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UNDERSTANDING THE JURY WITH THE HELP OF SOCIAL SCIENCE

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INSIDE THE JURY. By *Reid Hastie, Steven Penrod and Nancy Pennington.* Cambridge, Mass.: Harvard University Press. 1983. Pp. vii, 277. $20.

INTRODUCTION

American courts place tremendous responsibility in the hands of juries. In civil cases, juries determine whether persons who claim some kind of injury are entitled to receive compensation from other persons. Juries who find that compensation is in order can fix the amount of compensation at a level so low that it represents only nominal damages[1] or so high that the award plainly represents punishment for behavior regarded as totally unacceptable.[2]

Juries in criminal cases decide whether a defendant is guilty or not guilty, and if guilty, the degree of guilt. In some cases, juries decide what sentence to impose upon a convicted defendant. The most dramatic illustration of this responsibility comes in capital cases, in which a jury usually decides, or at least recommends a decision to the trial judge, whether a defendant should live or die.[3]

In the course of reaching these results, juries in both civil and criminal cases are asked to do a number of different things. They must decide who did what to whom, when, how and often why. Unlike historians, who may well study a subject for years before arriving at a conclusion about past events and who typically feel free to disagree among themselves as to the accuracy of various reconstructions, jurors have a limited amount of time in which to make a decision, have ac-

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1. *See, e.g.,* Harris, *Shockley Found Libeled, Receives $1 in Damages,* Wash. Post, Sept. 15, 1984, at A2, col. 1 (Atlanta jury awards Nobel prize winner $1 damages in suit against newspaper and reporter for comparing his genetic theories to those of Nazi Germany in WW II).

2. *See, e.g.,* Palmer v. A.H. Robins Co., 684 P.2d 187, 215-17 (Colo. 1984) (discussing the problem of "punitive overkill" resulting from multiple punitive damages awards in products liability cases).

3. Although the Supreme Court has not required that juries decide the life-or-death question, and although it has upheld a judge-imposed death sentence following a jury recommendation of leniency, Spaziano v. Florida, 104 S. Ct. 3154 (1984), every jurisdiction in the United States permitting capital punishment gives the jury the opportunity at least to make a recommendation as to whether it should be imposed.

cess to fewer facts than the historian,[4] hear evidence that supports the parties' views of past events rather than an independent, detached view, focus exclusively on the aspects of events to which the law attaches significance, and must endeavor to reach consensus amongst themselves on a reconstruction of the events at issue.

To further complicate the task, jurors must attempt to understand the law as it is given to them by a trial judge. The law found in statutes and decisions usually is written by lawyers for other lawyers. It is not easily explained to the uninitiated. And yet, after simply hearing the instructions delivered orally by the trial judge (and in some jurisdictions after having an opportunity to read the instructions), jurors must master the law so that they can apply it to the historical reconstruction upon which they settle.

And while finding facts and learning and applying law, jurors are also expected to do a little "rough justice" — to make the law work fairly in a particular case. This may mean acquitting a technically guilty defendant because it is unjust to apply the law as written to the circumstances of a particular case.[5] In a civil case, the jury may reduce a damage award to reflect the uncertainty it may feel about liability, even though the plaintiff has proved liability by a preponderance of the evidence, which is all that the law requires.

In sum, we expect a lot from our juries, and it is not surprising therefore that from time to time we are inclined to wonder whether we ask too much. Can a group of people, most if not all of whom have no legal training, come together once in their lives, hear an explanation of legal terms for the first time, consider opposing presentations by trained advocates and arrive at a result that is approximately correct and just? Doubts have been raised in complex cases.[6] But in other cases our judicial system has assumed that juries can and will do all of the tasks assigned to them, and that they will perform well.

For a considerable time, the assumption that juries truly did what was asked of them was based on anecdotal reports from lawyers, judges and persons who served on juries. But in 1966 Professors Kalven and Zeisel produced a study of jury behavior that was systematic and informative, and that led many observers to believe that the reigning assumption was supported by careful empirical observation.[7]

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4. This is attributable to various exclusionary rules that protect the process from "prejudicial" influences, *see, e.g.*, FED. R. EVID. 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time), or that serve to enforce constitutional or other legal rights, such as the exclusionary rule that suppresses evidence in some cases if it has been seized in violation of the Constitution. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405 (1984); Mapp v. Ohio, 367 U.S. 643 (1961).

5. Jurors are expected to do this on their own, since trial judges rarely tell juries that they may acquit a guilty defendant. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1137 (D.C. Cir. 1972).

6. *See, e.g., In re* Japanese Elec. Prod. Antitrust Lit., 631 F.2d 1069 (3d Cir. 1980).

7. H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

The jury, it appeared, had been tested and had passed the test.

Since the 1966 study, the focus has shifted from questioning whether the jury can do what is asked of it to questioning whether changes in the rules governing the way in which a jury is selected or directed to perform its tasks improve, adversely affect, or have no significant impact upon jury decisionmaking. After the Supreme Court held, in *Williams v. Florida,*[8] that six-member juries were constitutionally permissible in criminal cases, a spate of studies sought to test the Court's reasoning.[9] Numerous studies, this time of "death-qualified" juries,[10] also appeared in response to the Supreme Court's decision in *Witherspoon v. Illinois,*[11] in which the Court found insufficient data to justify a conclusion that juries from which persons opposed to capital punishment were excluded were biased on the question of guilt or innocence.

The most recent study prompted by such Supreme Court rulings is *Inside the Jury,* a collaborative effort by three social scientists which examines the effect that "decision rules" — rules governing the *number* of jurors that must agree before a verdict may be returned — have on jury behavior. The study appeared a little more than a decade after the Supreme Court's decisions in *Apodaca v. Oregon*[12] and *Johnson v. Louisiana,*[13] which upheld state decision rules permitting juries in criminal cases to return verdicts supported by a minimum of ten of twelve jurors and nine of twelve jurors, respectively.

