Are Hung Juries A Problem?

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INTRODUCTION

In the mid to late 1990s, the criminal justice community developed an intense interest in the phenomenon of jury deadlock, more commonly known as a "hung jury." Several factors prompted this interest. A number of communities, especially in California, were reporting that up to one quarter of all criminal jury trials were routinely resulting in mistrials due to jury deadlock. Other urban areas including the District of Columbia, Manhattan, NY and Houston, Texas began reporting hung jury rates in excess of 10%. These numbers raised significant concerns about the monetary costs associated with retrying cases as well as the emotional toll on victims and witnesses and potential public safety costs associated with criminal defendants serving less time in prison due to the failure of the jury to convict.[1]

During the same general time period, a handful of high profile trials resulted in hung juries[2] and several articles in prominent periodicals highlighted the issue of jury deadlock for the public. For example, Lyle and Eric Menendez stood trial on charges that they murdered their parents, raising a controversial "abuse excuse" in their own defense. The case was heard by dual juries, both of which deadlocked. At the retrial, the brothers were convicted of first-degree murder.[3] In another high profile case, the former mayor of Washington, DC, Marion Barry, stood trial on drug charges. However, the jury convicted on just one charge, acquitted on another, and hung on the remainder.[4]

In the wake of these high profile hung juries, some commentators questioned whether contemporary jurors had the intelligence and cognitive reasoning skills to evaluate evidence objectively. Other observers suggested that holdout jurors were deliberately engaging in jury nullification on racial or ethnic grounds. *The New Yorker* published an article by Professor Jeffrey Rosen entitled "One Angry Woman" that attributed jury deadlock in the District of Columbia to African-American women who were unwilling to play a part in sending another "brother" to prison.[5]

A frequently heard proposal for reducing the number of hung juries is non-unanimous verdicts, which are permitted in felony trials in Oregon[6] and in Louisiana.[7] The U.S. Supreme Court ruled that non-unanimous verdicts do not violate constitutional norms in *Duncan v. Louisiana*[8] and *Apodaca v. Oregon.*[9] Oklahoma also permits non-unanimous verdicts, but only in misdemeanor trials; 34 states permit non-unanimous verdicts in civil trials.[10]

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[1] CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, NON-UNANIMOUS JURY VERDICTS: A NECESSARY CRIMINAL JUSTICE REFORM (May 1995) 6-10 [*hereinafter* CAL. DIST. ATTYS' ASS'N.].

[2] *Id.* at 3-6.

[3] HAZEL THORNTON, HUNG JURY (1995).

[4] Joan Biskupic, *In Jury Rooms, Form of Civil Protest Grows*, WASHINGTON POST, A1, (Feb. 8, 1999), (*available at: http://www.washingtonpost.com/wp-srv/national/jury080299.htm*).

[5] Jeffrey Rosen, *One Angry Woman,* NEW YORKER 55 (Feb. 24 & March 3, 1997).

[6] OR. REV. STAT. § 136.450.

[7] LA. CODE CRIM. PROC. 782.

[8] Duncan v. Louisiana, 391 U.S. 145 (1968).

Others within the criminal justice arena are more cautious about modifications to verdict decision rules for both practical and philosophical reasons. They recognize, for example, that no government agency or research institution has ever determined the "normal" hung jury rate or standards for an acceptable range of hung rates, making it impossible to compare current rates to a baseline. Although many pundits have speculated about the factors that contribute to jury deadlock (evidentiary problems such as witness credibility, jury misunderstanding of evidence or substantive law, racial conflict, jury nullification), very little empirical research exists to verify these claims.

Normative questions about hung juries have also prompted calls for caution in implementing reforms. For example, is the evidence in some cases so evenly balanced that jurors' inability to achieve a consensus can be viewed as a reasonable and appropriate result? If so, are reforms intended to reduce the incidence of hung juries on the basis of system efficiency an appropriate public policy? Are hung juries the natural result of increased racial and ethnic diversity in jury panels? And if so, is it appropriate to undermine the significance of minority involvement in the justice system by diluting the effect of dissenting viewpoints?

Providing an empirical picture of hung juries was the principle objective for this 4-year study by the National Center for State Courts (NCSC) with funding by the National Institute of Justice (NIJ).[11] The research methodology was envisioned as a two-phase process. In the first phase, the NCSC proposed to conduct a broad-based survey of hung jury rates in state and federal courts while the second phase consisted of an in-depth examination of jury behavior in 10 jurisdictions to compare case and jury characteristics in felony trials that result in a verdict to those that result in jury deadlock. The types of factors that the NCSC proposed to study in the in-depth examination included case characteristics such as case type, complexity, and evidentiary factors; trial procedures including *voir dire* and trial techniques related to jury performance; jury demographics and attitudes; and jury dynamics during deliberations including participation rates and levels of conflict.

The first phase turned out to be critically important to the project – more so than we realized when we began. Ultimately, we were able to collect and compile statistics about hung juries from state courts and from prosecutors' offices in 30 jurisdictions and from all federal courts. But in doing so, we discovered an important source of variation across jurisdictions: the definition of a "hung jury." In some jurisdictions, a jury was counted as "hung" if it failed to reach a verdict on any charge or on any defendant. In other jurisdictions, a hung jury was only counted if it hung on the most serious charge. Some only counted a hung jury if it hung on all counts or on all defendants. Obviously, these disparate definitions have a significant effect on hung jury rates and make it very difficult to compare rates across jurisdictions. We realized early on how important it would be to be able to capture this degree of detail and more in our analysis of hung juries in the second phase of the study.

In the second phase of the study, we intended to compare various characteristics of jury trials that result in deadlock to those that result in verdicts in 10 jurisdictions. For a variety of reasons, however, we were able to secure the cooperation of just four courts to participate in the

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[9] Apodaca v. Oregon, 406 U.S. 404 (1972).

[10] STATE COURT ORGANIZATION, 1998, Table 42 (Trial Juries: Size and Verdict Rules).

[11] NIJ grant no. 98-IJ-CX-0048.

study: Los Angeles County Superior Court in California, Maricopa County Superior Court in Arizona, Bronx County Supreme Court in New York, and the District of Columbia Superior Court in Washington, DC. Some courts declined to participate due to concerns about the administrative burden of data collection on their respect staff. A more significant issue, however, was judicial sensitivity to the inviolability of jury deliberations, especially in felony jury trials. In spite of various procedures that we put in place to protect the confidentiality of the data, many courts were concerned that the information collected from jurors might provide a basis for convicted defendants to appeal the verdict. Because both Oregon and Louisiana permit non-unanimous verdicts in felony trials, we were disappointed that we were unable to recruit a court from either of those jurisdictions to participate in the study. As a result of these concerns, the study sample was much smaller than we had originally expected. Nevertheless, we are confident that this study provides greater insight about the incidence and causes of hung juries than was previously available.

The remainder of report is organized into seven chapters. Chapter 1 consists of a literature review that provides a comprehensive update of the existing literature related to jury deadlock. Chapter 2 discusses the findings from our broad-based survey of hung jury rates in state and federal courts. Chapter 3 describes the study methods employed for the project. Chapter 4 and 5 discuss the findings from the examination of hung juries in four courts. Chapter 6 uses a case study approach to examine the specific reasons that the juries deadlocked in the 46 cases in our sample. Chapter 7 provides conclusions and policy recommendations based on the study findings.

CHAPTER ONE – LITERATURE REVIEW

From a legal perspective, jury deadlock is something akin to a non-event. It has no official impact on the disposition of the case, but rather is viewed as an administrative "hiccup" in the justice system that causes the trial participants – judge, lawyers, and litigants – to start again with a new jury as if the previous trial never occurred. It is matter of settled constitutional law that double jeopardy[12] does not apply for cases in which a mistrial is declared on grounds of jury deadlock.[13] In the event of a hung jury, the justice system assumes as a matter of principle that there is legal continuity between the earlier trial and the retrial. Double jeopardy does not apply because original jeopardy, which attached with the swearing of the previous jury, does not dissipate as a result of the mistrial.[14] The same principles apply in cases involving jury deadlock on one or more of multiple criminal counts and on one or more of multiple defendants tried by the same jury.[15]

There is no set limit on the number of times that the prosecution can retry a case following a hung jury, although several courts have held that substantive due process considerations[16] prohibit an unlimited number of retrials.[17] Various circumstances pertaining to the case and the trial (e.g., sufficiency of the evidence introduced at trial, likelihood that the prosecution will present more persuasive evidence in a new trial) may provide a basis for the trial judge to dismiss criminal charges filed against the defendant rather than permit the prosecution to retry the case.

As a practical matter, however, a hung jury can have a rather dramatic impact on the disposition of the case. For a large proportion of mistrials due to jury deadlock, it provides an opportunity for the prosecution and defendant to readdress the strength of their respective cases and, in many cases, agree on an alternative to retrial (dismissal or plea agreement). One study of case dispositions following mistrials due to jury deadlock found that 26% of cases are dismissed and 41% are resolved with a plea agreement. Only one-third of cases are retried, and the dispositions for those cases tend to mirror dispositions for a first trial.[18] In a sense, lawyer

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[12] U.S. CONSTITUTION Amendment 5 ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). Jeopardy – that is, the risk that a criminal defendant might be convicted – attaches at the time the jury is sworn.

[13] *See, e.g.,* Richardson v. U.S., 468 U.S. 317 (1984); U.S. v. Willis, 102 F.3d 1078 (10th Cir. 1996); Berry v. Florida, 458 So. 2d 1155 (Fla. Dist. Ct. App. 1st Dist. 1984).

[14] Wisconsin v. Elkinton, 202 N.W. 2d 28 (1972).

[15] U.S. v. Medansky, 486 F.2d 807 (7th Cir. 1973).

[16] U.S. CONSTITUTION Amendment 14, Section 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

[17] *See, e.g.,* Michigan v. Sierb, 581 N.W. 2d 219 (1998); Hawaii v. Moriwake, 647 P. 2d 705 (1982); New Jersey v. Abbati, 493 A. 2d 513 (1985). Berch and Berch proposed a rule for Arizona that would allow the court the power to dismiss prosecution of a case that had hung one or more times. Michael Berch & Rebecca Berch, *The Power of the Judiciary to Dismiss Criminal Charges After Several Hung Juries: A Proposed Rule to Control Judicial Discretion*, 30 LOYOLA OF LOS ANGELES L. REV. 487 (1997).

[18] PLANNING & MANAGEMENT CONSULTING CORPORATION, EMPIRICAL STUDY OF FREQUENCY OF OCCURRENCE CASES EFFECTS AND AMOUNT OF TIME CONSUMED BY HUNG JURIES, 4-30 to 4-37 (1975) [*hereinafter* PLANNING & MANAGEMENT study].

negotiations following a hung jury exemplify Galanter's proposition that "juries provide signals or markers by which legal actors form estimates of what other juries will do [and] on that basis make decisions and formulate policies about claims, offers, settlements, and trials."[19]

Hung Jury Rates

The frequency of hung juries and the factors that contribute to jury deadlock have not been studied extensively in the past. The classic study of the American jury, conducted by Kalven and Zeisel in the mid-1950s, was the first to focus, albeit briefly, on the phenomena of hung juries.[20] Based on a sample of 3,576 criminal trials held in 1955-56 and 1958, the authors found that 5.5% resulted in hung juries.[21] Although Kalven and Zeisel acknowledged that methodological flaws may have resulted in fewer reported hung juries than actually occurred,[22] this finding apparently forms the basis for the conventional wisdom that a hung jury rate of 5% is the norm.

The only empirical study to focus exclusively on actual hung juries was conducted by the Planning and Management Consulting Corporation in 1975.[23] The study examined all hung juries that occurred in the 10 largest counties in California during the period 1971 through 1973.[24] It found that the frequency of hung juries was 12.2%, rather than the expected 5% based on Kalven and Zeisel's earlier work. Hung jury rates also varied considerably from county to county and from year to year. See Table 1.1.[25]

[19] Marc Galanter, *The Regulatory Function of the Civil Jury, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Liten, ed.) 61 (1993).

[20] HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 453 (1966).

[21] *Id.* at 56.

[22] *Id.* at 57, n. 2.

[23] PLANNING & MANAGEMENT study, *supra* note 18. That project started out as an ambitious study to examine four aspects of hung juries: their frequency; their underlying causes; their effects; and the amount of time they consume. Problems of data collection and the lack of detailed records on case characteristics prevented researchers from examining the second and third factors — causes and effects.

[24] The sample represented 76% of the state population and 81% of all Superior Court trials that occurred during the three-year period.

[25] *Id.* at 4-6.

Table 1.1.
Percentage of Hung Juries, by County*

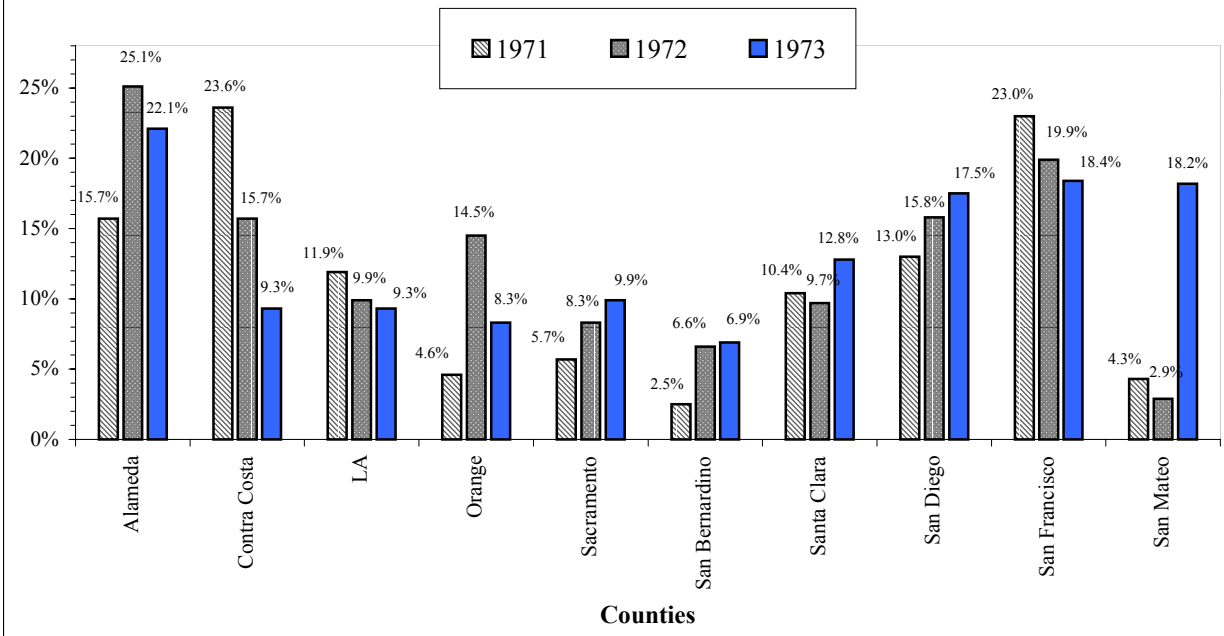
County	Year			Three year Average	Total Fluctuation in Hung Jury Rate, 1971-1973
	1971	1972	1973		
San Mateo	4.3%	2.9%	18.2%	8.5%	13.8%
Alameda	15.7%	25.1%	22.1%	21.0%	6.3%
San Diego	13.0%	15.8%	17.5%	15.4%	4.5%
San Bernardino	2.5%	6.6%	6.9%	5.3%	4.4%
Sacramento	5.7%	8.3%	9.9%	8.0%	4.3%
Orange	4.6%	14.5%	8.3%	9.1%	3.7%
Santa Clara	10.4%	9.7%	12.8%	11.0%	2.4%
Los Angeles	11.9%	9.9%	9.3%	10.3%	-2.6%
San Francisco	23.0%	19.9%	18.4%	20.4%	-4.7%
Contra Costa	23.6%	15.7%	9.3%	16.2%	-14.3%

*From Planning & Mannagement study, 4-6.

Over the three-year period, the lowest average hung jury rate (5.1%) occurred in San Bernardino, and the highest in Alameda County (21.0%).[26] The fluctuation in hung jury rates for each court averaged 7.2%, from a low of 2.4% in Santa Clara County to a high of 14.3% in Contra Costa County. Moreover, the direction of these fluctuations was not consistent across courts. See Figure 1.1. Rates in San Diego, San Bernardino, and Sacramento increased; rates in Los Angeles, San Francisco, and Contra Costa decreased; rates in Alameda and Orange spiked in 1972 and then declined; and rates in Santa Clara and San Mateo dropped in the second year of the study and then increased again.

[26] *Id.* at 4-4 to 4-5.

Figure 1.1
Percentage of Hung Juries, By County



Twenty years later, the California District Attorneys' Association found that hung jury rates in many of the same counties continued to average significantly higher than 5%, but also continued to vary substantially across counties and over time.[27] See Table 1.2. The rates varied from 3% to 23% across the nine counties for which data were available.[28]

[27] CAL. DIST. ATTYS.' ASS'N., *supra* note 1, Appendix C.

[28] *Id.*

Table 1.2
Percentage of Hung Juries, by County*

County	Year			Three Year Average	Total Change in Hung Jury Rate, 1992-1994
	1992	1993	1994		
Alameda		8.0%	15.0%	11.5%	7.0%
Contra Costa		17.6%	19.0%	18.3%	1.4%
Los Angeles	14.1%	12.9%	13.9%	13.6%	-0.2%
Ventura	10.8%	7.5%	7.5%	8.6%	-3.2%
Orange	10.7%	9.2%	7.4%	9.1%	-3.2%
Monterey	13.1%	5.4%	9.8%	9.4%	-3.3%
Riverside	17.4%	7.0%	9.4%	11.3%	-8.0%
Kern	11.8%	8.7%	3.4%	8.0%	-8.4%
Stanislaus	33.8%	30.2%	23.4%	29.1%	-10.4%

*From Cal. Dist. Attys.' Ass'n., Appendix C.

Only a handful of other courts across the country routinely document hung jury rates. In 1996, for example, the District of Columbia Superior Court reported a higher than expected hung jury rate of 11%.[29] But many courts do not record systematic information on the number of hung juries, ostensibly because they consider them to be infrequent and incidental to a final disposition, and thus inconsequential events that do not merit close monitoring.

The limited disposition data that are available are more likely to be collected by prosecutors' offices or sometimes by news reporters. But for the most part, empirically based rates are the exception, not the rule, and some estimates are extremely suspect, as Roger Parloff explained in a 1997 article criticizing the reliability of jury acquittal and deadlock rates that are often quoted in discussions of race-based nullification.[30] Parloff questioned hung jury rates comparing California's unanimous juries to Oregon's non-unanimous (10-to-2) juries. He noted, for example, that an article in *The American Enterprise* erroneously reported that there are between 10,000 and 11,000 hung juries annually in California (rather than the more reliable estimate of 10% to 15% *of the 10,000 to 11,000 criminal jury trials annually*).[31] Parloff also found the purported hung jury rate in Oregon, which was reported as four-tenths of one percent of all felony jury trials in a New Yorker article, suspicious in that "four of the eight counties in the survey reported no hung juries at all over the three-year span of the study".[32] He expected at least some hung juries were likely to occur in a three-year period.

[29] "Jury Management: Practices and Possibilities" (materials distributed for the District of Columbia Superior Court Judicial Education Conference, April 26, 1996).

[30] Roger Parloff, *Race and Juries: If It Ain't Broke ...,* AMERICAN LAWYER 5 (June 1997).

[31] *Id.* (*emphasis added*).

[32] *Id.*

Causes of Hung Juries

Why juries hang at these rates isn't clear. Some commentators claim that hung juries are the product of eccentric or nullifying holdout jurors. Most commentary focuses rather narrowly on the supposed failings of the individual members of a hanging jury, such as jurors' inability to comprehend the evidence and the law, their unwillingness to follow the law, or their illegitimate refusal to reach a verdict. The empirical data suggest more complex and nuanced explanations.

Based on their data, Kalven and Zeisel identified some general characteristics of cases likely to result in hung juries. For example, 10% of the cases in which the trial evidence was fairly close — that is, it did not strongly favor either the prosecution or the defendant — resulted in hung juries, regardless of the complexity of the trials.[33] In comparison, cases in which the evidence strongly favored one party resulted in hung juries in 2% of the easy[34] cases and in 5% of the complex cases.[35]

Part of Kalven and Zeisel's ground-breaking work in jury research included judges' views about case and defendant characteristics that the jury may have found important. They compared the characteristics for the cases in which the jury hung to cases in which the judge disagreed with the jury's verdict.[36] See Table 1.3. The two major differences were in jurors' opinions about the weight of the evidence (52% for juries that reach a verdict compared to 71% for juries that hang) and about the applicability or legitimacy of the applicable law (30% for juries that reach a verdict compared to 17% for juries that hang).[37]

Table 1.3.
Reasons for Full Disagreements and Hung Juries*

	Full Disagreements	Hung Juries
Sentiments on the law	30%	17%
Sentiments on the defendant	11%	7%
Evidence factors	52%	71%
Facts only the judge knew	3%	1%
Disparity of counsel	4%	4%
Total Number of Cases	634	161

*From Kalven & Keisel, Table 120, at 457.

[33] KALVEN & ZEISEL, *supra* note 20 at 457.

[34] Easy cases were defined as those cases with relatively few difficult evidentiary issues to be decided, according to the judge's assessment of the case. *Id* at 532.

[35] *Id* at 457.

[36] Kalven & Zeisel pioneered the technique of comparing jury verdicts to the decision that a judge would have made if the case had been tried to the court. *See generally id.* at 44-54.

[37] *Id.* at 456.

Kalven and Zeisel also found some striking characteristics about the vote split in cases that hang. In 63% of cases in which the jury deadlocked, the majority of jurors voted in favor of conviction compared to 24% of cases in which the majority of jurors voted in favor of acquittal. Jurors in the remaining cases (27%) were evenly split between conviction and acquittal.[38] This ratio closely mirrored the disposition of jury verdicts for cases in which the jury reached a consensus (64% conviction and 30.1% acquittal), suggesting that the propensity of juries to hang is largely symmetrical.[39]

They also discovered that the proportion of juries that hung with only one or two holdout jurors constituted 42% of all hung juries.[40] More importantly they learned that the minority faction in juries that hang is more likely to be a substantial proportion (e.g., 3 to 6 jurors) of jurors at the beginning of deliberations. They concluded that "for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations."[41]

The Planning and Management study also examined the causes of hung juries, but found very little from the basic case and defendant characteristics to explain this phenomenon. For example, the authors found variations in the frequency of hung juries according the type of offense charged, but these variations tended to mirror the frequency of case type distributions for all cases tried.[42] The vote split in hung juries for the Planning and Management study was similar to that found in the Kalven and Zeisel study. Vote splits of 11 to 1 and 10 to 2 accounted for 40% of the hung juries.[43]

The authors of the Planning and Management study did note that some of the periods of extremely high hung jury rates corresponded to periods of accelerated criminal dockets to catch up with an increasing backlog of criminal cases.[44] They also noted the possibility that judicial management of jury trials may be a factor. Interviews with selected members of the California District Attorneys' Office revealed increased hung jury rates during summer months when judges who were regularly assigned to the civil docket cover for criminal division judges who were vacationing.[45]

Many researchers have used mock juries to discover why juries hang. These studies, however, tend to emphasize hung juries simply as one possible outcome of a deliberation, not as an investigation into the phenomena of hung juries. Studies of mock jury deliberations, so useful for other research topics, can provide only limited insights about the dynamics of hung juries. Mock jury studies are often conducted under time constraints on jury deliberations, and thus

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[38] *Id.* at 460.

