

Jury News
By G. Thomas Munsterman

Hung Juries: Are They a Problem?

There seems to be an unspoken agreement among all researchers that one of the findings of any work of research will be that more research is needed. This seeming act of professional self-preservation is, in my experience, very well justified. The closer one examines anything, the more one wonders about some finer detail of the process. Each answer usually suggests another question.

Close examination of any topic can also give results that, while not on point to the research effort, are fascinating and perhaps are as significant as the project outcome. For instance, when we examined the Arizona rule that permits jurors in civil cases to discuss the evidence before deliberations, we wanted to know if these discussions caused them to prejudge the case or to form opinions early on that they would not change or be less likely to change. We found that discussing the case had no effect on the timing of jurors' opinion formation, but in conducting the research, we also discovered for the first time when jurors do begin to make judgments about the evidence, which turned out to be surprisingly late in the trial – in spite of all the hoopla propounded by trial consultants that jurors make up their minds during opening arguments. The former was an outcome of the research and the latter was a more general and illuminating finding.

Recent National Institute of Justice-sponsored research into hung juries by the National Center for State Courts focused on the causes of juror deadlock, but also provided a great deal more insight into the jury deliberation process in felony trials. For example, those of us working on the project – myself, Paula Hannaford-Agor, Valerie Hans, and Nicole Mott -- discovered that ambiguous evidence, poor group dynamics, and juror attitudes about fairness were the three most important factors related to juror deadlock. But we also found that the jury's final verdict is not necessarily the sum of the jurors' individual opinions – the actual process of deliberating has a profound effect on the final verdict. For example, we were amazed at how often the plot from *Twelve Angry Men* plays out in real life. In more than 12 percent of the trials in which a large majority of individual jurors favored a conviction on their first vote, the jury returned an acquittal as its final verdict. Wouldn't you like to be a fly on the wall during those deliberations?

In the following executive summary from our report -- *Hung Juries: Are They a Problem?* -- you may not find many surprises and, in fact, you will find that the juries are working quite well. The executive summary and the final report of the study are available on the NCSC Web site's Center for Jury Studies page at <http://www.ncsonline.org/Juries/index.html>.

ARE HUNG JURIES A PROBLEM?

EXECUTIVE SUMMARY

In the last couple of decades, court and media interest in deadlocked juries – more commonly known as hung juries – rose sharply, prompted by reports of increasing hung jury rates in several jurisdictions and a number of high profile cases in which the jury hung. Policy makers within the criminal justice system began asking why juries hang so often, and more importantly, what can be done about it.

There are legitimate reasons to ask such questions. A hung jury is a social and monetary cost to the court system, to the affected parties and, on a larger scale, to the community. A jury trial is a rare event and requires considerable time of judges, court personnel, attorneys, defendant(s), witnesses, and, of course, jurors. Furthermore, a hung jury postpones a final decision on the merits, thus delaying justice.

This emerging concept of a hung jury as a fundamental flaw in the jury system spurred a demand for research on the frequency and causes of hung juries and, more importantly, for solutions to address high hung jury rates in some jurisdictions. Under a grant from the National Institute of Justice, the National Center for State Courts (NCSC) undertook a four-year study of juror deadlock, and this report presents compelling and important information on this topic.

The NCSC project team used three different methodologies to approach these concerns. First, the project team conducted a broad-based survey of federal and state courts to document hung jury rates. Second, the project team selected four courts for an in-depth jurisdictional study on nearly 400 felony trials. Using surveys of judges, attorneys, and jurors, NCSC examined case characteristics, interpersonal dynamics during jury deliberations, and juror demographics and attitudes and compared these traits in cases in which the jury reached a verdict to cases in which the jury deadlocked on one or more charges. The third approach was a case study of 46 deadlocked cases from the in-depth jurisdictional study to develop a taxonomy of reasons for jury deadlock.

Hung Jury Rates in State and Federal Courts

Neither prior research nor standard court practices had identified an acceptable – or even typical – baseline rate for mistrials due to juror deadlock.¹ Courts generally do not record hung jury events on a systematic basis, ostensibly because they occur infrequently and do not completely dispose of the case. Another complication, which limited the ability to make comparisons across jurisdictions, is inconsistency in the definition of a hung jury, both between courts and prosecution offices, and among courts themselves. Some define a jury hung if it cannot reach a verdict on any charge, and others if the jury deadlocks on only one charge.

¹ Kalven and Zeisel reported an average criminal hung jury rate of 5.5 percent, but did not report the variation in the rate. A 1973 study in 10 California counties found a much higher rate – 12.2 percent over three years – but with large fluctuations from county to county and from year to year.

