

CHAPTER FIVE – DELIBERATION PROCESS

The deliberation process is a unique and important part of the jury's experience that serves several critical functions. As a democratic society, Americans accept group decisions over individual decisions, partly because groups impart a wider representation of backgrounds and experiences, assuming a relative amount of diversity among the group's individuals. Juries not only incorporate diverse members of the community, but they are asked to render a single, unanimous group decision. Individually, jurors observe the case presented before them, whereupon the judge instructs the jurors to retire to the deliberation room to discuss what they have seen and heard and agree upon a decision.

Ideally, deliberation encourages the collective pooling of information and the correction of mistaken memories or conclusions. Jurors test their interpretations and construal of the evidence during this discussion. It allows jurors to clarify, change, or solidify their initial positions.¹³⁴ In most instances, deliberation produces an agreed-upon verdict. However, it may also lead to impasse and a hung jury. It is worthwhile comparing and contrasting the deliberation processes of verdict and hung juries to see if there are characteristic features of deliberations in juries that hang.

Questions Asked

To measure how a jury collectively comes to a decision, we asked jurors several questions. One set of questions identified each juror's verdict preferences and how the juror voted at various stages during the trial and in deliberations. The second set asked jurors to report their perceptions of the jury's interpersonal experience.

From Jurors' Opinions to Ballots

Jurors were asked to recall their preliminary verdict preferences during several stages of the trial. Jurors were asked, "Thinking back over the trial and jury deliberations, when would you say that you started leaning toward one side or the other in this case?" Although only a small number began to lean toward one side or another during opening statements, many (52.6%) began forming an opinion during the evidentiary period of the trial. Another 20% began leaning during deliberations with other jurors. See Table 5.1. It is important to note, however, that the questions only indicate the timing of jurors' initial preferences, not the direction of those preferences. A juror who began leaning during the prosecution's evidence could be leaning toward either a conviction or an acquittal.

¹³⁴ Phoebe C. Ellsworth, Are Twelve Heads Better Than One? 52 Law & Contemp. Probs. 205, 206 (1989); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 112 (1986).

Table 5.1
When did you start leaning towards a side?

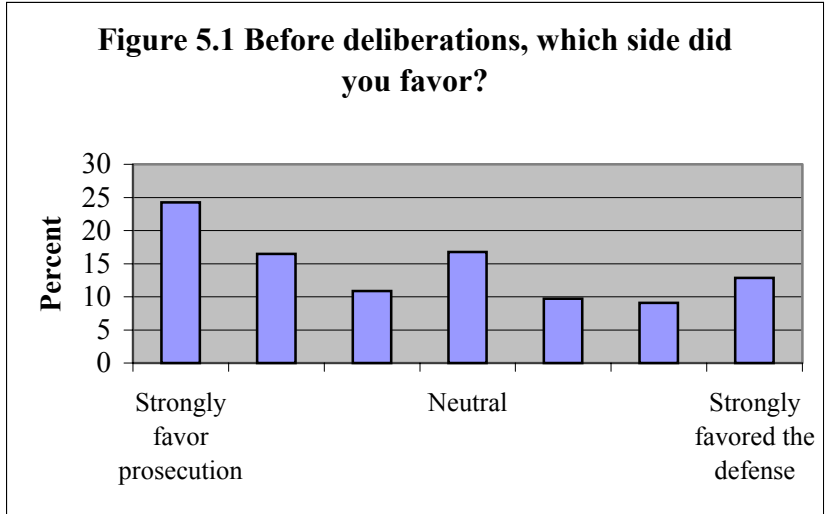
	%
Prosecutor's opening statement	6.0
Defense attorney's opening statement	3.5
Testimony of state's witnesses	37.2
Testimony of defense's witnesses	15.4
Closing argument of prosecutor	6.8
Closing argument of defense	4.7
Judge's final legal instructions	7.0
Jury's final deliberations	19.5
Total	100.0

Examining the link between when jurors report that they began leaning toward one side with their first ballot votes, we find, not surprisingly, that jurors who are undecided on the first ballot are most likely to report that they first began leaning during the final deliberations. Indeed, over one-third (36%) of the undecided jurors (on the first ballot) say that they began leaning during the jury's final deliberations, compared to 16% of those who leaning towards prosecution and 20% of the defense jurors.¹³⁵ In other analyses, jurors who said they strongly favored either the prosecution or the defense in the final ballot tended to report leaning earlier in the case, while jurors with less extreme opinions tended to be more undecided. Even so, most waited until they heard the evidence before reportedly beginning to lean toward one side or the other.

