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Frederick C. Moss

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BOOK REVIEW

INSIDE THE JURY. By *Reid Hastie, Steven D. Penrod and Nancy Pennington*. Cambridge, Massachusetts: Harvard University Press. 1983. Pp. viii, 277. \$20.00.

*Reviewed by Frederick C. Moss**

Some of our most venerable institutions do not age well. One of those institutions is the jury trial. The twelve-member panel whose job it was to reach a unanimous verdict is fast becoming a relic of the common law.¹ In an effort to streamline the machinery of justice, states have been tinkering with the jury trial system. And the United States Supreme Court has bestowed its blessings on much of this tinkering. In 1970, in *Williams v. Florida*,² the Court held that the twelve-person jury was but a historical accident of the common law, and that the required number of jurors on a criminal jury was not fixed by the Sixth Amendment.³ In *Williams*, the accused was allowed by law only a six-person jury even though he was charged with a serious felony, robbery, for which he could have been (and was) sentenced to life imprisonment if convicted. Justice White, writing for the majority, recognized that the jury performed the essential function of guarding the accused against arbitrary law enforcement by placing the ultimate decision in the hands of a group of laypersons. But he found "little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained."⁴

* Associate Professor of Law, Southern Methodist University School of Law. B.A., Georgetown University, 1965; J.D., Villanova University, 1968; LL.M., Harvard University, 1977. Director of the National Institute for Trial Advocacy Southern Regional Program.

1 The authors of *Inside the Jury* note that, according to a 1981 Center for Jury Studies Newsletter, "The twelve-member, unanimous decision jury is required in both criminal and civil trials in only seven states" (p. 2). See also Note, *The Erie Doctrine and Nonunanimous Civil Jury Verdicts*, 4 AM. J. TRIAL ADV. 665, 665 & n.2 (1981) (Of the thirty-one states that permit less than unanimous civil jury verdicts, ten require a five-sixths vote, sixteen require a three-fourths vote, two allow two-thirds concurrence, and three allow five-sixths verdicts when deliberations go beyond six hours.)

2 399 U.S. 78 (1970).

3 *Id.* at 102-03.

4 *Id.* at 100.

Eight years later, however, the Court in *Ballew v. Georgia*⁵ held that persons charged with nonpetty misdemeanors could not be convicted by unanimous five-member juries. Justice Blackmun, announcing the judgment of the Court, noted that the *Williams* case generated much scholarly work on the matter of jury size, and that while these studies did not pinpoint the exact number of jurors which are necessary for a panel to function properly, "they raise significant questions about the wisdom and constitutionality of a reduction below six."⁶ These questions related to whether a jury of less than six could adequately reflect a cross section of the community, whether verdicts of small juries would be accurate and consistent, and whether the deliberative process of such a small group could effectively counterbalance juror biases.

In 1972, the Supreme Court upheld the right of states to obtain felony convictions from less than unanimous twelve-person juries. In *Johnson v. Louisiana*⁷ and *Apodaca v. Oregon*,⁸ the Court affirmed convictions based upon nine to three, ten to two, and eleven to one jury votes, over arguments that the appellants were convicted by a process which allows the majority of the jury to ignore the reasonable doubts of its minority members. Justice White, on behalf of a bare majority of the *Johnson* Court, countered with what could be described best as a judicial "hunch."

[T]he mere fact that three jurors voted to acquit does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed a reasonable doubt about guilt. We have no grounds for believing that majority jurors . . . would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose⁹

Dissenting in *Apodaca* and *Johnson*, Justice Douglas insisted that unless unanimity were required there would be no reason for the majority jurors to consider seriously the reservations of the minority. All

5 435 U.S. 223 (1978).

6 *Id.* at 231-32.

7 406 U.S. 356 (1972).

8 406 U.S. 404 (1972).