Inside the Jury is a very important book to anyone who is interested in the way juries work. It is carefully done. The authors demonstrate their concern for accuracy at each step of their analysis. They recognize the dangers in moving too quickly from data obtained in simulated trials to generalizations about the way real jurors perform. To study a relatively small number of juries (sixty-nine in all), the authors spent a great deal of time and invested substantial amounts of research money. The investment was well worth it, for *Inside the Jury* is the most valuable source of information about how juries go about their decision-making tasks that has been produced. It will be cited in any future litigation or legislative debate concerning the merits of unanimous and nonunanimous juries. But *Inside the Jury* is much more than a study of rules of decision and their effects upon juries. It is rich in information relevant to a host of questions that lawyers,

8. 399 U.S. 78 (1970).

9. *See, e.g.,* Beiser & Varrin, *Six-member Juries in the Federal Courts,* 58 JUDICATURE 425 (1975); Mills, *Six-member and Twelve-member Juries: An Empirical Study of Trial Results,* 6 U. MICH. J. L. REF. 671 (1973).

10. *See, e.g.,* the studies cited and analyzed in Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983) *aff'd.,* No. 83-2113, slip op. (8th Cir. Jan. 30, 1985).

11. 391 U.S. 510 (1968).

12. 406 U.S. 404 (1972).

13. 406 U.S. 356 (1972).

judges and legislators continually ask as they endeavor to improve the quality of justice in America.

As good as *Inside the Jury* is, it is not perfect. In fact, the authors may believe that in some instances they have demonstrated more than they really have. There are some methodological problems that they miss, and this review will examine the most important of these. But nothing that will be said here is meant to depreciate the significance of the research reported in *Inside the Jury*. That research and the data that the authors have collected will enrich the discussion of juries and the trial process for the foreseeable future. Anyone would be proud to have made such a contribution.

I. The Simulated Trial Method

The authors of *Inside the Jury* began by deciding that a study of mock jurors dealing with a simulated case afforded a greater opportunity for gathering data than a study of jurors sitting in real cases "because of laws prohibiting the direct scrutiny of actual juries and because of the important advantages of scientific experimental methods" (for example, the capacity to tape a single trial and to show it to all juries in order to control for the quality of the performance by lawyers, witnesses and the trial judge) (p. 37). Thus, the research for *Inside the Jury* was done by recruiting mock jurors from the actual jury pools utilized in the superior courts of three counties in Massachusetts. At the beginning of each one-month sitting, a judge and one of the researchers explained the study to the jury pool and passed out a printed volunteer form to collect the names of potential mock jurors. The volunteer rate ranged between seventy-five and eighty-five percent (p. 45).

When the time for a mock trial came, the chief jury pool officer for each court would summon a panel of sixteen to twenty volunteers who submitted to an informal *voir dire* by a researcher. The *voir dire* sought to exclude from the mock juries law enforcement agents or members of their immediate families and recent victims of violent crime. Also excluded were prospective jurors who had heard about the experimental procedure or the results of any of the experimental work from other jurors, and those jurors who had been excused from jury duty for the following day. Once twelve jurors and an alternate were selected, the remaining jurors were excused and asked to return to the general jury pool to participate in the study at a later time (pp. 45-46).

The twelve jurors and the alternate watched a taped trial, which is described in the next section of this review. The researcher told them that the trial was a reenactment of a real case and that it included all of the evidence, details, and testimony that were important in the real case. The researcher also told them that after they watched the trial,

they would be observed as they deliberated to a verdict. The experimenter selected a jury foreman, usually picking someone who had previously served in that role. Although the mock juries contained more women[14] and more married jurors than the actual jury pool,[15] the composition of the mock juries appears in most other respects to have been very similar to the composition of the overall jury pool.[16]

After the jury watched the videotaped trial, it received instructions from the judge.[17] One-third of the juries were told that their verdict had to be unanimous, another third were told that at least ten of the jurors had to agree in order to return a verdict, and the final third were told that agreement by at least eight of the jurors was required for a verdict.[18] Thus, each jury saw the same trial and received identical instructions, except for the part concerning the agreement that was required for the jury to return a verdict (pp. 50-51).

Before beginning deliberations, each juror filled out an individual questionnaire indicating the verdict that he or she would choose if a vote were then taken, how certain the choice was, and the verdict that would be chosen as a second choice (p. 51). Thereafter, the experimenter took the juries to a deliberation room that contained ballot pads and pencils for each juror, photographs of the exhibits and of the street diagram used during the trial, and a small television camera that recorded the deliberations. The experimenter reminded the jurors of their decision rule and told them that they were provided ballots that they could use for a secret ballot if they wished, but that they were not obliged to vote in any particular way. Jurors also were told that they would be given a lunch break and excused at the end of the day if their deliberations had not concluded, but that they would have to return to complete deliberations. The experimenter informed the jurors that they could ask for further instructions and that portions of the judge's charge could be replayed on a television monitor; that if their foreman declared the jury deadlocked, a videotaped charge from the judge asking them to try once more to reach a verdict would be given; and that

14. The mock jury pool contained 44% women, while the actual jury pool contained only 34% women. P. 46.

15. Sixty-nine percent of the mock jurors were married, compared to 58% of the overall jury pool. P. 46.

16. For example, the mock juries had 44% white-collar workers as compared to 46% for the overall pool; 1% students as compared to 2%; 5% retired persons as compared to 6%; and 4% unemployed persons as compared to 3%. The most significant difference in occupational categories was that the mock juries had 13% blue-collar workers while the overall jury pool had 23%. P. 46.

17. Although the study does not make it absolutely clear that the instructions were also taped, it is a fair assumption (and one would hope) that they were, since any differences in the way the judge instructed each jury could have affected the outcome of the experiment. The authors do indicate that the judge's "dynamite" charge to juries having difficulty reaching a verdict was videotaped. P. 51.