Using data provided by state courts and prosecutors' offices, and supplemented with information gleaned from the annual reports of various state judiciaries, NCSC compiled a complete database of felony trial dispositions for 30 courts and partial data for an additional 16 courts.² The average hung jury rate was 6.2 percent, but with a great deal of variation ranging from 0.1 percent in Pierce County, Washington, to 14.8 percent in Los Angeles County, California. Neither demographic compositions of the populations nor community characteristics such as crime rates were related to hung jury rates.

Felony hung jury rates in 30 large, urban courts averaged 6.2 percent – only slightly higher than the 5.5 percent reported by Kalven and Zeisel in 1966 – but these rates varied considerably from jurisdiction to jurisdiction.

Formatted

The federal court data, provided by the Administrative Office of the U.S. Courts, consisted of criminal and civil jury dispositions for all federal district courts for the period 1980 through 1997. The federal hung jury rates in the 14 federal circuits were much more uniform and lower than in state courts, averaging 2.5 percent for criminal trials from 1980 through 1997.³ This 18-year rate varied only 1 percent, reaching a high of 3 percent in 1992. There was one exception to the overall low and stable federal hung jury rates. The D.C. Circuit had a much higher rate – 9.5 percent during this period. One possibility for the higher rates in the D.C. Circuit is the unique geographical and urban jurisdiction it serves. It is the only federal circuit comprised of a single city. The remaining 13 circuits each encompass large geographic areas, typically several states, comprised of a mix of urban, suburban, and rural locations. An examination of individual federal districts found greater variation of hung jury rates, with higher rates for courts located in urban areas.

In-Depth Jurisdictional Study

In the second phase of the project, NCSC obtained the cooperation of four state courts – the Superior Court of Los Angeles County; the Superior Court of Arizona, Maricopa County; the Supreme Court of Bronx County; and the District of Columbia Superior Court – to collect detailed information about felony jury trials.⁴ The project team selected these four sites due to court characteristics in addition to a willingness to participate. Both Los Angeles and Washington, D.C., were asked to participate due to their relatively high hung jury rates. Maricopa County provided the opportunity to examine relatively new and innovative procedures permitting judges to re-open a case and allow further presentation of evidence or arguments in the event of jury deadlock. And the New York Unified Court System was instrumental in securing the cooperation of the Bronx County Supreme Court.

² See generally Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *How Much Justice Hangs in the Balance? A New Look at Hung Jury Rates*, 83 JUDICATURE 59 (1999).

³ The hung jury rate was 1.6 percent for civil trials during the same period.

⁴ Although NCSC developed detailed data collection protocols and procedures to protect the confidentiality of the research data, fewer jurisdictions participated in the study than was originally anticipated. In spite of these concerns, none of the study data became the subject of discovery proceedings. The limited number of jurisdictions preclude generalization of many of the study conclusions to state courts nationally, but the sample of cases was sufficient to answer the most important research questions for the jurisdictions that participated in the study.

The resulting dataset consisted of survey responses from judges, lawyers, and jurors from approximately 100 non-capital felony jury trials in each of the sites between June 2000 and August 2001. The participants' rate of response was excellent. Approximately 90 percent of the judges submitted case data and a judge questionnaire. At least one attorney from each case responded in 88 percent of the cases. And 80 percent of the jurors, or an average of 10 jurors per case, responded (3,497 total jurors). The data reflected variable responses, suggesting honest and reliable data. The anonymous questionnaires did not provide any evidence that the participants felt pressure to respond in a socially desirable manner. The final dataset consisted of a total 382 cases, with which we compared various case and jury characteristics of juries that reached a verdict to those of juries that deadlocked. Thirteen percent of the cases hung on one or more charges.

Using multiple approaches to explore the data, we learned what differentiates a hung jury from one that reaches a verdict. Consistent themes of weak evidence, problematic deliberations, and jurors' perception of unfairness arose in the hung jury cases. These themes structure and inform the proposals we suggest for addressing hung juries. Interested courts and trial participants have voiced concerns about the incidence of hung juries and have subsequently put forward proposals to reduce their occurrence. However, many of the proposals target the symptoms of a hung jury, not the underlying cause. For example, eliminating the requirement of all jurors to decide unanimously on a verdict reduces hung jury rates, yet ignores addressing why one or two individuals refused to acquiesce to the majority. Our work investigates why juries hang and speaks to the resulting implications.

