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# **The role of the common law jury as direct deliberative mechanism for the democratic self-legitimation of law: an analysis of the function of the common law jury in the light of a reading of Habermas's social and legal theory.**

by Valerie Whittington

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## **Abstract**

The concept of legitimacy is examined (I) through a reading of Habermas's work on communicative action, and through a reading of the opening chapters of *Between Facts and Norms*. The claim that legal juries function in a manner similar to a 'parliament' is rejected in favour of a claim that they exercise a decentred 'particle' of popular sovereignty. (II) An analysis of the jury's lifeworld origins is undertaken and, (III) the essay then considers the democratic function of the operation of 'jury equity' whereby juries may produce 'perverse' decisions, or as described in the USA – jury 'nullification' whereby juries bring in verdicts that go against overwhelming evidence

## **Introduction**

In his theory of modernity, Jürgen Habermas (1996, p. 40) makes reference to the capacity of money and power to have a pernicious effect upon the legitimacy of law, so that the legal sub-system ends up providing legal justification for transactions secured by an *illegitimate* operation of the economic and administrative systems 'behind the backs' of the citizens of a society. This has important ramifications for democracy and its operational effectiveness. If true it undermines the legitimacy of law and the authority of the democratic state that underwrites its coercive power. It also throws

into question the operational effectiveness of *metasocial* mechanisms for the 'self-legitimation' of law which aim to be invulnerable to forms of strategic and instrumental manipulation. This essay explores the question as to how juries as direct, democratically constituted bodies, engaged in deliberative communicative action aimed at achieving consensus, bolster legitimacy within the common-law legal system. The idea is developed through a reading of Habermas's constructs of the 'lifeworld' and the 'public sphere' which are largely missing from the academic literature on legal juries produced by jurists. It is suggested there is ground to be gained in both directions: for the theoretical understanding of juries and for the further development of the understanding of the interaction between Habermas's concepts of 'lifeworld', public sphere and legitimacy. The exploration gives ground for further study of the theoretical and practical issues surrounding the use of citizens' juries as direct deliberative democratic forms.

### **(I) What is legitimacy according to Habermas and how is it constructed in the legal context?**

In its broadest sense legitimacy is concerned with the 'rightness' of a claim, imperative or action. Legitimacy as an aspect of communicative action is concerned with commands, orders and imperatives: it gives a speech act authority which suggests it ought to be obeyed. In this sense it has a 'normative' aspect standing 'behind' the claim that it should be obeyed, which suggests it can be justified by reference to universally applicable norms. Norms in moral theory are universals and Habermas argues that in the 'postmetaphysical' era when external validation cannot be sought from an infallible divine source, norms must be legitimated by other means.

Like rules, legitimacy can only have meaning within society: "to *think* one is obeying a rule is not to obey a rule...it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it" (Wittgenstein, 1953, p. 81, cited by Habermas, 1987, p. 17 - 8). Legitimacy only functions in a context of intersubjectivity (Habermas, 1987, pp. 1 - 76). Without language and its structuring of subjectivity through the different linguistic relations of the pronouns 'I' and 'me' (and we) there could be no context of communicative action to enable the making of 'validity claims' through statements asserting truth, rightness or sincerity of expression. Without communicative action there could be no *context for dissension*, which Habermas claims is operationalised through *communicative freedom* and gives interlocutors the power to accept or reject any claim. Habermas associates this freedom with the fundamentally non-coercive nature of communicative action because validity claims are always

open to rejection (Habermas, 1996, p. 119 and p. 127). Habermas weaves subjectivity, intersubjectivity, language and claims to validity into 'personhood' but does not reduce this to a mere theory of 'consciousness' because he steers away from the individual towards an intersubjective construction and finally towards objective processes of rationalisation and systematisation. Fundamental to the derivation of this intersubjective legitimacy is Habermas's theory of discourse.

### Discourse and legitimacy

Discourse according to Habermas is governed by rules that underwrite its basic logical coherence; normative rules that govern its reliability, such as the rule requiring that speakers are sincere, and that they undertake to justify their assertions or explain why they won't, and rules that try to 'protect' discourse to ensure power cannot prevent the success of the 'better argument'. If operating, these rules "direct participants towards a rationally motivated consensus" (Finlayson, 2005 p. 43 onwards). The rules for the 'ideal speech situation' include that every subject has competence to speak; everyone is allowed to question any assertion; everyone is allowed to introduce any assertion; everyone is allowed to express his attitudes, desires and needs and no speaker may be prevented, by internal or external coercion, from exercising those rights. These rules are *idealizing* because they direct speakers towards a rationally motivated consensus: "A discourse in which the voices of all concerned are listened to, in which no argument is arbitrarily excluded from consideration and in which only the force of the better argument prevails, will, if successful, result in a consensus on the basis of reasons acceptable to all" (Finlayson, 2005, Kindle, 36%, page 44 of 137, Loc 934 of 2607). Whether or not the parties *actually agree* is not in fact relevant provided they 'could' agree to the terms of the discussion. As considered below this is problematic as the theory appears to rely upon a 'universal' norm that sets out the terms of discourse that leads the theory back towards the problematic justification for the moral universal norms mentioned above.

In the legal and political context:

According to the discourse principle, just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses. Hence the desired political rights must guarantee participation in all deliberative and decisional processes relevant to legislation and must do so in a way that provides

each person with equal chances to exercise the communicative freedom to take a position on criticisable validity claims. Equal opportunities for the political use of communicative freedoms require a legally structured deliberative praxis in which the discourse principle is applied. Just as communicative freedom prior to any institutionalization refers to appropriate occasions for the use of language oriented toward mutual understanding, so also do political rights- in particular, entitlement to the *public use* of communicative freedom- call for the legal institutionalization of various forms of communication and the implementation of democratic procedures. These are meant to guarantee that all formally and procedurally correct outcomes enjoy a presumption of legitimacy. (Habermas, 1996, p.127)