Jurors indicated whether they changed their minds about their preliminary verdict preferences during the case and if so, when this change occurred. Most of the jurors (61.7%) did change their mind at some point during trial or deliberations. The two time periods with the largest percentage of jurors changing their minds occurred during logical stages. Almost one-fifth (18.4%) of the jurors reported they changed their minds during the state's testimony, which corresponds to the judge's instructions that jurors presume the defendant is innocent until proven guilty. And almost one-quarter (23.6 %) of the jurors changed their minds during deliberations with other jurors. Each of the remaining trial stages found less than ten percent of the jurors changing their minds.

Jurors were asked, "Before you began deliberating with your fellow jurors at the end of trial (after all of the evidence and the judge's instructions had been presented), which side did you favor?" Consistent with most conviction rates, jurors' opinions were skewed towards favoring the prosecution rather than the defense even early in the trial. Yet quite a few jurors remained neutral prior to deliberations. See Figure 5.1.

¹³⁵ The relationship between a juror's first ballot vote and the report about when he or she began leaning toward one side or another was statistically significant, Chi square (14) = 162.70 , p = .0001. This analysis was conducted with individual jurors' questionnaires and did not take into account the fact that jurors deliberated together.



To examine the voting process, and the relationship between initial opinions and final outcomes, we asked jurors to record the outcome of the first and the final votes on the most serious charge. We also inquired when the first vote occurred. Does the voting process differ for juries that reach a verdict compared to those who cannot? Interestingly, the members of hung juries report taking a vote – on average, in the first 10 minutes of deliberations – earlier than the members of verdict juries.¹³⁶ This is an intriguing result in that other projects using mock juries have also found a link between early voting and deadlock, as discussed in Chapter 1.

The initial votes in hung and verdict juries diverge as well. On the first vote, most verdict cases have a large majority (83% or more) favoring either an acquittal or conviction. Over half of the cases in which juries hang on at least one charge have a small majority (64%-82%) favoring acquittal or conviction on the first vote and another 28 percent (8 cases) fairly evenly split (50%-63%) on the first vote. See Table 5.2.

¹³⁶ M (Verdict Juries) = 3.02; M (Hung Juries) = 2.64, F (1, 338) = 4.51, p = .034.

