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Jury deliberation: an observation study

Gary Winship (2000) *Group Analysis*, 33, 4: 547-557

In this article, the way that the jury works is considered from a group-analytic perspective. Observational fieldwork of simulated jury deliberations is presented. The data was gathered from a joint funded Home Office and Law Commission project at the Socio-Legal Studies Centre, Oxford in 1995. Inferences are drawn from the observations and the unconscious group processes are considered. The efficacy of the jury process is discussed.

Key words: jury, observation, unconscious process

In studying the history of the jury, from the adoption of democratic trials in pre-Solon Athens (c. 500 BC) through to present-day jury system, the ascendancy and the demise of the jury system appears to be a concomitant of democratically ordered societies (Winship, 1997). That is to say, the jury system historically has emerged where there has been a shift away from despotic and oligarchical governance to more democratically inclined polities. The jury appears to be an emblem of a maturing public psyche where the responsibility for making stringent decisions is shared among the people, by the people and for the people as Aristotle (in *Politics*, 1905) urged.

The literature about jury research mainly encompasses 9 outcome paradigms that are of a behavioural, sociological and group psychometric perspective (e.g. Strotbeck and Hook, 1961; Mills and Kessler, 1973; Zeisel and Diamond, 1978; Baron et al., 1992). There is a dearth of research into the emotionality of the jury process and, as far as I can see, no psychoanalytic or group-analytic accounts. In this paper I carry forward a previous literature review

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(Winship, 1997) and present some preliminary formulations based on observations I undertook of mock jury deliberations. It is my hope that these findings may be the basis for future analytic enquiry and research into what must be a fecund area for group analysis in as much as social justice is a feature of group therapy.

A central tenet of my brief exegesis here is that the field of psychoanalysis and group analysis, vis-a-vis levels of unconscious primitive process has much to offer in helping us understand the hitherto enigmatic dynamics of the jury process. I say primitive process because the jury is confronted with processing and arbitrating over the breakdown of social restraint where primitive drives may be manifest. From a group-analytic perspective, the jury would appear to be a unique mini-lab for analysis of such primitive process beyond the clinical setting.

As a result of the highly emotive issues that the jury often has to process, it is not surprising that it becomes a tangled web of intrigue and confusion in the public domain. Indeed, the jury is not just a reservoir for the recesses of primitive process, because from beyond the court-room there is a weight of public pressure and opinion which affects the jury. One only has to look at the O.J. Simpson trial, arguably the most widely observed trial of this century, to get a measure of the

complex issues that may impinge upon the evidence that the jury needs to process. The Simpson trial is far from exceptional; rather we might see it as an amplification of the myriad of personal, social and cultural tensions that form in the crucible of the jury. There are therefore tensions both from within - the dynamics of the courtroom and the case at hand - and also without - the pressure of public opinion that permeates what we might think of as the jury matrix.

However, many of these dynamics have remained inaccessible to real-time research because the law imposes limits on jurors talking about their experiences. Therefore most of the research undertaken in the field is conducted in simulated settings and it is from such a research setting that I present my findings.

Jury Deliberation - A Fieldwork Observation Study

A research project jointly funded by the Home Office and the Law Commission, led by Sue Lloyd Bostock, was carried out in the Socio-Legal Studies centre in Oxford in 1995. This was the first

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large-scale jury research study in the UK since the 1970s. There were 24 mock trials and I carried out a non-participant observation procedure in four of the trials. Volunteers were recruited via local papers in Oxfordshire and were gathered into groups of twelve and invited along to the study centre by letter. Each sample group of jurors was asked to arrive at the same time. They were then ushered into a large room with a television. A researcher from the centre introduced the project as: 'a study to see how jurors arrive at their decision'. He then explained that they were to see a mock trial on video, with actors playing roles based on real cases, and that afterwards they would be asked to deliberate on the verdict. During proceedings the jurors were asked to complete two questionnaires. The deliberations were audio-recorded.