Hugh Baxter (2011) has claimed that Habermas's 'discourse principle' is inconsistent with his theory of procedural legitimacy: "Ultimately, the shift to the procedural focus cannot save Habermas's discourse principle. Procedural norms are positive legal norms, and as such, they are within the scope of the discourse principle" (Baxter, 2011 pp. 97-98). Being within the scope of the discourse principle means they are tied to at least one norm – that of the Discourse principle itself. Baxter claims that the democracy principle – the discourse principle as applied to laws – still contains an (impossible) universal element within it. "If procedure is to bear the weight of legal and political legitimacy, then procedural norms, above all, would have to qualify as legitimate. Given the discourse and democracy principles, that seems to require that the legal norms that constitute and regulate the democratic lawmaking process must themselves be capable of receiving the citizenry's universal assent" (*Ibid.*). It is accepted here that it is difficult to imagine how this could ever be realised. Perhaps in a 'decentred' modern society in which all normative 'agreement' occurs, the 'universal' agreement on the Discourse principle which clearly cannot be achieved 'at once' and 'forever' might better be regarded as 'fractured' and 'parcelled out' agreement that must accept the limitations of its own formation across time and in a variety of locations. Whatever the solution, the problem will not be solved here but it is acknowledged and it means that what follows must be prefaced with a presumptive '*If we accept the discourse principle then...*'

When Habermas links communicative freedom to the right to participate in rational discourses and connects both with political deliberative and decisional processes, he envisages an 'ideal' set of conditions in which discourse will take place. If this occurs – if the *procedural* criteria of discourse are achieved – then what results from this discursive

arena will be *presumed* to be legitimate. Habermas's theory of legitimation is based upon an 'ideal speech situation' that guarantees non-coercively the success of the better argument, where "[u]nder conditions of ideal deliberation ... 'no force except that of the better argument is exercised'" (Held, 2006, p. 238). It is worth noting that David Held here quotes from Habermas's 1976 text *Legitimation Crisis*. In later texts Habermas revised his position on force via a pragmatic *political* turn to the effect that if 'force' is to be employed then reasons must be stated. Finlayson (2005) notes that by *Between Facts and Norms*, Habermas has developed a *democratic principle* (D) that specifies the necessary condition of the validity of action-norms that holds also for legal and moral norms so that 'Only those laws count as legitimate to which all members of the legal community can assent in a discursive process of legislation that has in turn been legally constituted' (Habermas, 1996, p. 110). The coercibility of these norms does not rely upon *actual* agreement but only upon its 'amenability to consensus': "a norm is legitimate only if all members of the legal community can assent to it, and they can do so because it has been produced by a formal decision-making body which incorporates deliberation and discourse, is open to input from civil society, and conforms with legally instituted system of rights....The democratic principle only implies that legitimate laws must merit the assent of all members of the legal community; not that they must actually find it..."; "Habermas's theory of law, like his theory of morality, relies heavily on this distinction between what is in principle amenable to assent, and what in practice finds such assent" (Finlayson, 2005, Kindle, 75%, p.116 of 137, Loc. 1960 of 2607).

## Law, Legality and Legitimacy

Legitimacy in its very broadest Habermasian sense concerns the rightness of imperatives at the level of the individual speech act, or 'command', but it is also phylogenetically related to the legitimacy claims of 'law' in the juridical realm and 'sovereignty' in the political realm, the differences being how legitimacy is achieved and enforced in each field. In the legal and political realms the significance of legitimacy is that it carries with it coercive force: the fact that coercion is employed to enforce legal and political commands backed by norms, contrasts with communicative action, where agreement is achieved intersubjectively and consensually. For Habermas the absence of a metaphysical validation of law in the post-metaphysical era has given rise to a split between the facticity and normativity of law. This is reflected in the division in the use of the terms 'legality' and 'legitimacy' (Habermas, 1988, pp. 97–100). Legality is found in the form of positive law

and operates in accordance with clear and discoverable legal rules produced within the context of a supportive state apparatus that claims legitimacy from the operation of free and fair democratic processes. In what follows the historical legal development of the jury system – its *positive* aspect – is not considered, however it is taken that its legitimating capacity needs to be understood in its legal context and this changes depending upon historical and cultural factors. An Athenian style jury of male citizens or a colonial jury that excluded the indigenous population would not be considered legitimate in a modern liberal democracy. For an exploration of the pernicious ‘legitimacy’ of the colonial jury see Richard Vogler’s “The International Development of the Jury: The Role of the British Empire” (2001; in Hans, 2006).

In the first chapter of *Between Facts and Norms*, Habermas sets out a socially integrative role for law and addresses the problematic question of how law can fulfil that function aimed at the stabilisation of society in the post-metaphysical modern situation of “a predominantly secular society in which normative orders must be maintained without metasocial guarantees” (Habermas, 1996, p. 26). He concludes “along with Parsons and Durkheim,” that this stabilization cannot be effective simply on the basis of the instrumental “reciprocal influence of self-interested actors”. Habermas claims that purely instrumental and self-interested action does not have the capacity to integrate and stabilise society without the intersubjective influence of communicative action aimed at achieving consensus. However in a modern, diverse and pluralist society discursive non-coercive communicative action alone is insufficient to achieve this integrative goal when the archaic bonds and the “ties of sacred authorities” have been loosened. A new kind of norm is required to fulfil the integrative challenge: a norm capable of bringing about “willingness to comply *simultaneously* by means of de facto constraint and legitimate validity” (Habermas, 1996, p. 27). In effect Habermas is casting around for a norm that can re-unite facticity with its normative validity to restore the authority lost by the absence of divine assurance under conditions where the poles of action oriented to success (instrumental action) and action oriented to understanding (communicative action) have been driven apart to produce a “*perceived incompatibility of facticity and validity*” (Habermas, 1996 p. 27, italics in original).

Habermas found his solution, in a return to Kant’s *Doctrine of Recht* and the system of rights “that lends to individual liberties the coercive force of law” (Habermas, 1996 p. 27). This line of connection to individual rights which justify coercive protection, is taken from *The Metaphysics of Morals/Doctrine of Recht*. It offered Habermas a bridge to the ideals of autonomy; private and public: “In the legal mode of validity, the facticity of



the *enforcement* of law is intertwined with the legitimacy of a *genesis* of law that claims to be rational because it guarantees liberty. The tension between these two distinct moments of facticity and validity is thus intensified and behaviourally operationalized" (Habermas, 1996, p. 28). As a consequence, Habermas claims that the coercive aspect of law legitimized in this way provides two possible performative attitudes that satisfy the demands of both: 1) rationally choosing actors who *expect* enforcement and so comply - for whom the law has de facto validity and 2) actors who want to reach understanding and seek normative recognition with others - for whom the law achieves normative legitimacy capable of inducing respect (Habermas, 1996, p. 31).

