



The Lone Holdout Juror



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Introduction

In 2015, two New York State court juries deliberated for many days – one for 21 days, the other for 18 days. Both juries had lone holdouts and both juries hung.¹ This white paper was stimulated by these events.

It seems likely that most of us have had the experience of being out-voted. Whether the group of decision-makers is a family, or a work group, or a jury, we have participated in group decision-making. And, there have likely been moments when we have stood alone against the full weight of unanimous others and the impact of group dynamics.

Here, we address both individual and group-based factors that may create and sustain lone holdout jurors who never give in. First, we discuss relevant psychological research on the effects of groups on individual decision-making. There, we explore research on the presence or absence of common characteristics in holdouts. Second, we offer our thinking which begins with but goes beyond the data: We address whether individuals who are especially likely to stand alone can be identified during jury selection.

Hung Juries Are Rare And Lone Holdout Hung Juries Are Rarer

Research shows that the rate of hung juries differs by county and by year, but the average rates appear to be fairly consistent over the last 60 years or so. According to Kalven and Ziesel's 1966 book, The American Jury,² the national average for hung juries was just under 6%, and according to a report from the Planning and Management Consulting Corporation (1975),³ hung jury rates in California averaged about 12%. More recent research from the National Center for State Courts⁴ (discussed in more detail below) found that, the rate of hung juries across 30 state court-sites, averaged between 6% and 15%. And, the rate of federal hung juries is much lower at 2.5%.⁵

Hung juries tend to occur more frequently in urban areas, likely due to the greater heterogeneity that exists in urban areas relative to rural areas. According to Hannaford-Agor and colleagues (2002), while 1

¹ The jury in *NY v. Davis et al.* (the "Dewey" trial) went 21 days without reaching a verdict (jurors voted 11-1 for acquittal on the main charges against one of the three defendants on trial); the jury in *NY v. Hernandez* (the Etan Patz case) went 18 days without reaching a verdict (jurors voted 11-1 for conviction).

² Kalven, H. J., Zeisel, H. (1966). *The American jury*. Boston: Little Brown Co.

³ Planning and Management Consulting Corporation (1975). *Empirical study of frequency of occurrence, causes, effects, and amount of time consumed by hung juries*. Santa Barbara, CA.

⁴ National Center for State Courts (2003). A profile of hung juries. *National Center for State Courts Caseload Highlights: Examining the Work of State Courts, 9(1)*.

⁵ See *Supra* note 4.

in 3 hung cases is retried, 2 in 3 are not. Of the juries that hang, about 40% have either one or two holdouts – thus, lone holdouts are quite rare.⁶ More often, the hanging vote is more evenly divided.

The United States Are Not Unanimous In Their Requirement of Unanimity

Legal scholars have argued over the need for unanimity for decades. In defense of a nonunanimous jury, some have taken the position that the lone juror, who stands alone against 11 of their peers is less rational than others,⁷ and that the votes of the other 11 provide a more accurate read on the import of the evidence. It is, in part, for this reason, that Oregon and Louisiana do not require unanimous verdicts; 10-2 verdicts are sufficient, even in criminal cases. This is clearly an endorsement of the value of the majority view.⁸ And, despite the defendant's appeal in *Apodaca v. Oregon*, that a non-unanimous verdict violated his constitutional rights, the Supreme Court declined to overturn the verdict.

One added note on the legal import of hung juries: In some fundamental way, it seems that a jury that can not reach a unanimous verdict when called upon to do so, embodies the definition of reasonable doubt at a collective level. To the extent that this is a reasonable view of the meaning of hung juries, real skepticism should attach to retrials of criminal cases that end in 11-1 or 10-2 verdicts. Real weight should be given to the view that enough of a verdict has already been reached to assign case resolution to nearly unanimous outcomes (in the 48 states that do not already do so).

Psychological Research On The Pressure To Conform

The pressure to conform with the majority can be quite overwhelming and most do not resist. That said, as social psychologist and pioneering researcher on conformity Solomon Asch noted in his early research on conformity, “those who once tasted independence had greater possibilities for coping with the mounting pressure” (p. 23).⁹ And, Asch found, a minority of two was substantially more powerful than a minority of one.