18. Juries were assigned to decision rules randomly so that each experimenter had an equal number of juries in each decision rule during the course of the study. P. 51.

the jury would be declared a hung jury if it could not agree during its second round of deliberations (p. 51).

Following deliberations, the jurors were given a postdeliberation questionnaire, to be completed individually and without discussion. This questionnaire probed the jurors' reactions to the videotaped trial, how they reacted to other jurors, previous jury service and personal background, ability to remember information from the trial and the instructions, and jurors' opinions about nine key issues in the trial. At the end of this postdeliberation procedure, the experimenter debriefed the jurors and explained the purpose of the study (pp. 52-53).

II. THE VIDEOTAPED TRIAL

Because all of the data gathered by the authors was based on the mock jurors' reaction to one trial, the evidence comprising that trial is extremely important. The data must be analyzed in light of what the juries observed.

The researchers chose a murder trial that they regarded, with the advice and counsel of legal experts, as a typical, serious felony case that was sufficiently complex to afford a variety of verdict preferences. They began with a complete transcript of an actual trial and reenacted the trial using university faculty, professional actors, a police officer, a sitting superior court judge, and two attorneys. They gave each actor a summary of the case highlighting his or her testimony. The judge and attorneys received unabridged copies of the instructions given in the real case, selections of relevant testimony, and the actual opening statements and closing arguments made in the case. The participants in the reenactment endeavored to follow closely the original case while acting in the way they usually would in a courtroom (p. 47).

The tape began with the clerk's reading of an indictment charging the defendant, Frank Johnson, with the murder of Alan Caldwell on the night of May 9, 1976. Next, the prosecutor made an opening statement. Defense counsel did not follow with an opening statement, waiting instead until the beginning of the defense case to open to the jury.[19] The prosecutor called four witnesses.

A police officer testified as follows: While patrolling his beat, he heard a loud exchange of words between two men standing in front of Gleason's Grill. He moved closer, saw the victim strike the defendant, and saw the defendant draw a knife and stab downward in an overhead thrust into the victim's chest. The officer disarmed the defendant, requested help over a callbox telephone, and waited at the Grill until another officer came and took the defendant away and an ambulance removed the body of the victim (p. 47).

19. Whether this was a tactical decision or one required by a local rule or a particular judge's preference is not revealed.

On cross-examination, the officer stated that the defendant had behaved as a "quiet, law-abiding citizen" over the several years the officer had known him. Defense counsel's attempt to obtain the officer's comment on the victim's reputation for violence was cut off by an objection from the prosecutor. The officer was pressed further about details of what he had observed (pp. 47-48).

The second witness, the police officer who took the defendant to the station house, testified on direct examination that the defendant had stated that the victim pulled a razor on him, but the judge struck the testimony on the ground that it was illegally obtained.[20] On cross-examination, the witness stated that the defendant had not been in trouble before during the years the witness had known him (p. 48).

A medical examiner was the third witness. He testified about the cause of death and the condition of the body. Most importantly, he stated that a closed straight razor was found in the left rear pants pocket of the deceased, that the deceased had a blood alcohol level of 0.32% and, on cross-examination, that considerable force would have been required to cause the deceased's wounds, although he could not be sure whether the knife was thrust downward or upward into the deceased's body (p. 48).

Finally, the owner-bartender at the Grill testified as follows: The deceased and the defendant had quarreled at the Grill on the afternoon of the killing. The quarrel ended when the deceased threatened the defendant with a straight razor. Later, the defendant and a friend returned to the Grill. Shortly thereafter, the defendant and the deceased stepped outside together. The bartender could not see what happened because a sign blocked his view (p. 48). The judge did not permit the bartender to testify concerning the defendant's reputation for peacefulness, the prosecutor having successfully objected to this testimony (p. 48).

The prosecution rested on the foregoing testimony, and the defense began with an opening statement urging that the killing had been an act of self-defense. The defense called three witnesses.

First, the friend who had returned to the Grill with the defendant testified that the defendant had attempted to avoid an encounter with the deceased, that the deceased entered the bar after their arrival, and that the deceased initiated the conversation that led to the fight outside. Furthermore, the witness claimed that he saw the fight and that the deceased struck the first blow and drew a straight razor. He added that the defendant often carried his knife to use when fishing. The witness' attempt to describe the deceased's reputation for violence was cut off when the prosecution objected. On cross-examination, the

20. It violated Miranda v. Arizona, 384 U.S. 436 (1966).

prosecutor established that it would have been difficult for the witness to have seen so much through a narrow barroom door (pp. 48-49).

A barmaid from the Grill confirmed the bartender's account of the events and testified that a car parked in the street outside the bar would have obstructed the beat officer's (the first government witness') view of the fight. She also was barred from describing the deceased's violent reputation when the judge sustained the prosecution's objections to such testimony (p. 49).

The third witness was the defendant himself. He testified that he and the deceased had quarreled on the afternoon of the killing and that the deceased had pulled a straight razor on him. He said he left the bar to avoid trouble and spent the time before he returned to the Grill with his wife and children. He said that his friend came by, and the two of them went to the Grill at approximately nine p.m. The deceased entered the bar and asked him to step outside for a conversation. The defendant claimed that the deceased became hostile, threatened to kill him, punched him in the face, and drew a straight razor as the defendant stumbled. The defendant added that he drew his knife for protection and the deceased ran into it (p. 49).

The trial judge informed the jury that it could consider three degrees of homicide. He defined first degree murder as "a deliberately premeditated killing with malice aforethought," second degree murder as "a killing with malice but without premeditation," and manslaughter as "a killing without malice, as when a person, in the heat of passion or in sudden combat, inflicts a fatal wound upon another." The judge also explained that self-defense is established when "there is a reasonable expectation of suffering great bodily harm, all reasonable means of avoiding or escaping from the confrontation once it is apparent have been exhausted, and the means of defense is reasonable given the threat" (p. 50).[21]

III. THE DELIBERATIONS

The following table indicates both the predeliberation preferences of the jurors and the postdeliberation verdicts (p. 60):

21. It is impossible to tell from the authors' account whether the judge, in describing self-defense, placed the burden of persuasion on the defendant or whether the burden remained on the prosecution.

