

Is unanimity a nightmare?

Research about decision rules and verdicts from the jury in Argentina.

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I. Introduction

The trial by jury laws in Argentina show different approaches regarding the number of votes required for a valid verdict in a criminal case. The first province to implement trial by jury was Neuquen, which adopted a low majority of eight out of twelve to convict. Neuquén was followed by the Province of Buenos Aires that requires a majority of ten out of twelve for felony convictions and unanimous verdicts when the crime is punished with a penalty of life imprisonment.

These are the only two Argentinian provinces where trial by jury is currently operating.

Afterwards, the province of Chaco passed a trial by jury law where unanimous verdicts are required for guilty and not guilty verdicts, just like the classical model of the common law. However, although the jury should have started to work in the year 2016, until today there have not been any jury trials in that province.

Also, Rio Negro passed a new criminal code adopting the English variant.¹ This province has provided by law that the first jury trial will take place in the year 2018.

The clear evolution at a legislative level, has encouraged us to think about the reasons of these provinces to adopt a classical model of trial by jury while introducing a flexible requirement of majorities to achieve a valid verdict. That is to say, which arguments have been given by congressmen to adopt majority verdicts and which could be the possible concerns that legal actors in these two provinces might have regarding the issue of unanimity.

To begin with, we started by analyzing the discussion of congressmen about the bill of law 2.784² which reforms Neuquén's procedural code and implements trial by jury. Since Neuquén was the first province introducing a *common-law* jury of twelve lay citizens, we assumed that congressmen would have explained the reasons for reducing -from twelve to eight- the majority

¹ The English variant establishes that if after a reasonable time of deliberation, jurors cannot reach a verdict, they will be informed that a majority verdict is allowed (Cnf. Jurys Act 1974). And HASTIE, Reid, PENROD Steven, PENNINGTON Nancy (1986): "*La institución del jurado en los Estado Unidos, sus intimidaciones*", Civitas, Madrid, España, 267/268.

² Meeting 25 "Aprobación en general" (11/23/2011). Accessible at: <https://www.legislaturaneuquen.gob.ar/LegislaturaCodigoProcPenal/SesionGeneralCPPLegislaturaNeuquen.pdf>. and meeting 26 "Aprobación en particular" (11/24/2011). Accessible at: <https://www.legislaturaneuquen.gob.ar/LegislaturaCodigoProcPenal/SesionParticularCPPLegislaturaNeuquen.pdf>.

requested to achieve a valid conviction of a defendant (which differs from the United States with a long jury tradition where unanimous verdicts are required in almost every state).

However, despite our wish to find answers to that question, we found that the section of the criminal code³ that establishes a majority of 8/4 to convict was passed without any objection.⁴

The same feeling of uncertainty came when we analyzed the basis of law 14.453 – which introduced trial by jury in the Province of Buenos Aires- and a majority of 10/2 for felony convictions.⁵

No discussion was found in both parliamentary debates. No congressman from either of those provinces said anything about the matter, at least on any written document or formal record of the passing of the law. It was this silence that aroused our interest and triggered the reasons to write this paper.

Therefore, through this paper, on the one hand we intended to reveal those presumed reasons that are not said, find the possible causes for such a resistance to unanimity, with the aim of putting an end to them or -at least- demystifying them. And, on the other hand -after a little more than three years of jury trials in Argentina- we try to see how jurors have been deliberating so far under non-unanimous decision rules.

II. Brief Analysis of Unanimous Verdicts in the United States and the Benefits of Unanimity.

In the United States, unanimity is mandatory at a federal level with the Federal Rule of Criminal Procedure No. 31⁶ and -although states may have a system of majorities for their verdicts- only the states of Louisiana and Oregon do so.

Keeping unanimous verdicts in jury decision making is far from being a capricious requirement. It allows the jury to decide as a result of a robust deliberation,⁷ giving voice to minorities. Research about the functioning of the

³ Section 207 of the Procedural Criminal Code of Neuquén “(...)In courts composed of twelve (12) jurors, a guilty verdict will require at least eight (8) votes in favor of a conviction. In cases where the required majority is not achieved, the verdict will be no guilty.”

⁴ “Sections 203, 204, 205, 206, 207, 208, 209, 210, 211 and 212 are passed” Meeting 26. “Aprobación en particular” (11/24/2011). Accessible at: <https://www.legislaturaneuquen.gob.ar/LegislaturaCodigoProcPenal/SesionParticularCPPLegislaturaNeuquen.pdf>. (p. 57)

⁵ Accessible at: <http://www.casi.com.ar/sites/default/files/Fundamentos%20de%20la%20ley%2014543.pdf>.