While Asch focused most on those who conformed, for the purpose of this paper, we have mined his work for his attention to the non-conformists. According to Asch, non-conformists 1) have confidence in their perception and experience, 2) are independent and withdrawn, and/or 3) had doubts, but felt it necessary to push forward. In fact, some were convinced the majority was correct, but remained independent. These individuals had doubts in their own perceptions, assumed that the majority was probably correct, but still felt it was necessary to report what they saw: “Probably the others were right ... I felt that rather than go along [with the majority] I'd make the answers that appeared right to me”(p. 41).

⁶ Hannaford-Agor, J. D., Hans, V. P., Mott, N. L., & Munsterman, G. T. (2002). *Are hung juries a problem?* A report published by the National Center for State Courts. Retrieved from <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/Other/HungJuryFinalReport.ashx>

⁷ See *Supra* note 2.

⁸ Two states, Oregon and Louisiana do not require unanimous verdicts, even in criminal cases. (*Apodaca et al. v Oregon*, 406 U.S. 404, 1972; *Johnson v. Louisiana*, 406 U.S. 356, 1972).

⁹ Pg. 23 Asch tested whether social pressure would lead a person to conform; Asch, S. E. (1956). Studies of independence and conformity: A minority of one against a unanimous majority. *Psychological Monographs: General and Applied*, 70, 1-70.

In one study by Prager (1996) designed to test whether age predicted conformity, mock jurors voted twice – once after hearing a case and again after seeing fake ballots from other jurors.¹⁰ Age did not predict conformity, but it did predict confidence – such that older adults had significantly greater confidence in their votes compared to younger adults. Gender, however, did predict conformity, such that females were more likely than males to change their verdicts to conform with the fake ballots.

Research by Deutsch and Gerard (1955) has shown that people conform because of either normative or informational social influence.¹¹ Normative influence refers to those who conform because they want to fit in with the group and/or they fear the negative consequences of deviating from the group. Informational influence refers to those who conform because they think, since everyone else is in agreement, the majority must be correct – and they believe it.

These influences certainly come into play when judges give jurors who are struggling (who report that they believe they are hung) the Allen charge (which we discuss in more detail later), wherein jurors are essentially pressured by the judge to try much harder to reach agreement.

Peoples et al., (2012)¹² investigated whether mock jurors were more or less likely to change their verdicts to agree with the majority (in this case, acquittal) as a function of friendships with their fellow jurors. They found that those with *distant* friendships (i.e., acquaintances) with other mock jurors were *more likely* to conform to acquittal and those with *close* friendships to other mock jurors were *less likely* to conform to acquittal. This finding is consistent with research from McKelvey and Kerr (1988)¹³ which suggested that people were more likely to conform with strangers because they were eager to make a good impression, and they were less likely to conform with close friends because those friends had likely already formed their impressions. Perhaps, then, if trials are lengthy and jurors get to know each other, especially since they are not allowed to discuss the case and have to discuss themselves more personally, they form close friendships with one another. And thus, holdouts become more likely with longer trials.

Psychological Research On The Diffusion Of Responsibility

Thus, we know from decades of social psychological research that people are inclined to go along with the majority. A corollary experience exists in those who go along. This is the diffusion of responsibility. This term, “diffusion of responsibility,” has been used to describe the bystander effect, or bystander apathy, in which people are less likely to help when others are known to be present as compared to when they are alone.¹⁴

¹⁰ Prager, I. R. (1996). Age differences and conformity in juror decision making. *Dissertation Abstracts International*, 56, 7068.

¹¹ Deutsch, M. & Gerard, H. B. (1955). A study of normative and informational social influences upon individual judgment. *The Journal of Abnormal and Social Psychology*, 51, 629-636.

¹² Peoples, C., Sigillo, A., Green, M., & Miller, M. (2012). Friendship and conformity in group opinions: Juror verdict Change in Mock Juries, *Sociological Spectrum*, 32, 178-193.

¹³ McKelvey, W. & Kerr, N. H. (1988). Differences in conformity among friends and strangers. *Psychological Reports*, 62, 759-762.

¹⁴ Darley, J. M. & Latane, B. (1968). Bystander intervention in emergencies: Diffusion of responsibility. *Journal of Personality and Social Psychology*, 8, 377-383.

No one individual is responsible and, as a result, the members of the group may have a more diffuse, less strong feeling of personal responsibility. Mynatt and Sherman (1975)¹⁵ manipulated whether participants gave advice to an “advisee” as part of a group of three advisers or individually – advice leading to either success (gain of money) or failure (loss of money). Those who gave advice in groups, which led to failure, assumed the least amount of responsibility compared to those who gave advice individually, leading to failure, followed by those who gave advice leading to success (either individually or in groups). It is not surprising that people are unwilling to take responsibility for failed outcomes, and they are able to accomplish this shirking most easily if they were acting as part of a group rather than individually.

