The Jury Problem: Why Courts Should Change the Way Juries Deliberate

By Sami Azhari

On an episode of *Modern Family*, a character was asked how he met his girlfriend. He answered that he was the lone holdout on a jury for a triple homicide, with all the other jurors wanting to convict, except for him. The subtle implication was that deliberations were ongoing for some time, and his now-girlfriend agreed to go out on a date with him if he changed his mind. Shortly thereafter, a romance ensued, and an unfortunate defendant was imprisoned. While it was just a scene in a scripted sitcom, the episode raises an important question about what really goes on inside a jury room, and more important, what goes on inside jurors' heads.

Trial attorneys invariably accept that jurors are swayed by both facts and emotion. But do other factors affect jury deliberations? Imagine a situation where the fate of a criminal defendant rested solely upon the time of day at which jurors concluded their deliberations. Or imagine a plaintiff in a personal injury lawsuit reaping a windfall verdict, based not on the evidence, but because a juror was hungry or tired. This article is not an exhaustive psychological analysis of the jury system, but instead raises certain issues that may affect the fairness of a jury's verdict. It explores the dangers of our current jury deliberation methods and introduces possible solutions that can be integrated into the jury deliberation process to make it more effective.

Jury Trial History

The Sixth Amendment to the United States Constitution guarantees a speedy, public trial, by an impartial jury, in all criminal proceedings. The Seventh Amendment expanded this right to suits at common law, which led to juries being the triers of fact in civil cases. Jury trials have been a part of American jurisprudence for hundreds of years, though the system has evolved. It began with juries as individuals seeking evidence and has evolved to be a group of people who are to consider only the evidence presented and to decide among themselves, excluding any other outside influence. Drury Sherrod, *The Jury Crisis: What's Wrong with Jury Trials and How We can Save Them*, 13-15 (2019).

Just as jury trials have changed, so too have state and federal criminal codes, the rules of evidence, and civil procedure. Despite these changes, we are still following an antiquated model of decision-making. The *deliberation* process has remained unchanged. The fact finder, whether it be a judge or jury, hears the evidence, and makes a decision. No one can interfere with, or take a hand in, that process. The jury deliberation is sacred. Not only do we not know what jurors discuss, but we also do not know where the individual jurors' initial thoughts lie, how they may have changed as a result of the deliberation, or how the jury reached its final decision. All too often lawyers lament their inability to be a fly on the wall in the deliberation room. Even if a lawyer is fortunate enough to have a brief discussion with some jurors after the verdict, what jurors say will not shed any light on the hidden biases that may have affected their decisions. Jury trials have *voir dire*, where both sides can vet potential jurors, but the questions raised typically only go to obvious biases such as biases against a corporate defendant, a foreign plaintiff, etc. Often judges give attorneys little time or opportunity to ferret out biases, or to explore them once they are revealed.

Judicial Adaptation to Deliberation Issues

Historically, courts have hesitated to meddle in jury deliberations or question jury decisions. Case law demonstrates how difficult it is to impeach a jury verdict, and how little progress has been made. In 1987, the United States Supreme Court decided *Tanner v. United States*, 483 U.S. 107 (1987) where several jurors came forward with allegations that other jurors abused drugs and alcohol during breaks in the trial, causing them to fall asleep during the trial. The Supreme Court applied Federal Rule of Evidence 606(b) and prevented jurors from testifying about what went on during deliberations. Understandably, as cited in Justice Marshall's dissenting opinion, certain policy considerations support the common law rule against admission of juror testimony, including freedom

of deliberation, finality of verdicts, and protection of jurors against harassment by dissatisfied litigants. *Id.* at 137 (dissenting in part).

Not until 2017 did the Supreme Court take up the matter again, in *Peña-Rodriguez v. Colorado*. 580 U.S. ——,137 S. Ct. 855 (2017). There, a juror expressed racial animus toward the defendant while attempting to sway the jury toward a conviction. After the jury was discharged, two jurors stayed back to talk to the defense attorney and raise that issue. The case made its way to the Colorado Supreme Court, which affirmed the conviction. Not until the case reached the United States Supreme Court was the defendant's conviction be overturned, creating a Sixth Amendment-based exception to the strict no-impeachment rule. The court held that:

> [W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial or jury trial guarantee. *Peña-Rodriguez* at 869 (majority opinion).

While a step in the right direction, the *Peña-Rodriguez* decision only narrowly opened the door to contesting a jury verdict by limiting the issue to racial bias.

Bias

Everyone has instances in which they consciously make decisions based on poor reasoning, and jurors are no exception, regardless of how thoroughly they were vetted. This could be troubling for parties in a criminal or civil case. Examples are racial bias or a bias based on someone's nationality. Sherrod describes a products liability trial where a child was killed when she choked to death after sticking her head out a car window and accidentally raising the window with the switch until it pressed against her throat. Drury Sherrod, at 8. The mother and daughter were watching the girl's father play in a soccer game and the mother did not realize what was happening with her daughter until it was too late. A mock jury decided that the mother had been drinking because that is "just what Latin Americans did at soccer games." The reasoning was clearly flawed because no evidence was presented, or even suggested, that the mother had been drinking. Obviously, the plaintiff's nationality played a major part in the jury's decision.