⁶ Federal Rule of Criminal Procedure No. 31(a): “The verdict must be unanimous” quoted in “Johnson vs. Louisiana” 406 U.S. 356 (1972), N 69-5035, in BINDER, Alberto and HARFUCH. A. (dir) (2016): “El juicio por Jurados en la jurisprudencia nacional e internacional. Sentencias comentadas y opiniones académicas del common law, del civil law y de la Corte Europea de Derechos Humanos”, Bs. As., Ad Hoc, 245.

⁷ For more information see: GASTIL, John, E. PIERRE DEESS, & Phil WEISER (2002) “Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation” 64 J. of

jury in the United States has shown that the more rigorous the quorum requirement, the greater the discussion that take place during deliberation. This conclusion was obtained by observing the differences in the time of deliberation by jurors. Thus, when the jury is instructed by the judge on the requirement of reaching unanimity instead of a majority, jurors deliberated for a longer period of time.⁸

Apart from those benefits, the experience of jury deliberation has a democratic function,⁹ contributing to the sense of civic responsibility and the levels of public engagement of the citizens, the group discussions of juries are a powerful tool of social and educational influence.¹⁰

Finally, the unanimity rule brings a more trustworthy outcome to the citizenship. A decision made by twelve lay judges provides evidence that there was no reasonable doubt in any of them to pronounce a guilty verdict, unanimity is intimately related to the standard of reasonable doubt.

Thus, if we learn from countries like the United States -that have a long jury tradition- it will allow us to understand the benefits of this requirement, and maybe it would help us change the view by some in Argentina that passing a jury law with unanimous jury verdicts would become a nightmare.

III. Resistance to unanimity in Argentina. Why does it happen?

What we intend to do in this section is try to answer this question based on the observation of certain events that occurred in these years of experience with jury trials, the reality that surrounds this South American country and its idiosyncrasies.

In this way, we classified the possible reasons for such a resistance as follows:

a. Hung Juries.

A possible fear of a unanimity decision rule is the potential increase in deadlocks, which would lead to higher costs in the justice system and further delays in judicial proceedings due to the need of retrying cases.

Politics 585 and GASTIL, John, E. Pierre Deess, Phil Weiser, & Cindy Simmons (2010) *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation*. New York: Oxford Univ. Press.

⁸ DIAMOND, Shari (2016): "*Las múltiples dimensiones del juicio por jurados. Estudios sobre el comportamiento del jurado. Jurado penal y jurado civil*". Bs. As., Ad Hoc, 2016, 96 and SubQ.

⁹ In the United States the jury was also conceived for its sense of civic engagement. Thus, in Powers Vs. Ohio (1991), The Supreme Court of Appeal of the United States said that citizens not only have the right to a jury trial but also the right to serve as jurors, due to the value that the jury has as a tool for civic education.

¹⁰ See, e.g., GASTIL, John, BLACK, Laura W., DEESS E. Pierre y LEIGHTER, Jay (2008): "*From Group Member to Democratic Citizen: How Deliberating with Fellow Jurors Reshapes Civic Attitudes*", Human Communication Research ISSN 0360-3989; GASTIL, John (2004): "*Adult civic education through the national issues forums: developing democratic habits and dispositions through public deliberation, adult education quarterly*", vol. 54 no. 4, August 308-328.

Thanks to an interview with Carla Pandolfi¹¹ (Coordinator of the *Comisión Interpoderes* that worked for the “Reform of the Criminal Procedure” of the province of Neuquén in the year 2014), we were able to understand that deadlocks were a major concern and fear for congressmen in that province. She explained that after working very hard for years to eliminate the inquisitory system of justice, and to achieve the implementation of trial by jury, legislators in Neuquén did not conceive the idea that this change of the justice system could end up in failure, and -for them- the chance of retrying a case due to a deadlock was a risk they were not willing to take. According to Pandolfi: “*They were looking for a balance between reaching a rightful decision and not affecting the guarantee of double jeopardy.*”

However, it seems that this myth can be overturned if we examine the rates of hung juries in federal civil and criminal trials from 1980 to 1997 using data provided by the Administrative Office of the U.S. Courts in September 2002. According to that data, criminal hung jury rates during this period range from a low of 2.1% to a high of 3.0%

Also, along with this low rate of hung juries it is worth noticing that only one third of these cases are retried as the rest are dismissed or resolved with a plea agreement.¹² According to this research -in the United States- at a state level, the percentage of hung juries increases to 6.2% in the 30 jurisdictions in which the same study was conducted.¹³

Now, regarding the Argentinian experience with deadlocks, in Neuquén, a hung jury cannot occur (failure to achieve the requested majority results in an acquittal), so we only considered the Province of Buenos Aires. There, if the jury fails to achieve the required majority of ten and there are eight jurors in favor of a guilty verdict, they will be asked to return to the jury room to deliberate again up to three times. If they cannot overcome the deadlock, there will be a new trial in front of a new jury as long as the prosecutor request one.¹⁴

According to a survey of the jury trials held during the year 2015 and 2016 in Buenos Aires province, out of a total of 93 jury trials,¹⁵ there were only two cases where jurors informed the judge that they were having difficulties to reach a verdict. In both cases, after the judges instructed them, the jurors managed to overcome the deadlock and were able to reach a verdict, without the need for a new trial.¹⁶

¹¹ Email from Carla Pandolfi (2017/05/12).