[39] *Id.* at 460-61.

[40] *Id.* at 461-62.

[41] *Id.* at 462-63.

[42] Cases involving crimes against persons accounted for 40% of all of the hung juries in the sample, compared to 25.3% for property crimes, 20.7% for drug offenses, 9.3% for sex crimes, and 4.2% for other offenses. PLANNING & MANAGEMENT study, *supra* note 18, at 4-8 to 4-9.

[43] *Id.* at 4-13 to 4-15.

[44] *Id.* at 4-19.

[45] *Id.*

don't provide mock jurors with a full opportunity to arrive at a consensus if serious disagreements occur. The real life consequences of actual jury verdicts are also missing in a mock jury setting. For example, a person who might go along with others on a mock jury could hang an actual jury when conforming would produce what the individual sees as an erroneous conviction or acquittal. Finally, controlled laboratory experiments with mock jurors shed little light on exogenous factors that may affect the incidence of hung juries, such as the rate of plea bargaining, prosecution and defense litigation resources, and changes in local public sentiment concerning the criminal justice system. As a result, mock jury studies offer limited information about the actual frequency of hung juries or their underlying causes.

Nevertheless, these studies have proved useful for investigating, and confirming in many instances, Kalven and Zeisel's findings with respect to faction size and majority effects.[46] Davis et al. [47] and MacCoun and Kerr,[48] however, dispute Kalven and Zeisel regarding the equal probability that a minority faction will favor acquittal or conviction. Both of the latter studies found the effect to be asymmetrical in favor of acquittal. In a meta-analysis of the effects of jury size on dispositions, Saks and Marti found that larger juries (12 jurors) were more likely to hang than smaller juries (6 jurors), which is consistent with the theory that holdout jurors are more likely to have been part of a much larger minority faction at the beginning of deliberations.[49]

Studies of social influence in other contexts also inform much of the contemporary understanding concerning the dynamics of jury deliberations. Deutsch and Gerard described two types of social influence: informational influence and normative influence.[50] Informational influence occurs when people are genuinely convinced by the persuasive arguments of their peers, whereas normative influence occurs when people acquiesce to the majority opinion to avoid social rejection.[51] For jury deliberations, informational influence is thought to be the more appropriate method of interaction between jurors.

Previous experience as a juror may also be a factor in hung jury rates. Dillehay and Nietzel conducted a study of 175 criminal trials in a Kentucky Circuit Court that found juries with more jurors who had previously served on a jury were less likely to hang.[52] They admit the effect was modest, yet statistically significant.

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[46] *See, e.g.,* W. ABBOT, SURROGATE JURIES 61-62 (1990); B. Latane and S. Wolf, *The Social Impact of Majorities and Minorities*, 88 PSYCHOL. REV. 438 (1981); S. Tanford and S. Penrod, *Jury Deliberations: Discussion Content and Influence Processes in Jury Decision Making*, 16(4) J. APPLIED SOC. PSYCHOL. 322 (1986).

[47] J. H. Davis et. al., *The Effects of Consensus Requirements and Multiple Decisions on Mock Juror Verdict Preferences*, 17(1) J. EXP. SOC. PSYCH. 1 (1981).

[48] R.J. MacCoun & N.L. Kerr, *Assymetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54(1) J. OF PERSONALITY & SOC. PSYCHOL. 21 (1988).

[49] Michael J. Saks & Mollie W. Marti, *A Meta-Analysis of the Effects of Jury Size,* 21 LAW & HUM. BEHAV. 451, 459-61 (1997).

[50] Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Social Influence Upon Individual Judgment*, 51 J. ABNORMAL & SOC. PSYCHOL. 629 (1955).

[51] *Id.*

[52] Ronald Dillehay & Michael Nietzel, *Juror Experience and Jury Verdicts*, 9 LAW AND HUM. BEHAV. 179 (1985).

Using mock juries, Hastie et al. found that deadlock was significantly more likely to occur for juries that engaged in "verdict-driven" as compared to "evidence-driven" deliberations.[53] The verdict-driven deliberation begins with a public ballot, and the discussion of evidence is oriented around which verdict it supports. Jurors frequently mention their verdict preferences. In contrast, the evidence-driven deliberation focuses on constructing the best consensus account of what happened in the case. Jurors vote later in the deliberation.[54] Based on these findings, the authors concluded that jury instructions that educate jurors about evidence-driven deliberation styles might reduce the incidence of hung juries.[55]

Responses to Hung Juries

Policy makers have responded to reports of a hung jury problem with proposals such as non-unanimous verdicts, disqualification of "nullifying jurors," and other modifications to jury trial procedures such as reopening the case for additional evidence or argument by counsel.[56]

Unanimous and Non-Unanimous Verdict Rules

Of all of the proposed modifications to criminal jury trial procedures, those involving unanimity requirements are the most controversial. The concept of a unanimous verdict for criminal felony jury trials was virtually unquestioned in this country until very recently and continues to be the standard practice in all but two states.[57] Although the U.S. Supreme Court declined to extend unanimity (required in federal courts) to the states, no state has yet modified its procedures based on this ruling to recognize felony convictions by less than a unanimous verdict.[58]

Proponents of non-unanimous verdicts point to evidence that jury decision rules have a significant effect on mistrial rates.[59] Jurisdictions that require unanimity experience higher hung jury rates while those that permit non-unanimous verdicts experience fewer hung juries.[60] For example, the Kalven and Zeisel study found that jurisdictions that required unanimity experienced a 5.6% hung jury rate, while those that allowed majority verdicts had a 3.1% rate.[61]

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[53] REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY, 165-167 (1983).

[54] *Id.* At 163-165.

[55] *Id.* at 167.

[56] *See, e.g.,* B. Michael Dann, *"Learning Lessons and Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L. J. 1229 (1993).

[57] Non-capital felony juries must be unanimous in all states except Louisiana and Oregon. See text accompanying notes 7-11.

[58] *Apodaca v. Oregon*, 406 U.S. 404 (1972) (holding that the Sixth Amendment guarantee of a jury trial does not require that the jury's verdict be unanimous); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (holding that a state law permitting non-unanimous verdicts in non-capital cases does not violate the Due Process Clause of the Fourteenth Amendment).

[59] HASTIE, *supra* note 53.

[60] CAL. DIST. ATTYS.' ASS'N., *supra* note 1. Hung juries are not completely eliminated, however, even in jurisdictions that do not require unanimity. Parloff, *supra* note 30.

[61] KALVEN & ZEISEL, *supra* note 20, at 461.

Yet the arguments favoring jury unanimity are compelling. Unanimity requires jurors to listen and consider the views of all other jurors. Additionally, minority jurors deliberating under unanimity requirements have more opportunity to present their arguments and report greater satisfaction with their participation in jury duty.[62] In contrast, juries that are not required to return a unanimous verdict deliberate for shorter periods of time and, as expected, often stop deliberating once the majority has garnered the necessary number of votes.[63] The quality of the deliberation also differs: verdict-driven deliberation is more common in majority decision rule groups, while evidence-driven deliberation is more characteristic of unanimity decision rule groups.[64] As Abramson characterized the process, juries operating under unanimity requirements strive to understand the evidence and apply the judge's instructions; juries that are not required to return a unanimous verdicts, strive for a sufficient number of votes.[65]

Neilson and Winter address proposals for non-unanimous verdicts as a means to reduce or eliminate hung juries.[66] They examined the effect on the statistical probabilities of a non-unanimous verdict, as there are error rates in any legal decision. A judge or jury may convict an innocent defendant, or acquit a guilty defendant. Both of these situations result in an error that is socially costly. They argue that eliminating hung juries from the list of possible options would force the jury to either acquit or convict, increasing the probability that the decision would be incorrect. Thus, while retrials are often costly, the social cost of a wrongful acquittal or wrongful conviction should be weighed against it. Allowing a hung jury decreases the likelihood of an inaccurate verdict.

Jury Nullification

Jury nullification is a term used to describe a jury's decision to disregard the law and return a verdict that is inconsistent with the evidence and the law.[67] Many of history's most famous jury trials — Bushel's Case[68], the Zenger trial[69] — were cases in which the jury engaged in nullification. For much of American history, those verdicts have been heralded as courageous examples of political protest and moral integrity. Beginning in the late 19th century, however, a number of federal and state court decisions gradually eroded the right of jurors to decide the

[62] Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making,* 4 DEL. L. REV. 1 (2001).

[63] HASTIE, et al., *supra* note 53, at 94-98.

[64] *Id.* at 163-165.

[65] JEFFREY S. ABRAMSON, WE, THE JURY: JUSTICE AND THE DEMOCRATIC IDEAL 179-205 (1994).

[66] William Neilson & Harold Winter, *The Elimination of Hung Juries: A Comparison of Alternative Proposals* (unpublished manuscript on file with the authors) (July 2000).

[67] Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997); *see also* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999).

[68] T. Jones, 13, s.c. 6 Howell's State Trials 999 (1670).

[69] J. Alexander, A Brief Narrative at the Case and Trial of John Peter Zenger (S. Katz ed. 1972).

law,[70] and have established the willingness of jurors to abide by the law given by the trial judge as a basic criterion for jury service.[71]

Proponents of non-unanimous verdicts claim that the problem of hung juries is exacerbated by the proliferation of organizations advocating jury nullification, such as the Fully Informed Jury Association (FIJA).[72] Not only do those organizations believe that jurors should be informed of their power to disregard the law as given by the judge, but some propose that jurors should not reveal their knowledge of this right in jury selection.[73] The only way to "nullify these nullifiers," they argue, is to remove nullifying jurors from the panel, prosecute nullifying jurors for contempt of court, and permit non-unanimous verdicts.

Recent case law on jury nullification makes it clear that removal is easier said than done as it is often difficult to differentiate between a juror who intentionally disregards the law and a juror who genuinely has doubts about the evidentiary value of trial testimony. In *U.S. v. Thomas*,[74] for example, the Second Circuit Court of Appeals overturned a conviction that resulted after the trial judge removed one of the deliberating jurors on the grounds that the juror intended to engage in jury nullification. The appellate court agreed that a juror's refusal to follow the law is a legally permissible reason to dismiss a juror, even after jury deliberations have commenced.[75] But, the opinion noted that the trial record indicated that the defendant may have been unpersuaded by the prosecution's case.[76] The court held that it was impermissible to remove the juror after deliberations had begun solely to achieve a unanimous verdict.

The California Supreme Court used similar reasoning in deciding to affirm the conviction in *California v. Williams*.[77] In that case, the juror was decidedly more explicit during *in camera* discussions with the trial judge that he disagreed with the law that sexual intercourse with a minor was a criminal offense.[78] Relying on the court's statutory authority to remove jurors "for good cause shown,"[79] the trial judge discharged the juror and replaced him with an alternate.

A case that gained widespread notoriety with FIJA activists nationwide was *Colorado v. Kriho*,[80] in which the prosecution filed charges for obstruction of justice against a juror who failed to reveal her involvement in the marijuana legalization movement as well as a past arrest

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[70] *See* Sparf & Hansen v. United States, 156 U.S. 51, 74 (1895).

[71] For a comprehensive discussion of the history of jury nullification in America, *see generally* CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1999).

[72] *See, e.g.,* Frederic B. Rodgers, *The Jury in Revolt? A "Heads Up" on the Fully Informed Jury Association Coming Soon to a Courthouse in Your Area*, 35 JUDGES JOURNAL 10 (Summer 1996).

[73] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995).

[74] U.S. v. Thomas, 116 F. 3d 606 (2d Cir. 1997).

[75] *Id.* at 614-18.

[76] *Id.* at 624.

[77] California v. Williams, 21 P. 3d 1209 (Cal. 2001).

[78] *Id.* at 1212-13.

[79] CAL. PENAL CODE 1089.

[80] Colorado v. Kriho, 996 P.2d 158 (Colo. App. 1, 1999).

for drug possession during *voir dire*. Laura Kriho was the sole juror holdout in a drug possession trial, which eventually was declared a mistrial. The trial court found that Kriho had intended to obstruct the judicial process and that her actions had prevented the seating of a fair and impartial jury.[81]

Relying heavily on the *Thomas* decision, the Colorado Court of Appeals reversed the contempt charges and remanded for a new trial on grounds that the trial court impermissibly based its decision on the testimony of other jurors about Kriho's alleged motivation to nullify the law, rather than any evidence or testimony by Kriho herself.[82] The Kriho case presents a dramatic example of the political issues inherent in nullification that arise in the context of jury deadlock. For instance, a recent article in the New York Times claims that conflict and tempers are inflamed in some juries due to controversial issues such as death penalty laws, three strikes laws, or New York's Rockefeller-era drug laws.[83] Observers of the Kriho case viewed it as a test of the justice system's resolve to enforce juror adherence to the law, even though the jury's power to nullify enjoys historical respect as an appropriate exercise of democratic rights.

Jury Instructions

A recent article in the ABA Journal discussed the implications of jury instructions that are given to the jurors when they indicate they are deadlocked.[84] The purpose of the instructions is to encourage a verdict in hopes of avoiding a mistrial. Although the origin of the *Allen*[85] charge comes from a Supreme Court decision from 1896, it is still used in various forms today. In essence, the *Allen* charge states "that while no juror should acquiesce to the opinions of others, jurors who vote with the minority should reconsider their verdict in light of the fact that the majority had come to the opposite conclusion."[86]

In the context of hung juries, however, judicial attempts to break deadlock, such as the *Allen* charge, tend to emphasize normative influences, rather than informational influences.[87] A recent study of the effects of *Allen* on appeals found that the charge varies widely between jurisdictions and that while it may encourage a timely verdict, ultimately the process is prolonged due to *Allen*-related appeals.[88] Other, milder jury instructions were recommended such as the ABA's model instructions that address the whole jury, not just the minority members.

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[81] *Id.* at 164.

[82] *Id.* at 166.

[83] Katherine Finkelstein, *Tempers Seem to be Growing Shorter in Many Jury Rooms*, NY TIMES B1 (Aug. 3, 2001 late edition).

[84] M. Hansen, *All About Allen: Judges' charge to deadlocked juries comes under scrutiny*, 87 ABA J. 24-25 (June 2001).

[85] Allen v. U.S., 164 U.S. 492 (1896).

[86] *See* 11 CRIM. PRAC. RPT. 279 (July 16, 1997).

[87] VICKI L. SMITH & SAUL M. KASSIN, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 L. & HUM. BEHAV. 625 (1993); Saul M. Kassin, Vicki L. Smith & William F. Tulloch, *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 L. & HUM. BEHAV. 537 (1990).

[88] *See* Hansen, *supra* note 84 at 25.

A mock-jury study conducted on various jury instructions found that jurors were more favorable to the ABA instructions as compared to the dynamite or *Allen* charge.[89]

Reopening the Case

Generally if a jury reaches an impasse, the case is declared hung or the judge encourages the jurors to reach a decision by delivering some additional instructions such as a coercive *Allen* charge. However, during a time of jury reform in Arizona, Judge Dann of the Maricopa County Superior Court suggested a compromise between declaring a mistrial and delivering a coercive *Allen* charge.[90] Dann argues that "it is appropriate, and wholly consistent with the public interest in avoiding another trial in the case, to give [a deadlocked] jury the option … of telling the judge and lawyers which issues continue to divide them in the event further proceedings might be of assistance."[91] The suggestion was implemented as a court rule in Arizona in 1995,[92] and Dann and other judges have reported anecdotally that the technique is effective in a significant proportion of cases that would otherwise be declared mistrials.[93]

Existing Literature as a Basis for the Project Methodology

In the present study, we attempted to identify case characteristics and juror behaviors and attitudes that might test the various theories proposed about jury deadlock in the previous literature. Chapter 2 summarizes the findings of a broad-based survey of hung jury rates in state and federal courts. Chapter 3 discusses the project methodology in detail. Chapters 4 through 6 present results of the jurisdictional study. A summary of the project appears in Chapter 7.

[89] L. T. Wanshula, "To Nudge or to Blast? The Effect of Different Versions of the Dynamite Charge on the Behavior, Subjective Impressions, and Legal Understanding of Deliberating Mock Jurors" (1996) (unpublished Ph.D. dissertation, Northern Illinois University) (on file with author).

[90] Dann, *supra* note 56, at 1269-77.

[91] *Id.* at 1271.

[92] ARIZ. R. CRIM. PROC. Rule 22.4.

[93] Dann, *supra* note 56, at 1271-75; *Jury reform advocates suggest active help to resolve impasses*, 11 CRIM. PRACTICE RPT. 279, 281 (July 16, 1997).

CHAPTER TWO – HUNG JURY RATES IN STATE AND FEDERAL COURTS

A recurring question in much of the literature on hung juries is what proportion of jury trials result in deadlock. To answer this question, we collected information about felony jury trial dispositions for federal courts from 1980 to 1997, and felony case dispositions from the 75 most populous counties in the United States for calendar years 1996 through 1998. The Administrative Office of the U.S. Courts provided the federal court data. For the state court data, we reviewed the annual reports from state courts, many of which provide county-by-county details about case filings and dispositions. If the information from those sources was insufficient, we contacted the courts directly and asked if they could provide data. Many courts were only able to provide partial information. For example, some could provide the number of jury trials that occurred in a given year, but not the corresponding number of bench trials. Other courts could provide detailed information about jury and bench trials, but only incomplete information about non-trial dispositions such as plea agreements and dismissals. Using these various approaches, we were able to gather at least partial information for an average of 46 counties for the three-year period, and complete information for 30 of the counties.

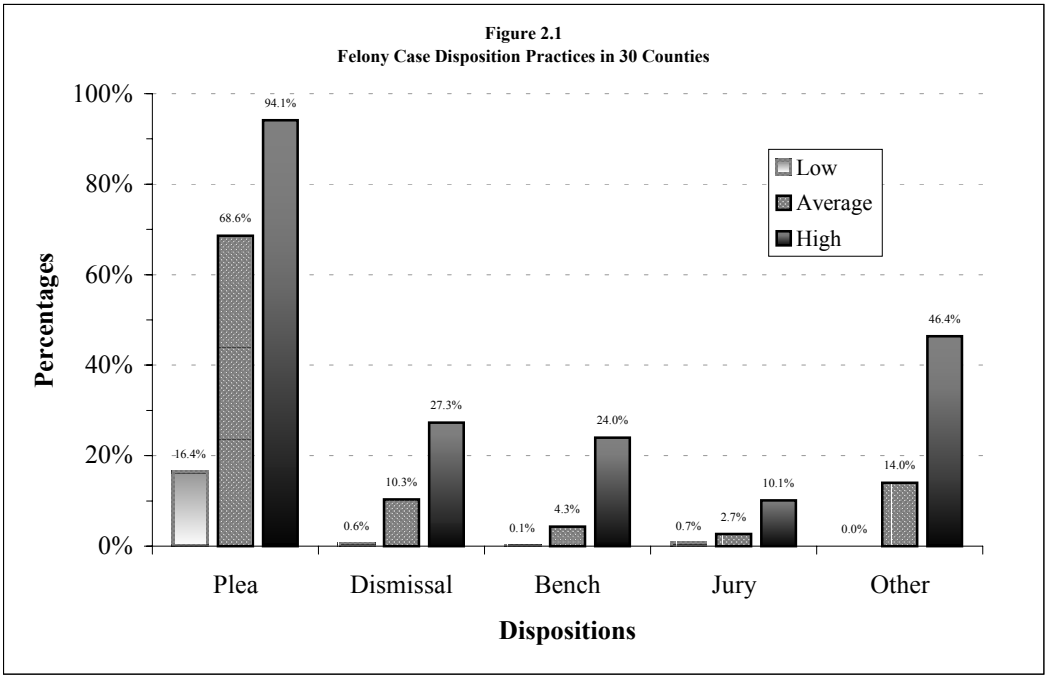
Information about the number of hung juries was particularly problematic for two reasons. First, a hung jury is an interim disposition from the court's perspective. It does not completely dispose of the case, and consequently many courts do not record this information on their automated case management system. To collect the information would require a file-by-file review of all the felony jury trials held during each year. In some jurisdictions, the courts referred us to the prosecutors' offices for detailed case information. But this source of information revealed a complication about measuring hung juries that we had not anticipated – namely, what constitutes a hung jury for the purpose of our study? Did the jury have to deadlock on all of the criminal charges it considered during deliberation? Or just on any charge? In trials with multiple defendants, did the jury have to deadlock on all defendants? Or only on one to be considered a hung jury? We discovered that between courts and prosecutors' offices, and even among courts themselves, there is no uniform definition used for counting the number of hung juries.[94]

Felony Dispositions in State Courts

What we found for these 30 counties was a surprising amount of variation in felony case disposition practices. See Figure 2.1. For example, the three-year average plea rate for all 30 counties was 68.6%, but three-year rates for individual counties ranged from a low of 16.4% in El Paso, Texas to a high of 94.1% in Santa Clara, California. We found similar variations in all of the major categories of case dispositions.[95] This made us wonder to what extent hung jury rates are related to extraneous case processing practices, rather than intrinsic characteristics of cases or juries.

[94] Indeed, in many instances neither the courts nor the prosecutors' offices were able to tell us what definition was used for reporting purposes when they provided us with data.

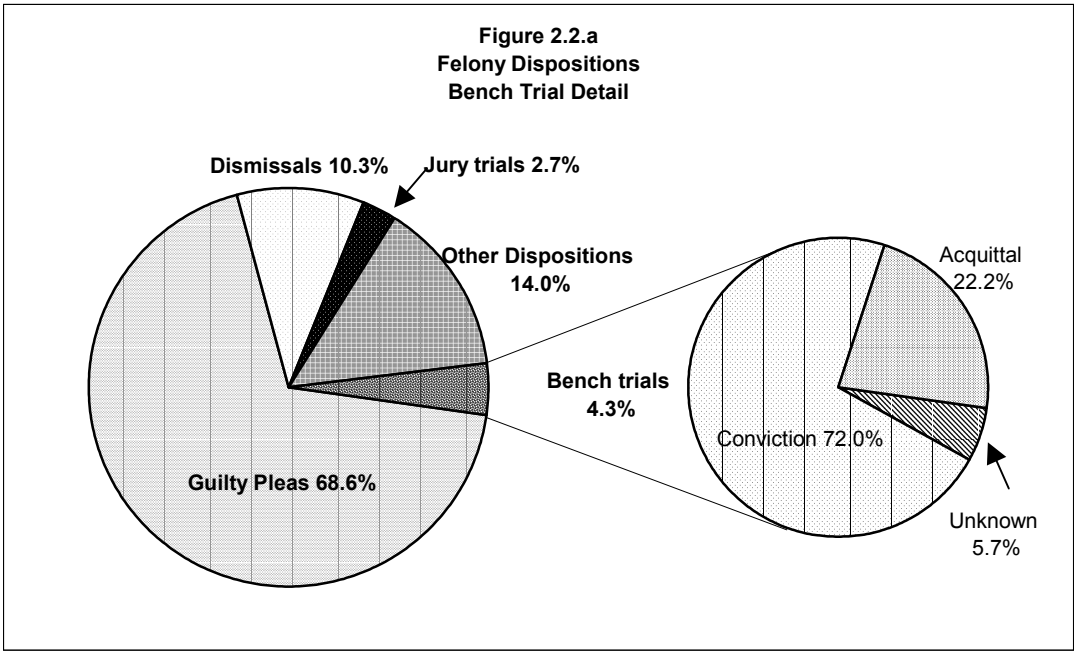
[95] To what extent these variations reflect actual differences in felony case processing practices versus differences in reporting criteria is unknown.