During my observations I carried out an adapted version of Esther Bick's (1964) unobtrusive psychoanalytic observation technique. This was a technique which I had researched and developed for my dissertation after a two-year infant observation course at the Tavistock Clinic, London (Winship, 2000). Regarding my technique for the jury observation - I sat outside the group in the corner of the room, about 2 metres away from the nearest juror. I was close enough that I was able to hear all the participants, but not so close that my range of view was limited. Scanning with my eyes and moving my head slightly, I could see across the sample group. Had I been sitting at the table, inside the group so to speak, I would have needed to move my head considerably more to see around the group. I considered the prevailing atmosphere, a combination of noise, gestures and words which required visual and auditory observation. I did not keep notes during the observation but within 15 minutes afterwards recorded what had happened, including some of my subjective responses. I attempted to keep an open mind and not to encode the data prematurely, following Rustin's (1989) recommendations for undertaking observation study. In watching the jury group I did not always follow the focal encounters but stayed attentive to other events, the responses and resonances of other jurors to the speaker. My field of study was as much about the space as the people. I did not attempt to objectify events, instead I acknowledged

my observation as inextricably linked to the network of social relations being studied - that is to say, observation via experiential assimilation or projective identification. I will now present one of the four observations.

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Observation

Fourth observation. The jury (ten women, two men) was shown a video of a trial where the defendant had pleaded not guilty to stabbing Mr R. The defendant claimed it was self-defence. He said he had been working on his car and then had gone around to 'have it out' with the Mr R over a dispute. When Mr R came out of his house he was allegedly brandishing a flick-knife. The defendant said he happened to have a screwdriver in his pocket, so he defended himself.

The video showed witness examinations and cross-examinations with all the key players. The final prosecution and defence cases were presented before the judge summed up. The video was engaging indeed; the actors looked into the camera so there was a feeling created of being drawn into the drama. As I observed the jurors watching the video they looked most absorbed, sometimes making notes. All appeared to be listening attentively and in silence. There was a palpable air of sombre application to their task of listening. After the trial was finished the jury gathered around the table. The researcher came back into the room and gave out a questionnaire. The questionnaire asked each juror if they had made up their mind or whether they were uncertain (this was an anonymous enquiry that was repeated at the end the deliberations). After this the researcher collected the questionnaires and said: 'You have 45 minutes to arrive at a decision, we normally require a 10:2 verdict. Juries often elect a foreperson.' He then left the room. I was sitting on the outside of the group and was introduced as someone who was there simply to observe proceedings and monitor the audio recorder.

In the fourth observation at first there was a brief silence of 15 seconds or so then someone started pouring out drinks of squash from a jug that was in the middle of the table and asked people nearby if they wanted a glass. Several conversations began taking place simultaneously as the first glasses of squash were drunk. There was hubbub and excitement within two minutes. Then someone said out loud above the noise: 'Let's see what happens if we vote now', and proposed a show of hands. Seven voted 'not guilty' (six female and one male), one (male) was unsure and the remaining four (females) voted 'guilty'. There followed a discussion about the evidence presented by the barristers about the stabbing. Several members demonstrated with thrusting motions how the fight might have happened and the question of self-defence

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versus hostile attack was the focus of the cogitations. As far as I could note, the re-enactment of the stabbings, as the jurors imagined it, were attempts at re-living the fight. In the main these were attempts to show that the stabbing must have been intentional (because there were two stabbings) and not accidental or done in self-defence. These enactments led to a series of sub-discussions then a brief silence. Someone asked if anyone had changed his or

her mind. A Scandinavian woman, who had voted 'not guilty', said that she believed that the accused had done the stabbing but there was not enough evidence to find him guilty. Another woman asked; 'What do the men think? They are always working with tools.' One of the men said that it was Sunday afternoon so the defendant had probably been drinking. There was a rather light-hearted discussion about Sundays and men and husbands, and at this point some of the jurors divulged some personal details about how they spend their Sundays.

There were a few more interchanges followed by a considered and more serious dialogue for the next 15 minutes or so, in which the jurors grappled with the act of spontaneous violence versus measured violence. Members appeared to be trying to think from inside, trying to put themselves in the place of the players in the trial - how they would or would not act spontaneously themselves given similar situations. Words were chosen carefully, debate was measured although there were moments of earnestness and attempts at persuading others to a point of view. The characters were analysed, for instance one woman said: 'The accuser was smug, he smiled all the way through his testimony.' The defendant was generally more esteemed by everyone. During this time there was no talking over each other. Each juror spoke. There was another show of hands; the only position change was that the male who had been unsure now voted 'not guilty' (8 'not guilty', 4 'guilty'). A woman commented that it was the younger people who were voting for a 'guilty' verdict. This indeed was an astute observation and was followed by a fragmentation again as the discussion sub-grouped into three pairings and two threesomes. This lasted for five minutes until the researcher came into the room on the mark of 45 minutes. He asked if they had reached a decision and was told by several jurors that they were still split. The group filed out of the room and several of the group members continued to converse with each other.