¹² PLANNING & MANAGEMENT CONSULTING CORPORATION, EMPIRICAL STUDY OF FREQUENCY OF OCCURRENCE CASES EFFECTS AND AMOUNT OF TIME CONSUMED BY HUNG JURIES, 4-30 to 4-37 (1975) in, HANNAFORD-AGOR, Paula L., (2002) Are [Hung Juries](#) a [Problem?](#), National Center for State Courts, 5.

¹³ *Id.* at 25

¹⁴ Section 371 *quater*, “2” 14.543 Law.

¹⁵ See Footnote 29.

¹⁶ Cases: “FUENTES NATALINI GERARDO EZEQUIEL S/ LESIONES, AMENAZAS, HOMICIDIO” T.O.C. 3 Bahía Blanca, (2016/03/17) and “GUERENDIAIN NESTOR MARCELO S/ HOMICIDIO, LESIONES”, T.O.C. 7 San Martin, (2016/03/09). In this last case, however, the Court of Appeal of the Province of Buenos

It is worth noticing that many people assume that a hung jury is a portrait of “Twelve Angry Men”, basically a single juror who does not agree with the decision of the remaining eleven. However, according to research done in the United States, in reality that is not what happens. When a deadlock occurs, the vote split tends to be more evenly divided. Therefore, unanimous verdicts would not change the outcome that much nor would they generate a substantial number of hung juries.¹⁷ In fact, as most deadlocks are not the consequence of a single holdout juror but rather of a more even vote split, once a deadlock occurred, if the parties can take this into account as an information of how is their case going so far, how strong or weak the case is to face a second jury trial, then they may come to agreement rather than face a new trial all over again.

So, dispensing with unanimity for such a small rate of retrials does not seem warranted. If we compare the benefits that unanimity brings to the discussion inside the jury room to its disadvantages, our assessment is that deadlocks are not a powerful reason to question the unanimity requirement.

In any case, what must be pursued are solutions to avoid a hung jury, such as an improvement of litigation techniques, better pre-trial decisions, a better preparation of the case, a thoughtful analysis of the evidence -in order to know if such evidence is weak or cannot be presented to the jury- among other possible strategies that the parties could use.

A first good approach is to recognize that -in general- jurors do not tend to hung if the case presented before them has strong evidence and the case has been properly addressed by the parties.

b- *Society's fear for unpunished crimes. Fear of legislator's political discredit.*

Argentina, as many countries in Latin America, suffers from the insecurity problem. Our society is affected by a context of increasing poverty and rising rates of crime.

Thus, this problem could show two sides of the same coin. On the one hand, society has a potential fear of unpunished crimes.¹⁸ The requirement of unanimity could cause a lower number of convictions under the logic that more members of the jury are required to agree about the guilty verdict of the defendant in order to obtain a conviction. As a consequence of this, there would be a claim of dissatisfaction of the victims of such crimes and the population's idea that the judiciary system does not work properly.

Aires, in September 27, 2016, nullified the verdict and ordered a new trial because after declaring a hung jury, the judge omitted to ask the prosecutor if he wished to continue with trial. It circumstance had been omitted by the professional judge, and was affected the accusatory principle.

¹⁷ Prof. Valerie P. Hans, Presentation before the Chamber of Deputies of Argentina, City of Buenos Aires, Argentina, 04/18/2017. (Original Transcription in Spanish).

¹⁸ HARFUCH, Andrés. (2013): “El juicio por jurados en la Provincia de Buenos Aires. La ley provincial 14.543 anotada y comentada. El modelo de jurado clásico”, Bs. As., Ad Hoc, 279.

This way of thinking can also be seen from political leaders and legislators who fear harming their own political careers. In other words, the legislators would not benefit if, by passing a jury law with the unanimity requirement, convictions would not be reached. And as a consequence, society would directly hold them responsible, causing a political cost that we believe they would not be willing to pay.

Criminal statistics presented by the Ministry of Security in Argentina show that in the year 2015, more than 10,500 victims of theft in the country were hurt or killed. This is a detail about daily violence, in which one case of theft ends dramatically every hour.

A homicide rate of 6.6 out of 100,000 inhabitants was registered, which is far above the figures in developed countries.¹⁹

We suspect that the call for more security has led the government to prefer the rule of majority in order to get more convictions.

We daresay that one of the reasons why legislators fear the requirement of unanimity is that they worry that the jury will find it difficult to unanimously reach a guilty verdict. And consequently, crimes would go unpunished.