Another interesting example is brought up by Daniel Pink in his book *When: The Scientific Secrets of Perfect Timing*. Pink argues that, despite knowing that timing is everything, it is generally thought of as an art. However, he cleverly explains how timing is really a science. His book brings up an interesting example that deals with stereotypes and another critical factor: *timing*. Researchers were asked to assess the guilt of a criminal defendant, and the "jurors" read the same set of facts. Pink, *supra*, at 21. The defendant's name differed for the two groups: half got Robert Garner, and half got Roberto Garcia. When the "jurors" decided in the morning, there was no difference in guilty verdicts between the two defendants. However, when the verdicts were rendered later in the day, the "jurors" were much more likely to find Roberto Garcia guilty than Robert Garner. The conclusion: As the day went on, people's ability to rationally evaluate evidence dissipated, while their reliance on stereotypes grew.

Jurors can hear evidence in cases that take only a few hours to put on, or they can be empaneled for several months in a more complex case. Either way, jurors are continually assessing their cases as they move along. Jurors are always warned by judges to keep an open mind and to listen to all the evidence before reaching a conclusion. That is a standard jury instruction in civil and criminal cases in Illinois and elsewhere. But any experienced trial attorney will agree that it never actually happens that way. Jurors are formulating opinions as they go, and the verdict in the end is the net result of the way jurors have been feeling throughout the entire trial. Drury Sherrod questions how capable jurors are of performing their roles as instructed. Specifically, he questions whether jurors wait to hear all the evidence before reaching their conclusions, whether they fabricate or embellish facts, or whether they ignore witnesses they cannot understand.

Mental or Physical Depletion

Whether it is a complex civil trial where a company's future is at risk, or a serious criminal case where someone is facing years in prison, the jury system should give the most assurance possible to all parties involved that the decision will be made fairly and be based on the evidence. Again, reality suggests otherwise. What if a defendant was found guilty because it was late in the day and jurors did not want to continue deliberating into the next day? What if a particular juror was mentally depleted and his decision to switch rendered a unanimous verdict? Justice demands assurances that this does not occur under any circumstance.

Daniel Khaneman, recipient of the Nobel Prize in Economics and author of *Thinking Fast and Slow*, recently discussed an alarming study of judges in Israel and the effect of hunger on whether a prisoner would get paroled. Khaneman found that Israeli parole judges would grant parole more often after they ate lunch. The "default" decision at parole hearings is a denial, as only 35% of parole requests are granted. Much like the example referenced above from Pink, at a certain time of the day, whether because of hunger or other reasons, the parole judges resorted to their simple "default" decision, much like jurors resorted to their "stereotype" decision.

What We Can Do

With what has been discovered on how timing and unconscious bias can affect decisions, the way jurors deliberate must be modified so we can increase the trustworthiness of verdicts without fear of violating FRE 606(b). As the work of Daniel Pink and Daniel Khaneman demonstrates, people suffer a lull in the middle of the day, making them less likely to go against the status quo during a stage of depletion. Potential modifications include implementing breaks, setting time limits on deliberations, pre-verdict polling, and

opening the door to the jury room.

Rather than forcing jurors to deliberate for hours in a conference room, juror break time should be implemented to allow them to replenish. A verdict should not be accepted by the court if it comes after a certain time of the day. For example, if a jury reaches a verdict close to 4:00 pm, it would be wise to let the jury go home for the day and return in the morning. This would give them an opportunity to reflect on potential verdict in the absence of other jurors and allow an escape from any issues of groupthink, fatigue, or acquiescence. All too often, jurors rush to a verdict at the end of the day, if for no other reason than to be done for the day, catch specific public transportation, or prevent coming back the following day.

Another remedy is a better handle on deadlocks. In many trials, juries send notes to the judge telling him they are hopelessly deadlocked. Sometimes, the note will specify the split, whether it is 10-2, 8-4, etc. More often than not, the judge will tell the jury to continue deliberating without telling them how long they will be held before declaring a mistrial. This is a recipe for disaster, as outnumbered jurors could feel pressured to change their vote. Time limits on deliberations would alleviate jurors' concerns that they will be held indefinitely until a verdict is reached.

Pre-verdict polling of jurors should be permitted to allow parties to explore how the verdict swung as the jurors deliberated. Allowing jurors to record their individual decision immediately after trial and keeping track of their decisions as the deliberations continue (perhaps every 30 or 60 minutes) could shed light on what jurors changed their minds and why.

Last, and most important, important strides in understanding deliberations will never be made without opening the door to the deliberation room and allowing the deliberations to be viewed by counsel, the court, or perhaps by approved third parties, such as researchers. Every aspect of a criminal or civil case is transcribed, and sometimes recorded – everything from the initial status and pretrial conferences, through the trial. Even after bench trials, judges provide a written opinion or a reason on the record for their ruling. Jury deliberations are the only secret part of the case where no one will have any idea why they ruled the way they did, what happened during the deliberation process, or what the jurors relied upon. Concerns will be raised about Federal Rule of Evidence 606(b) or any analogous state rule. However, allowing parties to view the deliberations would avoid the need for a juror to testify. FRE 606(b) does not specify grounds for setting aside the verdict; rather, it deals with the competence of a juror to testify. Fed. R. Evid. 606 Advisory Committee Notes. The Supreme Court has slightly opened the door to the jury room for a small improvement, but fairness will never be achieved unless the door is taken off its hinges. ■

Sami Azhari (sazhari@azharillc.com) is an attorney in Chicago focusing on federal and state criminal defense. He has coached mock trials at several law schools and lectured extensively through the Illinois Institute of Continuing Legal Education and Chicago Bar Association.

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