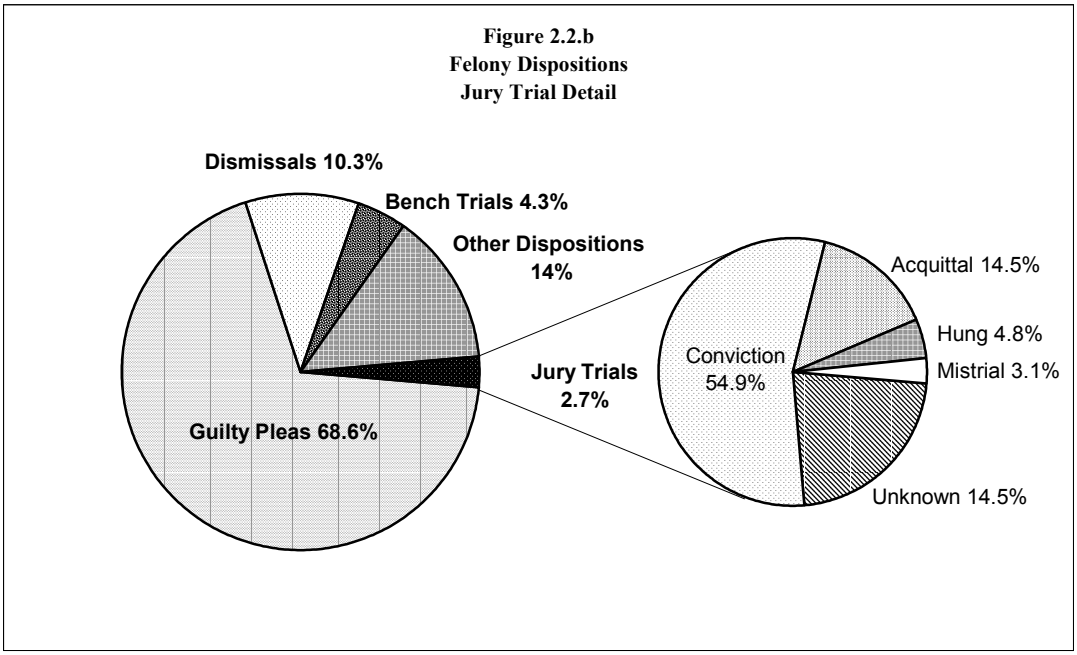


Bench trials accounted for 4.3% and jury trials accounted for 2.7% of all felony dispositions. Four of the courts[96] were not able to provide a breakdown of convictions and acquittals for bench trials (5.7% of all bench trials) and another four were not able to provide this breakdown for jury trials (22.7% of all jury trials).[97] Of those courts that did provide judgment and verdict information, we found that judges and juries convicted at close to the same rates. See Figure 2.2.a and Figure 2.2.b. Judges convicted in slightly more than three quarters of the cases (76.4%) compared to 71.0% for juries. Judges acquitted in 23.6% of the cases compared to 18.7% for juries. The 5% difference in both conviction and acquittal rates appears in the jury mistrial rate (6.2% hung jury and 4.0% other mistrial).

[96] Pima, Arizona; Marion, Indiana; Cuyahoga, Ohio; and Pierce, Washington.

[97] Los Angeles, California; Marion, Indiana; Cuyahoga, Ohio; and Pierce, Washington.

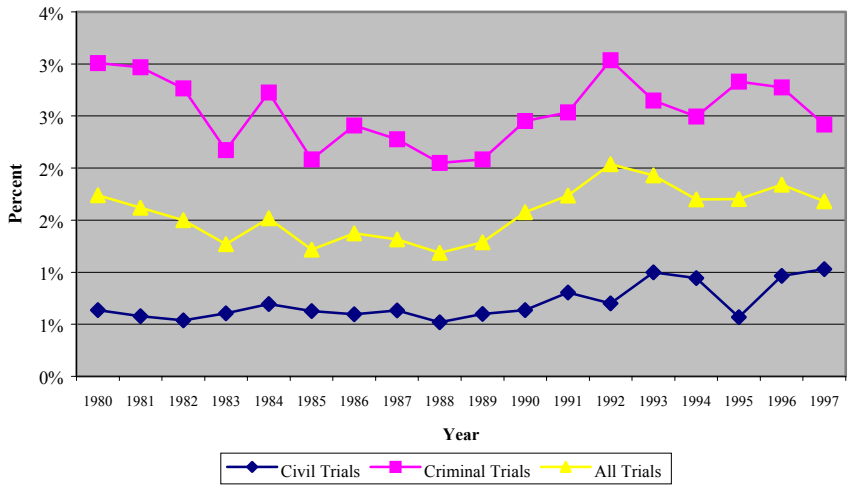




Hung Juries in Federal Courts: Low, Stable Rates

Federal court statistics provide a common reporting framework across federal court jurisdictions. Therefore, we first examine the rates of hung juries in federal civil and criminal trials from 1980 to 1997 using data provided by the Administrative Office of the U.S. Courts. See Figure 2.3.

Figure 2.3
Federal Hung Jury Rates (1980-1997)



Perhaps the most striking aspect of the federal hung jury data is the overall low rate. Indeed, the number of hung juries during this period is almost insignificant given the total number of jury trials. The highest number of hung juries is 203 out of a total of 9,971 jury trials in 1992. Also striking is the relative stability of hung jury rates over time. From 1980 to 1997, the total federal hung jury rate varies only .8%, with a low of 1.2% of all jury trials in 1985 and again in 1987, to a 17-year high rate of 2.0% in 1991.

One clear pattern is that civil juries are much less likely to hang than criminal juries. Criminal hung jury rates during this period range from a low of 2.1% to a high of 3.0%, which are higher and more variable than civil hung jury rates. The proportion of criminal jury trials in federal courts surpassed 50% of the total jury caseload from 1990 to 1993, which appears to explain the peak in hung jury rates during this same period.

The comparatively low rate of hung juries in civil cases may be a function of several factors. Under Federal Rules of Civil Procedure, federal juries typically consist of only 6 jurors (compared to 12 for criminal juries).[98] Garnering consensus among this smaller number of jurors may be a less difficult task, resulting in fewer hung juries.[99] Both civil and criminal jury verdicts must be unanimous under federal rules of procedure.[100] Furthermore, the burden of proof is lower in civil cases and civil cases may be less likely than criminal cases to contain issues and evidence that inalterably divide jurors.

With the exception of the D.C. Circuit, which we will discuss shortly, a pattern of low, stable rates of hung juries characterizes each of the federal court circuits. See Figure 2.4. Aggregating the hung jury data from 1994 to 1997, we find very little variance among the circuits. The Ninth Circuit, encompassing the federal district courts of Alaska, Arizona,

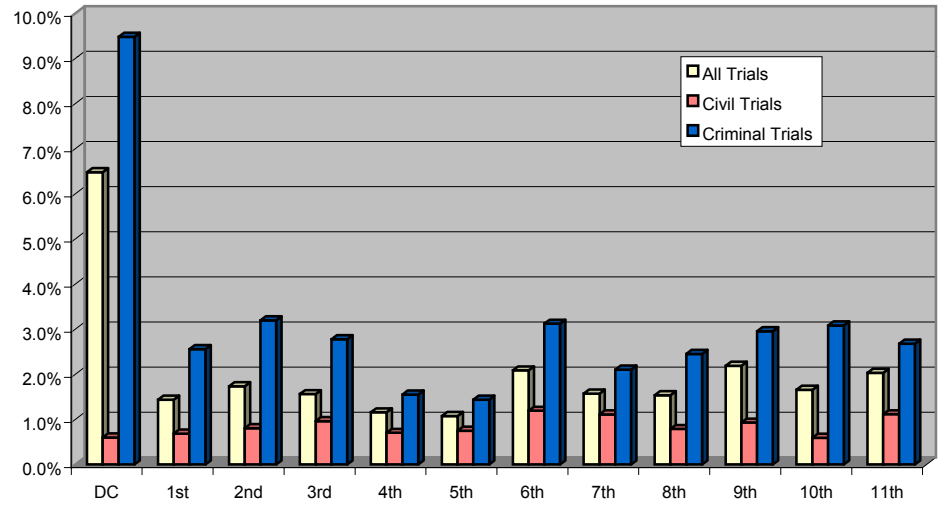
[98] FED. R. CIV. PROC. Rule 48.

[99] *See* Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability,* 79 JUDICATURE 263 (1996).

[100] FED. R. CIV. PROC. Rule 48; FED. R. CRIM. PROC. Rule 31.

California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, has the second highest total rate of hung juries. The Fifth Circuit (Louisiana, Mississippi, and Texas) has the lowest total rate. With respect to criminal hung jury rates, the Second Circuit moves into second place behind the D. C. Circuit while the Ninth Circuit falls to fourth place behind the Sixth and Tenth Circuits, which are tied. Again, the relative proportion of the criminal versus civil jury trial caseload appears to be the major factor in variations in overall hung jury rates.

Figure 2.4
Percentage of Trials Ending in Hung Juries by Federal Circuit (1994-1997)



The D.C. Circuit, however, presents a very different picture, attributable to higher hung jury rates in criminal trials. There, the total hung jury rate averages 6.5% during the 1994-1997 period, with a 9.5% criminal hung jury rate. This comparatively high rate of hung juries in the D.C. Circuit is similar to rates reported for the D.C. Superior Court. The higher rate is specific to criminal trials. The civil rate, at 0.6% during the same period, is actually tied with the Tenth Circuit for the lowest hung jury rate for civil trials.

What could possibly account for such a dramatic difference between the D.C. Circuit and the other federal circuits? One possibility is the relatively small sample size included in the D.C. Circuit statistics. For the entire four-year period, the D.C. Circuit tried only 327 criminal jury trials – a significantly smaller number than the average circuit caseload of 1,364 criminal trials. With a low base of trials, even a modest increase in the absolute number of hung juries will have a sizable impact on the hung jury rate. Indeed, in 1996, the number of hung juries in the D.C. Circuit was only 8 of a total of 58 criminal trials, producing the highest hung jury rate (13.8%) of the four-year period.

This pattern also appears in a number of the individual district courts that make up the federal circuits. The Western District of Kentucky reported 6 hung juries of 101 criminal trials (5.9%), the Western District of Arkansas reported 6 hung juries of 58 criminal trials (10.3%), and the Northern District of Missouri reported 6 hung juries of 78 criminal trials (7.7%) during

this period. Although the rates themselves appear high, the absolute numbers of hung juries suggest a less alarming picture.

Another unique characteristic of the D.C. Circuit is its relatively small, and overwhelmingly urban, geographic jurisdiction. The D.C. Circuit is the only federal circuit that consists of a single city. The other circuits all encompass substantially larger geographic areas with both urban and rural locations and variable population densities. The inclusion of rural areas of the country could mask higher hung jury rates in urban areas.

A closer look at the individual district court statistics tends to support the proposition that higher hung jury rates could be typical of higher density and heterogeneous jurisdictions. The Southern District of New York, which includes all of the New York City boroughs except Brooklyn, has a criminal hung jury rate of 4.2%, almost double that of the rest of the district courts within the Second Circuit. The Northern District of California, which draws its cases mainly from the San Francisco Bay area, has a criminal hung jury rate of 6.0%, while the Southern District of California (San Diego) has one of 6.3%. In the Tenth Circuit, the highest individual criminal hung jury rate among the district courts – 7.8% – occurs in the District of New Mexico (Albuquerque). Thus, the comparatively high hung jury rate in the D.C. Circuit may be typical of heterogeneous urban jurisdictions rather than a problem unique to the D.C. Circuit.

Examining the frequency of hung juries in federal courts has several advantages, one of which is a uniform reporting system for trial court statistics. A second advantage is relative consistency across jurisdictions with respect to caseload composition and applicable law and procedures. Both of these advantages are helpful for making meaningful comparisons among federal courts.

Hung Juries in State Courts: An Incomplete Picture

The advantages of legal and reporting uniformity are not found in the state courts, where the vast majority of criminal trials take place each year. Approximately 5,000 criminal defendants are tried in federal court each year,[101] compared to an estimated 54,625 criminal trials in state courts.[102] Moreover, the types of criminal cases that are filed in federal courts are limited to those crimes articulated in federal statutes. The caseloads of federal and state courts are quite different. Unfortunately, it is also true that state court statistics concerning the frequency of hung juries are not subject to uniform reporting criteria. As we noted above, only a handful of courts compile statistics about interim dispositions such as hung juries, making it very difficult both to collect the data and to evaluate them.

Figure 2.5 provides a preliminary view of hung jury rates in several large, urban state courts.

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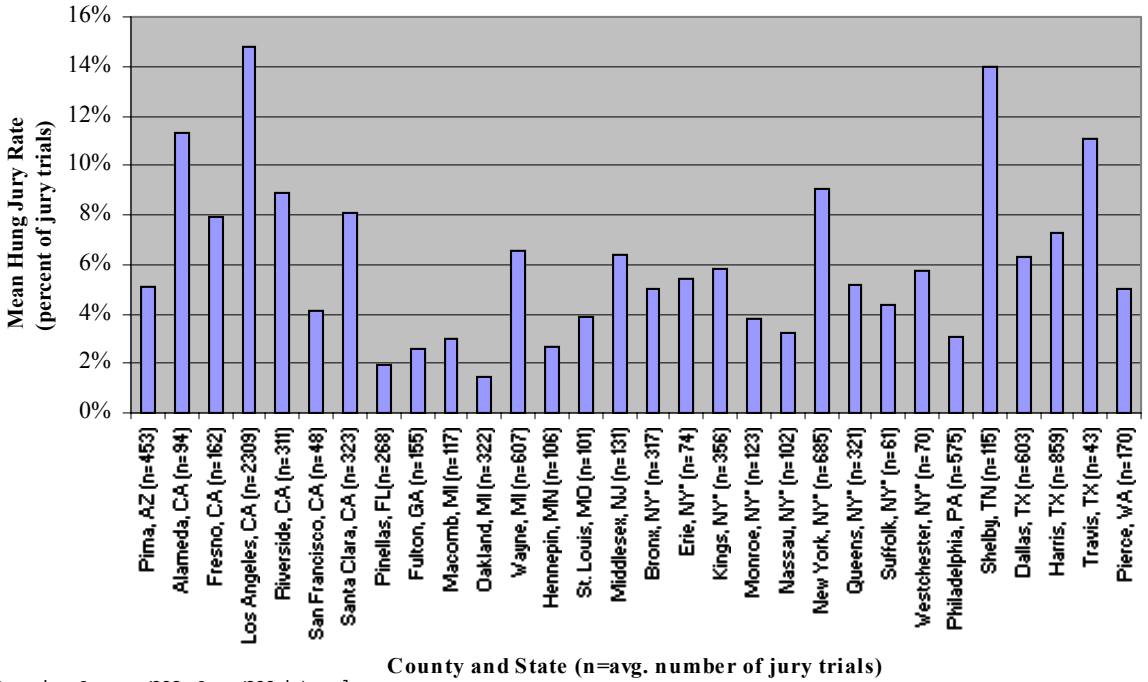
[101] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS Table D-4 "Criminal Defendants Disposed of, by Type of Disposition and Offense, During the Twelve-Month Period Ended September 30, 1996" (1997).

[102] BRIAN OSTROM & NEIL KAUDER, eds., EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 103 (2001).

Figure 2.5
Hung Jury Rates (Average 1996 - 1998)



*Based on January 1998 - June 1999 data only.

In contrast to the Planning and Management study discussed in the previous chapter, the annual rates for each court were highly correlated, so these data reflect the 3-year average hung jury rate for the period 1996 through 1998. Because of the definitional problems discussed above, they should not be used to rank these courts according to their respective hung jury rates. They do, however, provide a compelling illustration of the tremendous variability in hung jury rates from community to community.

The average hung jury rate for the 30 jurisdictions from which we were able to gather data was 6.2%, only slightly higher than the 5.5% rate reported by Kalven and Zeisel in 1966. Reported rates ranged from a low of 0.1% in Pierce County, Washington to a high of 14.8% in Los Angeles County, California. These contemporary data and those from the California study indicate that hung jury rates may fluctuate greatly from court to court, if not necessarily from year to year.

These data also support the contention that lower hung jury rates across a broad geographical area can obscure higher rates in discrete jurisdictions. The average hung jury rate of 6.2% for these state courts is considerably higher than those typically reported by the federal courts during the same period. Indeed, the rate is closest to the 9.5% rate report by the D.C. federal circuit court for 1994 through 1997. The state courts represented here are mostly located in urban and heterogeneous communities and encompass a much smaller geographic area than the federal circuits.

We suspect that complete hung jury data from all jurisdictions would probably show lower overall rates than the 6.2% rate of these urban courts. Data from New York State illustrate this. In addition to the 9 New York courts shown in Figure 2.5, we were able to obtain county

data for all 62 counties in New York State from January 1998 through June 1999. During this 18-month period, the statewide hung jury rate was 2.8%, not much higher than the 1.6% hung jury rate for the combined New York federal district courts. Rates in individual counties ranged widely, from 0% in 38 counties to 18.8% (3 of 16 jury trials) in Clinton County.

Hung Jury Rates and Community Characteristics

Using demographic information gleaned from the *City and County Data Book*,[103] we examined the hung jury rates from our data set to test some hypotheses. Of course, the assumption that community demographics are accurately reflected in the jury pools for those communities is a tenuous one. Although courts have made great progress in improving the representativeness of their jury pools in recent years, many factors intrinsic to the jury qualification and selection process can skew the jury pool.[104]

We found no correlations between hung jury rates and population density, community diversity (measured by percent non-white), or community crime rates. Nor did we find a correlation between hung jury rates and caseload processing characteristics (e.g., pretrial disposition rates). In some ways, this was surprising given that so much contemporary commentary links high rates of jury deadlock with the demographic characteristics of the communities in which those trials take place.[105] But this may also be a function both of the very small sample of counties for which we were able to obtain information and of the questionable reliability of some of those data.

Post-Hung Dispositions

Obtaining information on dispositions for cases that were originally declared a mistrial due to jury deadlock was difficult. Of the 30 counties that provided filing and disposition information for felony cases, only 9 counties were able to provide follow-up data on hung jury cases.[106] Even with these limited data, however, we observe similarities to the post-hung dispositions found in the Planning and Management study in California.[107]

The 9 counties reported a total of 453 hung juries during the period 1996 through 1998. Of those cases, over half (53.4%) did not require a second trial. Plea agreements resolved 144 (31.8%) cases and 98 (21.6%) were dismissed. Just under one-third of the cases (32.0% were retried to a new jury and a very small number (2.4%) were retried as bench trials. See Figure 2.6.a and Figure 2.6.b. The cases resolved by bench trial were evenly divided between

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[103] 2000 COUNTY AND CITY EXTRA: ANNUAL METRO, CITY, AND COUNTY DATA BOOK (Deirdre A. Gaquin & Katherine A. deBrandt, eds.) (9th ed., 2000).

[104] *See*, e.g., ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS (1998).

[105] *But see* Michael J. Saks, Trial Outcomes and Demographics: Easy Assumptions Versus Hard Evidence, 80 TX. L. REV. 1877 (2002).

[106] Travis County, TX; Harris County, TX; Hennepin County, TX; St. Louis County, MO; Pinnellas County, FL; Wayne County, MI; Macomb County, MI; Oakland County, MI; and Shelby County, TN.

[107] *See* PLANNING & MANAGEMENT study, *supra* note 18, at 4-30 to 4-31.

convictions and acquittals, but the sample size for the three-year period is extremely small – only 11 cases – and thus is not necessarily reliable. Retrials to a new jury, however, mirror the distribution of the original jury trial outcomes almost perfectly. Sixty-nine percent (69%) of retrials resulted in a conviction, 19% resulted in an acquittal, 8% resulted in another hung jury, and 4% were declared a mistrial for a reason other than jury deadlock.

Figure 2.6.a
Post-Hung Dispositions
Bench Trial Detail

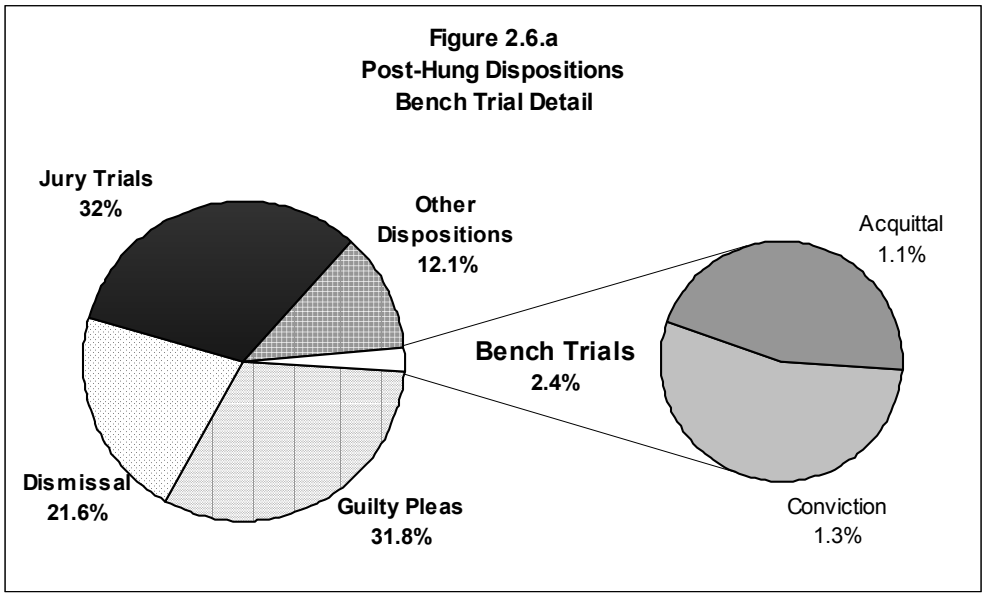
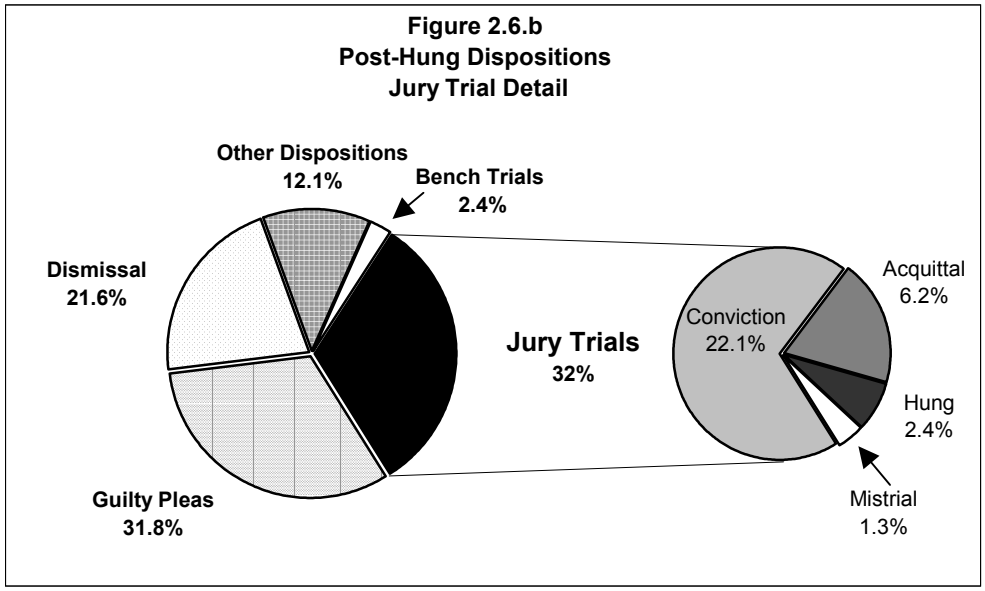


Figure 2.6.b
Post-Hung Dispositions
Jury Trial Detail



CHAPTER THREE – PROJECT METHODOLOGY

The NCSC elicited cooperation from four sites for data collection on hung juries: The Central Division, Criminal, of the Los Angeles County Superior Court, CA; the Maricopa County Superior Court (Phoenix), AZ; the Bronx County Supreme Court, NY; and the Superior Court of the District of Columbia. Site selection was based on several criteria. First, each site had to have a sufficiently high volume of felony jury trials to permit data collection within a reasonable period of time. Second, court personnel had to be willing to cooperate in data collection, including the court's agreement to adhere to privacy and confidentiality protocols. Finally, institutional characteristics were considered. Two sites were included because of reported concerns about hung jury rates (Los Angeles and Washington, DC). Arizona was chosen to examine the potential impact of an innovative procedure that permits judges to allow further evidence and arguments when a jury reports that it is deadlocked. We approached the New York State, Office of Court Administration for suggestions on high volume courts in New York City, and they were helpful in securing the cooperation of the Bronx County Supreme Court.