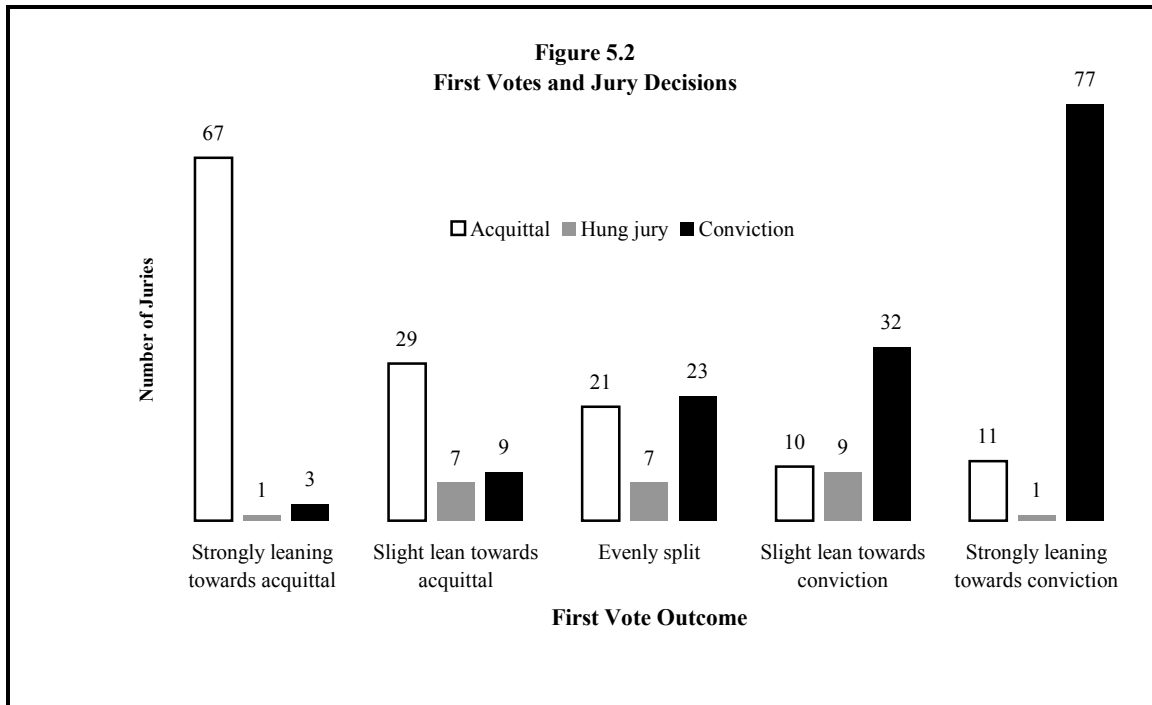
First Vote	Verdict		Hung	
	N	%	N	%
Evenly Split	46	15.4	8	27.6
Small Majority	83	27.9	16	55.2
Large Majority	169	56.7	5	17.2
Total	298	100.0	29	100.0

We examined the change if any, from the first vote to the final vote taken in deliberations. In a large majority of the cases, those leaning towards conviction or acquittal vote similarly in the first and final votes. On the other hand, a large majority of juries with more of an even split early on shift towards either an acquittal or conviction by the final vote in deliberations. See Table 5.3.

Of those on First Vote	Remain on Final Vote		Changed	
	N	%	N	%
Lean towards Acquittal	103	86.6	15	12.6
Evenly Split	11	20.3	43	79.6
Lean towards Conviction	132	88.6	16	10.7

It is interesting to see how the outcome of the jurors' first vote compares to the jury's group decision on the first count.¹³⁷ In general, jurors tend to persist in their early opinions. If jurors are leaning toward conviction initially, they most often convict. A similar pattern holds for those who initially favor acquittal. However, if jurors are quite evenly split or the jury has only a slight majority, the case is more likely to hang. Figure 5.2 demonstrates this pattern.

¹³⁷ Cases generally list the first count as the most serious charge. For the comparison between votes and jury decisions, we assumed that the jury's decision on the first count was equivalent to the most serious charge.



How would eliminating a unanimous decision rule affect the frequency of hung juries? If we assume that all other aspects of the deliberation are unaffected,¹³⁸ yet the jury at the end of the deliberation can reach a binding verdict even if one or two of its members disagree, that should reduce the frequency of hung juries. Of the 43 hung jury cases in the sample with final vote information, we find that 18 of them (42%) include two or fewer jurors in the minority on the final vote. Of those 18 cases, the proportion of cases with one person versus two person juror holdouts is about equal.¹³⁹

Interpersonal Dynamics in Deliberations

The deliberation process is the phase where individual opinions are expressed and hashed out to produce a group decision. Through these discussions most juries reach a consensus. To uncover why some do not, we compared reports about the deliberation process for verdict juries and hung juries.

To begin with, hung jurors are more likely to be surprised by the verdict preferences that other jurors express at the start of jury deliberations. Although jurors overall do not say they have a lot of trouble remembering the evidence and judicial instructions about the law during their deliberations (the average response is 2.6 and 2.7 for law and evidence respectively, where

¹³⁸ The research described in Chapter 1 suggests that the nature of the deliberative process is quite different in unanimity and majority decision rule groups, so the deliberations under the two decision rules are likely to differ on a number of dimensions.