We understand that, on the contrary, the requirement of unanimity favors society representation and scientific research shows that it forces a better analysis of evidence, with a longer deliberation process and a more comprehensive assessment of facts and law, assuring greater reliability in their decisions.²⁰ And, as a consequence of all that, jurors experience a higher level of satisfaction with their verdicts, assuring reliability in their decisions.

As we have already mentioned, the requirement of unanimity is closely related to the standard of reasonable doubt. That is the point to focus on to obtain more reliable verdicts.

c. The lack of training of judicial actors.

Another reason that is present in our long-standing inquisitorial legal culture is that prosecutors might not be able to deal with a group of jurors who will not fill in the omissions and defects of a case that is not well prepared, contrary to what happens when prosecutors try a case before a judge. Jurors might be much more demanding when assessing the evidence and delivering a guilty verdict.

In the Province of Buenos Aires, especially in Bahia Blanca and its neighboring city of Tres Arroyos, a particular phenomenon took place and it deserves to be highlighted. By the end of 2016, seventeen jury trials had been held, producing a total of eleven acquittals and only six convictions. This led

¹⁹ Accessible at: <http://www.lanacion.com.ar/1892796-en-2015-hubo-10500-muertos-y-heridos-en-robos-en-todo-el-pais>.

²⁰ HANS Valerie & VIDMAR Neil, (1986): "*Judging the Jury*," in HENDLER, Edmundo S. (2006): "*El juicio por jurados. Significados, generalidades, incógnitas*", 1ª, Del puerto, Bs. As., 117-127.

to an immediate and strong resistance to jury trials in those cities.

After the acquittal of a man accused of sexual abuse, the prosecutor that intervened in the case, attacked the brand-new jury system, stating: "*The time has come to propose a legislative change and review the jury trial law.*"²¹

In a later case of homicide, family members of the murdered man argued that "*the jury system does not work and crimes go unpunished*",²² after hearing a "not guilty" verdict from the jury.

Despite this understandable feeling coming from the family, it is necessary to review the "behind-the-scene" of this case. Two weeks before trial, the prosecutor in charge of the case decided to go on holidays and he had to be replaced by a colleague. Thus, the new prosecutor did not have sufficient time to properly prepare a murder case, and as was to be expected, the jury delivered a not guilty verdict.

This case has achieved so much media impact that even the Minister of Justice of the province has talked about the possibility of reforming the procedural criminal code.²³

In a bench trial in Argentina, judges probably would have compensated for the lack of training or preparation of the case of the prosecution. The old habit of inquisitive roots to rely on the judge as a *second accuser*, the perception that a trial is just a scenario where they reproduce the evidence already generated in the case file, or that the parties are prone to give greater prominence to an appeal than to the trial itself, all are serious problems in our country that jury trials are just making more visible, Jurors are unwilling to convict if they are not presented with adequate evidence – they do not fill in the gaps for a weak prosecutor performance.

So, when prosecutors express frustration at not getting enough convictions, those verdicts are perceived by many as unfair acquittals. Under this conception, the requirement of unanimity would only increase the burden of proof for the prosecution and its performance in trial, leading to more acquittals.

Now, however understandable the reaction of the victims, the truth is that prosecutors now need to fully perform their duty to obtain convictions under an accusatory system, when they are faced with jurors. Jury trials require a different and undoubtedly more demanding preparation of the case.

It is part of the function of the prosecution to find sufficient evidence during the investigation and produce it to the jury so that the jurors can render a verdict according to what's been presented to them.

To do this, prosecutors must use tools such as the examination of

²¹ Accessible at: <http://www.lanueva.com/seguridad-impresa/856760/juicio-por-jurados--llego-el-momento-de-revisar-la-ley.html>.

²² Accessible at: <http://www.lanueva.com/la-ciudad/880417/familiares-de-una-victima-piden-que-se-derogue-la-ley-de-juicios-por-jurados.html>.

²³ Accessible at: <http://www.lavozdelpueblo.com.ar/nota-51300-ferrari-afirmo-que-se-reevaluara-el-sistema-de-juicio-por-jurados>.

witnesses and experts, the introduction of material evidence, the use of graphic support and previous statements to refresh the witness's memory, etc. In addition, they must carry out a rigorous control of the evidence provided by the counterpart, in order to prevent evidence that might be irrelevant, impertinent or inadmissible. In order to carry out this control, the parties will have to know and handle the cross-examination of witnesses and experts, use previous statements of witnesses to point out inconsistencies, and learn how and when to introduce any objection.²⁴

Regarding this, a prosecutor –after a unanimous guilty verdict– described jury trials as follows: "*Trial by jury is a whole new form of trial to be adapted: in bench trial, you have to be a good litigant, but trial by jury is the ultimate expression of litigation; Where it is very important to be explicit and accomplish that the jury can see in a clear way what the crime is all about using all the technical means available.*"²⁵

So, this possible fear could be properly addressed with good training of the attorneys involved. Each must assume the responsibility that comes with their in a criminal trial. The State has to work hard to get a conviction with sufficiently consistent evidence. If this conception is taken into account when facing a jury trial, then there should be no fear of a unanimous decision of the people.

d. Lack of deliberation in the Judicial System

In our courts, there is a cultural understanding in which deliberation has never been a requirement that gives greater legitimacy to judicial decisions. In an inquisitorial culture with a strong presence of the written record, what usually happens is that this deliberation is substituted by the passage of the written case file among the three bench judges.