Data Collection

Pretest

The data collection protocol and questionnaire materials underwent a pretest in Los Angeles in July, 1999. Fifty trial packages containing Questionnaires and Case Data Forms were distributed to judges in non-capital felony trials. NCSC staff obtained data on 16 completed trials including 2 hung jury trials. In December, 1999, the project Advisory Committee offered its recommendations for modifications to the survey instruments and data collection protocols. Based on these recommendations, the surveys were revised to more accurately capture the nuances of measuring hung jury rates. In addition, the juror questionnaires were revised to avoid responses that would provide grounds for a defendant's inquiry into the validity of the verdict. Finally, data collection protocols were refined to increase the return rate of survey packages.

Data Collection in the Four Sites

Data were collected in Los Angeles from June 2000 through October 2000, a period that overlapped with a significant local investigation involving the Los Angeles police (the Ramparts investigation), producing some concern about the typicality of the conviction/acquittal ratio. Maricopa County began data collection in November of 2000 and ended in October 2001. A brief hiatus during this period was the result of some confusion on which cases were to be included in the study. For a short time, some judges believed that data were to be collected only if the jury hung. Thus, the number of hung juries in Maricopa County may be higher than is typically the case. Data from the Bronx was collected from February through August 2001, and from April through August 2001 for Washington, DC.

The sites were responsible for distributing and collecting questionnaire packets to all courtrooms hearing non-capital felony jury cases. Misdemeanor cases were excluded because hung juries in serious felony trials are typically of greater concern to justice system policymakers. Capital cases were also excluded because of the severity of the sanction and the

potential that confidential juror questionnaire data might be requested to support an appeal from a conviction.

Questionnaires

Each packet contained instructions and questionnaires for the judge, attorneys, and jurors. In addition, each packet had a case data form requesting information about case characteristics and outcomes. Many of the questions asked trial participants to give ratings on a 7-point Likert scale. The direction of the scales were always 1=least/most negative to 7=most/most positive. The basic content of each questionnaire is listed below (see Appendix A for actual questionnaires):

- Case Data Form – type of charge, sentence range, jury's decision, and demographic information about the defendant(s) and the victim(s), voir dire, trial evidence and procedures, and jury deliberations.
- Judge Questionnaire – (Part I) evaluation of the evidence, case complexity, attorney skill, likelihood that the jury would hang; (Part II) reaction to the verdict, opinion of hung jury rate in the jurisdiction, and experience on the bench.
- Attorney Questionnaires – (Part I) assessment of voir dire, case complexity, attorney skill, evaluation of the evidence; (Part II) reaction to the verdict, opinions of hung jury rate in the jurisdiction, and experience in legal practice. If the jury hung, attorneys also provided their views about why the jury was unable to reach a verdict.
- Jury Questionnaires – case complexity, attorney skill, evaluation of the evidence, formation of opinion, the dynamics of the deliberations including the first and final votes, juror participation, conflict, reaction to verdict, opinion about applicable law, assessment of criminal justice in community, and demographic information.

Human Subjects Protocol

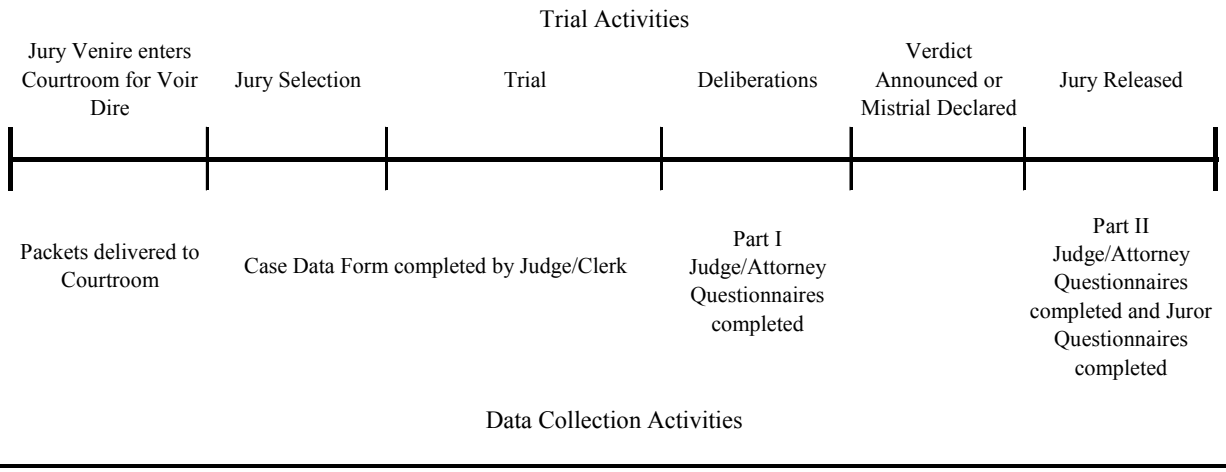
Because the study design included collection of information from key trial participants, including jurors, a protocol was developed that balanced the importance of confidentiality and the defendant's Sixth Amendment rights. NIJ regulations require that NCSC maintain the confidentiality of study data and prohibit their use in adjudicatory proceedings.[108] The purpose of the regulations is to protect the safety and privacy of study participants (judges, attorneys, and jurors). This project presented a potential legal dilemma in that the Sixth Amendment right of criminal plaintiffs to a fair and impartial jury supercedes NIJ regulations. To protect jurors' privacy in the event of competing demands, we revised the questions following the pilot test to eliminate questions that would provide a *prima facie* basis for an appeal (e.g., timing of opinion formation). We also stripped identifying case information from the questionnaires and destroyed the hard copies after being entered in the database at NCSC. To date, no party has requested these data.

[108] 28 C.F.R. Sec. 22.

Distribution of Study Packages

Judges and key court personnel were briefed on the project and instructed how the packet distribution was to occur. Figure 3.1 represents the time sequence for the packet distribution. Packets were sent from the jury assembly room to the courtrooms with the panel for voir dire. Once the jury was selected, court personnel distributed the packets to the judge and/or court clerk. If the case proceeded through to jury deliberations, and was not prematurely ended by a plea agreement, dismissal, or mistrial for some reason other than the jury's inability to arrive at a unanimous verdict, the judge was asked to complete the judge survey. In addition, either the clerk or the judge was to complete a questionnaire on the general case information on a case data survey form.

Figure 3.1
Time Sequence for Packet Distribution



Once the jury retired to deliberate, court personnel distributed the judge and attorney questionnaires. The judges and attorneys were asked to complete the questionnaires in two stages, answering some questions prior to the jury decision and the remaining questions after the jury rendered its verdict or the case declared a mistrial. The court personnel distributed the final set of questionnaires to the jurors after the verdict was announced or a mistrial declared. To protect confidentiality, respondents were provided blank envelopes in which to place the completed questionnaire. Court staff collected the completed questionnaires and gave these to the designated court liaison for each site, who forwarded the cases on to the NCSC for data entry and analysis.

Response Rates

In total, NCSC received at least one questionnaire from 404 packets out of 400 expected (100 cases from 4 sites).[109] In three cases, the defendant either pled guilty or a mistrial was declared prior to the jury's decision, so the case was dropped from the sample, leaving 401 cases with which to calculate response rates.

Case data forms were returned in 358 of the 401 cases, resulting in an 89% response rate. Judges completed 366 (91% response rate) questionnaires. The lead prosecution and defense attorneys were both requested to complete questionnaires. There were 576 total attorney questionnaires (either defense or prosecution) completed in 351 cases. Thus, at least one attorney responded in 88% of the cases and the prosecutor and defense counsel both responded in 64% of the cases. At least one defense attorney completed a form in 278 cases (69% response rate) and at least one prosecuting attorney in 287 cases (72% response rate).[110]

Capturing a response rate for jurors is trickier than with the other questionnaires. Overall, 3,626 jurors returned their questionnaires. In California, New York, and D.C., felony cases are tried to a 12-person jury. Arizona law provides for 8-person juries in felony trials unless the penalty for the defendant included death or a potential sentence of 30 years or more, in which case the number of jurors is 12. Thus, in Maricopa County the response rates must be calculated separately. In Maricopa County, there were 30 cases sitting 12-member juries. Sixty-nine juries had 8 members. In addition, there were six cases with so little information that jury size could not be determined. Thus, we divided the jury response rate assuming those six were 8-person juries and again assuming the cases were 12-person juries. The percentage was not affected by the difference in two calculations for these six cases when rounding to the nearest percent. Thus, the response rate for jurors across all sites, with consideration for jury size, was 80%.

Key information from the cases was contained in the Case Data Form. These surveys asked factual information about the criminal charges filed, and the jury's decision. If this key information was missing from the questionnaires, NCSC made follow-up inquiries with the courts. Thirty-one cases without a Case Data Form were salvaged through direct communication with the courts to obtain the key information about the case. The courts were unable to recover this missing information in twelve cases, which were not included in the final data analysis. Seven additional cases had so little information (three or fewer questionnaires received) that they were also eliminated from the analysis. For example, a few cases relied on only one questionnaire from one attorney and were therefore not included. Deletion of these 19 cases leaves 382 *usable* cases. The numbers of questionnaires included in the final *usable* database varied slightly for each site and are thus summarized in the following table.

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[109] Each court was provided with 150 packages, but instructed to discontinue data collection after 100 packages had been completed. The additional 50 packages were included to make up for packages lost because of last minute plea arrangements, dismissals, or mistrials not due to jury deadlock.

[110] Multiple defendant cases often had responses from more than one prosecutor or defense counsel.

Table 3.1
Participant Data

	Sites				
	LA	**Maricopa**	**Bronx**	**DC**	**Totals**
Cases[1]	89	99	97	97	382
Case Surveys	84	86	84	97	351
Judges	83	89	93	93	358
Attorneys	127	146	146	139	558
Prosecuting[2]	65	73	73	67	278
Defense[2]	54	73	73	69	269
Jurors	982	765	805	945	3,497
Average Response Rate					
12-person juries	11	10	8	10	
8-person juries		7 [3]			

[1]The number of cases indicates those cases in which we have received any single item back on an individual case.
[2]This number indicates the number of cases in which at least one prosecuting or defense attorney responded.
[3]Arizona uses eight person juries except for death penalty or sentences of thirty years or more.

Of the usable data, 982 jurors in Los Angeles responded in 89 cases (in one case 14 jurors were allowed to deliberate). Therefore, the response rate for jurors was 92%. The average number of jurors responding was quite high at 11 per case. As stated above, Maricopa County presented a unique situation with felony criminal cases heard before both 8-person and 12-person juries. There were 69 total 8-person juries. The average number of jurors responding was approximately 7 per case. In cases with a higher potential sentence, 12-person juries are used. There were a total of 30 cases heard by 12-person juries in which 295 of 360 jurors responded. The response rate for 12-person juries was 82% with an average of 10 jurors per case. In Bronx Supreme Court, 805 jurors responded in 97 cases. The juror response rate was lower; only 69% responded. The average number of jurors per case was 8. The Superior Court of the District of Columbia had 945 jurors responding in 97 cases (two cases had only 11 deliberating jurors). Thus, the juror response rate was 81% for jurors. On average, 10 jurors responded per case. The number of juror responses in particular was a concern for divided or hung juries to capture adequate information from the minority faction or holdout jurors as well as information from those in the majority. We are confident we were able to identify the holdouts in all hung jury cases.

Case Characteristics

Describing the characteristics of cases in the study will enable the reader to envision an overall picture of the sample. In addition, when we consider different ways of counting the rate of hung juries, it will be important to have a sense of case characteristics such as the number of defendants and number of charges.

Why Did This Case Go to Trial?

We asked both the prosecutors and the defense counsel why the case was tried at all, given that the vast majority of felony cases are disposed by a plea agreement or dismissal. Their responses fell into three categories: the defendant claimed innocence, the prosecution offered no plea, and no plea agreement could be reached.[111]

The prosecution and defense counsel agreed on the reason that the case went to trial 56% of the time across the categories, but these agreement rates varied substantially by category. See Table 3.2. The prosecution and defense agreed most often about the reason for the case going to trial when no plea was offered. The innocent defendant category showed agreement in 68.8% of the responses, and the no agreement reached category produced agreement in 29.8% of the responses. Disagreement between the parties occurs most often in the innocent defendant and no plea agreement reached categories. When the defendant maintains his innocence, 18% of the prosecuting responses indicate that no plea was offered while 12.7% report that no plea agreement could be reached. Some of this disagreement may reflect a stubborn client who rejects a reasonable offer. It could also indicate a situation in which the client has nothing to lose by going to trial because the defense claimed innocence, and another 22.8% of prosecution responses indicate that no plea was offered. Again, the disagreement in these cases may reflect situations in which the client has nothing to lose by going to trial because of statutorily limited bargaining power of the prosecution.

[111] The "innocent defendant" category includes responses that the defendant refused to plea and that the State's case was weak in addition to those that indicated that the defendant maintained his innocence. The "no plea offered" category includes responses indicating that there were prior convictions and/or sentences that impacted the offer made or prevented the prosecutor from making a plea offer, responses that indicated that the charged offense was a serious crime that impacted the offer made or prevented the prosecutor from making a plea offer as well as responses indicating only that no plea was offered. The "no agreement reached" category included only those responses indicating that both sides were willing to consider a plea but no agreement could be reached.

Table 3.2
Attorney Response Rates

		Prosecutor			
		Defendant Claims Innocence	No Plea Offered	No Plea Agreement Reached	Total
Defense	Defendant Claims Innocence n=102	68.6%	18.6%	12.7%	100%
	No Plea Offered n=14	28.6%	71.4%	.0%	100%
	No Plea Agreement Reached n=57	47.4%	22.8%	29.8%	100%
	Total n=173	58.4%	24.3%	17.3%	100%

n= The number of Defense attorneys in agreement with the Prosecutor.

Multiple Defendants and Multiple Charges

Most defendants (92%, or 338 of 366 cases for which we had information about the number of defendants) were tried alone, without a codefendant. Los Angeles was more likely to try defendants together than the other sites, although even in Los Angeles it was a small proportion of the caseload. Thirteen of the 28 cases in which two or more defendants were tried together were in Los Angeles; Phoenix had 2, the Bronx had 6, and D.C. had 7 cases with codefendants. Just three cases in the sample included charges against three defendants, and that was the maximum.

Typically, defendants tried alone faced 1, 2 or 3 separate charges (median 2.0, mean 2.7). Approximately thirty percent went to trial on a single criminal charge; a similar proportion faced two charges, and an additional 17% had three charges. The remaining quarter of the cases with individual defendants included from 4 to 17 charges. In 28 cases multiple defendants were tried, and the number of charges was higher (median 4.0, mean 5.2). The maximum number of charges appeared in LA where two defendants were charged with 22 separate counts. Maricopa County had the highest proportion of defendants charged with just one offense (41%) while the Bronx had the lowest (19%). Overall, juries considered a lesser-included charge in only 38 cases.

Case Types

Perhaps due to underlying differences across jurisdictions in the frequency of criminal behavior, enforcement policies, and prosecutorial charging policies, juries in the various sites heard somewhat different types of cases. Across the four jurisdictions, the most common case types were drug charges, murder, robbery, and assault. Table 3.3 shows the breakdown for the most common case types for each of the sites.

Table 3.3
Case Type

	Sites				
	LA	**Maricopa**	**Bronx**	**DC**	**Totals**
Drug offenses	34%	16%	34%	33%	28%
Murder (1st and 2nd degree)	12%	6%	18%	19%	14%
Robbery	20%	5%	20%	8%	13%
Assault	8%	20%	3%	14%	12%
Burglary/Larceny/Theft	5%	15%	9%	5%	9%
Weapons	0%	1%	6%	14%	6%
Sex offenses	4%	6%	6%	4%	5%
DUI/DWI	0%	12%	0%	0%	3%
All other offenses	17%	19%	4%	3%	10%
Case Type Totals	100%	100%	100%	100%	100%
	n=74	n=99	n=97	n=97	n=367
Mean # of charges	2.9	2.4	3.1	3.4	2.9
Max charges in any case	22	17	12	18	22

Drug charges comprised almost one-third of the cases in all the sites, except Maricopa County. Drug charges surfaced in only 16% of the cases from Maricopa County, yet there were a large number of alcohol or drug related DUI/DWI cases (12%) supplementing the lower proportion of drug cases. In Bronx and LA, about a fifth of the cases cited the most serious charge as robbery. DC and Maricopa County had fewer robbery cases (8% and 5%, respectively). Murder ranged from 6% in Maricopa County to 19% in DC. Assault charges were common in Maricopa County and DC (20% and 14%, respectively). DC also had a large number of weapons charges, comprising 14% of their felony jury cases.

Case types were somewhat different in trials with multiple defendants. About a quarter of the multiple defendant cases were first-degree murder trials, compared to 9% of the single defendant cases. Another quarter of the multiple defendant trials were robbery cases, in contrast to 12% of the single defendant trials. About one-third of the multiple defendant cases were drug-related, as opposed to a quarter of the single defendant cases.

Case Outcomes

Our primary focus in this study was on jury deadlock, but it is useful to have some information about the jury verdicts in the context of all dispositions. We coded the verdicts as convictions, acquittals, hung jury, or some combination of the three for cases with multiple charges. Verdicts in which the jury convicted of a lesser charge were coded as a conviction for that charge. As has been reported in studies of conviction rates, we found variation across sites.[112]

Table 3.4
Case Outcomes

		Sites				
		LA	Maricopa	Bronx	DC	Total %
Single Count						
Conviction	*n=64*	57.7%	70.3%	50.0%	50.0%	58.7%
Acquittal	*n=32*	26.9%	27.0%	44.4%	25.0%	29.4%
Hung	*n=13*	15.4%	2.7%	5.6%	25.0%	11.9%
Multiple Counts						
Conviction (all)	*n=70*	37.3%	46.3%	17.7%	18.2%	28.0%
Acquittal (all)	*n=69*	9.8%	14.8%	38.0%	39.4%	27.6%
Hung (all)	*n=14*	9.8%	3.7%	2.5%	7.6%	5.6%
Combination	*n=97*	43.1%	35.2%	42.8%	34.8%	38.8%
Total *(n)*		*79*	*91*	*97*	*94*	

Jury Selection

The process of selecting a jury (commonly called *voir dire*) has not been studied extensively, however there is a widespread understanding that practices vary significantly from court to court, and even from judge to judge, along a number of different parameters. The data from this study tend to confirm that view.

The median size of the jury venire from which the jury was selected ranged from a low of 40 in Maricopa County to a high of 70 in the Bronx. Panel size is most likely a function of the number of peremptory challenges available to the parties.[113] State statutes in Arizona and the District of Columbia provide for 10 peremptory challenges per side in felony trials, California

[112] *See* Neil Vidmar et al., Should we Rush to Reform the Criminal Jury? Consider Conviction Rate Data, 80 Judicature 286 (1997).

[113] G. Thomas Munsterman, Jury System Management (1996).

permits up to 20, and the number in New York ranges from 10 to 20, depending on the type (class) of felony.[114]

The fact that lawyers had large numbers of peremptory challenges available to them did not mean that they always used them. In Los Angeles, the median number of peremptory challenges used by prosecutors and defense counsel was 6 and 8, respectively. In Maricopa County, the median number of peremptory challenges used by both prosecutors and defense counsel was 6. In the Bronx, prosecutors used 10 and defense counsel used 9, and in DC, prosecutors used 9 and defense counsel used 10. Objections to peremptory challenges based on *Batson v. Kentucky*[115] were raised in 17% of the Los Angeles trials, 15% of the Bronx trials, 13% of the Maricopa trials, and 8% of the DC trials. Prospective jurors were more likely to be struck for cause in the Bronx and DC (median 15 and 16, respectively) compared to Maricopa County (6) and Los Angeles (2).

The length of *voir dire* in most of the sites averaged between 2 and 3 hours, except in the Bronx, which had a median time of 7 hours. Los Angeles was the only site in which judge-conducted voir dire was the norm; in the other three sites, both the judge and lawyers posed questions to prospective jurors. Case-specific jury questionnaires were used in about one-third of the trials in Los Angeles and the Bronx, but only 19% of the trials in DC and not at all in Maricopa County. Over half of the Los Angeles juries were anonymous compared to one-third of the DC juries, and 10% of the juries in Maricopa and Bronx Counties.

Despite these differences in local practice, the attorneys overall reported fairly high satisfaction with the adequacy of *voir dire* questioning (5.3 on a scale of 1 to 7), with no difference between prosecutors and defense counsel.[116] There was a marginal difference among sites, which appears to be driven by a lower rating by prosecutors in Los Angeles (4.8) compared to their defense counterparts (5.1).[117]

Defendant and Attorney Characteristics

To further describe the cases in the sample, 91% of the defendants were male, ranging from 86% to 93% across the four sites. The defendants' racial and ethnic characteristics differ by site reflecting differing demographic characteristics of the jurisdictions. See Table 3.5.

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[114] STATE COURT ORGANIZATION, *supra* note 10, Table 41.

[115] Batson v. Kentucky, 476 U.S. 79 (1986).

[116] M (Prosecutors) = 5.24, M (Defense Counsel) = 5.28, F (1, 544) =.106, *ns.*

[117] M (Los Angeles)=4.97, M (Maricopa)=5.41, M (Bronx)=5.33, M (DC)=5.29, F (3,348) = 2.166, p = .091.

Table 3.5
Defendant Characteristics

Ethnicity	Sites: LA n=97	Maricopa n=84	Bronx n=88	DC n=105	Total n=374
White (Non-Hispanic)	3%	35%	2%	1%	9%
Black (Non-Hispanic)	52%	27%	48%	90%	56%
Hispanic (Black or White)	41%	25%	44%	10%	29%
Other	4%	13%	6%	0%	5%

As shown in Table 3.6, most defendants were represented by public defenders or court-appointed attorneys. Just one in five defendants overall retained a private attorney. In five Los Angeles trials (1.5% of the sample), defendants represented themselves. Public defenders handled the majority of cases in Los Angeles and Phoenix, while the cases in the other sites were more evenly split between court-appointed attorneys and public defenders. The Bronx had the highest proportion of privately retained attorneys, close to one-third of the cases.

