One Inspiring Jury

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ONE INSPIRING JURY

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Americans love to complain about the jury. They complain about being called for jury duty. They complain about jury verdicts in highly publicized cases. They are outraged by the failure to convict “obviously guilty” criminals, such as the police officers in the cases of Rodney King and Amadou Diallo, the Menendez brothers in their first trial, and of course O.J. Simpson. In civil cases, they are appalled when plaintiffs win huge damage awards in “obviously frivolous” lawsuits. Juries are ignorant and uneducated, juries are gullible, juries are swayed by passion and prejudice rather than reason. Criticizing jury verdicts allows us to demonstrate our moral and intellectual superiority.

But I doubt that these criticisms reflect any sort of serious public condemnation of the jury. We criticize the jury in the same way that we criticize our children or our favorite team: we like to express our exasperation, but we wouldn’t trade them for anything. We wouldn’t even change them in any significant way. Over the years there have been many calls for the abolition of the jury in some or all kinds of cases,1 for the use of “blue ribbon” juries of well-educated experts,2 and for abolishing the requirement of unanimous verdicts in criminal cases.3 Over and over again these proposals flare up in the wake of particularly unpalatable jury verdicts, but over and over again they

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fizzle. No American jurisdiction has abolished the jury. No cases have been tried before juries of experts. In 1972 there were two states that allowed nonunanimous juries in some criminal cases; in 2002 there are still only two. Reforms have been implemented in some jurisdictions; however, these reforms are not designed to limit the jury's power, but rather to enable jurors to perform their task more effectively (for example, allowing note-taking, pre-instructing the jury on the law, and providing written instructions). In fact, we have faith in our jury system, and we are proud of it. The jury, a small group of ordinary citizens entrusted with the task of deliberating together to reach a just decision, is an important symbol of American democracy.

The jury in Twelve Angry Men is the embodiment of this ideal, the jury at its finest. Twelve Angry Men was the first film to focus on a jury deliberation, and the best. Many people have seen it, and many more are familiar with the plot — the story of how eleven jurors voted to convict a boy accused of killing his father with a switchblade, and how one man patiently and rationally persuaded them, one by one, to vote "not guilty."

Twelve Angry Men began as a television show in 1954. The script was rewritten by Reginald Rose and published in 1955. It was rewritten as a screenplay for its most memorable incarnation, the 1957 film directed by Sidney Lumet and starring Henry Fonda as the lone voice against conviction at the beginning, and Lee J. Cobb as the last hold-out against acquittal at the end. In 1997, William Friedkin directed a new version, with Jack Lemmon in the Henry Fonda role and George C. Scott in the Lee J. Cobb role, suggesting that the particular power of this story of the jury has endured even after the much-criticized jury trials of the 1990's. Both films attracted stellar casts, suggesting that the roles were highly prized by actors. The play has been re-enacted countless times by high school students and amateur theatre groups.


5. Twelve Angry Men (CBS television broadcast, Sept. 20, 1954). The show was directed by Franklin Schaffner, with Robert Cummings as the lone holdout, and a cast that included Franchot Tone, Edward Arnold, Paul Hartman, John Beal, and Walter Abel.

6. Rose was an Emmy Award-winning television writer. He died April 19, 2002.


8. An Internet search under "Twelve Angry Men" turned up nearly a quarter of a million references, many of them school assignments and announcements of productions.
By now it is not only part of our image of the jury, it has contributed to the essence of that image, and it has very likely influenced the way people approach their task when they are called for jury duty.

Unless people have served on a jury or are close to someone who has, they have very little knowledge of what real jurors are like, very little to go on in figuring out how to be a good juror. The jury room has traditionally been a black box, the secrecy of the deliberations zealously protected. An attempt by researchers to record the deliberations of real juries created a major outcry in 1955, including "public censure by the Attorney General of the United States, a special hearing before the Sub-Committee on Internal Security of the Senate Judiciary Committee, [and] the enactment of statutes in some thirty-odd jurisdictions prohibiting jury-tapping...." Much more recently, Judge Jose Cabranes upheld the importance of jury secrecy in no uncertain terms: "The jury as we know it is supposed to reach its decisions in the mystery and security of secrecy; objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself." Certainly in the mid-fifties, no one knew much about what happened during jury deliberations. Critics accused juries of flipping coins or basing their decisions on prejudice or sympathy, defenders argued that the jury basically gets it right despite their lack of sophistication in the law, but no one actually knew anything.