### Autonomy and legitimacy

In Habermas's theory, autonomy remains a key legitimating concept for law because law protects each citizen's self-legislation as a private individual (Kant's morally autonomous Enlightened subject obeying the self-given 'moral law' within). It is that which Kant, in Habermas's reading, calls upon coercive power to defend and it is simultaneously that which for Habermas will secure rule acceptance. The rules must be self-given and in a democracy the laws must be written by those who live under them. This self-legislating role requires at the very least *the possibility of participation* in political activity, such as voting or standing for office, and has implications for the possible legitimacy of laws passed by the representatives of the people under a constitution (Habermas, 1996, p. 110). However the democratic constitution proposed by Habermas must function in the social condition of complexity and 'modernity', in which illegitimate power relations based on 'interest' seek to inhibit and interfere with the mechanisms that provide democratic legitimacy both to the state and its laws. This situation is intensified under a representative system where the citizen's participation is reduced to 'acclamation' in elections. In the modern representative democracy it is suggested that parties use the mass media to manipulate the electorate to create an unthinking party allegiance, and in which system, voters are effectively reduced to the condition of consumers (Habermas, 1991, p. 176). The public sphere is denuded and the effect of organized interests turns legislators into the agents or principles of parties (not simply 'political parties' but also those of special-interest groups) (Calhoun, 1992, pp. 26-27).

The role of the state is vital to protect both private and public autonomy against "the overpowering of the legal system by illegitimate power relations that contradict its normative self-understanding", but this is difficult to achieve in a context where the system-steering and integrative mechanisms of money and administrative power operate 'behind the backs'



of participants.

[I]nstitutions of private and public law make possible the establishment of markets and governmental bodies, because the economic and the administrative system, which have separated from the lifeworld, operate inside the forms of law....

Often enough, law provides illegitimate power with the mere semblance of legitimacy. At first glance one cannot tell whether legal regulations deserve the assent of associated citizens or whether they result from administrative self-programming and structural social power in such a way that they independently generate the necessary mass loyalty.

The less the legal system as a whole can rely on metasocial guarantees and immunize itself against criticism, the less scope there is for this type of self-legitimation of law. (Habermas, 1996, p. 40)

The above is quoted at length because it is precisely in this arena that the role of the jury can be comprehended within the common-law legal framework as a communicative and *democratic* mechanism for the legitimation of law. But what does it mean to speak of any system as 'self-legitimating'? It requires that there should be a mechanism internal to a system that accords it validity, in some senses as a formal constitution does a state, or as a 'procedure' does in Habermas's theory. Using this construction, it is suggested here that the jury is a mechanism which works in a similar fashion for the 'uncodified' common-law.

This is problematic however from a Habermasian perspective because of the case-law basis of the common-law that appears uncertain, revocable and endlessly amendable. If this revocation and amendment occurs in the absence of a valid claim to legitimacy then the positivity of law "[forfeits] its capacity for social integration" (Habermas, 1996, p. 38). Habermas leads the search for law's legitimacy back to its origin in the legislative process and as a consequence the entire common-law, in Habermas's system for legitimating the law, appears undemocratic. To understand why that is, we need to consider what makes for a 'legitimate' legislative process for Habermas, and this means considering 'popular sovereignty.'

Modern democracies have decentred societies, where economic action, typified as "the decentralized decisions of self-interested individuals in morally neutralised spheres of action," (Habermas, 1996, p. 83) relies upon positive law to secure liberties by coercive means in order to permit it to 'get on with business'. The administration also needs positive law to enable it to

manage its welfare responsibilities. Leaving open the motives for compliance, “[t]hese laws draw their legitimacy from a legislative procedure based for its part on the principle of popular sovereignty. The paradoxical emergence of legitimacy out of legality must be explained by means of the rights that secure for citizens the exercise of their political autonomy” (Habermas, 1996, p. 83). Additionally, democratic legislative procedure can only draw its legitimating force from a process where citizens “*reach an understanding*”. This process whereby citizens reach understanding upon ‘rights’ is the forging of ‘popular sovereignty’, but these two aspects give rise to quite different political structures depending upon the emphasis placed upon them. The liberal tradition structures its ideal State around ‘individual rights’, and the Republican tradition around ‘popular sovereignty’. Habermas (1994) however tries to offer a *procedural* ‘third way’ that keeps both traditions in sight.

The ‘third way’ proposed by Habermas in “Three Normative Models of Democracy” introduces his discourse theory and takes elements from both liberal and republican traditions and “integrates these in the concept of an ideal procedure for deliberation and decision-making” (Habermas, 1994, p. 6). This “proceduralist” method (Habermas, 1996, p. 135) triangulates ‘practical reason’ expressed in “the rules of discourse and forms of argumentation” with both “universal human rights” and “the ethical substance of a specific community”: “In the final analysis, the normative content arises from the very structure of communicative actions” (Habermas, 1994, p. 6). Habermas suggests this ‘shift’ of the normative weight into discourse makes for a better ‘fit’ with society and the state under the condition of modernity. It offers a “constitutional answer to the question of how the demanding communicative forms of democratic opinion-and will-formation can be institutionalized” (Habermas, 1994, p. 7). The multiple connections between state and “peripheral networks of the political public sphere” thus reflects the *decentred* society of the complex postmetaphysical modern world (Habermas, 1994, p. 8).

The significance for legitimacy is that administrative power is produced through a sluice of “a public use of reason and a communicative power” (Habermas, 1994, p. 9) that feeds into and programs it. Public opinion “worked up via democratic procedures, cannot ‘rule’ of itself but can only point the use of administrative power in specific directions” (Habermas, 1994, p. 9). As a result “[d]eliberation is certainly supposed to provide a medium for the more or less conscious integration of the *legal community*,” as contrasted with a republican position where “the self-organization of the legal community, is not at the disposal of the citizens in any way” (Habermas, 1994, p. 9). Furthermore, “the only law that counts as

legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion-and will-formation" (Habermas, 1996, p. 135).