Table 3.6
Defendant Representation

	Sites: LA n=83	Maricopa n=82	Bronx n=78	DC n=90	Total n=333
Private Attorney	17%	18%	32%	11%	19%
Court-Appointed	10%	12%	40%	53%	29%
Public Defender	68%	70%	28%	36%	50%
Pro Se	6%	0%	0%	0%	2%

Jury Characteristics

Overall, juries in the study were fairly diverse in terms of their racial/ethnic and gender composition. To measure race/ethnic diversity, we calculated a jury score based on the race/ethnicity of jurors who responded to the study questionnaire. The questionnaire asked jurors to identify their race/ethnicity from a list of 7 possible categories. A score of 0 indicates that all of the jurors were of the same race/ethnic category while a score of 1 indicates that the

jurors reflected all of the available race/ethnic categories. In Table 3.7, we see that the average score is .55 – that is, that the average jury had at least one juror from approximately half of the available race/ethnic categories. Only 25 cases had a race/ethnic diversity score of 0. There was a great deal of variation by site, however, due largely to the racial/ethnic demographics of the communities from which those juries were drawn.[118] For most of the cases, the majority of jurors were female. Twenty-four (24) juries were entirely female, while only 5 juries were entirely male. A sizeable proportion of jurors also had prior jury experience, typically from service on a criminal case.

Table 3.7
Jury Demographics and Attitudes

	LA	Maricopa	Bronx	DC	All Sites
Race/Ethnic Diversity	.71	.35	.64	.53	.55
% Male	46.4%	48.8%	36.4%	36.2%	41.9%
% Previous Jury Experience	46.5%	29.5%	30.3%	54.7%	40.4%
Trust in Police*	5.3	5.6	4.6	4.8	5.1
Trust in Courts*	5.5	5.7	5.2	5.3	5.4
Concern About Crime Levels*	5.3	5.3	5.5	5.8	5.5

*on a scale of 1 to 7.

We also asked jurors about their opinions about the police, the courts, and crime levels in their communities. For the most part, the jurors in this study had a moderate level of trust in the police and the courts (5.1 and 5.4, respectively, on a scale of 1 to 7), although trust in the police was significantly lower in the Bronx and in the District of Columbia. Trust in the courts did not vary by site. Jurors on average were also moderately concerned about the level of crime in their communities (5.5), but not overly so.

[118] According to the 2000 Census, Maricopa County had the highest white proportion of the four sites (77.4%). The white population was actually a minority of the total population in the remaining three sites (Los Angeles – 48.7%, District of Columbia – 30.8%, and Bronx – 29.9%).

Frequency of Hung Juries

A limitation of our broad-based examination of hung jury rates is the variation in the definition of what constitutes a hung jury, making it difficult to compare across jurisdictions. One of the benefits of the second stage of our project was its ability to examine different ways of identifying and describing hung juries and hung jury rates. In the four jurisdictions we studied in this phase, we first identified whether the jury hung on all of the counts it considered. We also assessed how often juries hung on Count 1, typically the most serious charge. Finally, we measured how frequently juries hung on all counts in the case. Table 4.1 shows these figures.

Table 4.1
Percentage of Hung Juries

	Sites				
	LA	**Maricopa**	**Bronx**	**DC**	**Totals**
Hung on all counts n=27	11.7%	3.3%	3.1%	12.8%	7.5%
Hung on Count 1 n=36	16.2%	5.1%	3.1%	16.0%	9.6%
Hung on any count n=46	19.5%	7.7%	3.1%	22.3%	12.8%

Note: This analysis includes both single and multiple defendant cases.

A few initial observations are in order. First, the proportion of cases that result in hung juries varies across the jurisdictions. Two jurisdictions that were interested in participating in the study because of their concerns about hung juries – Los Angeles and the District of Columbia – have higher rates of hung juries than the other two sites, Maricopa County and the Bronx. Juries that hang on all charges constitute about one of every eight felony jury trials in Los Angeles and DC, while the "all hung" jury rate for Maricopa and the Bronx is much lower at 3%.

Secondly, different ways of measuring hung juries produce different percentages. Juries that hang on all counts are the least frequent, juries that hang on at least one of the counts before them are the most frequent, and the juries that hang on Count 1, typically the most serious charge facing the defendant, fall between the two.

Table 4.2
Multiple Defendants and Hung Juries

		Sites				
	N	LA	Maricopa	Bronx	DC	Totals
Single defendant						
All hung	23	10.6%	3.4%	2.3%	12.6%	7.0%
Count 1	33	13.6%	5.6%	2.3%	15.9%	9.1%
Any hung	38	16.7%	8.0%	2.3%	20.7%	11.6%
Multiple defendants						
All hung	3	18.2%	0.0%	0.0%	14.3%	11.5%
Count 1 (1st Def)	2.5	31.8%	0.0%	0.0%	29.0%	23.1%
Any hung	7	36.4%	0.0%	0.0%	42.9%	26.9%

Note: One multiple defendant case in which the jury hung on one defendant and acquitted the other on Count 1 is counted as one-half of a hung jury outcome on Count 1.

The analysis in Table 4.1 combines cases in which one defendant faced charges alone, and multiple defendants who were tried together. The presence of multiple defendants increases the overall number of counts. How will this affect hung juries? Looking at Table 4.2, we see that the chances of a hung jury appear to increase in multiple defendant cases.

The number of multiple defendant cases is quite small (28 cases) so the percentages should be interpreted cautiously. Of the 11 multiple defendant cases in Los Angeles for which we have outcome information, the jury hung on *all* charges in 2 of those cases, but hung on *at least one charge* on 4 of the 11. In DC, juries hang on *all* charges in 1 of the 7 multiple defendant cases, hanging on *at least one charge* in 4 of the 7 multiple defendant cases. In both sites, the likelihood of a completely hung jury in the multiple defendant case is slightly greater than the comparable likelihood in a single defendant case. However, the chance of hanging on any charge in the case seems to increase substantially with multiple defendants – although again the numbers are quite small and it would not be prudent to make too much of them. Juries reached verdicts in all the multiple defendant cases in Maricopa and Bronx counties.

The Number of Counts and the Likelihood of a Hung Jury

We predicted that the number of counts would affect the likelihood of hung juries. As counts increase, so does the opportunity for disagreement; however, more counts mean more opportunity for juries to agree on at least some of the counts.

That turns out to be the case. Looking at the cases that hang *on any charge*, the greater the number of charges, the more likely that one will be a hung jury outcome.[119] The effect of counts persists when we took into account whether multiple defendants were tried. That is, the importance of counts is not explained completely by the fact that multiple defendant cases have

[119] M (Cases that do not hang) = 2.81, M (Cases that hang on at least one count) = 3.76, F (1,357) = 5.23, p = .02.

more counts. 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.[120]

Case Types and the Frequency of Hung Juries

Are some types of cases more likely to result in hung juries than others? Could it be that evidentiary or other case factors, or public attitudes towards particular types of cases, help to produce hung juries? Table 4.3 shows the frequency of hung juries in different types of cases. Two analyses are included for each type of case: the number and proportion of juries considering the case type that hang *on all charges*, and hung on *any of the charges*. So, for example, there are four murder trial juries that hang on all charges, or 8.7% of the total number of juries that heard murder cases. Eleven murder trial juries hang on at least one charge, 20% of the total murder trial juries.

Table 4.3
Juries hanging on any or all charges, by type of case

	Of Entire Sample	All Hung		Any Hung	
	%	N	%	N	%
Drug	28	12	12.0	12	12.0
Murder (1st and 2nd degree)	13	4	8.7	11	23.9
Attempted Murder	4	1	3.7	3	23.1
Robbery	13	3	6.4	6	12.8
Assault	12	1	2.5	4	10.0
Burglary, Larceny, Theft	9	2	6.3	5	15.6
Weapons	6	1	5.0	1	5.0
Sex Offenses	0	0	0.0	1	5.3
DUI/DWI	0	2	16.7	2	16.7
All other offenses	7	1	4.0	1	4.0
Totals		**27**	**7.6**	**46**	**13.0**

Note: Number and proportion of hung juries may vary slightly from table to table, because of incomplete information about certain variables. In this table, only cases for which we had case type information are included in analyses.

There are some interesting results in this table. First, consistent with Table 4.1, juries are less likely to hang on all charges than on some charges. In addition, some types of cases appear

[120] M (Cases that hang on all charges) = 1.96, M (Cases that reached at least one verdict) = 3.02, F (1,357) = 4.01, p = .05.

to hang more frequently, although the numbers are small so we cannot make much of them. For example, drug cases constitute 28% of the sample, but only 12% of hung juries. In contrast, murder cases are more likely to hang on some charges and less likely to hang on all charges than would be expected from their proportion in the caseload (13% of the sample; but 24% of juries that hung on at least one charge; and 8.7% of juries that hung on all charges). Economic crimes including burglary, larceny and theft are 15.6% of hung juries, but 9% of the sample.

When juries hang, they seem to hang most frequently on the most serious charge. Six of the eleven hung jury outcomes in murder cases came on the most serious charge of first-degree murder. All but one of the hung juries in drug cases is for selling drugs rather than drug possession, and all twelve of the drug cases hung on the first count. Five of the six robbery charges also hung on Count 1.

Evidentiary Issues and Hung Juries

Do cases with complex evidence or legal instructions make it more difficult for jurors to reach agreement? To answer this important question, we analyzed questions posed to jurors, judges, and attorneys about the difficulty of the law and the evidence at trial. Table 4.4 compares the responses in cases in which juries hang on at least one charge to cases in which juries reach agreement on all charges. Because jurors within a jury are interdependent, we used the average (mean) rating of all jurors who responded in a particular case as our unit of analysis.

Table 4.4
Evidence Factors and Hung Juries

	Jury Trial Outcome			
	Verdict	**Any Hung**	**F-value**	**p-value**
Juror Responses (Mean of all jurors in a case)				
How complex was this trial? (M jury)	3.57	4.13	8.93*	0.003
Overall, how easy or difficult was it for your jury (M)				
…to understand the evidence in this trial?	5.02	4.32	20.46*	0.001
…to understand the expert testimony?	5.43	5.13	5.15*	0.024
…to understand the judge's instructions about the law?	5.70	5.17	13.73*	0.001
Do you agree [that] some of the other jurors did not understand key evidence in this case? (M)	3.46	4.86	59.94*	0.001
Judge Responses				
How complex was the evidence presented at trial?	2.53	2.52	0.00	0.970
How complex was the law?	2.82	3.20	2.04	0.154
How well did jury understand issues?	6.18	5.38	13.32*	0.001
Attorney Responses				
Prosecutor: How complex was this trial?	3.20	3.39	0.43	0.509
Prosecutor: How well did jury understand issues?	5.32	4.52	4.94*	0.027
Defense: How complex was this trial?	3.18	3.34	0.29	0.590
Defense: How well did jury understand issues?	5.22	4.81	1.24	0.267

Note: *Indicates the difference between the two outcomes was significant at a p < or = .05. All responses were along a 7-point Likert scale with 7 = most complex, very difficult, agree strongly, or very well, and 1 = least.

There is a clear pattern in this table. Juries in cases that hang on at least one charge rate the case as more complex and difficult for the jury to understand than verdict juries. In general, most juries do not appear to view their trials as highly complex. Just 16% of the juries gave an average rating of 5 or more on the 7-point complexity scale. And most jurors confidently say that it was easy to understand the evidence, expert testimony, and judicial instructions. However, on average, jurors in hung cases are more likely to say that it was difficult to understand the evidence, the expert witnesses, and the judge's instructions on the law than their verdict jury counterparts. They also are much more likely to agree with the statement, "Some of the other jurors did not understand key evidence in this case."

As a follow up, we examined whether jurors' ratings of complexity were reduced in cases where judges offered jurors techniques designed to aid their decision-making process. Judges permitted juror notetaking in 74% of the cases and provided notebooks in 56%. Written instructions were provided in a majority of the cases (61%). The only procedural factor decreasing judgments of complexity was when judges allowed jurors the option of submitting questions, which was an option in 38% of the trials. Jurors rated their cases as less complex when the procedural option of allowing juror questions was available to them.

Interestingly, judges and attorneys do not share the juries' perception that the hung jury trials are more complex. Overall, judges, prosecutors, and attorneys rate the complexity of the

evidence and law as comparable in hung and verdict cases. They also rate the jurors positively on how well they understand the evidentiary and legal issues in the case. However, once the jury hangs, judges and prosecutors (but not defense attorneys) express concern about juror understanding of the evidence and law. It's important to note that this rating comes after the jury reaches a verdict or hangs, so courtroom personnel may be taking the result into account as they search for a reason for a hung jury.

These analyses were done comparing juries that hung on one or more charges to juries that reached verdicts. Similar analyses were undertaken with juries that hung on all charges, although the numbers are relatively small so only large effects can be detected. There were similar patterns, though a few differences should be noted. Juries that hang on all charges do not rate the complexity of the trial higher than verdict juries, but they still report greater difficulty in understanding the evidence and the judicial instructions in the law. They also are more likely than verdict juries to say that others on their jury did not understand key evidence.

Examining the relationship between case complexity and hung juries in the four sites, we find it is a more consistent factor is some sites rather than others. In Los Angeles, although hung jurors report having trouble with the evidence and the law, they don't see their cases as more complex and neither do the judges and the attorneys. In Maricopa County, hung jurors report that their cases are more complex and that their jury had trouble with understanding the evidence and the law. Maricopa judges agree that the law in hung jury cases is significantly more complex, defense attorneys also see the cases as significantly more complex, and the prosecutors are marginally more likely to report that the hung jury cases are more complex. Thus, in Maricopa County, there seems to be general agreement that the cases in which juries hang on one or more charges are more challenging from an evidentiary or legal standpoint. There is no strong relationship between case complexity and hung juries in the Bronx, but in DC both judges and jurors see complexity differences. Judges see the legal issues in hung jury cases as more complex, while hung jurors report problems with both the evidence and the law. Case complexity, then, arises as a factor related to hung juries in more than one jurisdiction.

Quantity of Evidence

The fact that hung jurors report more difficulty with the evidence suggests that we should take a close look at the amount and type of evidence in the cases. Table 4.5 shows several measures, obtained from responses to the case data forms, of the overall quantity of evidence in verdict cases and cases in which the jury hung on any charge.

Table 4.5
Quantity of Evidence and Hung Juries

	Jury Trial Outcome			
	Verdict	**Any Hung**	**F-value**	**p-value**
Trial length	4.36	4.55	0.20	0.66
Trial length - natural log	1.26	1.39	1.29	0.26
Multivariate analysis of evidence quantity			1.04	0.40
Number of prosecution witnesses	5.70	7.29	3.15	0.08
Number of prosecution experts	0.89	0.94	0.04	0.84
Number of prosecution exhibits	14.45	19.89	1.95	0.16
Number of defense witnesses	1.86	2.23	0.87	0.35
Number of defense experts	0.15	0.03	1.08	0.30
Number of defense exhibits	4.02	4.06	0.00	0.98

Recall that the range in trial days is considerable. Cases in which the jury reached a verdict on all counts ranged from less than one day to 24 trial days, while cases in which the jury hung on at least one charged ranged from less than one day to 8 trial days. On the overall evidence quantity measures that we have available, there are no statistically significant differences between verdict and hung juries. The average trial length is similar, whether measured directly or by taking the natural log. Although there are some hints that the prosecution's case is a bit more extensive in hung jury trials (the number of prosecution witnesses is marginally greater in hung jury cases, for example), a multivariate analysis of the quantity of different types of evidence reveals no statistically significant differences. So, our conclusion is that the quantity of evidence does not appear to overwhelm jurors and lead them to hang.

Evidence Closeness or Ambiguity and Hung Juries

The groundbreaking research of Kalven and Zeisel (1966) suggested that the closeness of the evidence plays a significant role in hung juries. As noted earlier, Kalven and Zeisel found twice as many hung juries in cases that judges characterized as close than in trials with clear evidence.

In the original Kalven and Zeisel research, judges were asked "From the factual evidence in the case was the defendant's guilt or innocence (1) very clear; or (2) a close question whether or not he was guilty beyond a reasonable doubt?"[121] To obtain a more sensitive measure of the closeness of the evidence in the case, we asked our respondents, "How close was this trial?" with one endpoint of a 7-point scale labeled "evidence strongly favored prosecution" and the other endpoint labeled "evidence strongly favored defense." The judgments of the degree to which the case favors the prosecution or the defense are significantly correlated among juries, judges,

[121] KALVEN & ZEISEL, *supra* note 20 at 532. The question was asked only of Sample II respondents. (1,191 questionnaires, about a third of the total questionnaires in the Jury Project).

prosecutors, and defense attorneys.[122] Thus, jurors, judges, and even adversary attorneys tend to agree about what constitutes a relatively strong case for one side or the other.

To assess the closeness or ambiguity of the evidence, we took the 7-point evidence rating scale and recoded it so that the endpoints 1 and 7 represented the lowest level of evidence ambiguity, since the endpoints reflected the strongest assessments of the slant of the evidence to one side or the other. The midpoint of the original evidence rating scale now became the highest level of evidence ambiguity, and the intermediate scale values were recoded accordingly (e.g., 1= evidence clearly favored either prosecution or defense and 4= evidence favors neither party and is ambiguous). Table 4.6 shows the average responses of jurors, judges, and attorneys to questions about the strength and ambiguity of the trial evidence in verdict cases and cases in which the jury hung on at least one charge.

Table 4.6
Strength of Evidence and Hung Juries

	Jury Trial Outcome			
	Verdict	Any Hung	F-value	p-value
Juror Responses (Mean or sd of all jurors in a case)				
How strong was the prosecution's case? (M)	4.61	4.43	0.65	0.420
How strong was the prosecution's case? (sd)	1.22	1.51	15.17*	0.001
How strong was the defense's case? (M)	3.63	3.39	1.80	0.181
How strong was the defense's case? (sd)	1.34	1.41	0.94	0.333
Evidence favored prosecution/defense? (M)	3.54	3.44	0.17	0.683
Ambiguity of evidence	2.61	3.18	15.30*	0.000
Judge Responses				
Evidence favored prosecution/defense?	3.14	3.41	1.22	0.269
Ambiguity of evidence	2.61	2.86	2.51	0.114
Attorney Responses				
Prosecutor: Evidence favored prosecution/defense?	3.5.	3.35	0.39	0.532
Prosecutor: Ambiguity of evidence	2.54	2.28	0.41	0.520
Defense: Evidence favored prosecution/defense?	3.35	3.60	0.76	0.384
Defense: Ambiguity of evidence	2.58	3.04	1.88	0.172

Note: * Indicates the difference between the two outcomes was significant at a p< or = .05.
Responses were along a 7-point Likert scale with 7 = very strong or favoring defense and 1 = very weak or prosecution. Ambiguity was measured along a 4-point scale with 4 = most ambiguous and 1 = least ambiguous.

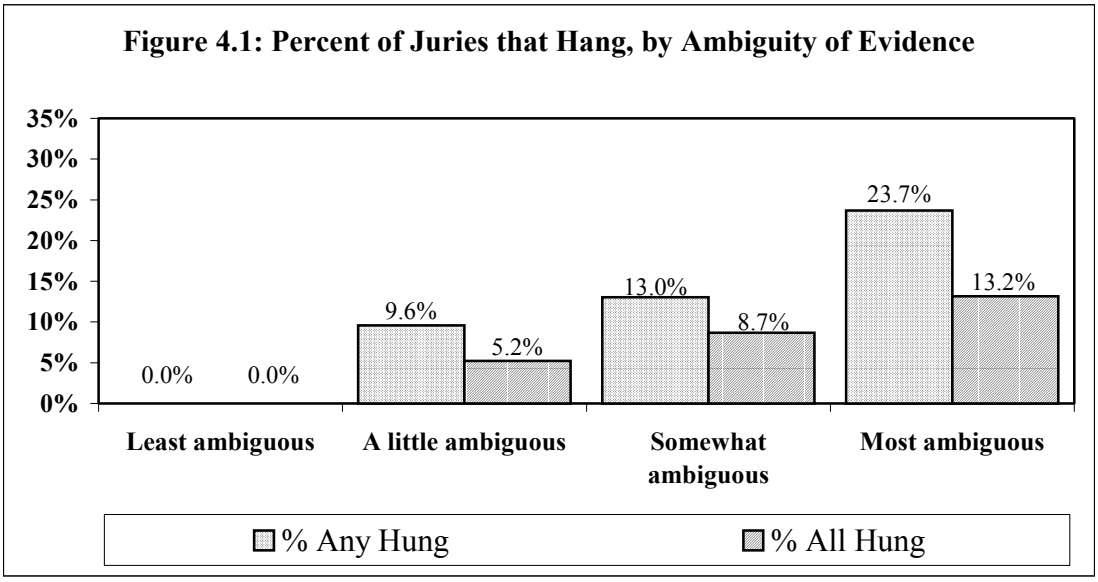
First of all, when jurors, judges, prosecutors or defense attorneys across the four sites are asked to rate the extent to which the trial evidence overall favors the defense or the prosecution, no differences between verdict and hung juries emerge.

[122] All correlations are statistically significant at $p < .001$, and range from .36 to .44.

The rated strength of the prosecution's case does seem to *vary* among jurors on hung juries, though. When we look at the mean or average rating for each jury, the prosecution's case is on average rated no differently by verdict and hung juries. The same goes for the rated strength of the defense's case. On a 7-point scale, the prosecution's case is given a 4.6 average rating, substantially higher than that of the defendant's case, rated on average at 3.6. However, when we measure the *variability* of jurors' perceptions of the strength of the prosecution's case, an interesting difference is found. Hung jurors are much more likely to disagree about the strength of the prosecution's case, as measured by the within-jury standard deviation of their ratings.

One can see from Table 4.6 that when the jury's average rating of evidence ambiguity or closeness is high, the jury is significantly more likely to hang. For example, in the group of the clearest cases, no juries are unable to reach a verdict. See Figure 4.1. As the degree of evidence ambiguity rises, so does the likelihood of a hung jury. Ten percent (10%) of the cases hang on at least one charge at the second level of ambiguity, 13% at the third level, and 24% at the highest level. There is a similar, albeit reduced and not statistically significant, trend for cases that hang on all charges. Although the judge's and the defendant's evidence ambiguity ratings follow a similar pattern to the jury's, neither relationship to hung juries is statistically significant. There is no such relationship at all with prosecutors' ratings of evidence ambiguity.

Figure 4.1: Percent of Juries that Hang, by Ambiguity of Evidence



Looking at the relationship between evidence ambiguity and hung juries across the four sites, we find some intriguing differences. In Maricopa County, which had a small number of hung juries, judges and defense attorneys both rate the ambiguity of evidence as significantly higher in the jury cases that hung, and juries and prosecutors are marginally more likely to say that the hung jury cases have more closely matched evidence. In Los Angeles, juries that hang on at least one charge are again significantly more likely to say that the evidence is close, and judges are marginally more likely to agree, but attorneys do not follow the same pattern. In the Bronx and the District of Columbia, there appears to be no relationship at all between the

closeness of the evidence and the likelihood of a hung jury, whether one looks at ratings of juries, judges, or attorneys. One is tempted to conclude that in some jurisdictions, evidence ambiguity plays a role in hung juries, while in some other jurisdictions hung juries may occur for different reasons.

Importance and Believability of Types of Testimonial Evidence

If evidence quantity does not differentiate verdict and hung juries, could the type of evidence be a factor? We asked both judges and jurors to rate the importance of different types of testimonial evidence in the cases before them, and how believable that testimony was. For instance, we asked judges or jurors to rate the importance and believability of testimony given by police, co-defendants, informants, eyewitnesses, victims, defendants, and experts. These questions were designed to examine whether certain types of witnesses or testimony created particular difficulty for jurors.

Judges who presided over verdict versus hung cases rate the importance of testimony by police, eyewitnesses, experts, informants, victims, and defendants quite similarly. Judges see the codefendant's testimony as more significant in hung jury cases than in verdict cases, reflecting the greater prevalence of multiple defendant trials in the cases in which juries hang on at least one charge. However, there are a small number of cases included in this comparison so the finding should not be over-interpreted.