¹³⁹ Maricopa County has a unique situation with only 8 jurors in some of the felony cases. It is unlikely that a policy change would be applied to a majority-rule decision with only 8 jurors. Therefore, an additional 3 Maricopa cases with one or two person holdouts were not included in the previous count of 18 cases.

1 = no trouble and 7 = a great deal), hung jurors report more trouble on both fronts. Both hung and verdict jury members say that they had sufficient time to express their views, report that they participated a great deal in the deliberations, and state that the deliberations thoroughly considered each juror's viewpoint. However, verdict juries report a greater degree of thoroughness. This is interesting in that their deliberations take on average approximately half the amount of time of the hung jury deliberations.

Table 5.4 contrasts verdict juries with juries that hung on at least one charge. The pattern of results is virtually identical for the comparison of verdict juries and juries that hang on all charges. The deliberation again is seen as more conflict-ridden, with greater difficulty in recalling the evidence and law, greater domination by one or two people, and a greater presence of "unreasonable people" on the jury. There are also very similar patterns of responses across sites.

Table 5.4
Deliberation Process in Verdict and Hung Juries

	Jury Trial Outcome		F-value	p-value
	Verdict	Any Hung		
Surprised by other jurors' verdict preferences?	3.21	3.96	19.22 *	0.001
Trouble recalling trial evidence during deliberation?	2.58	3.18	14.70 *	0.001
Trouble recalling law during deliberation?	2.49	3.15	12.00 *	0.001
How thoroughly was each juror's viewpoint considered?	5.98	5.59	14.63 *	0.001
Enough time to express views during deliberations?	6.35	6.33	0.04	0.846
How open-minded were other jurors?	5.75	4.48	69.49 *	0.001
Time and effort spent trying to convince others?	4.44	6.08	59.81 *	0.001
How much did you participate in deliberations?	5.71	5.85	2.24	0.136
How influential were you in deliberations?	4.57	4.33	6.16 *	0.014
Agree there were unreasonable people on jury?	2.64	4.60	90.25 *	0.001
Agree one or two jurors dominated the deliberations?	3.74	4.44	20.15 *	0.001
Jury personally close and friendly?	5.48	5.29	3.09	0.080
How much conflict was there on the jury?	2.91	4.43	53.73 *	0.001
Difficult to reach decision?	4.34	2.06	97.00 *	0.001
Satisfied with jury's deliberation?	6.06	4.37	149.37 *	0.001

Hung jury deliberations are characterized by more conflict, as shown in Table 5.4. Compared to verdict jurors, members of hung juries are more likely to agree with the statement, "There were some very unreasonable people on this jury." They are also more likely to say that one or two jurors dominated the deliberations. Predictably, they report that much more time and effort is spent trying to convince one another, that it is more difficult for the jury to reach a decision, and that they are less satisfied with the deliberation.

Based on these findings of the deliberation process, we undertook a factor analysis of these items related to group processes to determine which variables tended to correlate, which identified the *Group Dynamics* index. The index combined the following variables: how much conflict there was, how open-minded or unreasonable other jurors were, how much time jurors spent convincing one another, how often one or two jurors dominated the discussions, how difficult it was to reach a decision, and how difficult it was for the jury to understand the evidence.¹⁴⁰ The group dynamics scores were significantly different in hung versus verdict juries. Clearly, the dynamics present in deliberations were influential on the jurors individually as well as on their final group decision in the case.

Individual Verdict Preferences

Until now, we have limited our examination to hung versus verdict juries. Yet we also collected detailed information from individual jurors. For example, we asked jurors, “If it were entirely up to you as a one-person jury, what would your verdict have been in this case?” Their responses, which we call “individual verdict preferences,” provide insight into who the holdouts were and how their views affected the jury as a whole. From a jury research perspective, it is also interesting to understand individual responses. In much jury simulation research, only individual responses are collected. How important are deliberations and group decisions in comparison to individual decisions?