Further, diffusion of responsibility may lead people to make riskier decisions. Starting as early as the 1960’s, researchers have found that decisions made by groups tend to be more risky than the decisions made by each member of that group individually. In one study, Wallach, Kogan, and Bem (1962)¹⁶ gave participants twelve hypothetical situations and instructed them to choose between a more risky and more rewarding option or a less risky and less rewarding option (e.g., taking a lower paying job with more security vs. a higher paying job with no long-term security). All participants made individual decisions first. Those in the experimental condition, however, were then put into groups and instructed to come to a group decision. Group decisions tended to be more risky than individual decisions. This may explain why jurors are willing to go along with the majority. They can make riskier decisions -- which in this context could be acquitting even though they believe the defendant is guilty, or convicting when they are not convinced beyond a reasonable doubt -- and assume less responsibility for the decision made because of their group membership. One would hope that, in deliberations, jurors understand the importance of their decisions and fight to retain their sense of individual responsibility against the diffusion of responsibility, since the outcome of *that* group decision is arguably one of the most important decisions people make.

Psychological Research On Groupthink

“Groupthink” is also a noted feature of groups and one that makes the occurrence of a lone holdout very unlikely. Decades ago, Irving Janis published his book, Groupthink (1982).¹⁷ According to Janis, groupthink occurs when people are overly willing to compromise in order to reach consensus within a group. That is, those who are opposed to the general consensus are more likely to acquiesce with the other group members in order to appease the group and so reach a unanimous decision. As Janis noted, people are susceptible to groupthink when they are truly engaged in an in-group, and the motivation for unanimity precludes them from realistically assessing and considering other opinions.

¹⁵ Mynatt, C. & Sherman, S. J. (1975). Responsibility attribution in groups and individuals: A direct test of the diffusion of responsibility hypothesis. *Journal of Personality and Social Psychology*, 32, 1111-1118.

¹⁶ Wallach, M. A., Kogan, N., & Bem, D. J. (1962). Group influence on individual risk taking. *Journal of Abnormal and Social Psychology*, 65, 75-86.

¹⁷ Janis, I. L. (1982). *Groupthink: Psychological studies of policy decisions and fiascoes*. New York: Houghton Mifflin.

There are eight conditions or “symptoms” that Janis said should be present in order for groupthink to occur:

1. The **Illusion of invulnerability**, in which group members are overly optimistic and engage in risk-taking.
2. **Unquestioned beliefs**, in which group members ignore the consequences of their actions both individually and as a group.
3. **Collective rationalization**, in which group members ignore warning signs.
4. **Stereotyping**, in which group members demonize out-group members or those who oppose the group.
5. **Self-censorship**, in which group members hide their doubts or fears about the decision.
6. The presence of “**Mindguards**,” characterized as self-appointed group members who censor or hide problematic information from the group.
7. The **Illusion of unanimity**, in which group members believe that everyone agrees.
8. Members who question the group decision(s) are often given **direct pressure** to conform and maybe viewed as disloyal to the group.

Although Janis' identification of groupthink is somewhat disconcerting, he did suggest several ways in which the effects of groupthink could be eliminated.¹⁸ Janis suggested, for example, that a group leader should encourage group members (and himself/herself) to be critical and to prioritize expressing doubts and raising objections. Although Janis' suggestions were geared towards policy-making groups, each of Janis' "symptoms" is also likely to be present in the context of jury deliberations.

Some twenty years after Janis' groupthink theory was published, Neck and Moorhead (1992)¹⁹ applied his theory of groupthink to the jury deliberations process in a drug trafficking case, *U.S. v. John Z. DeLorean*. In their article, Neck and Moorhead described the ways in which each of Janis' symptoms would be present in a deliberation (e.g., insulation of a group; homogeneity of members' backgrounds; high stress from external threats). They also identified another symptom, the "highly consequential decision" which is inherently present in all jury deliberations.