Major Findings

To maximize the sample of hung juries for comparison with verdict juries, we generally used the broadest definition of a hung jury – one that hung on any charge – for analysis purposes. Under this definition, the sample consisted of 46 hung juries and 336 verdict juries.⁵ The average hung jury rate for the four jurisdictions was 12.8 percent. The D.C. Superior Court had the highest rate at 22.3 percent, followed by the Superior Court of Los Angeles County at 19.5 percent, the Maricopa Superior Court at 7.7 percent, and the Bronx County Supreme Court at 3.1 percent.

The number of charges the jury is asked to consider affects the likelihood of a hung jury. Looking at the cases that hang *on any charge*, the greater the number of charges, the more likely that the jury will hang on at least one charge. However, the reverse is the case when we consider juries that hang *on all charges*. On average, juries that hang on all charges consider fewer counts.

Consistent themes of weak evidence, problematic deliberations, and jurors' perception of unfairness arose in the hung jury cases.

Formatted

Evidentiary Factors

Evidentiary case characteristics that contribute to hung juries include a broad range of variables including the ambiguity of the evidence, the type of evidence, the level of case complexity, and attorney skills. Jurors and judges rated the evidence as more ambiguous or close when the jury deadlocked. Past work by Kalven and Zeisel supports this finding. From a generally descriptive and qualitative look at why juries in our data hung, we found the most common and primary reason was weak evidence. This held true for most types of offenses,

⁵ More narrow definitions would have produced samples of 36 hung juries (hung on the most serious charge) and 27 hung juries (hung on all charges), respectively.

although juror deadlock in drug cases was more often attributable to a related matter -- police credibility.

Police evidence, defendant testimony and co-defendant testimony emerged in our data as the most important types of evidence that jurors used to decide cases, making it critical for jurors to determine the credibility of testimony by those types of witnesses, particularly for cases in which the evidence for each side is fairly evenly balanced. Jurors generally thought that police evidence was critical to the case. However, jurors in cases that hung had greater differences of opinion about the credibility of police testimony.

Compared to cases in which the jury reached a verdict, the evidence was more ambiguous – that is, did not favor either side – in cases in which the jury deadlocked. Hung juries also reported that cases were more complex and that the jury had more difficulty understanding the evidence and the law than verdict juries.

When the defendant testifies, jurors in both hung and verdict juries reported that the testimony was very important in their decision. Yet verdict jurors rated the defendants' believability more favorably than did hung jurors.

Accusations of juror error coincide with questions of jurors' abilities as laypersons to understand complicated evidence and legal matters. When we asked jurors to rate their case, they did not find their cases, in general, to be very complex. However, jurors in cases that hung on at least one count rated the case as more complex and difficult for the jury to understand than verdict juries. The results of the complexity ratings led us to test whether the quantity of evidence contributed to their inability to reach consensus on at least one charge. We did not find any evidence that the quantity of evidence or the length of the trial overwhelmed jurors, leading them to hang. Instead jurors' perceptions of complexity were related to the legal instructions and the facts of the case.

Interestingly, we found judges' and attorneys' ratings of complexity did not always correspond to jurors' ratings. Neither judges nor attorneys found hung jury cases to be more complex than verdict cases. Overall, judges and attorneys rated jurors' comprehension of legal and evidentiary issues high. However, once the jury hung, judges and prosecutors (but not defense attorneys) expressed concern about whether the jurors understood the evidence and law. Of course, attorneys and judges rated the jurors after the jury declared its verdict, so perhaps they were reflecting in hindsight.

The prosecution bears the burden of proof. Thus, it is not a surprise that the jurors' ratings of prosecutor skill were slightly higher than their ratings of the defense attorneys nor that conviction rates are generally more than 50 percent. Analyzing the relative performance of the prosecutor versus the defense attorney from the jurors' and judges' point of view reveals that the winning side was indeed rated as more skillful than the opposing side. In hung juries, jurors rated defense attorneys' skills stronger as compared to prosecutors' skills.

Dynamics of Jury Deliberations

Jurors are greatly influenced by deliberations. Twenty percent of jurors reported that they did not even begin to form an opinion about the evidence until jury deliberations had commenced, and one-quarter changed their minds about their initial verdict preferences as a result of deliberations. More specific to this study, we found hung juries and verdict juries differed with respect to both the interpersonal dynamics among jurors and the group discussion processes during deliberations. The timing of the first vote, domination by one or two members of the jury during deliberations, and a focus of the deliberations on securing a verdict as compared to discussing the evidence were especially critical to the likelihood of a hung jury.

Initial juror votes are generally predictive of the final jury outcome. Juries with a large majority of members favoring either an acquittal or conviction on the first ballot, which occurred in more than half of the cases in our sample, were more likely to result in a verdict. In contrast, the vast majority of cases in which juries hang on at least one charge were evenly split or had only a small majority favoring one side on the first vote. Forty-two percent of the hung jury cases deadlocked with only one or two jurors holding out against the majority.