Public opinion produces influence, influence produces communicative power and via elections communicative power is transformed into administrative power. This "suggests a new balance between the three resources of money, administrative power, and solidarity, from which modern societies meet their needs for integration" (Habermas, 1994, p. 8). For Habermas this has a normative implication because "the integrative force of 'solidarity,' which cannot be drawn solely from sources of communicative action, should develop through widely expanded and differentiated public spheres as well as through legally institutionalized procedures of democratic deliberation and decision-making. It should gain strength to hold its own against the two other mechanisms of social integration – money and administrative power" (Habermas, 1994, p. 8). It is precisely as '*a legally instituted procedure of democratic deliberation and decision-making*' in which all citizens can potentially participate that the jury functions, and that is why the claim is made here that it is part of the arrangement of mechanisms envisaged by Habermas as providing social integration *and* legitimacy. It is also this reading of the 'separation' of democratic power between its 'external' legitimation by public opinion and its manifestation in administrative acts that leads to the claim here that the jury operates as a 'public sphere' as opposed to a 'mini' parliament exercising legislative sovereignty in its own right. In this way it forms part of the "'self' of the self-organizing legal community" that "disappears in subjectless forms of communication that regulate the flow of deliberations in such a way that their fallible results enjoy the presumption of rationality." If this is not to be an 'exaggerated' claim, no better in foundation than the rhetorical claims to the value of the jury made by sympathetic common-law jurists, then Habermas's claim for the capacity of 'procedure' to legitimate must also hold good. It is acknowledged here that that claim itself is problematic.

The question of how successfully procedure legitimates law and how law functions as a mechanism for social integration is challenged by John Sitton (2003) in *Habermas and Contemporary Society*. Sitton offers criticisms of Habermas's theory from a Marxist perspective. He argues that the lifeworld/system distinction "obscures our ability to grasp the extent to which global capitalism is a political construction" (Sitton, 2003, p. 151). In his analysis the application of 'law' appears a weak alternative to political praxis and analyses of power. Hugh Baxter (2011) in *Habermas: The Discourse Theory of Law and Democracy* is also unpersuaded by Habermas's distinction between lifeworld and system (Baxter, 2011, pp. 97-98, p. 177). How effectively the jury achieves or contributes to this process of integration will

not be considered, nor how able the law is at countering the *illegitimate* operation of money and power. This essay will focus upon elucidating how it is possible to make the claim for the jury that it *can* contribute to this process. The operation of money and power in society and the relations of these systems to the legal system would need a comprehensive critique which is not offered here, and it is acknowledged that any judgement upon the democratic *effectiveness* of the jury would necessarily have to be postponed until such a fuller account could be undertaken.

### **Juries and autonomy**

In the UK the jury operates within the common law and therefore is part of the legal sub-system and yet its personnel are not *of* the system. The jury exercises a form of autonomy within the system whereby the citizenry, drawn directly and randomly from the lifeworld, act as a check upon the development of the separate interests of law as a system *per se* because juries cannot be compelled to their decisions by judges or any other personnel of the legal sub-system. If illegitimate power is the province of money and (administrative) power, and if the legal system is in danger of immunizing itself against criticism (by its own internal mechanisms of self-justification found in universalising theories of justice), overly pressurised as it is by “the *secular* pressure of the functional imperatives of social reproduction” (Habermas, 1996, p.40), then the jury might be considered an acceptable democratic alternate mechanism for the self-legitimation of the legal system which would then not depend entirely upon the elected legislature for its legitimacy. The necessity for such an internal mechanism is understandable in the context of the common-law system where law is not only the product of Statute law made by the legislature, but is also found in cases and is ‘judge-made’. The jury is not *external* to the legal system; rather it sits in court, determines the outcomes of cases and is involved directly in the application of ‘common-law’ concepts derived from case-law. It will be seen below that for some commentators the jury should have no business with the ‘law’ but should be restricted to acting as an instrument solely for the determination of fact. However even this task is impossible in a common-law court without the necessity for the jury to engage with ‘judge-made’ law. For example, jurors must apply the *mens rea* concepts of ‘intent’ and ‘recklessness’ that are only defined in case-law and which the judge must explain to the jury. In earlier incarnations the jury was also expected to rule on the law (Gobert, 1997, pp. 35–45; Abramson, 1994, Ch. 2), and in this capacity as source of validation, it is claimed here that it provides the law with an alternate directly democratic and communicative internal

mechanism for self-legitimation. In 1649 the English radical Leveller John Lilburne demanded jury trial on charges of treason against Cromwell. Lilburne successfully defended himself, and won over the jury to acquit him arguing that juries had the right to judge both the facts and the law (Brailsford, 1983, p. 601). Lilburne faced down his judges with the claim: "You that call yourselves judges of the law are no more but Norman intruders; and indeed and in truth, if the jury please, are no more but ciphers to pronounce their verdict" (Brailsford, 1983, p. 598; Gregg, 1961, p. 299). Lilburne appeared to envisage the jury as exercising something akin to popular sovereignty.

The claim to the jury's *democratic* legitimacy in the modern context is founded upon the equal opportunity to participate in decision making afforded by the jury system (Abramson, 1994, Ch. 3). In the context of a parliamentary representative democracy the jury is not associated with popular 'sovereignty' *per se*. The jury works in an intersubjective and communicative fashion in the Habermasian sense. It seeks to achieve a consensus between participants in a uniquely constructed ideal speech situation which complies with Habermas's rules of discourse. Being drawn randomly and directly from the lifeworld, with its autonomy protected by statute and case-law, it is - in theory - rendered immune to the influence of systemic power in the form of money or administrative power and also in effect immune to the legal 'system' because its right to be the sole arbiter of fact is protected: *Bushell's case* 124 Eng. Rep. 1006 (C.P. 1670). Ideally the random selection of jurors neutralises the influence of 'interest' because in a diverse and pluralist society the jurors will present a cross-section of interests. Seen in this way the jury becomes an 'ideal' self-legitimizing mechanism for the law as it endorses the law in its 'factual' nature as determinative and coercive, yet it *simultaneously* dispenses validity and acceptability in its role as defender of individual rights in court and in its embodiment of civil public rights. The role of the jury throughout the history of the common law system has been championed on these grounds.