The purpose of the article by Neck and Moorhead was *not* to investigate what groupthink looks like in the context of deliberations – but to show how, in the presence of factors which tend to engender groupthink, groupthink *can be avoided*. The researchers garnered extensive information regarding the deliberations via post-trial juror interviews. Jurors' remarks were consistent with Janis' suggestion that in order to ameliorate the effect of groupthink, group members should be urged to be critical and express doubt. Specifically, results revealed that while jurors were trying to reach a unanimous verdict, they encouraged one another to do so with open minds and without pressure. And so, Neck and Moorhead identified this case as one in which most of the symptoms of groupthink were present, but the group did not succumb to groupthink. Perhaps, then, this advocacy for keeping an open mind and not giving in to group pressure is the very thing that allows for individuation. And, happily, this approach is a featured aspect of judicial instructions to jurors.

Who Are Lone Holdouts? Jurors Who Focus On Relevant Factors And For Whom There Are No Demographic Predictors

Studies have been conducted to evaluate whether and how holdouts differ from the majority and from dissenters who eventually go along with the majority. As noted earlier, some have suggested that the lone holdout is a crackpot²⁰ or a flake,²¹ but research contradicts this conjecture. In fact, some research suggests that holdouts are neither irrational nor eccentric, and they do not ask unreasonable or illogical questions.²²

¹⁸ Janis, I. L. (1973). Groupthink and group dynamics: A social psychological analysis of defective policy decisions. *Policy Studies Journal*, 2, 19-25.

¹⁹ Neck, C. P. & Moorhead, G. Jury deliberations in the trial of *U.S. v. John Z. DeLorean*: A case analysis of groupthink avoidance and an enhanced framework. *Human Relations*, 45, 1077.

²⁰ See Josh Meyer, Non-Unanimous Jury Idea Appeals to Some Reformers, Los Angeles Times, Sept. 28, 1994, at A12.

²¹ See Alan Hirsch, The Jury Is Way Out, Washington Times, Sept. 27, 1995, at A23; Henry Weinstein & Tim Rutten, Simpson Case Already Is Rewriting the Rule Book, Los Angeles Times, June 11, 1995, at A1, A34.

²² Diamond, S. S., Rose, M. R., & Murphy, B. (2005). Revisiting the unanimity requirement: The behavior of the non-unanimous civil jury. *Northwestern Law Review*, 201-230.

Early research by James (1959)²³ revealed that education did not predict whether jurors would be in the majority or in the minority. Later research by Hastie et al. (1983)²⁴ showed that holdout jurors did not differ from other jurors on a specific set of demographic characteristics.

The Arizona Project

In the first study of its kind, Diamond, Rose, and Murphy (2005)²⁵ videotaped 50 civil jury deliberations in the Arizona Supreme Court between 1998 and 2001. These researchers also obtained data including post-trial juror, judge, and attorney questionnaires. Results from the juror questionnaires were consistent with past findings, in that holdouts did not differ significantly from the majority jurors in their background characteristics (e.g., age, race, gender, education, occupation), prior jury service, or the amount they spoke. Also, in most of the deliberations, the holdouts argued with the majority about the credibility of the witnesses or the interpretation of the jury instructions. That is, their bases for disagreement were at the heart of the matter, not “fringe” concerns.

National Center For State Courts Study

Groundbreaking research conducted by The National Center for State Courts (NCSC) provides great insight into actual jurors’ decision making in real criminal trials.²⁶ Researchers collected case information and juror questionnaire data from 3,500 jurors from four sites in California, Arizona, New York and the District of Columbia. The data included final verdicts, individual opinions and verdicts, and information regarding the dynamics of the deliberations.²⁷

Hannaford-Agor and colleagues (2002) reported on this study, finding no significant differences in age, gender, race, educational background, income, level of religiosity, or occupational status between dissenters and holdouts. Waters and Hans (2009)²⁸ utilized NCSC data in their comparison between juries that reached a verdict and juries that hung, and found that in more than one half of the juries, there was at least one person whose individual verdict vote was different than the final jury verdict. Results revealed that, similar to previous research, demographic variables (e.g., race, education, age, gender) did not significantly predict dissension – nor did they predict whether dissenters ultimately conformed or held out. In a multivariate analysis, however, they *did* find that Hispanics were more likely than Whites to hold out for acquittal.

²³ James, R. M. (1959). Status and competence of jurors. *American Journal of Sociology*, 64, 563-570.

²⁴ Hastie, R., Penrod, S. D., & Pennington, N. (1983). *Inside the jury*. Cambridge: Harvard University Press.

²⁵ See *Supra* note 22.