9 406 U.S. at 361.

debate and deliberation will cease, he contended, when the requisite majority is reached. The result will be that the minority's doubts, which under a unanimity rule would force the majority to be more cautious and perhaps to compromise on lesser-included offenses or lesser sentences, will lose their moderating influence. In effect, he argued, the minority will be disenfranchised.¹⁰

The constitutionality of a less than unanimous verdict rule arose again in 1979. In *Burch v. Louisiana*,¹¹ the defendants were convicted of a nonpetty misdemeanor by a five to one jury vote. A unanimous Supreme Court ruled the conviction violated due process for "much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury."¹² The Court apparently remained persuaded by the social science studies regarding jury size which it relied on in *Ballew*.

None of the justices writing in *Apodaca*, *Johnson*, and *Burch* could find much in the social science literature either to help confirm or to cast doubt upon their judicial hunches about how juries deliberate under different decision rules, that is, under unanimous versus nonunanimous verdict rules. Most of the studies to that point had focused upon the effects of varying the jury size and the physical appearance of the parties. But these decisions have not made how juries function under unanimous and nonunanimous verdict rules simply a matter of academic concern. These decisions have raised as many constitutional questions as they have answered. Yet to be decided is the validity of a whole range of possible nonunanimous verdicts. Would it be permissible to convict on a vote of seven to five? What about eight to four? And given that less than twelve-member panels are constitutionally acceptable, what about convictions based upon six to three or five to three votes? The Supreme Court has said little to indicate how it would view any of these possibilities. However, the Court has indicated a willingness to consider social science studies in deciding such questions.

*Inside the Jury*¹³ is an attempt to help legislators, judges and trial attorneys better understand how juries deliberate. The central focus of this elaborate and systematic jury study is the effect of different decision rules, that is, the minimum number of votes required to

10 *Id.* at 388-93.

11 441 U.S. 130 (1979).

12 *Id.* at 138.

13 R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* (1983).

render a final verdict, upon both the deliberative process and final verdicts. The authors of the study examined the Supreme Court discussions of the jury's functions and derived five standards used by the Court to judge the adequacy of jury performance. A jury must be representative of a cross section of the community; it must be able to counterbalance juror biases; it should find facts accurately; it should apply the law correctly; and it should reach accurate verdicts (pp. 7-9).

To test how jurors perform according to these functional criteria under different decisional rules, the authors of the study created the most elaborate jury simulation to date. A real murder case was reenacted by a trial judge, two attorneys, professional actors and university faculty, and edited into a three-hour film. The jurors were recruited from actual jury pools in three Massachusetts counties. They were constituted into sixty-nine juries of twelve and shown the trial film. The only difference between them was that one-third (twenty-three) of the juries was instructed by the court that they must reach a unanimous verdict, another third was given a majority decision rule of at least ten out of twelve, and the final third was given an eight out of twelve majority requirement (pp. 45-50).

Immediately before deliberations began, the jurors were asked to indicate their first and second verdict preferences. Then they were placed in a room and their deliberations were videotaped. The jurors were told that they would be released at the end of the day. However, if at that time they had not reached a verdict, they would have to return the following day to continue deliberating. They were allowed to request the replaying of any portion of the judge's instructions. If the foreperson announced that they were deadlocked, they would be shown a videotape of the Massachusetts version of the "dynamite charge."¹⁴ If the jury announced itself deadlocked a second time it was declared a hung jury (p. 51).

Following deliberation, the jurors filled out a questionnaire regarding their opinions about the quality of the experimental trial and their deliberations, their sociometric rating of their fellow jurors, their own personal and demographic background, their recall of specific facts from the trial, and their opinions on key issues raised by the case (pp. 52-53).

One of the most impressive aspects of this study is the detail with which each jury's deliberation was dissected, scrutinized, and

¹⁴ See *Allen v. United States*, 164 U.S. 492 (1896); *Commonwealth v. Rodriguez*, 364 Mass. 87, 300 N.E.2d 192 (1973); *Commonwealth v. Tuey*, 62 Mass. (8 Cush.) 1 (1851).

categorized. Every utterance of every juror was coded according to whether it referred to trial facts or legal issues, and whether the remark was an assertion, a question, or a suggestion that some action be taken. The trial facts category alone contained forty-three classification codes, and particular key facts were identified and classified with the help of legal experts (pp. 53-55). These observations were used to keep track of the jurors' participation rates, voting patterns, and the amount of deliberation time spent on discussions of fact and law (p. 53).