This history and the claims made for the jury's popular democratic pedigree is often cited but seldom elaborated in a theoretical fashion by common law jurists. Abramson (1994) is a typical example of a thoroughly researched study that is rich in case-law and historical detail but largely empty of theoretical analysis. If however we analyse the role of the jury through Habermas's theory of legitimacy it offers a theoretical underpinning that avoids the resort to 'higher' law or to 'Justice', or to the claim that the jury operates beyond the reach of law in an entirely autonomous region of its own in such a way that the 'popular sovereign' idea perhaps suggested by Lilburne and also by Patrick Devlin (1956) who characterised the jury as

a 'mini-Parliament' are revealed as overstatements. From the elucidation of Habermas's theory of legitimacy above, the jury appears as a constituent element *within* the legal sub-system with a claim to be a mechanism of *uncoerced* self-legitimation. Uncoerced, in the sense that its deliberations and conclusions are not under the control of money or administrative power even though the condition of jury 'service' is itself coercively enforced albeit with provisos permitting non-attendance in certain situations

## II How juries function as a type of self-legitimizing mechanism within the legal system.

*Lord Thomas of Gresford: My Lords, I happened by coincidence to be reading a summing-up on Sunday, and I shall quote what the judge said to the jury. I think it is helpful to see how democratic principles are applied to a jury... The judge said:*

*"You stand in between the state and the accused person. Trial by one's peers has a long history in our jurisprudence as being the most tried and tested method of determining guilt or innocence of one's fellow citizens. It is an important right. Each of you will have come to the court bringing with you all of your lifelong experiences, coming from a cross-section of society, as to how people behave in our society, as to what is acceptable and unacceptable, and, most importantly, each of you brings with you, your innate common sense".*

Extract from Hansard: 20<sup>th</sup> March 2007 Col 1191 6.30pm : on the second reading in the House of Lords of the Fraud (Trials without Jury) Bill.

The above quotation is very typical of observations on the advantages of juries made by those who support the use of juries in the criminal justice system. Juries fulfil not only a practical role as determiners of fact, but also a symbolic role as representatives of the citizenry and arbiters of the *mores* of the citizens. Cross-sectionality which is seen as so important from the representational point of view, vies for prominence as justificatory democratic ideal with that of the jury as a location of deliberative collective reasoning. The call for impartiality and fairness *as epitomised in the selection process* can overshadow the relevance of cross-sectionality itself *for deliberation* (Abramson, 1994, Ch. 2; pp. 101-102, p. 140).

This section will explore how the concept of 'lifeworld' provides a theoretical framework for the understanding of how juries operate and why they are of particular value in relation to the deliberative process in the criminal trial. While the role of the jury as a deliberating body has been



explored by numerous empirical researchers, the theoretical grounding for the 'value' of jury trials is not usually elucidated in any more than the most general and vague normative terms as to what makes for a 'good' 'participatory' democracy without situating this within the wider democratic system. Why precisely should an 'ordinary person' be suited to the role of juror? Why do you need more than one of them? And, why does a judge not serve just as well instead?

Schutz (1974) identified the lifeworld as "that province of reality which the wide-awake and normal adult simply takes for granted in the attitude of common sense". It is the arena that is unproblematic (Schutz and Luckmann, 1974, p. 3-4). As part of this, individuals take for granted that others are endowed with consciousness essentially the same as theirs. The philosophical problem as to what constitutes the 'real' is de-problematized as it is simply an assumption made in the 'natural attitude' that the world is the same for others as it is for oneself (Schutz and Luckmann, 1989, Ch 6; pp. 99-100). In this way the outer world of objects is 'intersubjective' as it is brought into a "common frame of interpretation" (Schutz and Luckmann, 1974, p. 4). Individuals experience their lives within specific 'situations' (Habermas, 1987, p. 127): they relate to themselves by developing a memory narrative involving these previous situations, and each life, although unique to each individual, is also experienced alongside the lives of others in a mediate 'we' relation as a result of a "general thesis of reciprocity of perspectives" (Schutz and Luckmann, 1974, pp. 60-61). This also leads to potential for development of a typification of people (Schutz and Luckmann, 1974, pp. 68-92).

When considered in conjunction with the theory of communicative action, juries in the context of intersubjectivity bring their entire lifeworld experiences to bear upon the trial. Jurors sit together, they watch and listen silently side by side on the jury benches, and (in theory) without discussion during the case. At this point in the trial each juror is alone with their own lifeworld experiences which help them to interpret what is put before them. At the level of communicative action they must make decisions as to whether they can take something as a fact, for example whether or not to believe that an eyewitness was correct when they identified the defendant in an identity parade although their initial sight of the defendant during the offence was in limited light and for a short duration – they are being asked in this instance to agree or disagree with an assertion that might be characterised as 'true' or 'false' and to help them with this they will draw upon their own experience of meeting someone at night, or their 'general knowledge' of how hard it is to recognise someone after only a brief encounter, or even the now widely publicised unreliability of eye-witness accounts. Likewise when a



defendant claims they acted in self-defence and the judge has explained that the law requires the defendant to have been both justified in using force in the circumstances and to have used only reasonable force in those circumstances, a juror is considering a claim to justification that requires them to assess the 'rightness' (the legitimacy or illegitimacy) of the action taken, and to do this again they must rely upon general knowledge that will suggest whether they or 'most people', or a confident fit man of 40 with a height of 6'5", would feel threatened by his girlfriend screaming at him so that he had to grab her round the neck to stop her hitting him. And finally although by no means least, the jury, by virtue of the necessity to ascertain the facts, will have to assess the 'truthfulness' of all the witnesses and in this, perhaps in more than any other area, it is clear that juries bring their life skills (and potentially their prejudices) in 'reading' people to bear. Research shows that jurors continue to watch participants in 'off-stage' moments too (Rose, Seidman Diamond, and Baker, 2009). So, it is clear that juries are engaged in a 'situation' that requires 'life-world' general knowledge and they also practice all three varieties of communicative action. Each has the communicative freedom to accept or reject the validity claims presented, yet together they share the purpose of arriving at a consensus in the process of deliberation.