²⁶ Hannaford-Agor, J. D., Hans, V. P., Mott, N. L., & Munsterman, G. T. (2002). *Are hung juries a problem?* A report published by the National Center for State Courts. Retrieved from <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/Other/HungJuryFinalReport.ashx>

²⁷ See *Supra* note 26. Several courts declined to participate in the research because of inconvenience and/or because of concern that the collected data could give convicted defendants a reason to appeal.

²⁸ Waters, N. L. & Hans, V. P. (2009). A jury of one: Opinion formation, conformity, and dissent on juries. *Cornell Law Faculty Publications*, 114. Retrieved from http://scholarship.law.cornell.edu/lrsp_papers/114

Also, according to Waters and Hans (2009), compared to conforming dissenters, holdouts for acquittal were more skeptical of the police and holdouts for conviction thought they had a better understanding of the expert evidence. Thus, those who were skeptical of the police were more likely to be holdouts for acquittal and those who felt they were likely to understand and rely on expert testimony were more likely to be holdouts for conviction.

Background On The Allen Charge

When jurors report that they are struggling to reach unanimity or indeed that they believe they are hung, it is common practice for judges to encourage them to try harder. The Allen charge²⁹ is a type of supplemental instruction given to a deadlocked jury to encourage them to come to a unanimous decision. According to the Ninth Circuit in *United States v. Berger*³⁰:

In their mildest form, these instructions carry reminders of the importance of securing a verdict and ask jurors to reconsider potentially unreasonable positions. In their stronger forms, these charges have been referred to as “dynamite charges,” because of their ability to “blast” a verdict out of a deadlocked jury.

And, here is the text of the Allen charge as used in a criminal case in the Eleventh Circuit³¹:

Ladies and gentlemen of the jury, as I indicated last night when it was determined prior to the time that all of the members of the jury had been polled, that the verdict returned by the jury was not in fact unanimous, I am going to further ask you to continue your deliberations.

I am making this request of you so that you can make an effort, if possible, to reach agreement upon a verdict and dispose of this case, and I have a few additional comments I would like for you to consider as you do so.

First of all, this, like all cases before this court, is an important case. The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution.

If you should fail to agree upon a verdict, the case will be left open and may have to be tried again. Obviously, another trial will only serve to increase the cost to both sides. And there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial or more competent to try it or that more or clearer evidence could be produced.

²⁹ The Allen charge originates from United States Supreme Court case, *Allen v. United States*, 164 U.S. 492 (1892).

³⁰ *United States v. Berger*, 483 F.3d 1080,1089 (9th Cir. 2007).

³¹ *United States v. Chigbo*, 38 F.3d 543 (11th Cir. 1994).

If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others.

On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence. But after full deliberations and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty.

You may be as leisurely as you wish in your deliberations and should take all the time which you may feel is necessary.

Ladies and gentlemen of the jury, I will ask you now to retire once again and continue your deliberations with these additional comments in mind. Of course, these comments should be taken by you in conjunction with all of the other instructions I have given you in this case.

And Yet The Lone Holdout Juror Exists

The combination of group dynamics and the self-explanatory pressure applied by the Allen charge ensures that the jury deliberations process is stacked against the lone holdout. Despite this, lone jurors do sometimes hold their position against the interpersonal and legal pressures to get in line. While it is surely true that a broad range of committed positions drive lone holdouts to hang juries (e.g., the view that the prosecution's burden of proof has not been met vs. the view that the defendant is surely guilty), the simple ratio of an 11:1 hung jury creates so strong an overall impression that legal practitioners rightly grapple with the question of whether or not it is worthwhile to retry cases that yield these supermajority results. Will a second trial yield a unanimous verdict?

Nor, as noted above, is there much evidence that demographic characteristics predict whether someone becomes a holdout juror. Further, holdouts may experience an enormous amount of hostility, rejection, and isolation.³² Even so, some do hold out. Therefore, there must be other reasons – personal, characterological (not demographic) why one individual might withstand the pressure from their fellow jurors to go along with the majority.³³

Those Who Are Independent Or Even Contrary

³² At least in felony criminal trials, as shown in: Reichelt, J. (2007). Standing alone: Conformity, coercion, and the protection of the holdout juror. *University of Michigan Journal of Law Reform*.

³³ We knowingly exclude from consideration those who stand alone for reasons of psychiatric or intellectual disability. We assume that if these individuals appeared in court they would be excused from jury service.