The decision of the court is reached with a majority vote of two out of three.

It seems that this tradition of dispensing with deliberation might be a reason to not believe in a robust deliberation able to produce a unanimous verdict. In other words, if three professional judges cannot agree in one case and are allowed to reach a majority decision, then how can 12 lay citizens agree on the same verdict?

Nonetheless, it is time to rethink the concept of deliberation and unanimity is precisely the key to do that.

We want to share two recent cases from the Province of Buenos Aires that might demonstrate the commitment of the jury towards this

²⁴ See LORENZO, Leticia (2013), "*Manual de Litigación*", Bs. As., Didot.

²⁵ Interview with Mr. Miguel Francillo, prosecutor in La Matanza, Province of Buenos Aires, (04/22/2017). Accessible at: <http://www.juicioporjurados.org/2017/04/la-matanza-policia-de-la-metropolitana.html>

process of deliberation.

The first case, is a trial that held on April 18th, 2017 that lasted for three days. In that occasion, the jury reached a unanimous guilty verdict for eleven charges of sexual abuse committed by a father to his daughters. But the remarkable thing was that the verdict was rendered at midnight and after three hours of deliberation.²⁶ The other case is a trial that started at 8 am and the unanimous verdict was reached at 5 am. Instead of going home, the jury decided to stay and deliberate until the early morning.²⁷

We wonder, would many professional judges of our country be willing to thoroughly deliberate and reach a unanimous decision at these wee hours of the morning?

Like these cases, we believe there will be many more. That is why we think we should trust in the commitment shown by our jurors when they are asked to render a valid verdict.

IV. Empirical Data from Jury Trials in Argentina.

To learn more about the development of jury decision making in Argentina, we collected empirical data from jury trials held in the provinces of Buenos Aires and Neuquén.

Province of Buenos Aires

In this province, we obtained data from years 2015 and 2016, producing a total of 96 trials. From those 96 cases, we are only considering 93, as in three cases the jury was dismissed before any verdict was reached.^{28 29}

When conducting this research, we found two obstacles that limited our ability to reach some conclusions.

First, in the Province of Buenos Aires when the verdict is “not guilty”, courts do not ask jurors about the vote split in their decision. So, in most cases there is no record on how their vote was and therefore, it is not frequent to know if an acquittal was reached unanimously.

Notwithstanding that for statistics and research purposes it would of great help to have such information, the fact is that it is understandable that courts do not record votes in acquittals. After all, if a person is found not

²⁶ Morón, Province of Buenos Aires (04/18/2017). Accessible at: <http://www.juicioporjurados.org/2017/04/moron-veredicto-unanime-de-culpabilidad.html>.

²⁷ La Matanza, Province of Buenos Aires (05/2017). Accessible at: <http://www.juicioporjurados.org/2017/05/la-matanza-dos-motochorros-condenados.html>

²⁸ These three jury trials are: Azul (in June 2016), before Judge Alejandra Raverta, due to a plea bargain; Lomas de Zamora (in September 2016), before Judge Susana Silvestrini, where the prosecutor did not wish to continue with the indictment and San Martín (in September 2016), before Judge Javier Pablo Antonucci trial, where the jury trial was suspended.

²⁹ Statistics published by The Supreme Court of Appeal of Province of Buenos Aires. Accessible at: <http://www.scba.gov.ar/juiciosporjurados/archivos/estadisticas.pdf>. See also Trials by Jury of years 2015 and 2016. Accessible at: <http://www.scba.gov.ar/planificacion/Novedadesvarias.asp?id=6&cat=37>

guilty, it would somewhat sully his reputation to say some (perhaps even a majority) wanted to convict him.³⁰

Second, at this stage of the research, we were not able to determine with certainty in which trials the prosecutor requested for a penalty of life imprisonment (bearing in mind that those are the only cases where unanimity is always required to convict). As a result, at this point in the research, we are unable to know when jurors arrived at unanimous verdicts in cases where unanimity was not specifically required.

Neuquén

In that province, we were able to access to data from 33 jury trials, from the beginning of year 2014 to April of 2017.

As in the Province of Buenos Aires, when it comes to acquittal, there is no record of the actual final vote distribution.