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Observation Discussion

It is a methodological issue as to how best to process and draw inferences from the above observational material. Each of the four observations was unique, though a thematical or dialogical analysis comparing all the observations may locate some discernible patterns common to each of the juries. However, the analysis of each one on its own merits is the implied start point. Ideally this might be best done in a group forum, with external and independent witnesses to examine the data and then draw inferences, in much the same way that Bick (1964) recommends a collaborative effort in processing material from infant observations in a seminar setting. In the absence of collaborative data at this stage I will present some of my own responses. (Here, the reader may wish to stop and make a note of their own responses to the data set above before reading mine below.)

My overall feeling about the observation is that the discussions could not be considered as noticeably logical. In the above observation the jury did not nominate a chairperson and this might be significant. However, the other three juries did nominate Chairs and the discussions then seemed no less random. The discussion of the juries, to my mind, had more of a quality of free association. People seemed to speak what was coming into their minds. The evidence, mostly, became incidental to the expressed opinions and feelings of the jurors about the case. There was sense that the jurors were filling in the gaps for themselves: 'It was Sunday,

so he would ;, have been drinking.' In this way the jury was constructing a narrative of its own, a commonly noted *modus operandi*, noted by Pennington (1981). Likewise, Diamond and Casper noted the speculative nature of the jury discussion when they concluded that the group verdict was a product of preferences, expectations, inferences and stories that individual jurors brought to the deliberations. They concluded, however, that 'the algorithms that produce this transformation are not well understood' (1992: 559).

I suggest that the transformation of the story of the case of Mr R occurred as a result of identification whereby the discussion led into a domain which became increasingly personalized by one or more of the jurors. The emotional expression became more charged when the issues became personalized, that is to say when the jurors put themselves in the position of the key protagonists, for instance in the re-enactments of the stabbing. This emotionally charged identification was particularly noticeable in Observation Two, when

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the jury was deliberating over a case of sexual assault. At such times, when the material became subject to identification, the decibel level of the discussion would increase. There was a tendency within the group for one or more people to identify with either the defendant or the plaintiff; jurors would commonly use statements like; 'If that were me' or 'I would do such and such'. In the fourth observation, the identification with the case was

clearly represented when several people were thrusting imaginary knives into thin air or at each other. This seemed to be a case of projective identification or mirroring, whereby the dynamics of the case came alive in the jury. I had previously noted this process of identification when I examined the jurors' responses to the trial of John Hinckley, who shot President Reagan. Hinckley had developed a fixation for the young film-star Jodie Foster and in shooting Reagan he was mimicking the character Robert De Niro played in the film *Taxi Driver*: In the trial the jury was shown the film, heard psychiatric testimonials and heard the bizarre letters that Hinckley had sent to Jodie Foster. Juror Nathelea Brown reported afterwards (in the US there are less stringent laws about jurors talking about their experiences) that she herself had felt mad during the trial; 'I felt I was on the brink of insanity going through all this, you know' (cited in Hans and Vidmar, 1986: 183).

The group-analytic template for this process of identification, . . . whereby the juror and the jury-as-a-whole become a re-enactment of the internal world of the accused, is exemplified in Klein's (1963) exceptional paper 'On the Oresteia'. According to Greek myth, Orestes is brought before the Athenian jury convened by Athene, charged with the murder of his mother. After hearing the evidence the jury vote, but are split exactly. Athene uses her casting vote to acquit Orestes. The gorgon-like 'furies', who have tortured Orestes with psychotic-like hallucinations since the murder, are

angered about the decision. Athene offers the furies a home in her city and thus Orestes, though depressed, is relieved of their taunting. Klein (1963) interprets the myth in terms of the struggle to integrate the self, the opposing votes showing that the self is not easily united; that destructive impulses are in opposition to the need for reparation and compassion. In the trial scene Athene represents the good triumphant mother in contrast to Clytemnestra who represents the bad murderous

mother (she has killed Orestes' father, Agamemnon). The jury vote in the trial enacts the split of Orestes'

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internal objects, which are spilt at the paranoid schizoid level. The jury becomes a mirror of Orestes' internal dialogue.

The Good Enough Jury?

Projective identification may account for the way the jury becomes more embroiled than it ordinarily would in tense and emotive discussion. The jury is the recipient of the polemics of opinion in the court-room. In silence, with no recourse to challenge or question, the jury matrix becomes a reservoir which absorbs the multiplicity of projections in the courtroom. The way that the jury identifies with the case at hand, becoming absorbed in the dynamics of the case, might be not only legitimate but necessary. We might we think of projective identification as mediating understanding and

communication rather than impeding it. In this way, through a degree of emotional engagement, the jurors are able to examine the evidence with a depth that goes beyond logic and rationality.