Before we discuss the results of this inquiry, we should consider some caveats about the question and how jurors may have interpreted it. First, a substantial number of jurors (N=420, 12%) did not answer this question, a relatively high non-response rate for this study, suggesting that some may have found it difficult or confusing. As with all written questionnaires, respondents (in this case, jurors) may not have interpreted the question uniformly. One possibility is that the jurors may have thought we meant individual preference on the most serious vote (consistent with earlier questions); others may have thought we meant on the entire case. In another situation, some jurors may have thought “entirely up to you” meant what their verdict preference was prior to the deliberations, without the influence of other jurors. Perhaps the jurors are responding to levels of uncertainty in their votes with the group. Moreover, recall, jurors recorded their individual verdict preference after deliberations were complete and the jury stated a final verdict. Or, it raises the question of whether a difference in verdict preferences indicates that jurors were affected (legitimately or illegitimately) by the group discussions.

We evaluated the individual verdict preferences and discovered that 7.7% of the jurors remained undecided about the verdict at the end of the deliberation; and 12.9% said that if it were up to them they would have reached a verdict different from that of the jury as a whole. Close to half (46%) of the juries included either someone who remained undecided or who expressed a contrary individual verdict preference. These findings suggest we should take a closer look at some of the individual jurors’ preferences and the possible effect of deliberations on their votes. Even more important than evaluating the number of undecided jurors was the number of jurors who were in disagreement with the other jurors from the same jury. Over one-half (193 cases or 53.9%) of the cases had at least one juror with an individual preference against the group’s final vote on the most serious charge.

¹⁴⁰ The Group Dynamics index has a scale reliability of Cronbach’s $\alpha=0.91$.

Eighty-seven percent of the juries reached a verdict on all charges, so this level of disagreement came as a surprise. Why should individual verdict preferences – what jurors say they would do if it were entirely up to them – be so different from the jurors’ actual votes on the final verdict. One possibility is that the experience of jury service may instill a sense of role identity to a much greater extent than is generally believed. The expectation placed on all jurors from the very beginning of their jury service is that they will listen to the evidence presented at trial, apply the law as described in the jury instructions, and after discussing the evidence and law, arrive at a group consensus. It is possible that some jurors accede to the majority view, not because they are wholeheartedly persuaded by it, but because the pressure to conform to the role of consensus in jury deliberations outweighs any individual preferences. This does not necessarily mean that jurors whose individual preferences differ from their formal votes are simply caving in to the majority for the sake of unanimity. Individual preferences, for example, can be based on factors other than the weight of the evidence and the application of governing law (e.g., individual biases, beliefs about the fairness of specific laws). It may be that by adopting the role identity of jurors who are sworn to arrive at a group decision helps to isolate extra-legal influences that ideally are absent from the judicial process.

When there was a disparity between jurors’ individual preferences and the actual trial outcome, three-fourths of the time only one or two jurors disagreed. Yet one-quarter of the time, there were factions of three or more jurors whose individual preferences differed from their actual final vote. We examined cases with large numbers of jurors who expressed an individual preference against the final outcome if the decision were up to them alone. We found that a few of these cases were plagued with dominant and/or unreasonable jurors. A couple jurors simply disagreed on which side had a stronger case. As stated in the beginning of this section, the jurors may have had differing interpretations of the question. In many of the cases, the defendant faced several counts, often with lesser included charges. The jurors may have been answering the question on how they would have voted if they alone could decide more generally (i.e. guilt vs. innocence) whereas other may have had the first or most serious count in mind.

Given that jurors in a large proportion of trials expressed individual verdict preferences that differ from the trial verdict, what distinguishes jurors who eventually acquiesce to the majority view in deliberations from jurors who continue to holdout, producing a hung jury?¹⁴¹ Upon examination, we found that jurors who eventually hung the case (hereinafter “holdout jurors”) thought that the judge’s instructions were more difficult to understand, that the police were less believable, that the defense’s case was stronger, and that the defense attorney was more skillful compared to jurors who eventually joined in a unanimous verdict in spite of their individual preferences. See Table 5.5. The holdout jurors were also more likely to say that the first vote was taken earlier in deliberations, and that they were more certain on that vote.