It is important to clarify that despite having a total of 33 trials, we analyze the data as if we have 35 cases. This is because in two of those 33 trials, we have two defendants per case who were both convicted, but received different numbers of guilty votes.³¹

Analysis of Data in Both Provinces

Our intention with the data presented below is to observe both provinces not in an isolated way but comparing them both, trying to reach some conclusions based on the combined analysis of these two provinces and how their numbers speak altogether.

With that being said, in Buenos Aires, there were 60 convictions and 33 acquittals. Of those 60 convictions, 32 were unanimous, and the other 28 were the result of majorities of 10 or 11 guilty votes.

Table 1: Convictions and acquittals in Buenos Aires

Guilty votes	Frequency	Percent
10	13	14.0
11	3	3.2
10 or 11	12	12.9
12	32	34.4

³⁰ Email from Prof. Shari Seidman Diamond. (05/04/2017).

³¹ Those are the only two cases that we treated differently -despite having more cases with multiple defendants in Neuquén- because in the other cases the vote split did not vary among defendants from the same trial.

Not guilty (fewer than 10)	33	35.5
Total	93	100.0

In Neuquén, we there were 29 convictions and 6 acquittals. Of those 29 convictions, nine were unanimous, nine cases showed majorities like those requested in the Province of Buenos Aires (five cases of 11-1 and four cases of 10-2) and the remaining eleven convictions were the result of majorities of 8-4 in four cases and 9-3 in seven cases.

Table 2: Convictions and acquittals in Neuquén

	Guilty votes	Frequency	Percent
Valid	8	4	11.4
	9	7	20.0
	10	4	11.4
	11	5	14.3
	12	9	25.7
Not guilty (fewer than 8)		6	17.1
Total		35	100.0

As can be seen below in Table 3, in Neuquén there is a jury conviction rate for all type of crimes of 82.9 %, while in Buenos Aires the conviction rate is 64.5 %. This difference is significant ($p < .05$).

Table 3: Combined rates for convictions and acquittals for all crimes

			PROVINCE		Total
			Buenos Aires	Neuquén	
VERDICT	Guilty	Count	60	29	89
		%	64.5%	82.9%	69.5%
	Not Guilty	Count	33	6	39
		%	35.5%	17.1%	30.5%
Total	Count	93	35	128	

%	100.0%	100.0%	100.0%
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After observing these results -a 18.4 % conviction rate difference between Neuquén and Buenos Aires - we wondered whether the conviction rates would change if we distinguished those cases of aggravated murder separate from the other cases in both provinces. It is important to underline that according to Argentina's Criminal Code,³² the commission of an aggravated murder may lead to life in prison and therefore we thought the conviction rates might change due to the severity of the crime and its punishment.

In the following tables, we divided the aggravated murder cases from the other cases in Buenos Aires and Neuquén.

Table 4: Verdicts for aggravated murder versus other offenses in Buenos Aires

			Other offenses	Aggravated Murder	Total
VERDICT	Guilty	Count	48	12	60
		%	63.2%	70.6%	64.5%
	Not Guilty	Count	28	5	33
		%	36.8%	29.4%	35.5%
Total	Count		76	17	93
	%		100.0%	100.0%	100.0%

Table 5: Verdicts for aggravated murder versus other offenses in Neuquén

			Other	Aggravated Murder	Total
VERDICT	Guilty	Count	11	18	29
		%	78.6%	85.7%	82.9%
	Not Guilty	Count	3	3	6
		%	21.4%	14.3%	17.1%
Total	Count		14	21	35
	%		100.0%	100.0%	100.0%

³² Section 80, CRIMINAL CODE OF ARGENTINA.

So, if we take a look into [Tables 4 and 5](#), what we observe is that conviction rates are higher in Neuquén jury trials than in Buenos Aires jury trials both for aggravated murder cases and for other offenses.

So, how can we explain this consistent difference in conviction rates in the two provinces? Why these rates are higher in Neuquén for both types of offenses?

We believe that one of the reasons for the higher conviction rate in Neuquén might be that jury trials in Neuquén are always mandatory for the most serious crimes (those punished with penalties above fifteen years in prison). The prosecutor decides whether there will be a jury trial, if the prosecutor does not want a jury trial, basically he asks for less than fifteen years, but once the prosecutor ask for a jury trial the defendant has no right to waive it. In that way, the cases that are tried before a jury tend to be severe crimes and strong cases, where prosecutors are more confident they can present more compelling evidence. In other words, prosecutors select their cases.

The fact that these might be strong cases could explain why 40% of the cases in Neuquén ended with 11 or 12 guilty.³³

By contrast, while in Buenos Aires jury trials are also available for the most serious crimes, there is a major difference, Jury trials are not mandatory or the result of the prosecutor's decision. The defendant is allowed to waive his right to be tried before a jury.