The wealth of information which this study has produced is difficult to summarize. Much of the data simply confirms what most observers of the jury system have long believed. Some of it will disappoint trial attorneys who seek confirmation of their pet rules of thumb for jury selection. Other findings could be seen as proving that the Supreme Court took a wrong turn when it jettisoned the unanimity requirement in criminal cases. And occasionally, this book recommends small but important changes in trial procedures which could help jurors better perform their difficult job.

The trial which all of the juries saw involved a barroom fight. The antagonists had had a run-in earlier in the day at the same bar. At that time, the victim threatened the defendant with a razor. When they confronted one another again at the bar later that evening, the argument continued and the men stepped outside to settle it. It was undisputed that shortly thereafter the defendant mortally stabbed the victim in the chest. The defendant contended that the victim had come at him with a straight razor and had run onto the knife he pulled in self-defense. Eyewitnesses on both sides disagreed over what happened. The medical examiner found a closed straight razor in the victim's pants pocket (pp. 47-49).

The charge to the jury defined four verdict choices: first degree premeditated murder, second degree murder with malice but without premeditation, manslaughter, and not guilty by reason of self-defense. The predeliberation poll of the jurors indicated that close to a third favored the manslaughter verdict. However, after deliberations fifty-six percent of the verdicts across all decision rules were for second degree murder (pp. 59-60). All of the legal experts who had reviewed the trial agreed that the "correct" verdict was second degree murder. Therefore, the study indicates that varying the decisional rule has little effect on the probability that a jury will reach the proper result (p. 63).

There were other results of the study which lend support to

those who favor the greater utilization of less than unanimous verdicts. The unanimous verdict rule produced more hung juries (three out of twenty-three versus one out of forty-six) (p. 60). Furthermore, the stricter the decision rule, the longer the juries deliberated (p. 76).

However, the authors of the study concluded that, on balance, the evidence presented more reasons to favor the unanimity rule. Most disturbing of all was the fact that there was a relatively high frequency of first degree murder verdicts from nonunanimous verdict juries (no unanimous first degree murder verdicts versus six nonunanimous first degree verdicts). In the opinion of consulted legal experts, these harsh verdicts were untenable under the facts of the test case (pp. 60-62). The evidence from this study lends credence to the explanation that these six failures in the deliberative process were related to the decisional rules.

The decisional rule appears to influence the deliberative process in several respects. First, it is clear that Justice Douglas was more correct than Justice White in their hunches in the *Apodaca* and *Johnson* cases. The evidence from *Inside the Jury* indicates that “[n]onunanimous juries discuss both evidence and law during deliberation far less thoroughly than do unanimous rule juries” (p. 228). Moreover, final verdicts were more closely related to predeliberation verdict preferences in juries under the majority decision rule (pp. 62, 228). For example, five of the unanimous rule juries began their deliberations with four or more members favoring first degree murder verdicts, but none of these juries ultimately rendered this verdict. Under majority rules, by contrast, eleven juries started with four or more jurors favoring first degree murder, and four of these juries ultimately rendered that verdict (p. 228). These results clearly imply that the longer and more thorough deliberations under the unanimity rule tend to have a moderating effect upon final verdicts and thereby minimize harsher, aberrant verdicts.

The intense scrutiny of the deliberations in this study has turned up an even more specific likely cause of the first degree murder verdicts by majority rule juries. It appears that every one of these majority rule juries made serious and persistent errors in understanding the judge's instructions regarding verdict categories (p. 168). This would suggest that “longer, more thorough deliberation might eradicate these errors, as in the unanimous rule juries” (p. 229).

Two other findings demonstrate that deliberation remains critical, or becomes even more so, after a faction of the jury reaches a size large enough to render a two-thirds majority verdict. First, impor-

tant events occur in unanimous juries after the largest faction numbers eight. At this point,

[t]wenty-seven percent of the requests for additional instructions . . . , twenty-five percent of the oral corrections of [factual or legal] errors made during discussion, and thirty-four percent of the discussion of the beyond reasonable doubt standard of proof occurred . . . (p. 96).