¹⁴¹ The personal verdict preferences differing from the actual jury verdict were symmetrical with the acquittal or conviction rates of the respective sites.

Table 5.5
Comparison of Jurors Whose Individual Preferences Differ from Final Votes

		N	Mean	Std. Dev.	F	Sig.
Easy to understand judge's instructions? (1 = very difficult, 7 = very easy)	Did not hang	287	5.6	1.7	4.1	0.04
	Holdout	104	5.2	1.8		
How believable were the police? (1 = not at all believable, 7 = very believable)	Did not hang	281	5.1	1.7	4.4	0.04
	Holdout	106	4.7	1.7		
How skillful the defense attorney? (1 = not at all skillful, 7 = very skillful)	Did not hang	290	4.2	1.8	6.9	0.01
	Holdout	104	4.7	1.6		
How strong was defense's case (1 = consistently weak, 7 = consistently strong)	Did not hang	288	3.5	1.6	6.4	0.01
	Holdout	105	4.0	1.7		
How easy for you personally to decide on verdict? (1 = very difficult, 7 = very easy)	Did not hang	288	3.4	2.1	9.5	0.00
	Holdout	104	4.1	2.3		
Difficult to judge due to religious beliefs? (1 = strongly disagree, 7 = strongly agree)	Did not hang	286	2.2	1.9	10.5	0.00
	Holdout	104	1.6	1.3		
When was jury's first vote? (2 = within first 10 min. of delib., 3 = early on in delib.)	Did not hang	288	3.0	1.5	6.2	0.01
	Holdout	106	2.5	1.4		
How certain were you on the first vote? (1 = not at all certain, 7 = very certain)	Did not hang	282	5.1	1.8	9.0	0.00
	Holdout	105	5.7	1.5		

These same holdout jurors also said it was easier to decide the case personally, it was more difficult for the jury to reach a decision, and less likely to say it was difficult to judge another person based on religious beliefs. The holdout jurors that hung the case thought the jury was less open-minded to others' ideas, each point of view was not as thoroughly considered, there were more unreasonable jurors, more conflict, and more time spent convincing one another to agree. Surprisingly, the holdout jurors thought they were less influential during deliberations than those that disagreed alone, but did not hang. Holdout jurors were more surprised by others' votes and subsequently less satisfied with the deliberations and the decision. See Table 5.6. All of the aforementioned results reached statistical significance.

Table 5.6
Comparison of Jurors Whose Individual Preferences Differ from Final Votes

		N	Mean	Std. Dev.	F	Sig.
How surprised were you by other jurors' votes? (1 = not at all surprised, 7 = very surprised)	Did not hang	290	3.9	2.0	5.7	0.02
	Holdout	106	4.4	2.1		
How openminded was the jury to each other's ideas? (1 = not at all open, 7 = very open)	Did not hang	284	5.1	1.8	9.8	0.00
	Holdout	103	4.4	1.9		
How influential were you in the deliberations? (1 = not at all influential, 7 = very influential)	Did not hang	287	4.5	1.6	4.1	0.04
	Holdout	104	4.1	1.6		
Some unreasonable people on jury? (1 = strongly disagree, 7 = strongly agree)	Did not hang	287	3.3	2.3	12.6	0.00
	Holdout	106	4.2	2.2		
How thoroughly was each juror's point of view (1 = not at all thoroughly, 7 = very thoroughly)	Did not hang	286	5.7	1.6	3.9	0.05
	Holdout	104	5.3	1.5		
How much conflict on jury? (1 = none, 7 = a great deal)	Did not hang	288	3.4	2.0	24.3	0.00
	Holdout	103	4.5	2.0		
How much time/effort was spent trying to convince to (1 = none, 7 = a great deal)	Did not hang	285	5.2	1.7	31.4	0.00
	Holdout	103	6.2	1.2		
Easy to reach decision? (1 = very difficult, 7 = very easy)	Did not hang	285	3.4	1.8	50.7	0.00
	Holdout	106	2.0	1.5		
How satisfied were you with the deliberations? (1 = not at all satisfied, 7 = fully satisfied)	Did not hang	285	5.2	1.9	8.4	0.00
	Holdout	104	4.6	2.0		
How satisfied were you with the decision? (1 = not at all satisfied, 7 = fully satisfied)	Did not hang	289	5.0	2.0	12.9	0.00
	Holdout	105	4.1	2.4		

We examined the two groups' demographic characteristics for differences. None of the characteristics such as age, gender, race, educational background, income, level of religiosity, or occupational status was statistically significant between the two groups.