Pre- and postdeliberation verdicts and deliberation times.

Jury verdicts	Decision rule 12/12	10/12	8/12	
Postdeliberation				
First degree murder	0	5	1	
Second degree murder	13	13	13	
Manslaughter	7	5	8	
Not guilty	0	0	0	
Hung	3	0	1	
Predeliberation preferences				
First degree murder	21%	28%	17%	
Second degree murder	24%	23%	26%	
Manslaughter	30%	29%	33%	
Not guilty	12%	05%	11%	
Undecided	13%	15%	13%	
Holdout jurors at end of deliberation in verdict-rendering juries (averaged)	0.00	1.61	2.89	
Deliberation time (averaged in minutes)[a]	138	103	75	$F(2,63) = 6.56$ $p < .003$ $MS_e = 3096$

There are several aspects of the table that are especially interesting. In all three groups of jurors, the modal verdict is second degree murder. Thirteen of twenty-three juries in each group returned this verdict. No jury returned a not guilty verdict. The only obvious difference between the unanimous and nonunanimous verdict juries is that only nonunanimous juries returned verdicts of first degree murder.[22] It is also significant that only approximately one-quarter of the jurors in each group began deliberations with a second degree murder verdict as their first choice. Thus, there can be no doubt that group deliberations produced results that differed from individual analyses.

While the table reproduced above affords a summary of the results of deliberations, the authors of *Inside the Jury* offer more than this. In fact, the heart of their research revolves around an observational coding scheme that measured the participation rates of jurors, their voting patterns, the accuracy of their application of the law, the amount of reliance upon the evidence presented, and the accuracy of statements concerning the evidence. It is impossible, of course, for the reader to do more than consider the authors' representations concerning their efforts to assure consistent and fair measurement of juror behavior, but these representations do suggest an overriding concern for accuracy and fairness. Two coders, a male and a female college graduate each in their early twenties, coded all of the jury tapes. In addition, one of these coders coded samples of the deliberations twice, separated by an

22. Hereafter, the word "nonunanimous" and the term "majority-rule jury" will be used interchangeably.

interval of several months. These same samples were coded by other coders who worked independently. It appears from all this that the coding scheme produced consistency and enabled the researchers to make fair comparisons among the various jurors and juries.[23]

The conclusions drawn from the coding and study of actual juror performance *during* deliberations reveal differences that might well be regarded as more significant than the differences in overall results among the various groups set forth in the table above. At one point, the authors summarize some of the more salient findings as follows:

> [B]ehavior in unanimous rule juries contrasts with typical behavior in majority rule juries in six respects: deliberation time (majority rule juries take less time to render verdicts), small faction participation (members of small factions are less likely to speak under majority rules), faction growth rates (large factions attract members more rapidly under majority rules), holdouts (jurors are more apt to be holdouts at the end of deliberation under majority rules), time of voting (majority rule juries tend to vote sooner), and deliberation style (majority rule juries are slightly likelier to adopt a verdict-driven deliberation style in contrast to the evidence-driven style).
>
> . . . Verdict driven juries vote early and organize discussion in an adversarial manner around verdict-favoring factions, as opposed to evidence-driven juries which defer voting and start with a relatively united discussion of evidence, turning to verdict categories later in deliberation. [Pp. 173-74.]

Having made these findings, the authors of *Inside the Jury* apparently conclude that they have demonstrated the superiority of the unanimous jury over nonunanimous juries.[24] Other social scientists appear to have accepted these conclusions. Indeed, two reviewers have been so bold as to state that *Inside the Jury* establishes that the Supreme Court was wrong in upholding nonunanimous juries in Oregon and Louisiana.[25]

The authors of *Inside the Jury* bolster the case for unanimous juries by noting that only nonunanimous juries returned verdicts of first degree murder, a verdict that they find to be clearly excessive on the facts of the case shown to the juries (p. 62). Although the random allocation of jurors happened to produce a distribution that had a much larger percentage of jurors whose predeliberation assessment was first degree murder in the juries operating under a ten-person majority requirement than in the other two categories, the authors maintain that this does not explain why only nonunanimous juries returned first degree murder convictions. Five juries in the unanimous decision group had either four, five or six members whose initial verdict prefer-

23. *See* pp. 53-58.

24. *See* pp. 227-33.

25. Loftus & Greene, *Twelve Angry People: The Collective Mind of the Jury*, 84 COLUM. L. REV. 1425, 1429 (1984).

ence was first degree murder, but none of these juries returned a verdict of first degree murder. Ten juries in the majority of ten decision rule group had this many jurors begin with first degree murder votes, and four of these juries actually convicted the defendant of first degree murder. Only one jury in the majority of eight groups had such a large number of members with an initial preference for first degree murder, and it did not convict on this charge (p. 61).

IV. WHAT THE STUDY PROVES

Before reading *Inside the Jury,* I thought it might be useful to record the hypotheses that I expected to be proved correct by a study of unanimous and nonunanimous juries. These hypotheses are not original, but find their support in other studies and descriptions of jury behavior.