Research has shown that holdouts may have positive views of themselves and negative perceptions of their peers. Hannaford and colleagues³⁴ found that holdouts were more likely than other jurors to say their fellow jurors were less open-minded, more unreasonable, gave less consideration to alternate points of view, raised more conflict, and spent more time trying to convince each other to agree.

Individuals whose personalities and/or world views are highly unusual may frequently find themselves standing alone. These are people who may define themselves in terms of their differences from others and who may take pride in the uniqueness of their views. These individuals may disagree with the majority, for characterological reasons that transcend substance. They may hold out because of reasons not related to whether or not the defendant has been proved guilty beyond a reasonable doubt – but on some “inappropriate basis.” For example, in a Santa Clara kidnapping case, the lone holdout empathized with the defendant (an alleged child abuser) because he had an “unruly daughter of his own.”³⁵ They may seek a contrary position as a way of affirming their independence; and some may enjoy the secondary benefit of this independence -- the opportunity (even if dysfunctional) to frustrate those around them.

Those Who See Themselves As Superior

Some may stand alone because they believe their position to be morally or intellectually superior. The prevalence of racism in world culture makes it easy to imagine that such a thing could occur. And, the beautifully democratic nature of juries is intended to ensure diversity of membership. Some will be highly educated, some will not; some will harbor deep prejudices (efforts to ferret them out notwithstanding), some will not. Diversity may result in some individuals perceiving themselves as superior to the others. This sense of superiority may function to buttress their ability to cling to a unique position in a group that disagrees. Some have suggested that teachers are more likely than those from other occupational groups to be holdouts.³⁶ Perhaps this is because they are more accustomed than others to addressing uninitiated others and to “turning them around” with their teaching.

Those Whose Independence Is A Result Of the Group’s Process

Or, people may stand alone at first as a way to add breadth to an overly narrow conversation (e.g., “I’ll play devil’s advocate”), and then become committed to their minority or singular view. Especially with regard to decisions that pertain to new topics – jury deliberations necessarily pertain to new topics – individuals may become committed to idiosyncratic views because they have voiced them. Once people form an opinion, they are not likely to change their opinions when challenged with inconsistent information.³⁷ Also, self-perception theory suggests that we

³⁴ See *Supra* note 6.

³⁵ Osher, J. (1996). Note and comment: Jury unanimity in California: Should it stay or should it go? *Loyola of LA Law Review*, 29. (e.g., Santa Clara kidnapping case where the lone holdout refused to convict based on evidence that was inadmissible)

³⁶ Quote from Mortenson, Stan in Smith, E. B. (2004, March 30). Lone jurors sometimes hold key to final verdict. *USA Today*. Retrieved from <http://usatoday30.usatoday.com>.

³⁷ Asch, S. (1946). Forming impressions of personality. *Journal of Abnormal and Social Psychology*, 41, 258-290.

come to know ourselves and our opinions by observing our own overt behaviors.³⁸ Jurors who voice a unique view may come to see themselves as true believers of those positions and become reluctant to compromise them for the sake of the whole.

The last sort of individual identified, those who may not go along because they have become committed to a view voiced during deliberations, is hypothesized to emerge during deliberations. That is, at least in theory, these individuals do not bring a predisposition to singularity to deliberations. Instead, their interest in and ability to hold out is forged in the midst of deliberations, as self-perception and group dynamics do their work.

Identifying Prospective Jurors Who Are Likely To Be Lone Holdout Jurors

Can individuals likely to hang a jury be identified during jury selection? Surely, identifying potential lone holdouts is not a simple task.

With regard to the first two groups identified above -- those who seek independence and/or may be contrary -- occupation and appearance seem likely to provide clues. Those who make their livings by “thinking outside the box” or by virtue of their personal creativity (e.g., artists, musicians, researchers) seem more likely than others to be self-referential and less likely to bow to the pressure of the majority. These are individuals who respect their own views to an unusual extent because their livelihoods depend on their creativity in a more singular way.

Appearance can also provide insight into those who resist conformity. Styles of dress that are unusual, especially if they require real attention (and not simply the absence of attention to appearance), may also reveal individuals who are not much moved by conformity and are willing to expend effort to distinguish themselves from others.

Those who see themselves as superior may present themselves more forcefully than others during voir dire. An easy measure of this sort of “force” is often reflected in the note-taking that follows jurors’ remarks. Those prospective jurors whose voir dire responses create the longest records may well be the sorts of individuals who will tend to distinguish themselves during jury deliberations as well. Certainly, they can be expected to try to lead the jury. If others do not follow, they may be more likely than other sorts of jurors to stand alone.