Second, in over thirty percent of the unanimous juries, the final verdict did not coincide with the verdict espoused by the eight-person faction (p. 96). Thus, in the words of the authors, "the jury decision task is not completed even when the majority faction is quite large" (p. 229).

Justice Douglas' suspicion that the adoption of less than unanimous verdict rules may result in the disenfranchisement of minority viewpoints seems to be confirmed by this study. The evidence indicates that members of small jury factions tended to speak more in unanimous juries than in majority rule juries. There are several possible reasons why this would occur. Participation in the deliberation process may be directly proportional to the perceived likelihood that the juror is able to affect the verdict decision by deadlocking the vote, changing another juror's mind, or forcing concessions on the part of the majority faction. Obviously, as the verdict requirement decreases, so does the probability of a minority juror affecting the final verdict (p. 112).

Another factor possibly contributing to the lesser participation by minority faction jurors in nonunanimous panels is that the deliberative atmosphere is less conducive to cooperation and conciliation. The researchers noted that nonunanimous jury deliberations are more adversarial than those of unanimous juries, "even combative" (p. 112).

It may be that larger factions in majority rule juries adopt a more forceful, bullying, persuasive style because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members. Thus, they are not concerned that their persuasive tactics will leave a few opposition jurors untouched or even frozen into defensive postures (p. 112).

No doubt most trial attorneys will read this book with the hope that it will provide them with the key to jury selection. This expectation springs from the eternal belief of litigators that a person's attitudes, prejudices, predilections, and character traits are reflected in

his or her demographic background, gender, religion, ethnicity, and political beliefs. In this respect, the book will be most disappointing because it will provide little support for these popular notions.

In this jury study, all 828 participating jurors filled out a questionnaire calling for their age, sex, occupation, residence, education, political party, ideology, marital status, income, race, and previous experience as a juror. A subsample of 269 jurors completed a more detailed questionnaire that covered additional matters, such as spouse's occupation, years of employment, newspaper most read, ethnic origin, frequency of newspaper reading, as well as attitudinal questions regarding police, punishment, and the impact on the juror of learning that the defendant had young children (pp. 128-29).

All of this information was assessed in an attempt to find correlations between attitudes and demographic characteristics on the one hand, and verdict preference and deliberation performance on the other. With regard to individual bias in verdict preference, the four most significant factors, residence in a wealthy suburb, attitude toward punishing one who kills another, marital status, and newspapers read, could correctly classify only 45.6 percent of the jurors. When the verdict preferences were reduced to only two categories, favoring murder and not favoring murder, sixty-one percent of the jurors were correctly classified. In short, much of the folklore surrounding jury selection techniques was not borne out by this study (pp. 129, 237).

With regard to performance by the juror during deliberation, some juror characteristics were found to be fairly reliable in predicting whether a juror will be persuasive in the jury room. Many of these characteristics are related, and include education, income, social status, and occupation (pp. 131-46). The clear lesson for the trial attorney is that he or she must closely scrutinize jurors who have education, income, social and occupational levels higher than the other jurors because if they serve on the jury, their point of view will carry disproportionate weight.

Inside the Jury, nevertheless, does contribute some important insights on jury selection. The authors conclude that the most important characteristic of a potential juror is the juror's "world knowledge" about matters which will arise in the course of the trial which the juror may be asked to decide. For example, in the context of the trial used in the study, this could include "the juror's knowledge of social customs that might govern barroom quarrels, the effects of alcohol on physical coordination, and the acuity of visual

perception under various viewing conditions . . .” (p. 130). And to the extent that the juror’s personality and demographic factors relate to relevant, case-specific knowledge and attitudes, they may be expected to influence his or her verdict.

Thus, a juror from a lower-class environment might believe . . . that men frequently carry knives or other weapons without specific plans to use them, whereas a juror from an upper-class environment might see possession of a knife as a rare event and infer malice or premeditation from possession (p. 130).