My hypotheses were these: (1) Unanimous juries are likely to deliberate longer than nonunanimous juries, since everyone on the unanimous jury must finally agree upon a verdict, while dissenters on majority-rule juries never need be convinced of the correctness of the majority view. (2) Unanimous jurors who finally commit themselves to a group verdict are less likely to be critical of the final verdict than nonunanimous jurors. Since people rarely like to confess their own mistakes, unanimous jurors will tend to support their verdicts, while dissenters on nonunanimous juries will disagree with the verdict, and the fact that they disagree might cause some discomfiture for the majority jurors (although the majority in some cases might actually become more confident after hearing and rejecting the arguments of the dissenters). (3) Unanimous juries are more likely to hang than nonunanimous juries, since it is always harder to get twelve votes than to get eight or ten. (4) Except perhaps in "majority of eight" juries, which might begin with the necessary majority or a group close to the majority number and thus have very brief deliberations, the factual accuracy of majority-rule and unanimous juries should be similar. Majority-rule juries would perhaps benefit from an adversarial development of facts during deliberations, while unanimous juries might benefit from the need to collect the facts necessary to satisfy everyone. (5) Unanimous juries might actually compromise in order to reach a consensus in circumstances in which majority-rule juries would not compromise and would end instead with a majority group and a dissenting group.

For the most part these hypotheses proved to be correct. But I would not have predicted that "majority of ten" juries would produce less accurate verdicts than unanimous juries, as the study suggests. I doubt that I would have predicted that jurors in nonunanimous juries would consider their deliberations to have been less careful and less serious than jurors on unanimous juries (p. 79).

Certainly, there is cause for concern if majority-rule juries are less careful, less serious and more likely to err than their unanimous counterparts. There is also cause for concern if it is true that majority-rule juries are likely to hurry toward judgment once they approach the number needed for a verdict while unanimous juries are likely to exercise far more care throughout deliberations, and, as the study suggests, even change verdicts with some frequency in the final stages of deliberations (p. 102). Thus, the issue is whether the study demonstrates these occurrences in a convincing enough fashion to warrant concern.

Others may be quicker to embrace the conclusions which the authors suggest than I, and they may be correct to do so. But I believe that what the authors identify as the most serious problems with nonunanimous juries remain speculative and unproved. The study is superb in forcing the potential problems to the surface, and it need not provide final answers to take its place among the best social science works on the legal system. In my view it earns its place, but it does not provide final answers to the questions that it raises concerning majority-rule juries.

One reason for my doubts is that even a study so carefully done as this one is bound to have methodological problems. There are, for example, two principal problems with the authors' approach to testing the degree and quality of participation by majority and minority jurors in the deliberations of nonunanimous juries. First, it appears that the jurors selected for the mock juries almost all had prior experience, and the authors even selected foremen who had previously served in this position. To the extent that jurors with prior service knew that unanimous verdicts are the American norm, they also knew that when they were placed on a majority-rule jury they were asked to depart from the norm. Is it any wonder that they would have less confidence in verdicts rendered according to a procedure that they knew was not the one usually employed in the courts where they had served?

Second, the jurors were not told until debriefing why they were asked to operate on a majority-rule basis. If, in fact, jurors understood that unanimity was the norm and that they were in an experiment, they might well have concluded that as soon as they had a majority confident enough to return a verdict they should do so. In their eyes, this might have been what the researchers expected of them.

We would have had a real test of whether minority jurors are likely to have their views fairly considered by a majority had the jurors been given an instruction like the following:[26]

> To return a verdict, at least (ten, eight) of you must agree with that verdict. This does not mean that as soon as you have (ten, eight) votes

26. Another defect is that the study apparently assumes that in majority-rule jurisdictions lawyers would not comment to the jury on the need for full participation and the importance of allowing minority voices to be heard.

> you should stop deliberating. It is vital that all of you share your views with one another and that those of you in the majority at any point carefully consider the views of those of you in the minority, and that those in the minority at any point carefully consider the views of those in the majority. If, after carefully considering all views and deliberating so that everyone has been heard, you reach a point at which you believe that further deliberations will not affect the verdict, you may return a verdict supported by (ten, eight) votes.

It is possible that the dissenting Supreme Court justices in *Johnson v. Louisiana* and *Apodaca v. Oregon* were correct in asserting that majority jurors will dominate discussion and that once a majority is reached, minority views will be ignored. *Inside the Jury* cannot confirm or rebut their assertion, however, since it did not test it, at least not in a way that permits any firm conclusion to be drawn.

There are also major problems with the authors' suggestions that the juries which returned first degree murder verdicts were plainly wrong. It is apparent that the authors too readily accepted the claims of experts whom they consulted that second degree murder was the "correct" verdict. The real case from which the videotape was drawn did produce a second degree murder conviction, and it appears that the actors and researchers knew this. Thus, it is predictable that they would have begun with a bias toward a second degree murder verdict. It is also predictable that the performers on the videotape, especially the prosecutor and the defense attorney, would have been affected by their knowledge that second degree murder was assumed to be the correct result.

Although a reader of the book does not see the tape, he must be able to take the description of it as accurate, or he will be at a loss to evaluate the study. The description of the witnesses' testimony establishes to my satisfaction that a reasonable jury could have arrived at any verdict from first degree murder to not guilty. The reasoning a jury would use to reach each verdict is described below.

First degree murder. The defendant knew that the deceased carried a razor, and he had quarreled with the deceased the very afternoon of the killing. Yet, the defendant armed himself with a knife and returned to the Grill. He went outside with the deceased, apparently without hesitation. He knew, of course, when he did so that he had his knife with him. Although the deceased might have struck the defendant, a fight is precisely what the defendant expected, and he deliberately stabbed the deceased to death with great force. It really does not matter what the patrolling officer saw, since there is no dispute that the killing was executed with great force. Moreover, it is inconceivable that the deceased pulled his razor from his pocket, since it was found unopened in his pocket by the medical examiner. The alcohol level of the deceased suggests that he probably had trouble even

carrying himself very well, let alone in making a dangerous assault upon the defendant. This is premeditated murder.

Second degree murder. The defendant might have known when he returned to the Grill that there would be trouble, but he did enter when the deceased was not present. Although the defendant armed himself, he did so for protection. He went outside with the deceased to avoid appearing to back down a second time. When the deceased struck the defendant, the defendant killed him. He acted with malice, but he had not planned to kill the deceased.