This information might be useful to explain why –in comparison to the percentages in Buenos Aires- there is a far higher proportion of aggravated murder jury trials in Neuquén (60% of all jury trials) than in Buenos Aires (18% of all jury trials) and a higher conviction rate for those crimes.

However, Neuquén is also showing high rates of conviction for the other offenses (78,6 % vs. 63,2%). As a result, this higher conviction rate in Neuquén cannot be fully explained by the higher proportion of aggravated murder jury cases in Neuquén.

Another reason that might explain this higher number of guilty verdicts in Neuquén is the lower majority required to convict in Neuquén. Recall that Buenos Aires requires 10 guilty votes for a conviction, unless the prosecutor has asked for life in prison, which would require a unanimous guilty vote,, 9 votes leads to a hung jury, and 8 or fewer guilty votes produces an acquittal, while in Neuquén, a guilty verdict always requires only 8 votes in favor of guilt and there are no hung juries.

Going back to [Table 2](#), in Neuquén there were 31.4% of cases with final votes that would not have produced a conviction in Buenos Aires: 11.4 % of cases that ended with 8 votes for conviction and 20 % of cases that

³³ Of the 35 Neuquén's cases, 5 cases ended with 11 guilty votes and 9 cases ended with 12 guilty votes.

ended with 9 for conviction (and thus would have been a deadlocked jury in Buenos Aires. If we only consider the non-aggravated murder cases and we create a hypothetical scenario where Neuquén requires 10 jurors to convict, rather than 8, there would have been 8 guilty verdicts in the 14 cases (57,2% convictions) rather than 11 guilty verdicts (78,6% convictions). So, the conviction rate for non-aggravated murder cases would have been lower in Neuquén than in Buenos Aires (57,2 % vs. 63,2%).

The problem here is that we cannot make many assumptions as any change in the decision rule would probably affect the final vote of the jury. Thus, jurors in Neuquén have to have 8 guilty votes in order to convict, but we cannot know with certainty what would had happened if they had needed to achieve 10, 11 or 12 guilty votes for a conviction instead of 8.

It is fair to think that if there were 8 or 9 people in favor of a conviction, they would had continued deliberating until reaching the number of 10 (majority requested in Buenos Aires for felony convictions). But, at the same time it would also be fair to believe that 3 holdout jurors would in some cases be enough to resist the majority and to hang that same jury.

As a consequence, there is no way that we can be sure about the possible outcomes of this hypothetical scenario. We cannot know if an 8/4 conviction was the result of fewer jurors agreeing on the same verdict or the result of a jury settling for fewer guilty votes simply because they were not asked to reach a greater majority or even unanimity.

However, what it is certain in this analysis is that defendants in Neuquén are facing a rougher situation than their peers in Buenos Aires.

There was another aspect of Neuquén's cases that we thought it was worth looking at: the length of deliberations. Maybe this would tell us something about those guilty verdicts with low majorities and whether those jurors spent less time deliberating.

Table 6

Guilty votes		Deliberation per hour of trial	Length of deliberation (in hours)
8	Mean	.6889	3.3333
	Number of cases	3	3
9	Mean	.9736	3.4583
	Number of cases	6	6
10	Mean	2.7500	4.0000
	Number of cases	4	4
11	Mean	.6750	2.3500
	Number of cases	5	5

12	Mean	.6313	2.4578
	Number of cases	9	9
99 ³⁴	Mean	.8068	3.9340
	Number of cases	5	5
Total	Mean	1.0000	3.1341
	Total number of cases ³⁵	32	32

Unfortunately, we were not able to find a pattern between the length of deliberation and the majority reached by the jury. Also, in Neuquén we found that –at least with the relatively small number of cases we currently have (n=32),- longer trials did not seem to produce longer deliberations.

One could argue that if reaching a majority of 8 took as much time as unanimity, then there is no reason to be worried about the robustness of deliberation in convictions with just 8 or 9 guilty votes. The problem with drawing this inference, in addition to the small sample of cases we currently have, is that there are other reasons that may account for deliberation time. As explained above, as defendants cannot waive a jury and jury trials are under prosecutor’s request- 12 guilty votes might have been reached more easily because the prosecution had a really strong case and therefore the time spent inside the jury room could be reduced in comparison to other cases because more evidence in the case supported a conviction, so the case was clearer for the jury.

Some Conclusions...

At this stage, with the number of jury trials that have been conducted in Argentina to this point, we still do not have a large sample of cases that would help us to reach more decisive conclusions.

Nevertheless, one can validly argue that having different systems of majorities has major implications for the outcome of a trial. When a province chooses a certain system, inevitably the parties face very different consequences, specially the defendant.