Verdict and hung jurors are also very similar in their ratings of importance and believability of these different categories of witnesses, with two exceptions. First, when the defendant testifies, the defendant's testimony is seen as highly important, and the rated importance does not vary for verdict and hung jurors. However, verdict jurors rate the defendant's believability more favorably than do hung jurors. Verdict jurors report similar overall levels of sympathy for the victim and the defendant.

Table 4.7
Type of Evidence and Hung Juries

	Jury Trial Outcome			
	Verdict	Any Hung	F-value	p-value
Juror Responses (M or sd of all jurors in a case)				
Importance of police testimony (M)	5.27	5.27	0.00	1.00
Importance of police testimony (sd)	1.43	1.53	1.00	0.32
Believability of police testimony (M)	5.12	4.99	0.55	0.46
Believability of police testimony (sd)	1.25	1.47	7.25 *	0.01
Sympathy for victim (M)	3.85	4.10	1.18	0.28
Sympathy for victim (sd)	1.57	1.46	0.70	0.40
Believability of victim (M)	4.39	4.27	0.24	0.63
Believability of victim (sd)	1.47	1.51	0.12	0.73
Sympathy for defendant (M)	2.94	2.90	0.07	0.80
Sympathy for defendant (sd)	1.58	1.56	0.05	0.82
Believability of defendant (M)	3.68	3.19	3.87 *	0.05
Believability of defendant (sd)	1.42	1.51	0.40	0.53
Judge Responses				
Importance of police testimony	4.90	4.98	0.05	0.82
Importance of eyewitness testimony	5.81	5.71	0.06	0.80
Importance of expert testimony	4.19	4.00	0.25	0.62
Importance of real/demonstrative evidence	4.40	4.41	0.01	0.92
Importance of defendant testimony	5.60	6.13	1.58	0.21
Importance of co-defendant testimony	3.18	5.50	4.36 *	0.04
Importance of informant testimony	3.73	4.73	1.11	0.30
Importance of victim testimony	6.11	6.16	0.02	0.90

Scale: 1 to 7, where 1 is low and 7 is high on importance, believability, sympathy.

Police testimony is rated as quite important[123] and believable.[124] Overall there are no detectable differences between verdict and hung juries on these perceptions of police testimony. However, looking closer at the sentiment within juries, the *variability* within juries is significantly greater in juries that hang on one or more charges. Verdict juries tend to agree more about the believability of the police (sd = 1.25); while hung juries are more split in their opinions (sd = 1.47). Similar results are obtained when we compare verdict juries with juries that hang on any charge or on all charges. So these analyses indicate that divergent evaluations of the merits of police and defendant testimony may at least partly underlie the jury's inability to reach a verdict.

To assess whether different sites varied in the importance of police evidence, we also undertook analyses of variance with site as a factor. Police testimony is rated as important in all sites, and its importance does not change significantly across sites. However, the believability of police testimony varies. It is lowest in the Bronx (4.51), and highest in Maricopa (5.58), and in between in the other two sites (DC: 5.09; Los Angeles: 5.21).[125] Furthermore, the variability or standard deviation of jurors' ratings of police believability differs across sites.[126] Jurors within

[123] 5.27 on a 7-point scale of importance.

[124] M = 5.12 and 4.99 for Verdict and Hung juries.

[125] F (3, 355) = 14.06, p = .001.

[126] F (3, 340) = 10.36, p = .001.

juries differ more on their ratings of the police in the Bronx (sd = 1.49) than in Maricopa (sd = 1.09). The other sites fall in between the two.

There is a statistically significant site difference in jurors' ratings of trust in the police.[127] All four sites are significantly different from one another on post-hoc tests. Maricopa jurors express the strongest trust in the police (5.63 on a 7 point scale), followed by Los Angeles (5.28), DC (4.81), and the Bronx (4.59). The police in Maricopa, then, tend to be evaluated in a more uniform and positive way compared to the Bronx, and the Los Angeles and DC sites tend to fall in between the other two sites in ratings of police testimony and trust.

Attorney Skill

Is attorney competence linked to hung juries? Can a talented attorney hang a jury, or predispose one that is badly split to reach a verdict? To answer these and other questions about the importance of attorney quality, a number of questions tapped trial participants' views of the attorneys in their cases. We asked jurors, judges, and attorneys to rate the skill of both sides on a 1 to 7 point scale. In addition, we developed a relative skill rating of the two sides by subtracting the defense skill rating from the prosecutor rating. Positive numbers show that the prosecutor is rated more highly than the defense; negative numbers show that the defense attorney is rated more positively.

[127] F (3, 357) = 41.36, p = .001.

Table 4.8
Attorney Skill and Jury Verdicts

	Jury Trial Outcome			
	Majority Conviction	**Mixed**	**Any Hung**	**Majority Acquittal**
Juror Responses (M of all jurors in a case)				
How skillful was prosecutor?	5.24	5.10	4.61	4.32
How skillful was defense attorney?	4.15	4.53	4.38	4.80
Attorney skill -- prosecutor minus defense	1.08	0.57	0.23	-0.49
Judge Ratings				
How skillful was prosecutor?	4.97	5.06	4.62	4.86
How skillful was defense attorney?	4.86	5.42	5.16	5.29
Attorney skill -- prosecutor minus defense	0.10	-0.39	-0.53	-0.44
Prosecutor Ratings				
How skillful was defense?	4.83	5.60	5.26	4.88
How skillful were you?	4.93	5.36	5.35	5.04
Defense Ratings				
How skillful was prosecutor?	4.79	5.00	5.24	4.84
How skillful were you?	4.99	5.22	5.38	5.21

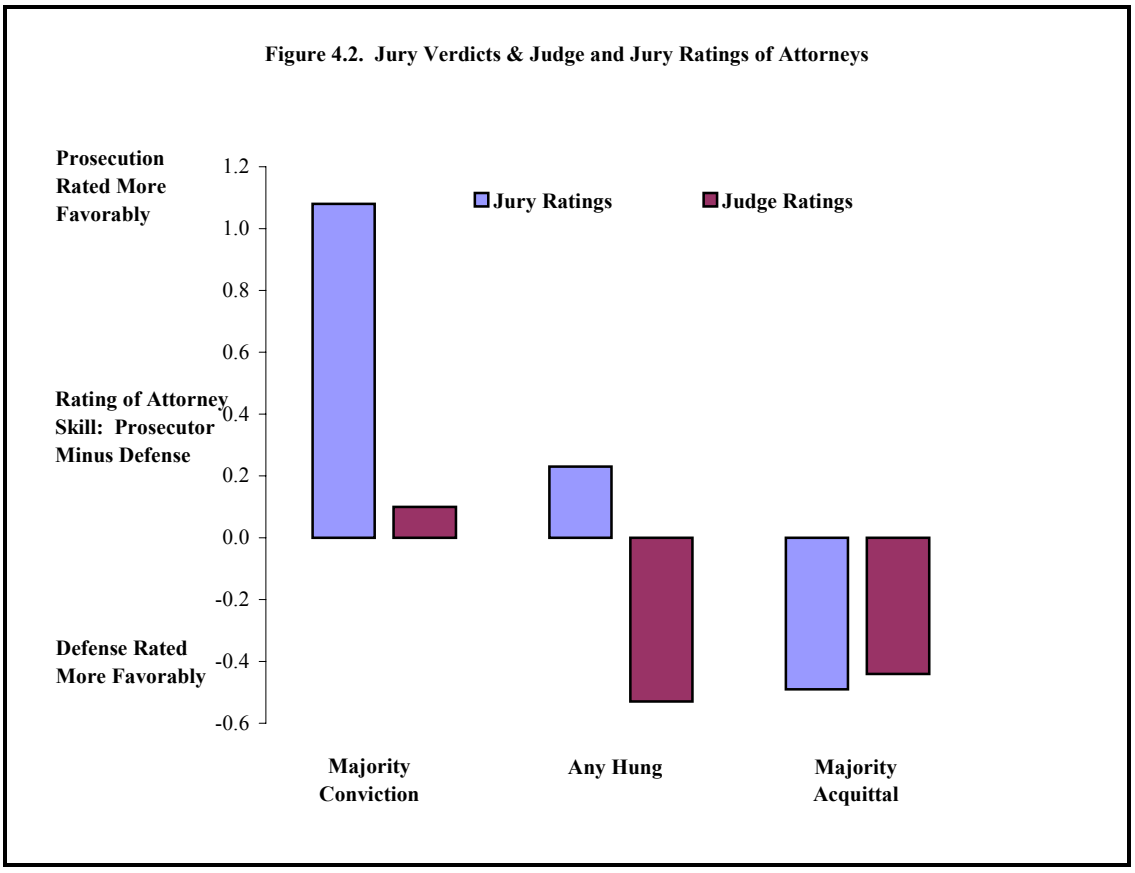
Scale: 1 to 7, where 1 is low skill and 7 is high skill.
Combined scale: Defense rating is subtracted from prosecutor rating.
Negative numbers indicate better defense; positive numbers better prosecutor.

On average, jurors' ratings of the prosecutor (4.85) are slightly higher than their ratings of the defense attorney (4.45). However, the judges' ratings go in the opposite direction, with slightly higher ratings of the defense attorneys (5.11) than the prosecutor's (4.90). The two sets of ratings, though, are significantly correlated with each other (.25, $p = .001$ for prosecution ratings; .37, $p = .001$ for defense attorney ratings; .41, $p = .001$ for combined skill rating). Prosecutors and defense attorneys tend to rate themselves higher than the opposing counsel, not surprisingly. Attorneys' ratings of their own skills were uncorrelated to juror ratings; however, they were linked to judges' assessments ($r = .17$, $p = .001$ for prosecutor and judge ratings of the prosecutor; and $r = .17$, $p = .001$ for defense attorney and judge ratings of the defense attorney).

Jurors' average ratings of the prosecutor's and defense attorney's skill differ across the sites. Analyses of variance showed that there are significant site differences in both sets of ratings. $F(3, 359) = 3.43$, $p = .017$ for prosecutor's skill and $F(3, 359) = 14.48$, $p = .001$ for defense attorney's skill). Pair wise comparisons of the sites show that DC jurors rate the prosecutor's skill the lowest (4.60), compared to the Los Angeles prosecutor rating (5.10) which is highest. Prosecutor ratings in the other two sites fall in between. DC has the lowest defense attorney skill rating (4.01) and the Bronx has the highest defense attorney skill rating (5.02), with the other two sites in between.

Table 4.8 and Figure 4.2 (see table above and figure below) show the links between attorney skill ratings and verdict outcomes. Not surprisingly, one can observe in the juror and

judge ratings that cases in which the jury acquits have relatively higher defense attorney skill ratings, cases in which the jury convicts have relatively higher prosecutor skill ratings. Hung juries include cases with relatively stronger defense attorneys, as can be observed in the pattern of relative ratings.



Directionality of Evidence and Jury Case Outcomes

Another angle to take in looking at the importance of evidence in hung juries is to examine whether the rated strength of the evidence in hung jury cases is comparable to cases in which the jury convicts or alternatively acquits. For this analysis, we evaluated the outcome pattern in each jury trial as (1) majority conviction, in which the jury convicted on all or the clear majority of the charges it considered; (2) majority acquittal, in which the jury acquitted the defendant on all or the clear majority of the charges; (3) mixed outcomes, in which the jury produced a combination of convictions and acquittals that were approximately equal. Finally, we identified (4) the hung jury cases, in which the jury hung on any count.

The categories are mutually exclusive, so that even if a jury convicts on a majority of charges, yet hangs on one charge, it is classified as a hung jury for the purposes of this analysis. Table 4.9 shows how juries, judges, prosecutors, and defense attorneys rate the relative merits of the prosecution's case and the defense's case for these outcomes.

Table 4.9
Directionality of Evidence and Jury Verdicts

	Jury Trial Outcome			
	Majority Conviction	Mixed	Any Hung	Majority Acquittal
Judge: Evidence favored defense?	2.64	2.84	3.41	3.90
Jury: Evidence favored defense?	2.47	3.40	3.44	4.94
Prosecution: Evidence favored defense?	3.19	3.35	3.35	4.08
Defense: Evidence favored defense?	2.90	3.11	3.60	3.90

Note: 1= evidence strongly favored prosecution; 7 = evidence strongly favored defense.

All four sets of courtroom observers show a very similar pattern. Juries, judges, prosecutors and defense attorneys rate the evidence as most strongly favoring the prosecution in the cases in which the jury convicts on the majority of charges. Similarly, they rate the evidence as most supportive of the defense in cases in which juries acquit on the majority of charges. There is a decided pro-prosecution tilt to the evidence, according to all the courtroom actors. Even cases that result in defense verdicts are rated at around the midpoint of the 7-point scale. This may reflect both the fact that the prosecution chooses cases for trial, and thus can drop weak cases, and the high standard of guilt beyond a reasonable doubt.

What about hung juries? Like mixed juries, they fall between the majority conviction and majority acquittal juries. For juries, judges, and defense attorneys, the evidence in hung jury cases is rated as significantly different from both the conviction and acquittal cases, in post-hoc tests. However, prosecutors see evidence in the hung cases as comparable to the majority conviction trials. Quite similar patterns are found in all four sites, with evidence in hung jury cases in between the majority conviction and acquittal trials. All of this reinforces the conclusion that evidence ambiguity, or alternatively the competing strengths of prosecution and defense evidence, constitutes a key factor in producing hung juries. Trying to assess the relative merits of the two sides may be exactly what is giving the jury trouble. However, we should also examine other possible evidentiary contributors to hung juries.

Judge/Jury Agreement

All defendants have a right to a jury trial and can waive that right in favor of a bench trial. Historically, jury trials have been thought to produce more acquittals than a bench trial. Therefore, researchers are interested in rates of how often the judge and jury agree. We found that when the jury convicted on a majority of the charges, the judge would have also convicted in all but 9 cases (93.7% agreement). However, when the jury acquitted on a majority of the

charges, the judge would have only acquitted in 39.3% of the cases. In all, the judge agreed with the jury in 70.3% of the cases.[128]

Kalven and Zeisel (1966) examined 3,576 criminal trials for judge-jury agreement. Below Table 4.10 compares their agreement rates with ours.[129] The rates are similar.

Table 4.10
Comparing Kalven & Zeisel's (K & Z) Judge-Jury Disagreement Rates to Current Study

		Jury Verdict		
		Acquits	**Convicts**	**Hung on Any**
Judge Preference				
Acquits	NCSC vs.	42 (14.4%)	9 (3.1%)	8 (2.7%)
	K & Z	479 (13.4%)	77 (2.2%)	40 (1.1%)
Convicts	NCSC vs.	65 (22.3%)	133 (45.5%)	35 (12.0%)
	K & Z	603(16.9%)	2217 (62.0%)	157(4.4%)

Judge's predictions generally followed jury verdicts although they were not always on target. In 66.4% of the cases the judge predicted the jury would return a guilty verdict on all the charges when indeed the jury convicted on a majority of the charges. In 56.5% of the cases, the judge predicted that the jury would render an acquittal on all charges when the jury acquitted on most of the counts. Finally, in 41.4% of the cases the judge predicted the jury would find the defendant guilty on some charges and not guilty on others when the jury was evenly split in reaching acquittals and convictions. On the other hand, the judge was much better at predicting a hung jury than convictions or acquittals. The judge was asked, "What is the likelihood that the jury would hang?" In the juries that hung on any charge, the judge provided a much higher percentage than in the other cases. See Table 4.11.

[128] This figure excludes cases when the jury hung or when the jury decision was evenly split between acquittals and convictions (excludes 71 cases).

[129] In the current study, there were 79 cases in which the judge did not respond and an additional 28 cases with mixed acquittal/conviction verdict that were not included for the comparison with Kalven and Zeisel. Note our hung jury rates apply when the jury hung on any count. Kalven and Zeisel's data may thus be underestimated in comparison with our data. In total, there were 292 cases with comparable data in the current study and 3,576 cases in the Kalven and Zeisel study.

Table 4.11
Judge's Prediction of Likelihood of a Hung Jury

Judge's Prediction (% Likely to Hang) When Jury's Decision was…	N	Mean %	Median %
Majority Conviction	145	17.4	10.0
Majority Acquittal	116	21.6	17.5
Hung on Any Count	43	37.4	40.0
Mixed Conviction/Acquittals	30	19.9	10.0
Total	**334**	**21.5**	**14.0**

Other Case Characteristics

A number of factors conspired to make it difficult to identify whether case factors such as the defendant's and victim's race, ethnicity, or gender influences the likelihood of hung juries. Most important, of course, is that there are relatively few hung jury trials, making it difficult to test for such effects statistically. In addition, case information about the defendant's and victim's race and gender (especially data on the victim) was frequently missing. In some drug cases there were no victims identified, thus the case type affected the rate of missing information on victims. That said, the defendant's gender and race, the victim's gender and race, the number of victims, and the relationship between the defendant and victim are all statistically unrelated to the probability of a hung jury. The sole exception is that cases with women victims are less likely to hang on all charges.[130] Just 1.4% of the 70 cases that are identified as having a female victim result in a completely hung jury, compared to 9.7% of 118 cases with male victims. There were a small number of cases for which we have victim information.

Juror Characteristics

Characteristics of individual jurors may play a role either directly or indirectly in hung juries. Even if individual characteristics are not directly linked to a predisposition to hang, diversity along demographic or attitudinal lines may make it more difficult for jurors to agree unanimously. For these reasons it is important to examine whether particular juror characteristics, or constellations of characteristics, are more frequent in juries that hang.

In general, most of our analyses find no significant relationships between various juror characteristics and the likelihood of a hung jury outcome. For instance, the proportion of men on the jury is unrelated, as is the educational, racial, economic, and age diversity of the jury. The one factor that varies significantly is the percentage of jurors who have served previously on a jury. In cases that reach a verdict, 38% of the jurors have previously served on a jury. In hung juries, 54% of the jurors have prior jury service ($F(1, 336) = 19.85$, $p = .001$). Surprisingly, this finding counters previous mock jury work on jury findings.[131] The same relationship between prior jury service and hung jury outcomes is found when we compare verdict juries with juries

[130] Fisher exact test, $p = .034$.

[131] Dillehay & Nietzel, *supra* note 52.

that hang on all charges. Investigating whether this reflects different practices among the jurisdictions, we examined the relationship between prior jury service and any hung jury outcomes within each site. In both the District of Columbia and the Bronx, there is a statistically significant relationship between the two. There is no relationship between prior jury services and hung jury outcomes in Los Angeles or Maricopa County.

Sentiments About Law and Fairness

Juries' general concerns about crime in the community, trust in the police, and trust in the courts are all unrelated to the likelihood of a hung jury. However, sentiments about the fairness of the specific law in the trial and the fairness of the case outcome emerge as important elements. See Table 4.12. On average, juries rate the fairness of the laws in their cases relatively highly, with an average rating between 5 and 6 on a 7-point scale. However, juries hanging on at least one charge rate the fairness of the law in the case as lower than verdict juries. Hung juries also rate the fairness of the legally correct outcome lower. The concern seems to be a broad one about the general fairness of a law rather than a more specific concern about the impact on the defendant.

Table 4.12
Juror Views about Fairness of the Law*

	Jury Trial Outcome			
	Verdict	**Any Hung**	**F-value**	**p-value**
How fair was law in this case?	5.73	5.21	14.74*	0.001
How fair was legally correct outcome?	5.46	4.57	43.85*	0.001
Worried about consequences of conviction for defendant?	3.45	3.29	0.96	0.328
Consequences for defendant too lenient or harsh?	4.28	4.16	1.44	0.231

***on a scale of 1 to 7 where 1 = strongly disagree and 7 = strongly agree.**

Multivariate Model

Multivariate models simultaneously integrate the effects of variables, which in theory isolate the effects of each by controlling for others specified in the model. Logistic regression models are typically used for binary or dichotomous outcome variables, such as whether a jury is likely to hang or to arrive at a verdict. However, the data in this study have unique dimensions that called for consideration of alternative methods.

Methodological Considerations

One concern we encountered with these data derived from our data collection decisions. We provided all jurors, attorneys and judges with questionnaires. Jurors are, in a sense, nested within a case. Thus, the case to which jurors are assigned affects their responses. We are not able to simply evaluate the jurors' responses as independent and individual observations.

Hierarchical Linear Modeling was considered as an option for handling these multi-level data. However, our outcome variable – whether the jury as a whole hung – is technically a case-level variable. HLM is limited to an outcome variable in the lowest level data, in our situation, juror-level data.

A second alternative was to use a technique known as survey probit regression analysis. This method allows researchers to use individual (juror-level) variables yet account for the group membership (such as cases), thus overcoming the problem of juror dependence by adjusting the standard errors.

Finally, we combined all the juror-level responses to the case-level through aggregation methods. However, this approach loses some of the variation found at the juror-level. Despite this, we ran a multivariate analysis using a technique called complimentary log log. Essentially, this is a logistic regression analysis on outcome variables with a skewed distribution (gompit distribution named after Gompertz). In this case, we have a binary outcome (hung vs. verdict) in which most cases end in verdicts. The two possible outcomes were skewed in favor of a verdict. The gompit complementary log-log regression model fit the data. The results of this model were replicated by the survey probit regression analysis. Thus, we ultimately decided to use that method to analyze the data due to the robustness of the results using alternative methods. The following section presents the results found using survey probit regression analysis.

Results

An initial model using survey probit regression that sufficiently predicts hung juries was developed based on a combination of theory and several univariate results mentioned earlier in this chapter (see Table 4.13).

Table 4.13
Combined Model

	Coef.	Std. Err	t	P>|t|
Strength of prosecution case - St. Dev. (Juror)	0.88	0.31	2.79	0.01*
Understood evidentiary and legal issues (Judge)	- 0.07	0.08	- 0.83	0.41
Easy to understand judge's instructions (Juror)	- 0.03	0.03	- 0.82	0.42
Previous jury experience (Juror)	0.31	0.09	3.27	0.00*
Fairness of legally correct outcome (Juror)	- 0.12	0.03	- 3.88	0.00*
Group dynamics (Juror)	0.18	0.02	7.31	0.00*
Constant	- 6.24	1.06	- 5.90	0.00

Number of PSUs = 288	F(6, 282) = 16.91
Population size = 2,503	Prob > F = 0.000

Recall that we originally examined the jury's ratings on the strength of the prosecution's case. We found that the average rating did not differ between verdict and hung juries. However, when considering the standard deviation (or the differences among jury members) on judgments of prosecutorial strength, we uncovered a significant effect. This effect held true in the

multivariate analysis, when controlling for all other variables. The more deviation among jurors in a case about how strong the prosecution's case was, the more likely the jury was to hang.

In our univariate analyses, judges thought the jurors understood the major evidentiary and legal issues in the case better in verdict cases than in hung cases. Adding this to our model, we found that controlling for all other variables, this variable did not significantly account for which juries hung. Jurors were also asked how well the jury understood the judge's instructions. Judicial instructions to the jury have been criticized because of their complicated language and legalese used and for the judges' delivery method. Jurors have more difficulty recalling instructions given verbally than written instructions. Jurors may refer back to written instructions while in deliberations. However, according to our model, jurors from hung cases did not report more significant difficulty with the instructions. Therefore, when other factors are taken into account in the multivariate analysis, difficulty with the evidence and law are not significant predictors of hung juries.

During the voir dire process, attorneys and/or judges consider jurors' demographic characteristics and attitudes. We found that most demographic information we collected did not significantly help predict hung juries. Jurors' trust and confidence in the courts and in the police bore little relationship to a hung jury outcome. However, prior jury experience was a significant predictor of hung juries in both the univariate analysis and in our multivariate model.

