ed. Craig Calhoun (Cambridge: MIT Press, 1992).

40. Vicki L. Smith and Saul M. Kassin, "Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries," *Law and Human Behavior* 17, no. 6 (1993).

41. Martin F. Kaplan and Charles E. Miller, "Group Decision Making and Normative versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule," *Journal of Personality and Social Psychology* 53, no. 2 (1987).

42. Smith and Kassin, "Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries," 642.