Judicial Actions When Jurors Deadlock

Some juries have difficulty but manage to reach a final decision in the case. Others do not. Are there actions that a judge can take to assist the jury when it indicates that it is experiencing difficulty? On the case data survey, we inquired whether the jury ever indicated it was having difficulty reaching a verdict, and if so, how many times. In 65 jury trials in our sample, juries reported that they were having trouble reaching a verdict. In 27 of the 65 cases, juries communicated their trouble once, in 24 cases twice, and in 14 trials three times. Judges sent juries back to deliberate to try to resolve the difficulty in most of these trials (58 of 65).

Judges also provided different types of assistance. Table 5.7 shows the different types of assistance rendered, and the frequency of use in verdict and hung juries. The numbers indicate how many cases a particular type of assistance is provided. For comparison purposes, both cases that hung on any charge and cases that hung on all charges are included in the table, and contrasted with verdict juries.

Table 5.7
Assistance to Juries Having Trouble Reaching Verdict

	Jury Trial Outcome			Total Use
	Verdict	Hung		
		On Any	On All	
No assistance given	8	8	4	16
<i>Allen</i> -type charge	10	10	5	20
Additional jury instructions	6	7	6	13
Case reopened for additional evidence	0	0	0	0
Case reopened for additional argument by counsel	0	4	3	4
Other assistance	0	4	2	4
Totals	24	33	20	57

No assistance is reportedly given to juries in 16 of the 57 cases for which we have information. The most common method of assisting juries is the *Allen* charge, used in about one-third of the cases. The *Allen*-type charge is used most frequently in the Bronx and the District of Columbia. Another quarter of the judges give additional jury instructions, and the case is reopened for additional argument by counsel in four cases, all of them in Los Angeles. No case in the sample is reopened for additional evidence, a practice that is permitted in Arizona under revised procedural jury rules. Although these numbers are quite small, there is no apparent relationship between the type of assistance provided and whether or not a jury ultimately reaches a verdict.

Whether or not the jury has communicated directly to the judge about its difficulties, judges do appear to be able to anticipate when the jury will hang to some degree. When asked to predict the likelihood that the jury would hang, in advance of knowing the verdict, judges predict 19% of the verdict juries will hang, compared to 38% of the juries that eventually hang on one or more charges.¹⁴²

Conclusions

It is obvious from these analyses that the process of jury deliberation is a critically important factor in the ultimate outcome of the trial. Certainly the deliberation practices, especially the timing of the first vote are related to the likelihood of juror deadlock. Also important are the interpersonal dynamics of the jurors during deliberations. Juries that hung reported having more trouble remembering the evidence and law, having less thorough discussions of the evidence during deliberations, experiencing more conflict among the jurors and more domination by one or two jurors, and having a larger presence of unreasonable people on the jury. These findings suggest that jurors might benefit from guidance on how to conduct effective small group discussions.

¹⁴² $F(1, 328) = 33.96, p = .001$.

A second striking finding is that a large proportion of jurors appear to conform to the majority viewpoint in deliberations, in spite of the fact that that viewpoint is inconsistent with their individual verdict preferences. To some extent, this may be the result of the strong pressure for unanimity that is inculcated in jurors from the very beginning of their jury experience. But the differences between holdout jurors who maintain their individual preferences and hang the jury and the jurors who do eventually acquiesce in a unanimous verdict suggest that evidentiary factors continue to play a dominant role in jury deadlock. The holdout jurors on hung juries appear to maintain their positions on principled grounds such as ambiguous evidence and disagreements about the correct application of the law.