In *reaching an agreement* on the verdict under the supposedly 'ideal' speech situation of the jury room, a jury in England and Wales has two hours to achieve unanimity, much longer to achieve a majority, but if they cannot achieve agreement, then as a 'hung' jury that has failed in its task it will be discharged and a fresh trial commenced with another jury. Some experiments have been undertaken in the USA enabling jurors to deliberate *during the course of the trial* rather than restricting deliberation to the end. This research was undertaken to see whether it helped juries cope with extensive and complex evidence notable in fraud trials (Seidman Diamond, Vidmar, Rose, Ellis, and Murphy, 2003, 2006). Despite the occasional high profile disaster, such as the Vicky Pryce case (Rozenberg, 2013a, 2013b), the jury is an extremely efficient mechanism to reach consensus. In only 0.6% of jury trials in the UK are juries unable to achieve a conclusive unanimous or majority decision (Thomas, 2013, Crim. L.R. 6, 483-503; citing herself 2010, at fn. 49). The variety of crime 'situations' is effectively infinite; a diversity of facts, individuals, and varying strengths of evidence that it is almost impossible to imagine an 'expert' who could confidently undertake the complex judgements that jurors make if he or she had to undertake the same alone and without the subsequent assistance gained though discussion with others. The 'ideal' speech situation of the jury room deliberation envisages a group engaged in seeking a unified (public) consensus without concern

for their individual or group 'personal' interests. This may seem an idealistically tall order, but empirical researchers note that for the most part juries do succeed in this task because, as noted above, the number of 'hung' juries is small. This is particularly so in the UK where the majority verdict is permitted in criminal trials after a minimum period of two hours (The Criminal Justice Act 1967 c.80 s.13 as incorporated into The Juries Act 1974 c.23 s.17).

### Experts and laypersons

Every normal adult is in full possession of general knowledge. The individual differences in general knowledge are only minor: in any case they have hardly any *social* relevance. Every normal adult can be considered typically to be highly competent. Further since only a relatively limited portion of the social stock of knowledge consists of special knowledge, all problems which have the status of being able 'in principle' to be mastered are also typically mastered by everyone. The lifeworldly reality is relatively easy for everyone to survey... Only rarely in the routine of life do problem situations arise in which the factor of being a layman is prominent. Therefore competence in general knowledge must play a predominant role in the apprehension of oneself. (Schutz and Luckmann, 1974, p. 325)

There are many criticisms that can be levelled at the assertions in this passage and certainly contemporary social theory which emphasises difference and the cross-roads nature of subjectivity and identity would take issue with the notion of 'generality' per se and the resort to 'normalcy' as a guide to likely generality. That every normal adult is in 'full possession' of general knowledge or that the differences between adults are negligible is certainly doubtful, and Schutz elsewhere admits as much: "Everyone, that is, every normal adult, knows that his knowledge is not 'complete', and he knows some things better than others. This consciousness of not knowing, and knowing the varying quality, is the basic correlate of the social distribution of knowledge" (Schutz and Luckmann, 1974, p. 320). In relation to the role of a jury it is precisely the mixture *and diversity* of the generality of knowledge and individual specialisms (which will be found in jurors as much as in any other section of the public) that fits the jury precisely for the job they do.

It is arguable that it is precisely in the 'rare' occurrence of the 'problem

situation' of a crime and the existence of disputed versions of this that the factor of being a lay person is 'prominent', so that in this instance the lay person is unusually the 'expert'. In the special case of the jury it is clear that a 'single' lay person expert would be unsuited to the task of utilising their general knowledge because 'general knowledge' as it is found in any individual will be incomplete. As Schutz observes, despite the generality of knowledge, not everyone is introduced to the same general knowledge, but "rather learns the version belonging to the class into which he was born" (Schutz and Luckmann, 1974, p. 326) so that knowledge acquired throughout a life will be differently acquired between individuals dependent upon the social circumstances of their acquisition of that knowledge. The socialization of individuals in their subjective acquisition of general knowledge is essentially individual in nature, and access to different 'general' knowledge depends on the social structure and its stratum.

No individual can access 'general knowledge' in an unproblematic fashion on their own, and the necessity of communal agreement upon its contents becomes necessary if the term is to have any meaning at all. 'General' knowledge only coalesces into an identifiable object through the agreement between parties to a discussion – it has no other way of instantiation. It might be said that general knowledge is not 'general' as such but coalesces in a specific instantiation, such that the statement "a person would take off her coat if the sun were shining and it was a hot day in the absence of any other reasons not to" remains a simple assertion in the absence of intersubjective agreement to acknowledge its claim to validity as a general proposition. Once it has received this 'agreement' it could then be identified as 'general knowledge'. It is by nature intersubjective and discursive which is why a 'jury' (just as a group of friends together talking) becomes an 'expert' at its instantiation.

This unstable non-rational, non-systematized 'lifeworld' element is criticised by both positivist and realist legal theorists who see impartiality and certainty as keys to a Justice that is denied by the unpredictability of juries and 'creative' wayward judges using dubious methods of 'distinguishing' to get out of following previous case-law (see Lord Reid in *R v National Insurance Comrs, Ex pp Hudson* [1972] AC 944, 966 quoted by Lord Hoffmann in *A v Hoare* [2008] UKHL 6 at para. 20). These elements are inveighed against as dangerously 'arbitrary' and anathematic to law both as system and as a mechanism for doing justice by stabilising expectations because it permits within law a mechanism for creating exceptions.