These findings tend to justify what most trial attorneys try to do during voir dire.¹⁵

Other bits of lawyer folklore concerning the selection of juries were confirmed by this study. These include the fact that occasionally a juror will refuse to convict because the juror disagrees with the law the defendant is accused of breaking (p. 172), that the jury foreperson dominates the deliberation process (p. 144-45), that younger and better educated jurors recall evidence and legal definitions better than older and less educated jurors (p. 135-37, 142-43), and that jurors generally have difficulty understanding the judge’s instructions on the law (p. 88).

Inside the Jury also makes some simple, easily usable suggestions for improving jury performance. As previously mentioned, the authors discovered that jurors had a great deal of difficulty understanding and remembering the judge’s instructions on the law. Misinterpretation of instructions was found to be causally related to most aberrant verdicts. This study makes it painfully obvious that the Massachusetts practice of not reducing the jury charge to writing and letting the jury take it to the deliberation room is counter-productive (p. 231).

This experiment also revealed that more thorough and accurate deliberations followed an agenda different from those which were less productive. These less productive, “verdict-driven” juries began their deliberation with a ballot. Then the opposing factions mar-

15 It should be noted that the jurors selected to participate in this study were not “voir dired” by either the judge or the attorneys. Rather, they were informally questioned by the experimenter who sought to identify and exclude jurors who were law enforcement agents or had members of their immediate family so employed, had been the victim of a violent crime, had heard of the experiment from other jurors, or had been excused from jury duty for the next day (p. 46-67). Therefore, each panel probably contained jurors who would have been struck by the prosecution and defense peremptorily. Given, however, that this circumstance equally disadvantaged both sides of the case, it is difficult to say that it was a significant flaw in the experiment.

shalled facts remembered from the testimony in support of their verdict preference (p. 163). On the other hand, "evidence-driven" juries had different characteristics. Public balloting occurred late in the deliberation process after substantial discussion of the evidence. During that discussion, individual jurors did not advocate one verdict, but reviewed the facts with reference to several possible verdicts. Early in the deliberation, the "evidence-driven" juries attempted to reach a consensus on the most likely story of what actually happened. Only later did the juries turn to the task of deciding which verdict was called for by the story that they had constructed from the evidence (p. 163).

The authors concluded from their study of these two different styles of deliberation that the "evidence-driven" method is preferable to the other. "Verdict-driven" juries tended to be "relatively hurried, cursory on testimony-law connections, less respectful of their own and others' persuasiveness and openmindedness, and less vigorous in discussion. . . . [and] somewhat more likely to appear under majority rule conditions . . ." (p. 165). Also, "the evaluation of evidence for its credibility and implications appear[ed] to be more disjointed and fragmentary in verdict-driven than in evidence-driven juries" (p. 164). As a consequence the authors make the sound but novel recommendation that the trial judge instruct the jury "to begin deliberation with a review of the evidence and to avoid early or frequent vote-taking" (p. 230). There seems to be no reason why a judge could not do this routinely. Usually a judge will instruct the jury that its first duty is to select a foreperson. This study now gives trial judges good reason to more fully set the jury's deliberation agenda.

Inside the Jury provides a fascinating insight into the deliberative processes of the average criminal jury. The authors are to be congratulated for avoiding as much as they did slipping into that social science "babble" that makes laypersons' eyes glaze over and minds go blank. The only difficulty that laypersons will have with this book, and it is not a large problem, arises from its heavy reliance on statistics. Graphs and tables are sprinkled liberally throughout. Too often the significance of a finding is expressed by reference to its "F-statistic" or its " $p < \text{value}$." Despite a gallant effort by the authors to explain what these terms mean in the Appendix, a good deal will be lost upon those ignorant of statistics.

Nevertheless, the book is uniquely valuable for anyone interested in furthering his or her understanding of how and why the jury

system works. It is especially recommended for any legislator who is considering whether to further abandon the unanimity decision rule. It sounds a strong note of caution to this legislator. And for those who espouse the elimination of juries altogether in civil cases, *Inside the Jury* paints a convincing portrait of an old institution that still works, and works remarkably well.