In the univariate analyses, we found juror concerns about the fairness of the law in the case appeared to differentiate hung and verdict juries. To follow up on this result, as well as to address a widespread concern about jury nullification, we included this variable in the multivariate model. We asked jurors, "In some trials, a strict application of the law might not seem to produce the fairest possible outcome. In this trial, how fair would you say the legally correct outcome was?" In our model we found that jurors who thought the legally correct outcome was unfair were more likely to hang. This measure does not accurately identify jury nullification in action, but identifies the jurors' views that the legally correct outcome may not be the fairest.

As a final component in our multivariate combined site model, an index of "group dynamics" items,[132] significantly predicted hung juries. Deadlocked juries obviously experience more conflict and discord than verdict juries. This index tapped the jury deliberation experience including presence of conflict, unreasonable or dominating jurors, difficulty reaching a group decision, how much time and effort was spent convincing one another, and how open-minded jurors were to others. The deliberation process is shrouded in secrecy, yet often overlooked by outside observers as an important experience for jurors in how they decide a case. The interpersonal dynamics within a jury may not explain why juries hang, yet indicate problems within deliberations. Recall that this model is attempting to explain all of the hung juries in these four sites. What is common across these hung juries is conflict among group members.

[132] See *infra* at p. 69.

Site Specific Results

If we use the combined model and test it in each of the four sites,[133] we find that each site varies in what most significantly contributes to explaining hung juries. Beginning with the District of Columbia, the model does not fit the data nearly as well as in the combined model. As shown, in the first section of Table 4.14, only group dynamics remains as a significant predictor of hung outcomes.

Table 4.14
Site Specific Models

	DC				Los Angeles			
	Coef.	**Std. Err**	**t**	**P>|t|**	**Coef.**	**Std. Err**	**t**	**P>|t|**
Strength of prosecution case - St. Dev. (Juror)	0.81	0.55	1.47	0.15	2.21	0.74	2.85	0.01*
Understood evidentiary and legal issues (Judge)	0.03	0.14	0.24	0.81	0.01	0.19	0.06	0.95
Easy to understand judge's instructions (Juror)	- 0.07	0.06	- 1.23	0.22	0.01	0.04	0.35	0.73
Previous jury experience (Juror)	0.21	0.11	1.89	0.06	0.23	0.17	1.35	0.18
Fairness of legally correct outcome (Juror)	- 0.02	0.04	- 0.60	0.55	- 0.25	0.05	- 5.02	0.00*
Group dynamics (Juror)	0.20	0.04	5.05	0.00*	0.28	0.07	3.78	0.00*
Constant	- 7.39	2.03	- 3.64	0.00	-10.38	3.07	- 3.38	0.00
Number of PSUs = 84	F(6, 78) = 5.70				Number of PSUs = 71	F(6, 65) = 8.83		
Population size = 763	Prob > F = 0.001				Population size = 739	Prob > F = 0.000		

	Maricopa				Bronx			
	Coef.	**Std. Err**	**t**	**P>|t|**	**Coef.**	**Std. Err**	**t**	**P>|t|**
Strength of prosecution case - St. Dev. (Juror)	0.33	0.75	0.44	0.66	- 0.09	0.53	- 0.18	0.86
Understood evidentiary and legal issues (Judge)	- 0.18	0.29	- 0.63	0.53	--	--	--	--
Easy to understand judge's instructions (Juror)	- 0.02	0.10	- 0.18	0.86	- 0.03	0.05	- 0.53	0.60
Previous jury experience (Juror)	- 0.03	0.25	- 0.12	0.90	0.81	0.11	7.28	0.00*
Fairness of legally correct outcome (Juror)	- 0.15	0.07	- 2.07	0.04*	- 0.16	0.03	- 5.46	0.00*
Group dynamics (Juror)	0.17	0.05	3.71	0.00*	0.07	0.04	2.00	0.05*
Constant	- 4.61	2.13	- 2.16	0.03	- 3.36	0.81	- 4.16	0.00
Number of PSUs = 69	F(6, 63) = 2.76				Number of PSUs = 80	F(5, 75) = 14.70		
Population size = 518	Prob > F = 0.001				Population size = 580	Prob > F = 0.000		

In Los Angeles, all of the same variables are significant as found in the combined sites model, with one exception. The one exception in Los Angeles was that previous jury experience was not a significant factor. Another interesting difference was that the deviation of jurors' ratings of the strength of the prosecution's case was an even more important factor for the Los Angeles cases as compared to the overall combined model.

Maricopa County has only two significant predictors of hung juries – the group dynamics index and jurors' fairness ratings of the legally correct outcome.

[133] An alternative approach was to use interaction terms. However, with so few hung juries in some of the sites we were limited to using separate models for each site.

In the Bronx, it is difficult to predict hung juries, since the rate of hung juries is so low.[134] Only 3 of 101 cases hung. However, the model replicates similar findings from the other sites. Group dynamics and fairness of the legally correct outcome were both significant predictors of hung juries. As was the case in Los Angeles, previous jury experience also had a significant impact.

The causes of conflict and disagreement among jurors who hang may be attributed to numerous and diverse case-by-case reasons. While some may hang due to evidentiary problems, others may hang because of concerns with the applicable law, or even because of personality conflicts among individual jurors. To better understand some of these issues we looked more closely at the cases. In the next chapter (Chapter 5) we will investigate the important process of deliberation in more depth as a follow-up to this analysis. Chapter 6 will take another approach to answer the question "why do juries hang?" by closely examining each of the hung cases individually.

[134] We dropped the variable "Understood evidentiary and legal issues" as rated by the judge in the Bronx site due to low response rates in the three hung jury cases.

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

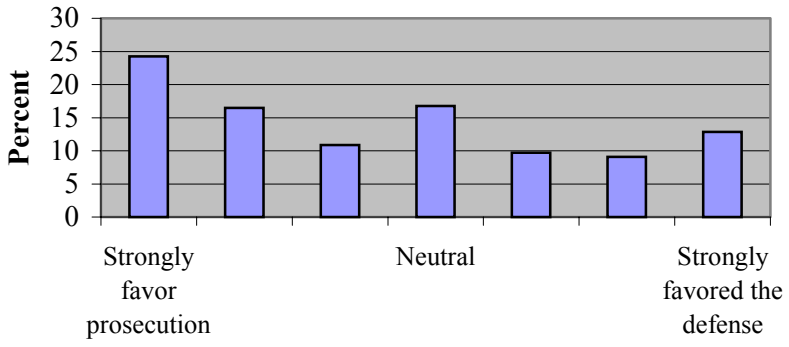
Examining the link between when jurors report that they began leaning toward one side with their first ballot votes, we find, not surprisingly, that jurors who are undecided on the first ballot are most likely to report that they first began leaning during the final deliberations. Indeed, over one-third (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.

Figure 5.1 Before deliberations, which side did you favor?



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.

Table 5.2
First Vote Results in Verdict and Hung Juries

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

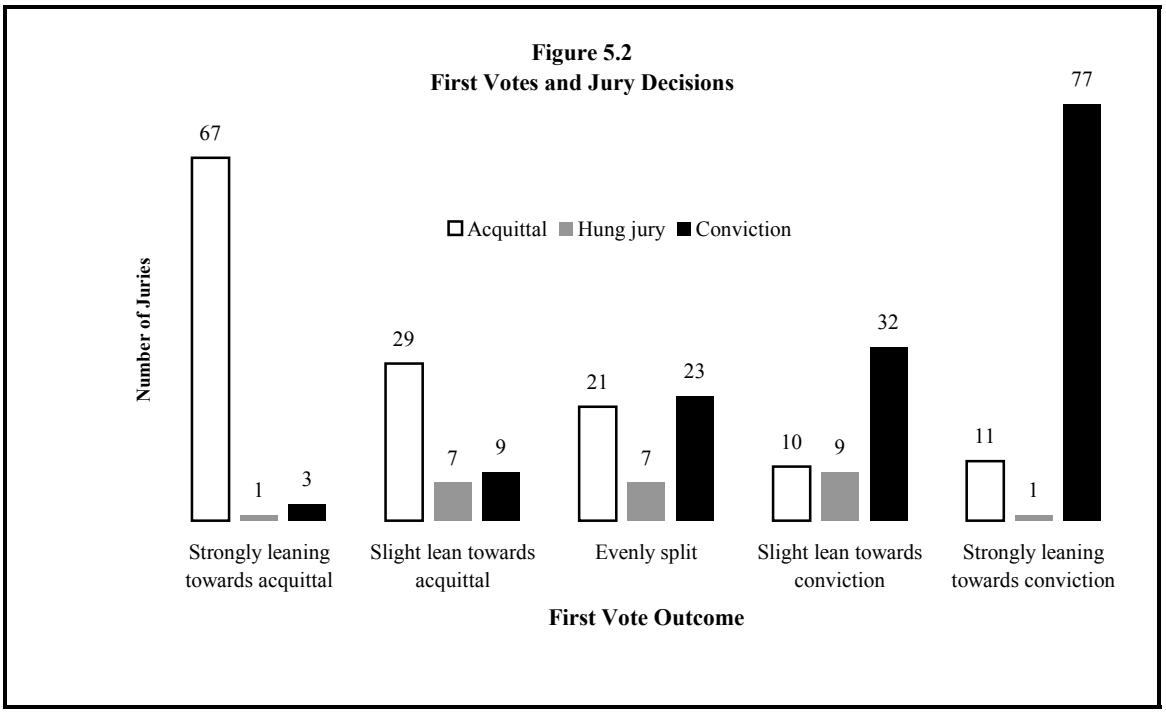
We examined the change if any, from the first vote to the final vote taken in deliberations. In a large majority of the cases, those leaning towards conviction or acquittal vote similarly in the first and final votes. On the other hand, a large majority of juries with more of an even split early on shift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

Table 5.3
Shifts from First to Final Vote

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			
	Verdict	Any Hung	F-value	p-value
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 α=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 it if 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?	Did not hang	287	5.6	1.7	4.1	0.04
(1 = very difficult, 7 = very easy)	Holdout	104	5.2	1.8		
How believable were the police?	Did not hang	281	5.1	1.7	4.4	0.04
(1 = not at all believable, 7 = very believable)	Holdout	106	4.7	1.7		
How skillful the defense attorney?	Did not hang	290	4.2	1.8	6.9	0.01
(1 = not at all skillful, 7 = very skillful)	Holdout	104	4.7	1.6		
How strong was defense's case	Did not hang	288	3.5	1.6	6.4	0.01
(1 = consistently weak, 7 = consistently strong)	Holdout	105	4.0	1.7		
How easy for you personally to decide on verdict?	Did not hang	288	3.4	2.1	9.5	0.00
(1 = very difficult, 7 = very easy)	Holdout	104	4.1	2.3		
Difficult to judge due to religious beliefs?	Did not hang	286	2.2	1.9	10.5	0.00
(1 = strongly disagree, 7 = strongly agree)	Holdout	104	1.6	1.3		
When was jury's first vote?	Did not hang	288	3.0	1.5	6.2	0.01
(2 = within first 10 min. of delib., 3 = early on in delib.)	Holdout	106	2.5	1.4		
How certain were you on the first vote?	Did not hang	282	5.1	1.8	9.0	0.00
(1 = not at all certain, 7 = very certain)	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?	Did not hang	290	3.9	2.0	5.7	0.02
(1 = not at all surprised, 7 = very surprised)	Holdout	106	4.4	2.1		
How openminded was the jury to each other's ideas?	Did not hang	284	5.1	1.8	9.8	0.00
(1 = not at all open, 7 = very open)	Holdout	103	4.4	1.9		
How influential were you in the deliberations?	Did not hang	287	4.5	1.6	4.1	0.04
(1 = not at all influential, 7 = very influential)	Holdout	104	4.1	1.6		
Some unreasonable people on jury?	Did not hang	287	3.3	2.3	12.6	0.00
(1 = strongly disagree, 7 = strongly agree)	Holdout	106	4.2	2.2		
How thoroughly was each juror's point of view	Did not hang	286	5.7	1.6	3.9	0.05
(1 = not at all thoroughly, 7 = very thoroughly)	Holdout	104	5.3	1.5		
How much conflict on jury?	Did not hang	288	3.4	2.0	24.3	0.00
(1 = none, 7 = a great deal)	Holdout	103	4.5	2.0		
How much time/effort was spent trying to convince to	Did not hang	285	5.2	1.7	31.4	0.00
(1 = none, 7 = a great deal)	Holdout	103	6.2	1.2		
Easy to reach decision?	Did not hang	285	3.4	1.8	50.7	0.00
(1 = very difficult, 7 = very easy)	Holdout	106	2.0	1.5		
How satisfied were you with the deliberations?	Did not hang	285	5.2	1.9	8.4	0.00
(1 = not at all satisfied, 7 = fully satisfied)	Holdout	104	4.6	2.0		
How satisfied were you with the decision?	Did not hang	289	5.0	2.0	12.9	0.00
(1 = not at all satisfied, 7 = fully satisfied)	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 in 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			
	Verdict	Hung		Total Use
		On Any	On All	
No assistance given	8	8	4	16
***Allen* -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.

CHAPTER SIX – REASONS FOR JURY DEADLOCK IN INDIVIDUAL CASES

In the previous two chapters, we used statistical analyses to identify the factors that contributed to hung juries across all of the cases. Another approach to the question of why juries hang is to focus on each individual case, attempting to answer the question, why did a particular jury hang? We examined all of the available data from each individual hung jury, assessing whether a specific issue or problem appeared to be the most significant reason for the jury's inability to reach a verdict. This individual-level approach complements our statistical analysis of hung jury cases.

To undertake this qualitative analysis, we developed case summaries for each of the hung juries. The summaries included case facts, judge, attorney, and juror responses to central questions, and the reasons that judges and attorneys provided for why the jury hung. Focusing on the cases in which the jury hung on any count, we first looked at the explanations given by the judge and attorneys for why the jury hung, and then examined the juror responses to see if we could find evidence to support the judge and attorney explanations.

The idea to examine hung jury cases on an individual basis was not part of the original analysis plan for this project, and it did not occur to us to try this approach until after we had undertaken a great deal of the analyses discussed in Chapters 4 and 5. For a number of reasons, it should be construed purely as an exploratory and largely descriptive investigation, rather than a methodologically rigorous analysis. Our sample contained only 46 cases in which the juries deadlocked on one or all charges – too small a number to make reliable statistical inferences, particularly when accounting for variations by site, case type, and other key factors.

Constraints on time and staff resources also prevented the use of independent coding by multiple coders. Although the primary cause of juror deadlock was fairly clear in most cases, the determination of secondary causes and their respective priorities sometimes required a more subjective judgment. In a few cases, the process of identifying a "reason" was somewhat challenging. We looked for convergence between judicial and attorney explanations and the juror data, but it was not always present. Interestingly, the judges' views tended to be more consistent with juror responses than the attorneys' perceptions of why the jury hung. Despite the difficulty of making these qualitative judgments about the most significant reasons for a hung jury, we felt that the individual case-level approach was a valuable supplement to the statistical analyses.

A Taxonomy of Hung Juries: Five Reasons Why Juries Hang

We were able to identify some cause of juror deadlock for 43 of the 46 cases (93%) in which the jury hung. See Table 6.1. Of the cases in which we were able to identify a reason for jury deadlock, over two-thirds (70%) of the cases also had at least one secondary cause, and 19% had more than one secondary cause.

Table 6.1
Reasons Why Juries Hang

Reason (N=46)	Factor: % (N) Primary	% (N) Secondary	% (N) Primary or Secondary
Weak Evidence	62.8 (27)	6.5 (3)	69.3 (30)
Police Credibility	16.3 (7)	10.9 (5)	27.2 (12)
Juror Concerns about Fairness	16.3 (7)	10.9 (5)	27.2 (12)
Case Complexity	4.7 (2)	26.1 (12)	30.8 (14)
Dysfunctional Deliberation Process	--	30.2 (13)	30.2 (13)
Unknown	6.5 (3)	--	--

By far, the most frequent primary cause of hung juries was weak evidence (63%). Police credibility problems and juror concerns about the fairness of the law or its application in the case were tied for the second leading cause each at 16% of the cases. Case complexity was the primary cause of deadlock in only two cases, but played a secondary role in about one-quarter of the hung juries. Dysfunctional deliberation processes were not identified as the primary cause of hung juries in any case, but appeared to play a secondary role in about 30% of the hung juries. Each of these reasons, and some illustrative cases, are described in greater detail below.

Weak Evidence

Evidentiary weakness was identified as a hung jury factor in cases in which the judge, lawyers, and/or jury indicated that the case was weak, that the case was close, and the jury said it was difficult to decide the case. If the case weakness factors were stronger than other factors or if there were no other discernible factors present, weak evidence was identified as the primary cause of the jury deadlock.

Weak evidence was by far the most significant cause of juror deadlock in our sample of cases, contributing to the hung jury as the primary cause in 27 cases and playing a secondary role in an additional three cases. Less than one-fifth (19%) of the cases had evidentiary weakness as the sole cause of juror deadlock; the majority of cases had at least one other factor, usually case complexity.

An illustrative case was an assault trial in which the victim was acquainted with the defendant. Jurors were evenly split (6-6) on the final ballot. The judge reported that the evidence was very close and somewhat complex, and thought that victim credibility was the primary contribution to the jury's deadlock. The prosecutor attributed the hung jury to the fact that the evidence was too close, but the defense counsel believed that jury nullification was also a factor. The jurors unanimously reported difficulty in believing the victim's testimony and felt little sympathy for her. Several jurors expressed difficulty in personally deciding the case.

Police Credibility

Police credibility was identified as a hung jury factor in cases in which the judge said the police testimony was important but not credible or in which the jurors who indicated that they voted for an acquittal stated that they thought the police testimony was important but not credible. Police credibility was a primary factor in cases in which there was no other discernible cause for the hung jury or when police credibility indicators were stronger than indicators for other factors.

Police credibility was the primary cause of juror deadlock in seven cases, all but one of which were drug sale or possession cases. In four of the cases, case complexity or weak evidence played a secondary role. Police credibility was the second most common reason for jury deadlock (tied with juror fairness concerns) and was either a primary or secondary factor in about one-quarter of all hung jury trials. There were only three cases in which police credibility was the sole cause of the hung jury.

One of the drug possession cases provides a good illustration for this cause of juror deadlock. The judge in this case identified police credibility as the primary cause of juror deadlock, although he personally did not believe that the evidence was close and would have convicted the defendant in a bench trial. Both of the attorneys felt that juror bias was the cause. The jury thought that police testimony was important for the case, but did not see the police testimony as highly credible. Two jurors indicated that they would have voted to acquit the defendant if they were making the decision alone. These two jurors rated the credibility of the police testimony at the midpoint of the seven-point scale. The final vote split was 11-1 to convict.

Case Complexity

Case complexity was identified as a hung jury factor in cases in which the jury said they had trouble understanding the evidence, expert testimony, and/or judge's instructions. Judicial or attorney comments about case complexity also were considered. Case complexity was coded as a primary factor in cases in which there were no competing reasons or when the case complexity indicators were stronger than the indicators for other factors.

Case complexity was rarely the primary cause of a hung jury. It appeared to be the most significant variable in just two hung jury trials. However, it was a secondary factor in another twelve cases, so that it played some role in jury deadlock in 31% of cases.

An illustrative case is an attempted murder trial in which the jurors rated the case as quite complex. The judge also rated the evidence and the law in the case as complex. The defendant was tried for six offenses. There were 14 witnesses, 31 exhibits, and two experts. Two jurors reported that they had trouble understanding the evidence, and almost all of the jurors indicated that some other jurors did not understand key evidence. The judge and the defense attorney did not comment on the causes of the hung jury, but the prosecutor thought the evidence was too close. On the first vote during deliberations, the jury split 4-8 to acquit. By the end of deliberations, the jury was still deadlocked – at 4-8 to convict.

Juror Concerns About the Fairness of the Law

Juror concerns about fairness was identified as a hung jury factor in cases in which one or more jurors indicated they voted to acquit and that they thought the law was unfair, that the legally correct outcome was unfair, that they were concerned about the consequences of a conviction to the defendant and/or that they thought the penalty was too harsh. Juror fairness concerns constituted the primary reason when there were no competing factors or when juror concerns about fairness were stronger than indicators for other factors. Concerns about fairness played some role in jury deadlock in 27% of the cases. It was the primary factor in seven cases, although it was the sole factor in only three cases. It played a secondary role in five cases.

A drug sale case provides an illustration of a trial in which juror concerns about fairness apparently led to a hung jury. The defendant was tried on one charge, and there was just a modest amount of evidence, which most of the jurors and the judge said favored the prosecution. The final vote split was 11-1 for conviction. The defense attorney and the judge did not comment on the causes for the jury deadlock, but the prosecutor thought it was the result of juror bias or prejudice. All but one juror thought the law was very fair, and all but two thought the legally correct outcome was fair. The one juror who thought the law was unfair and that the legally correct outcome was very unfair was the only juror who claimed to have voted for an acquittal. He was also the only juror who indicated that he would acquit if deciding the case alone. Nonetheless, four jurors found it difficult to decide the case personally. Two jurors said that their religious beliefs made it difficult to judge the defendant. Almost all of the jurors thought that some jurors dominated the process and that there were some unreasonable people on the jury.

Dysfunctional Deliberation Process

Dysfunctional deliberation process was a term that we used to describe cases in which jurors reported a high degree of conflict, some jurors dominating the deliberation, and/or unreasonable people on the jury. Essentially, this factor emphasizes juror deadlock based primarily on personality or social conflicts rather than evidentiary factors or individual beliefs about law and justice. However, we acknowledge that sometimes it might be difficult to distinguish between these causes. Dysfunctional deliberation process was never a primary reason for a hung jury, but contributed at a secondary level in thirteen trials.

A burglary trial that ended in a hung jury serves as an illustration of how a dysfunctional deliberation could be a contributing factor, though not the primary factor, for a hung jury. In this case, the evidence appeared to be equivocal for guilt. The first ballot vote was 5-7 for acquittal, with the final vote split 9-3 for conviction. The judge and the defense attorney felt that the jury deadlock was caused by the weakness of the case, although the prosecutor did not comment on a reason for the hung jury. The jury thought that the case was close and some reported having difficulty personally deciding the case. However, the evidence itself was not seen as complex or difficult to understand. None felt that the law was unfair or that the consequences to the defendant were too harsh. A majority of jurors felt that one or two jurors dominated deliberations, and some felt that there were some unreasonable people on the jury. A few jurors felt like there was a lot of conflict. In this trial, weak evidence emerged as the most critical factor, but one can observe that jurors also indicated some difficulty with the dominance of some unreasonable jurors during deliberations, so a dysfunctional deliberation process was identified as a secondary factor.

Do Primary and Secondary Reasons Tend to Combine in Any Patterns?

As we have observed, in most cases more than one reason can be identified as a cause of the hung jury. Some primary reasons tend to combine with secondary reasons in a pattern, and a few linkages stand out. See Table 6.2, which includes just those cases in which more than one reason was identified. Case weakness, the most prominent primary reason, appears most frequently with case complexity and a dysfunctional deliberation process. Police credibility and juror fairness concerns appeared in combination with weak evidence in five cases apiece. Although dysfunctional deliberation process appeared with weak evidence most frequently, it was the only category of secondary factors that appeared in all four other categories.