This process *appears* to hand the jury, along with autonomy, a form of popular sovereignty dressed up with the personality of the demos. This is clearly an inflated claim and sounds like the univocal and impersonal

'People' of totalitarian states. See Habermas's reference to the 'plebiscitary-acclamatory' form of 'regimented public sphere' (Habermas, 1991, preface p. xviii). It resembles the extreme end of a Republican reading that regards as possible the unification of citizens under a form of general will. A transcendental 'demos' does not reflect the discursive and intersubjective nature of the jury. Neither does the aggregation of individual positions supposed by Liberalism offer a plausible description of the jury's capacity for reaching unanimous agreement. While it is evident that the jury in this analysis draws on its life-world origins to justify its autonomy (to decide independently of outside influence the facts of a case), its manifestation of a form of 'public autonomy' needs further elaboration. This can be done by locating the jury in the realm of the public sphere. The jury has in its origins (from its historical restriction to those with property) a bourgeois pedigree. This property requirement was finally only abolished in 1972: the Criminal Justice Act 1972 c.71 consolidated in the Juries Act 1974 c.23 (Gobert, 1997, p. 115-6). Gobert observes that a similar movement happened around the same time to 're-classify' offences in such a way as to send more people to the Magistrates' Court and so away from the jury. Gobert sees this as Parliament's 'sabotage' of its own democratic reforms that only around 2% of criminal cases end up in the Crown Court where juries sit. This figure has not changed in the years since Gobert made this observation. Over 90% of all criminal cases in England and Wales are heard *entirely* in the Magistrates' Court (MoJ, 2013) Further research would be required to substantiate whether there are grounds to speculate that the erosion of confidence in the jury runs in parallel with the historical deterioration of the bourgeois public sphere traced by Habermas in his early work. That the limitation of the role of the jury has occurred simultaneously with its 'democratisation' warrants further examination. It may be that the 'autonomy' of the jury, its 'permission' to act as sovereign, was initially sanctioned by its early class (and gender) credentials. In this respect the jury has some claim to be considered as a constituent part of the 'bourgeois' public sphere described by Habermas.

To see the jury as a public sphere brings with it the powerful criticisms that have been levelled at this concept. Nancy Fraser (1992) has criticised the Habermasian 'ideal' public sphere as of weak democratic value given its original historical limitation to bourgeois white men, and that even where drawn from a wider plethora of groups in modern society the public sphere is incapable of 'bracketing out' the disparities of social inequalities between interlocutors. She argues that the idea of 'bracketing out' is a typically liberal solution:

Liberal political theory assumes that it is possible to organize a democratic form of political life on the basis of socioeconomic and sociosexual structures that generate systemic inequalities... [T]he problem becomes...how to insulate political processes from what are considered to be non-political or prepolitical processes, those characteristic, for example, of the economy, the family, and informal everyday life. (Fraser, 1992, p. 121)

She cites the analysis of Jane Mansbridge; “the transformation of ‘I’ into ‘we’ brought about through political deliberation can easily mask subtle forms of control.... Subordinate groups sometimes cannot find the right voice or words to express their thoughts, and when they do, they discover they are not heard” (Fraser, 1991, p. 119). While the concept can be revitalised by a re-reading of the idea of the public sphere as made up of numerous and overlapping spheres, this also returns the idea of ‘interest’ into the public sphere and as such it becomes a potentially fractured space of moral and political disunity as opposed to an arena for the achievement of consensus. The experience of the inability to find juries that will ‘bracket out’ social and sexual differences in the context of racially segregated and patriarchal societies has dogged analysis of the jury system in both the USA and the UK. Jeffrey Abramson (1994, pp. 108-118) offers numerous examples of racial bias evident in jury empanelment and deliberations in the USA. For what it may be worth, although there is great concern in the USA for the way in which race is treated in their criminal justice system, empirical research carried out in the UK has concluded that in the British context juries do not appear to discriminate on the grounds of race (Thomas, 2010, p. ii). This can be contrasted with the public debate in the USA over the acquittal of the man accused of killing Trayvon Martin: see Charles M. Blow (2013).

### **III The operation of ‘jury equity’ in decisions that reject overwhelming evidence**

#### *E.P. Thompson in “Writing by Candlelight” (1980)*

*The English common law rests upon a bargain between the Law and the People. The jury box is where people come into the court; the judge watches them and the jury watches back. A jury is the place where the bargain is struck. The jury attends in judgment, not only upon the accused, but also upon the justice and humanity of the law.... (Auld, quoting Thompson, 2001, Ch.5, para. 99)*

Despite this quotation from E. P. Thompson, in the paragraphs that

followed Lord Justice Auld in his *Review of the Criminal Courts of England and Wales* (the Auld Review) spoke out strongly against the capacity of juries to bring in perverse verdicts, which fly in the face of overwhelming evidence. Against this view, Lord Denning had criticised the pejorative use of the term 'perverse' verdict as 'impertinent' (Gobert, 1997, p. 63). Unpersuaded by the rhetoric of those such as Devlin (1956) or Denning, Auld weighed in heavily on the side of those who say it is no business of the jury to go changing the law by means of nullification (Auld, 2001, Ch.5, para 105). Auld wanted jurors to be legally required to rule on the basis of evidence. For an opposed position to Auld see Michael Zander (2005, p. 14, fn. 21). Auld stated that Juries are not as Devlin claimed a 'mini' parliament and that they have no business acting like one when acting as 'finders of fact' in criminal tribunals. While Lord Justice Auld's position is a respected one held by many within the English legal system, it fails to consider those theories of participatory democracy in which this action of juries might be found to be legitimate upon acceptable theoretical grounds. However, the use of the word 'parliament' confuses the process of nullification with legislation and so misrepresents the effect of jury 'nullification'. No laws are cancelled by jury nullification, the same law remains in force after the decision and even in respect of that decision there remain avenues of appeal which lie entirely under the jurisdiction of a professional (and in the UK non-elected) judiciary. A mere jury decision in a trial court of first instance is no precedent for any court to follow and thus it does not and cannot produce a substantive 'common law'. The only 'precedent' set is the continued possibility for such decisions by juries in future, and that is an already existing precedent of long standing in the English common law: see *Bushell's Case* (1670) which was itself the result of an *appeal* court decision sanctioned by a judge in a higher court. In some instances juries' refusals to apply laws they disliked led to subsequent repeals of legislation, which rather argues *for* the legitimacy of the nullification process than otherwise. Laws, from those punishing people who aided and abetted escaping slaves, to prohibition, to the extensive use of the death penalty in England produced regular 'nullification' verdicts by juries and as such contributed to movements that led to formal changes in the law by the legislature. See nullification used by juries against The Fugitive Slave Act in Abramson (1994, pp. 77–85) and Gobert (1997, pp. 33–35). Rather than view this as 'illegitimate' it might be better understood as a mechanism whereby the citizen 'influences' the legislative process. The jury in this context can be seen as '*jurisgenerative*'. *Jurisgenerative* communicative power, that no one is able to 'possess', underlies the administrative power of government. It operates as a form of political power: Habermas takes the following from Arendt; "Power springs up between men when they act