Manslaughter. Although the defendant had a knife with him, he did not want any trouble. He went with his friend to the Grill and did not begin any quarrel. Rather, he stepped outside with the deceased to resolve matters that had arisen in the afternoon. When the deceased struck the defendant in the face, as he plainly did, the defendant, knowing that the deceased had previously pulled a razor on him, acted in the heat of passion and in fear and killed the deceased.

Not guilty. The defendant had every right to go to his neighborhood bar where it seems he regularly spent time. He had not caused any problem in the afternoon, yet he knew that the deceased had pulled a razor on him. Although the defendant did not want to appear to abandon his bar out of fear, he also did not want to risk harm from the deceased. He armed himself in order to defend himself if it became necessary to do so. When the defendant went outside with the deceased, he hoped that the two of them could resolve the difficulty that had arisen during the afternoon. When the deceased struck him, the defendant reasonably feared for his life and might have thought that any movement of the deceased's hands and arms involved the use of a razor, since only that afternoon he had seen the razor. Although it appears that the defendant was incorrect about the razor, he reasonably feared for his life and he acted reasonably, especially since it was night and he could not see well.

The authors and their experts might well have considered second degree murder to be the correct result because of the result of the real trial and also because in real life that verdict is expected in many such cases. But the methodological problem is that in real life second degree murder verdicts may commonly be returned precisely because juries must be unanimous, and therefore they tend to compromise. This is not the same as saying that a verdict of second degree murder is a correct verdict. Because of the influence of the knowledge of the real trial's results — a result which because of long experience with unanimous juries was thought to be "correct" — the participants in the mock trial might have sent subtle messages that increased the likelihood that a second degree murder verdict would be returned.

There is no way of knowing what is "correct" in either the real trial or the mock trial. Reasonable people could reach different results

and, in my judgment, could have returned any of the four available verdicts. It may be that the "majority of ten" juries compromised less often than the unanimous juries, but this is not a sign of inaccuracy or undue harshness. It is what one might have expected from nonunanimous juries. It is especially interesting to note that when jurors were asked postdeliberation questions about their confidence in the verdicts, the level of confidence among "majority of ten" juries was highest. Somewhat surprisingly, the confidence level was higher, not only among those voting with the majority, but also among dissenting jurors on "majority of ten" juries than the confidence level among the jurors on unanimous juries (p. 77).[27] The "majority of ten" jurors who voted with the majority also expressed greater agreement with the verdict than the jurors on unanimous juries (p. 77). This suggests that the dialogue between majority and dissenting jurors on majority rule juries may produce a greater sense of confidence among the majority as to the correctness of their result than a unanimous jury produces.

It should be apparent, then, that *Inside the Jury* cannot tell us whether unanimous juries are more accurate than majority-rule juries or whether unanimous juries compromise to an undesirable extent. It cannot demonstrate whether the confidence of the majority on majority-rule juries in their verdicts is justified or is the product of insufficient attention to the minority's arguments. Nor can it tell us whether majority-rule juries are prone to err as a result of reaching decisions too quickly. Although it is not a source of ready answers, *Inside the Jury* does serve to remind us that these are important things to think about, to worry over, and to study. And while *Inside the Jury* does not demonstrate whether the majority or the dissenters on the Supreme Court were correct in upholding nonunanimous juries, it does demonstrate that the justices asked the right questions.[28]

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27. Holdout jurors on unanimous juries obviously produced hung juries, which made it difficult for the authors to say much about how the confidence levels for majority and holdout jurors on hung juries ought to be assessed. *See* pp. 78-82.

28. My own view is that even if it were proved that majority-rule juries are as accurate as unanimous juries and less likely to compromise, majority-rule juries offend the basic notion that proof beyond a reasonable doubt is required in order to convince the public that it should have confidence in verdicts. When one, two, three or four jurors are willing to proclaim publicly that the defendant is not guilty of the charge that a majority upholds, public confidence in the accuracy of verdicts diminishes. It is true that hung juries do not require entry of judgments of acquittal, and this means that the government's failure to prove to each juror the first time around that the defendant is guilty as charged is not an absolute bar to conviction. But I believe that the public understands that group dynamics are such that hung juries may result more from breakdowns in juror communication than from defects in evidence.

A hung jury means that a jury has been permitted to end deliberations without being compelled to return a verdict. No one can be certain that the jury might not have been unanimous if it had taken all the time required to reach unanimity. At some point, fears of exhaustion justify dismissing the jury. A nonunanimous verdict, on the other hand, is an announcement that some jurors' reasonable doubts are to be disregarded once and for all. Whether this analysis supports a constitutional rule barring majority-rule juries is more difficult to answer than whether it argues for legislatures to retain unanimous juries as a matter of choice.

V. LESSONS OF THE STUDY

There is much to learn from *Inside the Jury,* and I attempt here to point out only a few of the lessons that might be learned. One lesson, hardly new but confirmed by the study, is that jurors endeavor to follow the judge's instructions, but often have great difficulty in doing so. *Inside the Jury* establishes that juries make a considerable number of mistakes of law (pp. 80-81). There is a need for comprehensible jury instructions if jurors are to do a better job in applying the law as it is written to the facts of particular cases.[29]

Another lesson, of particular importance to trial lawyers, is that juries often use a story model to analyze a case. The stories that jurors tell to make facts fit together is related to the verdicts jurors choose (p. 23). Juries that are evidence-driven tend to focus on arriving at a group story, whereas verdict-driven juries tend to develop individual juror stories and push toward votes on those theories early. Either type of jury ought to be affected by the skill with which a lawyer can pull together the disparate facts of a case and weave for the jury a script that the jury members will adopt as their vehicle for assessing the evidence or thinking about verdicts. Opening statements that put forth attractive stories which fit the evidence to be presented and which are followed by consistent closing arguments are of critical importance. One reason why the juries in the study may have been prone to convict rather than to acquit might be the failure of defense counsel to offer the defense story immediately. This is speculation, of course, but it is something that trial advocates will want to think about.