To further examine the voting process, we asked jurors when they took the first vote in deliberations. Members of hung juries reported voting earlier than the members of verdict juries. Previous work in this area has also linked early voting to deadlocked juries. Perhaps jurors would benefit from guidance on how to conduct effective small group discussions.

Although serving on a jury sometimes bonds jurors together on a personal level, interpersonal dynamics may also be the source of contention. We found that interpersonal dynamics were consistently problematic in hung juries. The group dynamics of a jury may not explain why a jury hangs, but does indicate a struggle during deliberations. We defined group dynamics as the amount of conflict there was, how open-minded or unreasonable other jurors were, how much time jurors spent convincing one another, and how often one or two jurors dominated the discussions. Furthermore, hung jurors were considerably less satisfied with the deliberation process than verdict jurors.

Juries that hung reported more trouble remembering the evidence and law, less thorough discussions of the evidence during deliberations, more conflict among the jurors and more domination by one or two jurors, and a larger presence of unreasonable people on the jury. Hung jurors were also considerably less satisfied with the deliberation process than verdict jurors.

One of the questions posed to jurors asked them to identify what their verdict preference would have been if the decision were entirely up to them individually. A surprisingly large proportion of jurors maintained individual verdict preferences that ran counter to the group's majority. Yet some jurors choose to acquiesce while others held out, hanging the jury. From this, we wanted to know what distinguished holdout jurors from those with individual preferences that differed from their final group vote, but did not hang the case. Jurors differed on numerous questions; yet the findings suggest that evidentiary factors continue to play a dominant role in jury deadlock. Characteristically, holdout jurors thought that the judge's instructions were more difficult to understand, the police were less believable, the defense's case was stronger, and the defense attorneys were more skillful. Holdout jurors, much like hung juries in general, said that the first vote was held earlier in deliberations, and the holdouts were more certain on that first vote. Holdout jurors were also more surprised by other jurors' votes and were much less satisfied with the deliberation process and, logically, the final decision.

Juror Attitudes

Both popular culture and recent commentators paint a vivid picture of a holdout juror engaged in race-based jury nullification or the promotion of a personal political agenda. Our data simply do not support these images. We did not find any effect of race or ethnicity as a predictor of hung juries. Furthermore, no other demographic characteristics differentiated verdict juries from hung juries nor did verdict jurors and hung jurors differ on most attitudinal questions. In fact, jurors' general impressions of the courts and the police were quite positive overall. Jurors, much like other members of the public, believe the courts are generally fair. In fact, jurors rate the fairness of the laws in their cases relatively high. However, juries hanging on at least one charge rated the fairness of the law in their case lower than verdict juries. Similarly, hung juries rated the fairness of the legally correct

Juries hanging on one or more charges rated the fairness of the law and the fairness of the legally correct outcome lower than verdict juries.

outcome as lower than verdict juries. These attitudes about the fairness or legitimacy of the governing law are often associated with juror nullification. It is important to note, however, that attitudes do not necessarily result in actions and we cannot infer from the existence of these attitudes that individual jurors intentionally refused to agree on a verdict on the basis of their concerns about the fairness of the law.

We confirmed these results in multivariate analyses as well as in the case study that focused only on the 46 hung cases. We assigned primary and secondary reasons in our qualitative analysis describing why the cases hung on one or more charges. Juror concerns of legal fairness played some role in approximately one-quarter of the hung jury cases. However, this reason was most often seen in conjunction with other factors and was the sole factor in only three of the hung jury cases.

Practical Implications

These findings suggest that frequent proposals for reducing the incidence of hung juries have not addressed the underlying causes of hung juries but merely the symptoms. A primary example is the proposal to eliminate unanimous decision rules for jury verdicts. Using jurors' responses, we found that 42 percent of the hung juries across all four sites deadlocked with only one or two holdout jurors. Clearly, permitting non-unanimous verdicts would effectively reduce the number of hung juries. However, research on the effect of majority-rule versus unanimous decision rule has highlighted a considerable concern for the quality of deliberations. Majority-rule jurors tend to deliberate toward a group consensus (verdict-driven), emphasizing the voting process by securing ballots early in the deliberation process. In our data, hung juries voted earlier than verdict juries. This proposed change would be unlikely to tap the true causes of hung juries: evidentiary factors, problematic deliberations, and juror attitudes about fairness.

Frequent proposals for reducing the incidence of hung juries do not address the underlying cause of hung juries, but merely the symptoms.