together, and it vanishes the moment they disperse". This is axiomatic for the 'power' operationalised by the jury (Habermas, 1996, p. 147). In this light, nullification is the exercise of communicative freedom; it allows for the *emergence* of political power rather than the exercise of an *already* constituted power (Habermas, 1996, p. 149). In this sense if there is 'sovereignty' exercised by juries then it resembles the idealised dispersed sovereignty which Habermas claims is appropriate to the modern decentred state. In "Popular Sovereignty as Procedure" (1988), Habermas sees the need for sovereignty to be proceduralized and fractured, dispersed throughout society – so that it is "parcelled out over many stages: the process of proceduralized opinion-and will-formation must break down into numerous smaller particles. It must be shown that political morality is exacted only in small increments" (Habermas, 1996, p. 487). This 'particle theory' of sovereignty described by Habermas offers a more fitting metaphor for the jury's exercise of popular sovereignty, saving it from the hyperbole of both advocates and opponents alike.

If the above interpretation is accepted then it is clear that juries do not 'legislate' even when they make the implementation of a law ineffective. The jury might be said in these contexts to 'dis-approve' a law. This will raise the legitimacy of the law in question as a matter for subsequent debate and consideration by the legislature. This interpretation saves juries from the otherwise dubious claim to a form of "sovereign normless decisionism" which would allow for the "free rule of the exception", in an apparently normless law reminiscent of Carl Schmitt's decisionism

(Scheurman, 1994, p. 40, pp. 68-80). Juries, however, do not single-handedly decide upon the legal or moral norms reflected in law, but they bring them back into the public sphere for re-consideration. In this way juries make the 'legitimacy'/'legality' separation *recognisable* and bring the legitimacy of a specific law again into processes of deliberation in the public sphere.

One possible solution to the 'perversity' of juries might be to *force them* to abide by their oaths to try the case on the evidence alone, which Lord Justice Auld did suggest. Yet there are numerous 'old' cases where juries in delivering their judgements, in the days in England when they provided reasons for these, were very careful to word them with 'lawyerly' economy. There were several attempts by the jury in *Bushell's case 1670*. Initially they returned a verdict worded "Guilty of speaking in Gracechurch street". After being bullied, locked up and threatened by the judge, they finally bit the bullet and returned 'not guilty verdicts', for which the judge fined them for bringing in a verdict contrary to the evidence (Abramson, 1994, pp. 68-73). Quite apart from the practical difficulties of Justice Auld's suggestion, there



is some justification to say it would be unacceptable to force jurors to abide by their oath if their autonomy is to be taken seriously.

Historically jurors were called upon to deliver verdicts according to their conscience, not merely in line with evidence (Gobert, 1997, p. 18-19). The old law of 'conscience' can be closely associated with the idea of autonomy. To require jurors to go against their 'consciences' is to remove their autonomy in an unacceptable fashion when a matter seems not a matter of mere 'legality' but goes to the heart of 'legitimacy'. This would be when the law in question, or its application to the facts before them, provokes the question as to whether its brute application is justified, whether it is 'right'. In the case of Clive Ponting the judge told the jury that the 'interest of the State' was equivalent in our Parliamentary democracy, to the 'interest of the government of the day' and that Ponting had 'no defence' when he disclosed information about the sinking of the General Belgrano to an elected Member of Parliament for the opposition. The jury acquitted and rejected the judge's 'correct' elucidation of the law that Ponting had no defence and they must convict. The jury's acquittal appeared to endorse a much broader view of 'the interest of the state' and its constituent personnel. The judge relied in his argument upon the 'fact' of elections (and inevitably by implication the constitutional import of the operation of the Parliamentary version of sovereignty as being an effective majority in the House of Commons) to underwrite his argument that "[i]nterests of the state, I direct you, means the policies of the state as they were in July 1984" (Ponting, 1985, pp. 190-191). If juries in circumstances such as this were required to 'abide by their oath' against their conscience then their autonomy would be forfeit. As Ponting himself noted: "a jury left with no practical option but to convict ... has become a charade" (Ponting, 1985, p. 185). In the Ponting case *to require the jury to convict*, when they could not but perceive themselves as fair arbiters of what is and is not 'in the State's interest' because they themselves were called to sit effectively in their capacity as members of a public who legitimate the State during elections, seems itself perverse.

The above consideration of 'perverse' verdicts suggests that they do not detract from trial by jury. Rather they offer the common-law an internal mechanism of self-legitimation through ties to the public sphere facilitated by jury decisions however controversial. If the jury is disallowed the capacity for rejecting the case of either side then the essential discursive importance of the capacity to say either 'yes' or 'no' to any validity claim is undermined in such a way that communicative freedom is denied. The theoretical capacity to 'reject' *any* validity claim is integral to communicative theory and its expression in communicative power. If the jury are only to be permitted to 'acclaim' a legally 'correct' verdict then their position becomes analogous

to the ideal 'automaton' judge imagined by Weber, (Scheuerman, 1994, p. 71) or that of the denuded 'voter' identified by Habermas in *Transformation of the Public Sphere* and in "On Political Participation" where the cynical manipulation of the 'apathetic majority' within electorates at election times produces "ersatz public spheres" subservient to party mass management (Habermas, 1991, pp. 175-6). It is precisely the capacity of juries to *autonomously* reject or accept freely that establishes their authoritative significance and permits the claim that they underwrite the legitimacy of the legal system. Denuded of this capacity they are worthless even as determiners of fact.

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