However, the arguments against the capacity of the jury to process evidence logically by getting emotional entangled have rather led to the jury being under fire (Findlay and Duff, 1988). There have been a number of high-profile travesties of justice, particularly so in cases where the jury has become a regressive and punitive ancilla of public opinion. The trial of child defendants for the murder Jamie Bulger in the UK is a case in point. Several months before the two accused boys were brought for trial, the general behaviour of the public and the press was akin to that of a lynch mob. The accused were described as 'evil' before any guilt was proven. It would have been impossible for any juror to remain removed from the media coverage and social influence in the case. There has recently been a call from a European Commission for Human Rights for a re-trial, on the grounds that the first trial was unfair. We have also seen the fallibility of the jury under the weight of public opinion, with several recent retrials such as the 'Birmingham Six' in the UK, and the miscarriage of justice in the trial of Rodney King in Los Angeles. The racial prejudice apparent in the jury verdict of the Rodney King trial even prompted the US President at the time and later a UK high court judge to say they could not see how the jury reached its verdict (Crowther, 1992). Influential figures such as Brian Clapham (1991) believe that the jury ought to be abandoned in favour of a system where decisions are made by

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judges who, he considers, are better informed about jurisprudence and are therefore more able to process legal data. He also cites the sheer expense to the public purse of the present jury system. This may be a sound economic argument but these attacks represent a rather worrying assault on collectivism and faith in group democracy.

Foulkes's conceptualization of the healthy wholeness of a group may form a fundamental argument in favour of the jury system. The jury is gathered in a group

because many heads are better than one where the stringency of decision-making is shared in a group that is . sizeable enough to allow anonymity where it is still possible to maintain a personal opinion against a majority which is not so numerically overwhelming (reference, the film *Twelve Angry Men* starring Henry Fonda). The healthy wholeness of the group holds the group together as it is faced with high levels of emotional engagement. Overall, from observations, I felt that there was something reassuring about the capacities of the mock juries to take on a difficult task with a serious interest in searching out the truth. There were attacks on thinking and flights into chaos, but the jury showed that it could hold firm to its task. Even where interest dwindled and confusion reigned, the collaborative efforts reigned true. I had a feeling that I was witnessing citizenship cogitating towards its civilizing best.

The current argument that this task of deliberation should be ., assigned to individual magistrates would be a denial of the necessity for social connectedness in establishing the moral and social way of things. The commandeering of people to the jury is perhaps a strength of the process. Arguably, the reluctant juror, pulled off the street is the best juror for this unsavoury job. The jury verdict is tremendously difficult. It is an either/or situation. The search for a verdict, then, arguably involves the jury operating at a primitive level of splitting, an intrapsychic process, that may be said to reenact the early experience of differentiation between the good and the bad. Juries re-enact the split in order to reach a decision about truth. I suggest that the jury is a group re-enactment of a primary process as inclined to integrative behaviour as it is to regressive behaviour, where paranoid schizoid splitting is almost functional in identifying truth and untruth.

Theories aside, at the end of the day it may be a question of faith; does one subjectively believe the jury is good enough? Do we believe it has the capacity to function as a task group and not exist at the level of a

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basic assumption group? When we question the capacity of the jury we are, by implication, saying something about society-as-whole. I would draw the reader's attention here to Alford's (1990) debate about a Kleinian/Bionian account of groups where he takes a counter-position to Rustin's (1990) conceptualization of the possibility of benign social construction. Rustin's (1990) concept of the innate human capacity for reparation and morality is clearly resonant with Foulkes's notion about the healthy wholeness of the group.

In defence of the jury, I would argue that it is a concomitant of a belief in democratic justice that signifies a maturing public psyche. However, if the jury system is to be secured it is necessary for it to be seen as a less enigmatic and mysterious emblem of justice. Its ownership needs to be held more resolutely in the public sphere. There is some impressive work carrying forward the idea of group democracy in the shape of 'citizens juries' (Stewart et al., 1994). Deconstructing the jury and understanding how it functions may be part of demystifying the jury and firming-up its crucial role in society. I hope I have thrown some light on some of the mysterious algorithms of transformation in the jury by examining the dichotomy between its regressive and maturing tendencies, and its potential to sustain democracy.

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