So, even if the vote split in these cases might not always tell us much (since there is no certainty on how a jury would have voted if the decision rule was different), we still cannot ignore that the 11.4 % of all the cases in Neuquén where a conviction was achieved with 8 guilty votes might had resulted in an acquittal in Buenos Aires.

³⁴ Number 99 represents the acquittals (cases with less than 8 guilty votes in favor of a conviction).

³⁵ In 3 of the 35 cases from Neuquén the length of deliberation was not available and therefore those 3 cases were not included in Table 6.

Apart from that percentage, another 20 % of the convictions with 9 guilty votes in Neuquén might had resulted in a deadlock in Buenos Aires.

All these numbers -although they are not able to give us any certainty- they do help us to reinforce our point: not choosing unanimity as *the* requirement for a valid verdict and having different systems of majorities may lead to easier convictions and uneven consequences for the parties in the different provinces of Argentina. It is inevitable to think that this sets out a problem in terms of equality before the law for the defendants in Neuquén.

Finally, combining the 128 cases from Neuquén and Buenos Aires, one could say that - even when it was not required by law- there are a significant number of cases in which jurors raised the bar and pursued unanimous verdicts. In Neuquén, almost 26% of the cases ended with unanimous verdicts and in Buenos Aires, 35.5% of trials ended in unanimous verdicts.

V. Final Remarks

As we stated throughout this article, unanimity fosters more robust and thorough debate among jurors because all must agree with the verdict.³⁶ As a result, that decision rule can lead to greater legitimacy for the verdict.

Regarding the greater legitimacy of the decision made by jurors, defense attorneys in Neuquén have introduced appeals against majority verdicts, arguing that the system of majorities violates guarantees granted by our National Constitution.³⁷ ³⁸ These defenses argue that -contrary to what happen when a verdict is unanimous- a majority verdict leaves room for the reasonable doubt and therefore violates the presumption of innocence, constitutionally granted.

For all these, we understand that it would be important to review the current laws that establish a system of majorities and to introduce unanimity as a common requirement for all our provincial laws, taking Chaco and Rio Negro as an example to follow.

Also, as a temporary solution -until all jury laws introduce unanimity- we believe that it might be of good practice for trial judges to deliver instructions that encourage jurors to exhaustively deliberate in all criminal cases, even when unanimity is not legally required. In other words, encourage them to pursue unanimous verdicts.

Another feature that is important to take into account is that unanimous verdicts are originally designed both to acquit and to convict (as the jury law of Chaco contemplates, based on the laws of common-law

³⁶ Prof. Valerie P. Hans, Presentation before the Chamber of Deputies of Argentina, *supra* note 18

³⁷ Courts of Appeal of the Province of Neuquén. Cases: CARBAJAL (7/22/2015), Reg. Sentencia N° 44 T° III Fs. 544/573; CANALE (7/24/2015) Reg. Sentencia N° 46 T° III Fs. 590/612; MORALES (4/16/2015) Reg. Sentencia N° 23 T° II Fs. 279/290; GONZALEZ (12/10/2014) Reg. Sentencia 01/2015 Leg. Nro. 10.842/2014; CAHUIMPAN (4/01/2015), Reg. Sentencia 27/2015, Legajo Nro. 11348/2014; and TRONCOSO (12/2/2015), Reg. Sentencia. A No 099- To VII – 1357.

³⁸ Sections 1, 18, 33 and 75 subsection 22. NATIONAL CONSTITUTION OF ARGENTINA (1994)

countries) and therefore if unanimity is required only to deliver a guilty verdict -as in the case of the Province of Buenos Aires- the quality of the deliberation is also jeopardized.

Not only that, if unanimity is required only to convict a defendant, we will continue to find fears and resistance from legislators, prosecutors and the victims of the crimes.

As a final remark, we wanted to share a recent case from the Province of Buenos Aires. In March 2017, a trial by jury was held in the city of San Martin, in a case where the defense alleged self-defense.³⁹ While the twelve seated jurors were deliberating inside the jury room, the six alternate jurors asked the judge if they could deliberate informally there in court, in other words, to have "a mock deliberation". The six alternate jurors unanimously arrived at the same verdict as the seated jurors, who spent three hours inside the jury room. For both, the verdict was "not guilty".

The importance of this example is that it suggests we should have more faith in our lay citizens and their will to participate and deliberate. Reaching unanimity is nothing more than that, a broader participation and a richer and more thorough debate. Lay citizens in Argentina are demonstrating with these small but great examples that they are rising to the occasion and are ready to take the leap towards the requirement of unanimity.

We hope that our work will help us to wake up from this alleged *nightmare* and ensure that future legislative reforms introduce unanimity as a requirement for a valid verdict. The idea is to demand more from ourselves rather than loosen the law, aiming for a more reliable and legitimate system of justice.

³⁹

Case: "HERRERA RUBEN OSCAR S/ HOMICIDIO" TOC 4 San Martin, (03/20/2017).