Table 6.2
Primary Reasons by Secondary Reasons for Hung Jury

Primary	Any Secondary					
	Weak Case	Police Credibility	Case Complexity	Concerns About Fairness	Dysfunctional Deliberations	Total
Weak Case	-	5	9	5	9	**28**
Police Credibility	3	-	1	-	1	**5**
Case Complexity	-	-	-	-	1	**1**
Juror Concerns About Fairness	-	-	2	-	2	**4**
Total	**3**	**5**	**12**	**5**	**13**	**38**

Site Differences for Primary Reasons

The weakness of the case dominates the primary reason for a hung jury in three of the four sites. See Table 6.3. It accounted for 80% (12 of 15) of the cases in Los Angeles, five of the seven cases (71%) in Maricopa, and about half of the hung juries in the District of Columbia. Police credibility accounted for the two Bronx hung juries that we were able to link to a reason. Police credibility also emerged as a primary factor in a few cases in Los Angeles and District of Columbia. Juror concerns about fairness, and case complexity, were most significant in the District of Columbia.

Table 6.3
Primary Reasons for Hung Jury by Site

	Sites			
Reason	**LA**	**Maricopa**	**Bronx**	**DC**
Weak Case	12	5	-	10
Police Credibility	2	-	2	3
Juror Concerns About Fairness	1	1	-	6
Case Complexity	-	-	-	2
Dysfunctional Deliberation Process	-	-	-	-
Unknown	-	1	1	1
Total Number of Cases	**15**	**7**	**3**	**21**

Case Type Differences for Primary Reasons

There were some differences in the reasons for a hung jury when analyzed by the type of offense for which the defendant was tried. The most common primary reason was weak evidence, and this held for most types of offenses. It was identified as the primary reason for a hung jury in 9 of the 12 murder trial hung juries and 50% or more of all other case types, with one exception. Hung juries in drug cases were more often attributable to police credibility issues, although weak evidence was a primary factor in a significant number of drug cases too. Interestingly, and contrary to our expectations, juror fairness concerns were found in several of the most serious types of cases including murder and robbery.

Table 6.4
Primary Reason for Hung Jury by Offense Type

Offense	Primary Reason					Total Cases
	Weak Case	Police Credibility	Juror Fairness Concerns	Case Complexity	Unknown	
Murder (1st and 2nd)	9	--	2	1	--	12
Sex Offenses	1	--	--	--	--	1
Robbery	3	1	2	--	--	6
Assault	3	--	--	--	1	4
Burglary/Larceny/ Theft/Forgery	4	--	1	--	1	6
Drug Offenses	4	6	1	--	1	12
DUI/DWI	2	--	--	--	--	2
Attempted Murder	1	--	--	1	--	2
Weapons	--	--	1	--	--	1

Summary

Using a qualitative approach to analyze the available data and information from each individual hung jury, we were able to identify probable causes in the vast majority. More than any other factor, the weakness of the evidence presented at trial accounts for most hung juries. Police credibility emerges as a significant variable in a smaller number of hung juries, predominantly drug cases. Juror concerns about fairness also appear to contribute to their inability to agree on a verdict. Case complexity and deliberation problems, though not often the primary causes of a hung jury, seem to add to the burden a jury is facing for other reasons.

Given the necessarily impressionistic analysis of this case-level inquiry, there are some reassuring convergences between its results and the conclusions of the quantitative analyses reported in previous chapters. The importance of evidence was observed in a number of statistical comparisons between juries that hung and those that were able to reach verdicts. Overall, hung jurors saw the evidence as more ambiguous and the prosecution's case as weaker. They also were more likely to say that their cases were complex, suggesting the same conclusion of the qualitative analysis that complex evidence may play a role in hung jury outcomes. As for the police factor, recall the statistical finding that the members of hung juries were more likely to disagree about the believability of the police witnesses who testified in their trials. Juror fairness concerns constituted a significant factor in both univariate and multivariate analyses. Hung jurors were much more likely to express doubts about the fairness of the law in the case and the fairness of the legally correct outcome.

CHAPTER SEVEN – CONCLUSIONS AND RECOMMENDATIONS

This research effort was mounted to respond to growing concern within the criminal justice community over jury deadlock. Increased monetary costs associated with retrying cases as well as emotional costs for victims and witnesses and potential public safety costs were specifically cited as the consequences of hung juries. The *Allen* charges that were frequently used to address juror deadlock seemed to be less effective than they had been previously. In addition, they were increasingly criticized as unduly coercive on holdout jurors.

A number of assumptions about the causes of hung juries have been voiced. Many observers concluded that the primary cause of jury deadlock was that individual jurors held out for illegitimate reasons. Some viewed the problem as jurors' racial or ethnic bias or conflict. Others claimed that it was jury nullification, the refusal of some jurors to base their verdict on the evidence and the law. Still others claimed that criminal jury trials had become more complex, thus taxing juror comprehension of the evidence and making it difficult for jurors to come to a consensus. A variety of proposals based on these assumptions were offered to deal with the problem of hung juries.

However, prior to the current research project, only a handful of studies had given more than superficial consideration of juror deadlock, and even then only in the context of one possible outcome among many. On this slim basis, it was difficult for policy makers to make informed judgments about the probabley effects of various proposals to curb the incidence of hung juries.

To provide a more substantive basis for decision-making, this project combined three different methods in its study of hung juries: a broad-based survey of hung jury rates in state and federal courts; a jurisdictional study of nearly 400 felony jury trials that compared juries that were able to agree on a verdict to juries that deadlocked on one or more charges; and a case study of the 46 hung juries from the jurisdiction study sample.

In the broad-based survey of hung jury rates in state and federal courts, we found a great deal of variation in hung jury rates. Federal court hung jury rates tended overall to be fairly low and stable over a long period of time, but showed greater variation when federal districts were examined individually. This was especially true in the D.C. District Court, the only federal district court limited to a single urban jurisdiction.

State court hung jury rates in 30 large, urban jurisdictions averaged 6.2%, but varied considerably from court to court, possibly due to differing reporting measures. The state court survey consisted exclusively of large, urban jurisdictions, and the variation among sites lends credence to the contention that lower hung jury rates across a broad geographical area can obscure higher rates in discrete jurisdictions. Some variation appears to be related to actual jurisdictional differences, although standard measures of community diversity, density, crime rates, and felony case management differences appear to be unrelated to hung jury rates in those jurisdictions.

It was difficult to obtain complete information about the ultimate dispositions of cases that originally resulted in a hung jury. The limited data we were able to obtain suggest that juror deadlock often forces prosecutors and defense counsel to reassess the relative strengths and weaknesses of their cases and agree on a non-trial disposition. Over half of the cases that originally hung ultimately resulted in a plea agreement or a dismissal. Only one-third of trials

that resulted in a hung jury were retried to a new jury. Dispositions in the retrials mirrored the original distribution of jury trial outcomes almost perfectly – a fact which belies the popular contention that these cases would have resulted in a conviction but for the unreasonable behavior of one or two holdout jurors.

In the jurisdictional study, we collected an unusually rich set of questionnaire data from judges, attorneys, and jurors in 382 cases across four sites. From this sample, we were able to compare cases in which juries reached verdicts to those in which juries hung on one or more charges, which occurred in 13% of the trials. These comparisons identified three critical aspects of felony jury trials that are related to the likelihood that a jury will hang: the evidentiary characteristics of the case; the interpersonal dynamics of deliberations; and the individual jurors' opinions about the fairness of the law as applied during the trial. Multivariate analyses of the data as well as the case studies component of this project confirmed that all three of these aspects contribute to the likelihood of jury deadlock.

Evidentiary characteristics of the case include a broad range of interrelated variables including the ambiguity of the evidence, case complexity, and prosecutorial charging practices. Like Kalven and Zeisel, we found that the ambiguity of the trial evidence – that is, how closely matched the prosecution and defense cases are – plays a significant role in producing hung juries. Cases in which the evidence was fairly close were significantly more likely to hang than cases in which the evidence strongly favored one side. From jurors' perspective, case complexity plays a role in juror deadlock. Jurors in cases that hung reported that their cases seemed more complex and they found it more difficult to understand the evidence, expert testimony, and the jury instructions than jurors in cases that arrived at a verdict. Curiously, however, neither the judges nor the attorneys shared jurors' perceptions that hung jury cases were more complex.

One aspect of case complexity was the number of criminal charges that jurors were asked to consider as well as the number of defendants tried in the same proceeding. Prosecutors in criminal cases have the discretion to charge multiple defendants in one case and to decide how many counts the defendant will face. Our results indicate that these decisions by prosecutors affect whether a jury will hang. Since we used two definitions of a hung jury – when the jury hung on any count as well as when the jury hung on all counts – we were able to evaluate the effects of both. In cases where a defendant faced more counts, the jury was more likely to hang on any count. When jurors were limited in the counts they could consider, they were more likely to hang on all the charges. The number of charges creates an opportunity, or lack of opportunity, to compromise.

The second aspect of felony trials related to hung juries was, not surprisingly, how the jurors themselves interacted. We found high correlations among a number of factors including the level of conflict among jurors, the domination of one or two jurors during deliberations, jurors' assessments of the open-mindedness of their peers, and their collective ability to recall evidence and to reach a group decision, which we collectively termed "group dynamics." Two additional variables, which did not correlate strongly enough to be included in the group dynamics index, were also related to the jury's deliberative process: the timing of the first vote during deliberations and the individual jurors' previous experience as a juror. Other studies have documented the relationship between the timing of voting in deliberations and juror deadlock in mock juries,[143] and our research confirms this relationship in actual juries. Juries that take an

[143] HASTIE et al., *supra* note 53.

early vote tend to be "verdict-driven." They discuss evidence in terms of whether it supports one verdict or another. In contrast, "evidence-driven" deliberations tend to begin with a broader discussion of the evidence and take votes later in the deliberation. This may help to explain why early voting is associated with jury deadlock. Publicly stating one's position on a topic tends to solidify those opinions. Declaring a vote early in jury deliberations could produce a similar effect, polarizing opinions and increasing the likelihood of the jury hanging.

The relationship between juror deadlock and previous jury experience was a surprise. Only Dillehay and Nietzel had ever found a relationship between hung juries and previous jury experience.[144] Their study found that jurors with previous experience were *less* likely to hang, whereas our study found the opposite. Dillehay and Nietzel's sample was drawn from jury trials conducted in Fayette County, Kentucky in 1973, so the change in the direction of the relationship could be the result of changes in the attitudes of jurors over the past quarter century, particularly with respect to deference to authority. Jurors today may simply be less willing to accede to the views of their more experienced peers unless those views are consistent with their own independent conclusions about the evidence.

Of particular note from our study is the absence of any correlation between juror deadlock and the demographic composition of the jury. A great deal of commentary about hung juries suggests that juror deadlock results from racial or ethnic conflict among individual jurors. Overall, the juries in this study were fairly diverse, but we found no relationship whatsoever between the likelihood that a jury would hang and its racial, ethnic, gender, or socio-economic composition.

There were, however, differences based on the attitudes of individual jurors with respect to their perceptions about the fairness of the law as applied in the case. These attitudes constituted the third major aspect of felony trials related to hung juries. Because juror nullification is suggested as a frequent cause of hung juries, we attempted to measure juror opinions about the fairness of the law they were asked to apply in the case. Overall, jurors reported a fairly high level of trust and confidence in the courts and the police in their communities, and there was no significant difference in these ratings by hung and verdict juries. But jurors in hung jury cases believed that the law as it was specifically applied to the defendant in those cases was less fair. It was not possible from these data to determine if individual jurors consciously and deliberately refused to agree on a verdict due to personal opposition to the application of law. It is clear that opinions about legal fairness that are frequently associated with nullification were held more often by jurors in cases that deadlocked than by verdict jurors. To the extent that nullification may be a factor, it raises fundamental normative questions about the role of the jury in American jurisprudence and whether the exercise of the jury's nullification powers continues to be an appropriate function in a democratic society.

In the case studies component of this project, we developed a taxonomy of reasons for jury deadlock consisting of five categories: weak evidence; police credibility problems (arguably a distinct subcategory of weak evidence); juror concerns about fairness; case complexity; and a dysfunctional deliberation process (a catch-all phrase indicating poor interpersonal interactions among the jurors). We examined all of the information about each case to assess the primary and secondary reasons that the jury hung. Weak evidence was

[144] *Dillehay & Nietzel*, *supra* note 52.

overwhelmingly the predominant category for the 46 hung jury cases in our sample. A substantial majority of cases featured two or more reasons for the deadlock. Juror concerns about the fairness of the law were present in slightly more than one-quarter of the cases, yet they occurred as the sole reason for the hung jury in only three cases, less than 7% of the total. Similarly, dysfunctional deliberations were not the sole reason in any single case, although they contributed to juror deadlock in nearly one-third of the cases. This is particularly notable when we recall that evidentiary factors were more likely to affect jurors who ultimately held out against the majority than for jurors who joined in a unanimous verdict despite individual preferences for a different outcome to the trial. Although non-evidentiary factors do play a role in hung juries, they usually do so only in combination with fairly strong evidentiary factors.

Given the findings from this study, what can or should policymakers do in jurisdictions where high hung jury rates result in unacceptably high costs for judicial administration or public trust and confidence in the justice system? One popular proposal is to eliminate the requirement of a unanimous verdict in felony trials, adopting a super-majority verdict rule (e.g., 11-1, or 10-2) instead. There is no question that this approach would substantially reduce the number of hung juries in most jurisdictions. Proponents of non-unanimous verdict rules favor this approach insofar that it eliminates the "veto-power" of jurors who unreasonably or illegitimately thwart a consensus among the jurors.

But it is also clear from this study that such an approach would address the symptoms of disagreement among jurors without necessarily addressing the actual causes – namely, weak evidence, poor interpersonal dynamics during deliberations, and jurors' concerns about the appropriateness of legal enforcement in particular cases. Moreover, there is empirical support that the introduction of a non-unanimous verdict rule might also affect the jury's deliberation process in unintended ways such as cutting off minority viewpoints before the jury has an opportunity to consider those opinions thoroughly. Solutions that focus specifically on the underlying causes of juror deadlock, rather than on its effects, may prove to be more effective in the long run. Possible remedies include better case selection and preparation by attorneys; better tools for jurors to understand the evidence and law; and guidance for jurors about how to conduct deliberations.

Solutions addressing juror deadlock as a result of weak evidence fall almost exclusively within the purview of the prosecution. Not only do they decide which cases to try, they also have substantial discretion to choose the specific charges as well the number of charges.[145] The data from this study suggest that in jurisdictions with high hung jury rates, the prosecution should evaluate its charging and trial preparation practices to determine if the state's evidence is sufficiently unambiguous to support a verdict. In particular, prosecutors should assess the degree to which police misconduct has damaged the police credibility in jury trials in their respective jurisdictions, and be prepared to offer corroborating evidence in trials that rely heavily on police testimony.

To the extent that case complexity affects juror evaluation of evidence, however, judges can reduce the likelihood of juror deadlock by permitting jurors to take notes, permitting jurors to submit questions to witnesses, providing jurors with written copies of instructions, and other techniques that have been shown to improve juror comprehension and performance. Providing

[145] This is the philosophical justification for the requirement that the prosecution prove its case beyond a reasonable doubt.

tools that help jurors deal with the inherent complexity of cases may decrease the number of disagreements jurors have concerning evidentiary matters.

This study also found that interpersonal dynamics during deliberations are also a key factor in juror deadlock. Judges have traditionally been reluctant to instruct juries on how to conduct deliberations for fear that such instructions would be viewed as inappropriately influencing the jury's verdict. It is clear, however, that many jurors lack previous experience in the type of small-group problem-solving process that epitomize jury deliberations. We know from both this and previous studies that some deliberative processes are more conducive to building consensus than others. Although mandating certain procedures for conducting deliberations probably would be viewed as an invasion of the jury's province, providing jurors with guidance about how they might go about structuring their deliberative process, which jurors could then accept or reject as they deem appropriate, might prevent some of the group and individual juror behaviors that characterize deliberations in juries that deadlock.[146]

The question of how best to address juror attitudes about the governing law and its applicability in a given case is more difficult for several reasons. By definition, much of the problem – and hence, the solution – lies with public acceptance of the legitimacy of the governing law as developed by the legislative branch. Given a well-functioning system of random selection in jury management, the existence of public misgivings about the law, or about the state's application of that law in particular cases, will be present in the pool of available jurors in jury trials in roughly the same proportion as it exists in the general population. Without an effective method to detect and remove individuals who harbor those attitudes during the jury selection process, they will also appear on the jury panel itself. Attitudes about legal fairness were a primary factor in only a minority of cases in our study, usually in conjunction with other factors, but they were a factor nonetheless.

One solution again involves prosecutorial discretion about which cases to bring to trial. There is certainly a strong public policy viewpoint that public opinion should not dictate prosecutorial policies regarding charging procedures. There are several recent examples of instances in which public opinion lagged behind official policy on criminal prosecution, such as the enforcement of drunk driving and domestic violence laws. The fact that some portion of the jury pool is unconvinced that a particular law should be enforced should not necessarily be the determining factor in whether to pursue a particular case, but it should not be ignored either.

And therein lies the difficulty for the various players in the justice system. Part of the challenge is the fact that attitudes themselves do not equal actions. There was no statistically measurable difference in jurors' opinions about the fairness of the legally correct outcome between jurors who ultimately held out and caused the jury to hang and jurors who eventually concurred in the verdict. Indeed, the single most important factor in juror opinions about the fairness of the law was in the context of its application in the case rather than the fairness of the law per se. Attempting to gauge jurors' opinions on this issue before the introduction of evidence may be an impractical exercise in crystal ball-gazing. A more productive approach would be to explain to jurors why the application of the law in the case is appropriate, thereby introducing an explicit rationale for jurors to follow the law even if their individual preferences

[146] The American Judicature Society has published a booklet of recommendations about conducting jury deliberations, located at http://www.ajs.org, that judges can incorporate into their own instructions or provide separately.

would be to ignore it in under the circumstances of a particular case. Jurors are more likely to follow the law when they are provided with explanations and justifications rather than straight admonitions to apply the law.[147]

None of these solutions offer a fool-proof remedy for juror deadlock in every situation. Doubtless, some juries will be unable to come to consensus regardless of the resources provided to help them understand the evidence and conduct productive deliberations. Nonetheless, these solutions include basic steps to improve the likelihood that juror deadlock will only take place in cases in which the evidence is so closely matched that twelve 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.

[147] See, for example, the findings reported in Shari S. Diamond & Jonathan D. Casper, Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury, 26 Law & Soc. Rev. 513 (1992). These researchers found that mock jurors were more likely to follow judicial instructions about a treble damages provision in an anti-trust case when the instructions included justifications for the provision.

APPENDIX

Case Data Survey
Judge Questionnaire
Attorney Questionnaire
Juror Questions and Questionnaire

Case Data Survey

Contact NCSC for survey
research@ncsc.dni.us

Judge Questionnaire

Contact NCSC for survey
research@ncsc.dni.us

Attorney Questionnaire

Contact NCSC for survey
research@ncsc.dni.us

Juror Questions and Questionnaire

Juror Questionnaire

Your participation in this study is entirely voluntary. Your responses will be kept strictly confidential. Please record your answers on the attached answer sheet

General Questions about the Trial

1. Do you agree or disagree that the attorneys presented all the relevant evidence in this trial?
2. How complex was this trial?
3. Overall, how easy or difficult was it for your jury to understand the evidence in this trial?
4. How easy or difficult was it for your jury to understand the expert testimony in this case?
5. How easy or difficult was it for the jury to understand the judge's instructions about the law in this case?
6. Do you agree or disagree with the following statement: "Some of the other jurors did not understand key evidence in this case."
7. How important was police testimony to the prosecution's case?
8. How believable was the police testimony in this case?
9. In some criminal cases, the victims of the crime testify. How believable was the testimony of the victim(s) in this case?
10. In some criminal cases, the defendant testifies. How believable was the testimony of the defendant(s) in this case?
11. Overall, how much sympathy did you feel for the defendant(s) in this case?
12. Overall, how much sympathy did you feel for the victim(s) in this case?
13. How skillful was (were) the prosecutor(s) during the trial?
14. How skillful was (were) the defense attorney(s) during the trial?
15. Overall, how satisfied were you with the manner in which the trial was conducted?
16. How strong was the prosecution's case?
17. How strong was the defense's case?
18. All things considered, how close was this case?

Your Opinions about the Case.

19. 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? (please check one box only)
20. Did you find yourself changing your mind about the direction you were leaning during any of the following stages of the trial? (check all that apply)
21. Before you began deliberating with your fellow jurors at the end of the trial (after all of the evidence and the judge's instructions had been presented), which side did you favor?

22. How easy or difficult was it for you **personally** to decide what the verdict should be in this case?
23. Do you agree or disagree with the following statement: “Because of my religious beliefs, I found it difficult to judge another person.”

Your Jury Deliberations.

The next set of questions asks about your experiences during the jury deliberations that took place at the end of the trial, after all the evidence and the judge's instructions were presented.

24. When was the jury's first vote?
25. Was the first vote a secret ballot?
26. On the jury's first vote, how did you vote on the most serious charge?
27. How certain were you in your first vote?
28. On the jury's first vote on the most serious charge, how many jurors voted guilty, not guilty, or were undecided?
29. On the jury's final vote, how did you vote on the most serious charge?
30. On the jury's final vote on the most serious charge, how many jurors voted guilty, not guilty, or were undecided?
31. When deliberations began at the end of the trial, how surprised were you personally at the verdict preferences expressed by the other members of the jury?
32. How open-minded were the members of the jury to the ideas of other jurors?
33. How much did you participate in the jury deliberations?
34. How influential were you in the jury deliberations?
35. How much would you say that one or two jurors dominated the deliberations?
36. Do you agree or disagree with the following statement: “There were some very unreasonable people on this jury.”
37. How much trouble did the jury have recalling the trial evidence during the jury deliberations?
38. How much trouble did the jury have recalling the judge's instructions on the law during the jury deliberations?
39. How thoroughly was each juror's point of view considered in the jury's deliberations?
40. How personally close and friendly would you say the jury was?
41. How much conflict was there on the jury?
42. Do you feel that you had enough time to express your views during jury deliberations?
43. How much time and effort did jurors spend trying to convince people to agree?

44. How easy or difficult was it for the jury to reach a decision?
45. How satisfied were you with the jury's deliberations?
46. How satisfied were you with the jury's decision (guilty, not guilty, hung)?
47. How fair do you think the law was in this case?
48. To what extent were you worried about the consequences to the defendant of a conviction by this jury?
49. In some trials, a strict application of the law might not seem to produce the fairest possible outcome. In this trial, how fair would you say the legally correct outcome was?
50. In some trials, the consequences of a conviction might seem either too harsh or too lenient for the particular case and defendant. How lenient or harsh do you think the consequences of a conviction were likely to be in this case?
51. If it were entirely up to you as a one-person jury, what would your verdict have been in this case?
52. How much trust and confidence do you have in the police in your community?
53. How much trust and confidence do you have in the courts in your community?
54. To what extent do you believe that crime is a serious problem in your community?

Our final set of questions asks about you and your household, and will help us analyze the information you and other jurors have given us. Again, all of this information is completely confidential and will only be used to help us study and improve the jury system.

55. Were you the jury foreman or presiding juror?
56. Have you ever served as a juror before this trial?
57. If yes, was your jury service in a civil or criminal case?
58. Gender:
59. Age:
60. How many years of school have you completed?
61. Race/Ethnicity:
62. How would you describe your religious beliefs?
63. What was your total household income last year?
64. Job status:
65. If you are presently employed, please select the occupational category below that best fits your occupation:

THANK YOU VERY MUCH FOR YOUR HELP WITH THIS IMPORTANT PROJECT!