Another proposal addresses changes in the voir dire process. Various proposals currently consider the number of peremptory challenges allowed for attorneys. Some suggest attorneys need more challenges, while others suggest severely restricting the number. Interestingly, we found that attorneys were typically satisfied with the voir dire process regardless of whether the jury hung or not.

A discussion on how to reduce the incidence of hung juries relies on a basic assumption: that deadlocked jurors are bad jurors. Attorneys or, in some jurisdictions, judges are responsible for eliminating impartial jurors during voir dire. Yet it appears that holdout jurors are difficult to detect. Furthermore, the questions asked of jurors may not be the most appropriate for identifying a holdout juror. Attitudinal questions and demographic data are not good predictors of which juries will hang. Perhaps as a better approach, voir dire questions should assess the juror's ability to problem solve and whether he or she possesses successful interpersonal skills.

A final proposal we hoped to study was the effect of various deadlock instructions on reaching a verdict. We found that most judges do not give assistance to juries who declare they reached an impasse, and if a judge does instruct the jury, it is likely an *Allen*-type charge. In our data, we did not detect any difference for whether a jury hung or not based on the types of deadlock instructions.

What can be done to produce the most effective use of time and resources, yet also produce the most just and accurate decision in felony jury trials? Evidentiary issues are most

within the reach of courts and attorneys to address. Although a hung jury may be an appropriate outcome when the evidence evenly supports both sides, better pre-trial decisions and trial preparation will effectively reduce hung juries. If juries hang due to weak evidence, prosecutors should reevaluate charging policies and decisions on which cases are brought to trial. In particular, prosecutors should assess the degree to which publicity about police misconduct has damaged police credibility in jury trials and be prepared to offer corroborating evidence in trials that rely heavily on police testimony. If a case progresses to trial, case preparation becomes imperative. As we found, attorney skill affected the outcome of the trial.

Jurors' perceptions of case complexity were also related to the likelihood of a hung jury, suggesting that efforts to provide jurors with tools to comprehend the evidence and process information more effectively may reduce the incidence of juror confusion and resulting deadlock. Simple tools may benefit jurors, such as providing jurors with paper on which to take notes or notebooks with relevant case information, and clear, concise, and well-organized written copies of instructions.⁶ Hung juries reported their cases were more complex. Yet we also found that jurors' assessment of complexity was lower when jurors were allowed to submit questions to witnesses.

Individuals serving on a jury are likely inexperienced in making a legally binding decision of great consequence. Based on our findings that hung juries experience interpersonal conflict or dysfunctional deliberations, jurors would be at an advantage if judges provided guidance on how to deliberate. Judges are often reluctant to offer guidance to jurors because of concerns about interfering or influencing deliberations. The emphasis of our proposal is on guiding the process of deliberations, as opposed to intruding on the content of jury discussions. Advice on structuring discussions, selecting a presiding juror, conducting ballots, discouraging counterproductive behavior such as juror dominance and close-mindedness, and providing suggestions for resolving conflict may be a more productive remedy for poor interpersonal dynamics than most common practices, which consisted of administering an *Allen* charge or doing nothing.⁷

We found a common secondary reason for hung juries was when particular jurors believed the legally correct outcome was unfair. A resolution is for attorneys to identify and excuse these jurors during the voir dire process. Unfortunately, identifying the holdouts or the minority faction is not an easy task. Furthermore, it is difficult to identify true jury nullification. It is easy to confuse jury nullification with disagreement over the interpretation of evidentiary or legal matters.

Despite the policy changes suggested above, some juries will still hang. Statistically speaking, some juries will simply be unable to agree. As such, we have come full circle to our original question: What is a typical or reasonable rate at which juries hang? We know that several jurisdictions have rates higher than the conventional 5 percent. Even more importantly, we know that the rates vary considerably from jurisdiction to jurisdiction. Whether the rate matches our low rate of 3.1 percent or our high rate of 22.3 percent, we also know that a small percentage will simply be unable to reach consensus. The data from this project suggest that hung jury rates can be reduced by paying attention to evidence strengths and charging decisions, guiding jurors in deliberations, and paying attention to fairness concerns. These steps improve the likelihood that juror deadlock will only take place in cases in which the evidence is so closely

⁶ See generally G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead, (eds.), *Jury Trial Innovations* (National Center for State Courts, 1997).

⁷The American Judicature Society has published a useful booklet on model deliberation guidance. *The American Judicature Society, Behind Closed Doors: A Guide for Jury Deliberations*. See www.ajs.org.

matched that 12 reasonable people can disagree about the conclusions they should draw about its meaning. While this may not be the preferred outcome in any given case, it will preserve the traditional role of the jury in the American justice system.