A third lesson to be gleaned from *Inside the Jury* is that scientific jury selection is unlikely to make much of a difference in the outcome of the typical case. The researchers examined most of the jurors by questionnaires focusing on age, gender, occupation, residence, education, political party, ideology, marital status, income, race, number of previous cases heard as a juror, and number of criminal cases previously heard as a juror. The only significant differences among the ways jurors voted that might be explained by background characteristics were that unemployed and retired jurors were somewhat more defense-oriented than working people, women tended to be more defense-oriented than men, and jurors with more jury experience tended to be more prosecution-oriented than beginning jurors (pp. 128-33). On the whole, however, the relationships between voting patterns and juror characteristics were weak.

A smaller number of jurors answered questions concerning years of employment, spouse's occupation, spouse's years of employment, years of residence at their current address, number of children, news-

29. As discussed below, a defendant deciding whether to go to trial or plea bargain might well want to know that juries err on the law in a disturbing number of instances.

paper most often read and frequency of newspaper reading, ethnic origin and degree of ethnic identity, and perceptions of the defendant and the victim. Several of these factors did display some, if only modest, predictive value: residence in a wealthy suburb, attitude toward punishing someone who causes another's death, and newspaper most frequently read (p. 129).

The authors conclude that it is difficult to predict who will be a holdout juror, but less difficult to predict who will be persuasive and who will participate actively in jury discussions. Those jurors who participated more also tended to be more persuasive to other jurors. Educated jurors tended to participate more frequently and to remember more than other jurors. High status occupation jurors, who also frequently were highly educated, also performed actively and remembered more than most jurors. Men spoke more than women, but this might have been explained by the generally higher educational and occupational levels found among the male jurors. The oldest and youngest jurors tended to participate less than others. Prior jury service did not necessarily make jurors more likely to participate. Jury foremen were likely to participate more than average jurors. It is a little surprising, but open-mindedness was associated with speaking more rather than less (pp. 135-47).

In sum, the results of comparing background characteristics to voting patterns indicate that it is extraordinarily difficult to predict how jurors will vote on the basis of characteristics that lawyers typically consider in deciding whom to strike and whom to pass during jury selection. The authors conclude, however, that "the jurors' world knowledge concerning events and individuals involved in the facts of the case does affect their verdict decisions" (p. 149).

These findings confirm a view that I have expressed elsewhere,[30] which is that lawyers who focus on a single characteristic — for example, race or sex — in exercising peremptory challenges are probably making a mistake. No single characteristic is likely to be a very accurate predictor in all cases. It also should make attacks on the consistent use of peremptory challenges to exclude members of a single group harder to win,[31] since the study indicates that the views of individuals do not differ appreciably as a result of their race, sex, ethnicity or background characteristics (and therefore the requisite prejudice may not be shown).

Inside the Jury gives us reason to be concerned about something that is too often overlooked when juries are selected, namely, that some jurors are likely to be especially persuasive in a group. Had I the power to roll back the clock and to change one part of the study, I

30. *See, e.g.*, Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982).

31. *See generally*, S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 889-96 (2d ed. 1984).

would not have excused from the juries law enforcement officers, their families, and recent victims of violent cime. Had these prospective jurors been included, we could have learned whether they have stronger feelings about aspects of the criminal justice system than other jurors, whether they are more likely than other jurors to voice their feelings, and whether they tend to be more or less persuasive than other jurors.

I have been convinced for some time that one key to fair jury trials is to assure that jurors who are biased for or against one side are excused.[32] This seems to lie at the core of the sixth amendment guarantee of "an impartial jury."[33] The Supreme Court has told us that jurors who come to a case knowing about one of the parties, even a criminal defendant, can be trusted to put aside extrajudicial knowledge and to decide the case on the basis of the evidence presented in court.[34] Just last term the Court overturned a court of appeals' decision holding that a murder defendant did not receive a fair jury trial when the community feeling was so overwhelmingly against him that prejudice seeped into the jury box.[35] This confidence in the ability of "partial" jurors to act impartially is troubling. Jurors who confess to being predisposed are permitted, if not coerced by the trial judge, to state that they will be fair and thus to avoid challenges to cause. Now that *Inside the Jury* establishes that a juror's world view and feelings about the people involved in a case may be more significant than the background experiences and characteristics that a juror brings into the box with him, courts may be convinced that greater attention must be paid to the problem of juror bias.

Inside the Jury should also make courts pause before assuming that various errors in the impanelment of jurors are harmless. In another decision rendered last term, *Hobby v. United States,*[36] the Supreme Court asserted its faith in the proposition that any discrimination in the selection of jury foremen and deputy foremen in the federal system, as opposed to some state systems,[37] was harmless because their role was ministerial only. But according to *Inside the Jury,* foremen tend to have special influence in deliberations. Hence the very title of "foreman" may give one juror unique power to influence others. In the future, it would be interesting to see other studies examine whether the foreman's influence varies depending on the way the person is selected for the job — *e.g.,* by the trial judge, by the seat number in

32. Whether this is accomplished by expanding the scope of challenges for cause or by more careful *voir dire* and use of peremptory challenges is less important than that it is accomplished in some way.

33. U.S. CONST. amend. VI.

34. *See* Murphy v. Florida, 421 U.S. 794 (1975).

35. Patton v. Yount, 104 S. Ct. 2885 (1984).

36. 104 S. Ct. 3093 (1984).

37. *See, e.g.,* Rose v. Mitchell, 443 U.S. 545 (1979).

which he or she is seated, by random selection, or by vote of the jurors at the start of deliberations.

There are two other lessons to be learned from *Inside the Jury,* although these have little to do with matters that the authors undertook to study. One has to do with the relationship of trials to plea bargaining, and the other with the effect of errors of law on jury verdicts.