Conclusion

As we noted at the start, the impetus for this paper was the recent occurrence of two hung juries, each with a lone holdout, following weeks of deliberations. The purpose of this paper was to take a closer look at the likelihood and the nature of hung juries and the psychological phenomena that make lone holdouts less likely. We then considered the possible factors that might help holdouts resist the pressures of the group, when most others acquiesce. And, we noted the reality that hung juries are rare, and lone holdouts rarer.

Trial length may foster an environment in which a lone holdout is more likely to hold his or her own position against the majority. This may occur because long trials may lead to friendships among the jurors, and friendship appears to free people to speak their own minds and hold their own views.

³⁸ Bem, D. (1967). Self-perception: An alternative interpretation of cognitive dissonance phenomena. *Psychological Review*, 74, 183-200.

While no demographic characteristics offered broad insight into holdouts, a few specific differences emerged: those with skepticism towards police as well as those who reported an eagerness to rely on expert testimony were more likely to hold out (though in opposite directions). Additionally, those who are inherently contrarians, or who are especially self-referential in their work may be more likely to resist the pressure of the group.

Jury deliberations are a fascinating process. Deliberations stand the best chance of embodying the best of democracy to the extent that open-minded thinking is encouraged. Open-mindedness weakens the influence of groupthink. Non-conforming jurors tend to raise central not peripheral concerns and this serves justice. We encourage judges and attorneys to encourage independence of thought so that juries can do their best work, protected as much as possible from the distorting pressures of groupthink and the diffusion of responsibility. While lone jurors may be taken to slow the rate at which the wheels of justice turn, they also offer important protections to those on trial. Only when the jurors retain high levels of individual responsibility can we feel most assured that deliberations function as intended – wherein each juror votes as an individual and does not violate his or her conscience. Thus, we find in lone holdouts reassurance that the negative effects of group dynamics on decision-making have been staved off in favor of a more thoughtful, individually responsible pursuit of justice.

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Dr. Julie Blackman is one of the nation's leading trial strategy consultants. She joined DOAR in 2011 after heading her own trial consulting business for many years. She is currently a Senior Vice President at DOAR. Her consulting work has focused primarily on complex litigation, particularly patent trials and white collar crime cases. She has worked on many high profile trials.

Julie's work as a trial strategy consultant and expert witness in cases involving family violence has spanned more than 35 years. She holds a Ph.D. in Social Psychology from Teachers College, Columbia University, and received her undergraduate degree from Cornell. For the first ten years of her career, she taught in the Psychology Department at Barnard College. She brings an educator's perspective to her consulting work in general and especially to complex litigation. Julie works with attorneys to help them promote juror comprehension, so that deliberations and verdicts will be more meaningful. Most often, in the courtroom, the better teacher wins.

She works from two fundamental truths about jurors – first, that they are new to the matters at hand, and second, that they will not be permitted to ask questions as they arise. How best to teach and persuade jurors given these realities leads to front-of-mind strategies for themes that she advances in her work with attorneys. She is an astute jury selection consultant and she works side-by-side with attorneys and witnesses to improve the clarity and the credibility of testimony. She leads insight-enhancing pre-trial research activities including surveys, focus groups and mock trials that inform attorneys of the likely consequences of their persuasive efforts. She speaks frequently at professional meetings of judges and lawyers, and has written often at the interface of psychology and the law. She is deeply interested in the ways in which the Internet has and is continuing to transform the courtroom, and hopes to continue to play a leadership role in the discussions that are shedding light on the look of justice in the future.



Marlee Kind Dillon, PhD
Consultant

Marlee Kind Dillon works as part of the Jury Consulting practice at DOAR. At DOAR, Marlee is closely involved in the development and analysis of focus groups, mock trials, jury selection, voir dire, and case strategy. She has extensive experience designing and conducting research on juror attitudes, with an emphasis on eyewitness identification issues as well as the efficacy of judicial instructions. She has presented her research at prestigious conferences around the country.

Marlee worked as a Psychology Professor at John Jay College, where she taught undergraduate students how to design psychological research experiments and analyze results. With this experience, Marlee is particularly skilled at describing complex psychological and statistical issues in a simplified and comprehensible way.

Marlee holds a B.A. in Psychology from Temple University, and a Ph.D. in Psychology and Law from John Jay College of Criminal Justice.