As noted at the very beginning of this review, American courts ask juries to do several tasks, most of which are difficult. *Inside the Jury* demonstrates, without intending to do so, that a jury called upon to assess the mental state and intent of a defendant often must be at sea during deliberations. I have explained why any of the four available verdicts would have been appropriate in the taped trial shown to the jurors. Although most of the juries returned second degree murder verdicts, there is no reason to believe that this verdict is more correct than other verdicts. Nearly half the juries did not return this verdict. This means that even with the standard of proof beyond a reasonable doubt as a protection, no criminal defendant can be guaranteed a "right" answer. Nor can a prosecutor having to bear this burden of proof, especially when unanimity is required and compromise is possible, be assured the "right" verdict.

In a world of such uncertainty, is it necessarily bad for defendants and prosecutors to make an effort to agree outside of the trial process on the just result? If each side believes that uncertainty has been fairly resolved, and if both have attempted to recognize the risks of presenting any reconstruction of facts to a jury, is the notion of compromise worse than the risk of forcing a jury decision? These are not rhetorical questions. Plea bargaining is disagreeable for many reasons. But *Inside the Jury* indicates that the difference among verdicts to be expected from juries is also cause for concern. No one would propose, I suspect, that we deny jury trials to defendants who want them, but *Inside the Jury* might support an argument that those defendants who fear jury error more than prosecutorial overreaching in bargaining ought to be permitted, even encouraged, to attempt to reach a fair disposition with the prosecutor short of trial.

The final lesson is one of the most important from my perspective. Years ago, I expressed concern about the tendency of courts to find errors harmless in criminal cases, especially nonconstitutional errors.[38] The videotaped trial described in *Inside the Jury* appears to be a classic case in which a trial judge erred, and in which the error might have had more impact on the jury's deliberations than an appellate court ever would concede.

The trial judge erred, I believe, in excluding evidence of the vic-

38. *See* Saltzburg, *The Harm of Harmless Error,* 59 VA. L. REV. 988 (1973).

tim's reputation for violence. In most jurisdictions, the victim's reputation for violence is admissible to support a claim of self-defense.[39] At the time the trial judge ruled in the videotape, Massachusetts courts might well have limited reputation evidence to that known to the defendant.[40] The trial judge excluded the evidence completely, even though it appears that the defendant and the deceased were from the same neighborhood, that reputations there were generally known, and that the defendant knew the reputation of the deceased.[41] Had the evidence been admitted, the jury would have been able to consider not only the single altercation during the afternoon, but also the deceased's apparent violent personality. This would have provided strong support for the defendant's claim that he acted reasonably in defending himself.[42]

It is not hard to imagine an appellate court dismissing any error as harmless, however. The court might say that the jury heard about the victim's violent behavior in the afternoon and that reputation evidence was unnecessary to show the violent, or at least bellicose, nature of the deceased. *Inside the Jury* demonstrates that jurors try to follow the judge's instructions on character evidence (p. 155). Thus, a diligent jury would have paid no attention to the defense's attempt to show that the deceased's violent character made it likely that he initiated a violent attack and that the deceased's reputation made the defendant's response reasonable.

When the exclusion of this evidence is considered together with the failure to give an instruction that a jury can consider a defendant's character and that character evidence alone may create a reasonable doubt, the verdicts of second degree murder become more understandable. Why was there no affirmative instruction on behalf of the defendant? Perhaps there was none in the real trial. Or perhaps defense counsel on the tape neglected to ask for one. It is not unreasonable to observe that a jury asked to believe self-defense might have been influenced by more proof regarding the deceased and an instruction on the possible significance of the defendant's own reputation.

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39. *See* R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 238 & n.88 (2d ed. 1982). A typical rule is FED. R. EVID. 404(a)(1).

40. *See* Commonwealth v. Gibson, 368 Mass. 518, 333 N.E.2d 400 (1975); Commonwealth v. Tircinski, 189 Mass. 257, 75 N.E. 261 (1905).

41. The defendant did not testify that he knew the deceased's reputation, but it seems likely that his lawyer by that time had given up the point after repeatedly failing to get the evidence admitted.

42. A related ruling was the refusal to permit the owner-bartender to testify to the defendant's good reputation. While at some point the character evidence would have become cumulative and not very valuable, in this case the character evidence was the most important evidence supporting the defendant's self-defense theory. Testimony by the owner-bartender might have been especially significant on the theory that the jury might have been impressed that even in the bar the defendant was known to be peaceable. Yet, this is the kind of ruling that is unlikely ever to be disturbed on appeal.

Again the problem of uncertainty raises its head. The Supreme Court is wont to say that trials are often not perfect, and apparently no effort need be made to make them as perfect as can be.[43] As a result, the difference between verdicts in real cases based on similar facts, although not between verdicts in this study, may well be traceable to the difference in a ruling on an evidence point. Once again, one may wonder whether the defendant who seeks to plead and achieve certainty is poorly treated vis-à-vis the defendant who chooses trial.

CONCLUSION

Inside the Jury is a wonderful addition to the literature on juries. It probably is the most important study since Kalven and Zeisel did *The American Jury* almost two decades ago. By using real jurors, the authors have overcome the defects apparent in many less ambitious efforts using college students as subjects. Through videotape and scrupulous analysis of deliberations, *Inside the Jury* tells lawyers, judges, lawmakers and social scientists interested in the behavior of groups generally and juries particularly more than they ever knew about jury behavior.

With all of its strengths, *Inside the Jury* is not a perfect study. Its flaws are real and should not be denied simply because the study is so evidently significant and its effort so worthy of praise. *Inside the Jury* will surely inform for years to come debates about trials, trial strategy, and the role of judges in supervising juries. And if it is used properly, it will pave the way for further work on juries. Surely its authors would welcome this. If, however, more is claimed for *Inside the Jury* than is warranted, the additional work that should be done might be delayed. That would be too bad, because *Inside the Jury* has identified the questions that most need to be answered.

43. *See* Brown v. United States, 411 U.S. 223, 231 (1973).