Starting in the mid-1970s there has been an explosion of social science research on the jury, and scholars now know a great deal more about jury behavior than they did in the 1950s. But ordinary citizens do not read scholarly journals. They are not taught about juries in school. When they arrive at the courthouse for jury duty, they may be given a brief lecture by the judge, or shown an orientation videotape. These introductions are usually a combination of solemn reminders of the vital importance of the jury in a democratic society, earnest exhortations to take their responsibility seriously, and practical information about the length of the lunch hour and the process of reimbursement. The main actors (judge, lawyers, bailiff) are sometimes identified, and occasionally jurors will be told a little about the law, such as the distinction between civil and criminal cases. Usually this is all the advance information they get.

At the end of the trial, before sending the jury off to deliberate, the judge reads aloud a lengthy set of instructions on the law, typically ending with a few brief snippets of advice about how to conduct their deliberations. The one clear task they are given is to choose a fore-

11. For criticisms, see FRANK, supra note 1, at 111-25. For praise of the jury, see SIR PATRICK DEVLIN, TRIAL BY JURY (1956) and LOUIS NIZER, MY LIFE IN COURT (1978).
person, in jurisdictions where the foreperson is elected. The rest is typically vague and lofty, not much more useful than the initial orientation. For example, the California Instructions, which are fairly typical, advise that:

The People and the defendant are entitled to the individual opinion of each juror.

Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.

Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision.

Do not decide any issue in this case by the flip of a coin ["do not put beans up your nose"], or by any other chance determination.

The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts.

In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict.

When people are chosen to serve on a jury, they are generally anxious to perform their task well, and eager for guidance on how to be a good jury. The abstract and faintly patronizing advice exemplified by the California Instructions provides almost no useful information about the questions jurors are likely to have: What is the foreperson supposed to do? Should we start with a vote? Should we go through each legal charge one by one or should we start by trying to figure out what happened? Since few jurors have previous experience, and since neither the schools nor the courts provide much information, most of what people know about juries comes from the media: newspaper reports and sometimes interviews with jurors after high-profile cases, courtroom novels and first-person accounts by people who have served on a jury and want to tell their story, and most of all from the movies and television.

12. In Twelve Angry Men the foreman was apparently designated in advance, as all the jurors know who it is when they enter the jury room.


14. For an example of one juror’s specific suggestions about the sort of guidance that is needed, see Annie King Phillips, Creating a Seamless Transition from Jury Box to Jury Room for More Effective Decision Making, 32 MICH. L. REFORM 279 (1999).
Twelve Angry Men is the preeminent jury movie. For a long time it was the only one, and I expect it is still the most widely known. Certainly it is the one most relevant to jurors’ concerns about how to approach the task of deliberation. In Twelve Angry Men the jury deliberation is the entire movie, not just a climactic occasion to resolve questions and issues raised in other contexts. The script begins with the judge’s final instructions to the jury and ends with the last holdout for conviction saying “Not guilty.” It all takes place in the same room (with an occasional side conversation in the restroom). The most exciting “action” is probably the re-enactment of an elderly eyewitness hobbling from his bed to the door of his apartment in order to find out if he could have gotten there as fast as he said he did. The movie is mostly talk.

And yet it is filled with suspense. Emotions run high on the jury — it is a hot steamy day, the air conditioning doesn’t work (the electric fan in 1957), at the outset the jurors believe that it will be a matter of minutes before they reach a verdict and can all leave, eleven quickly vote guilty, and then one juror dashes their expectations by saying, “I don’t know,” and insisting on a full discussion. The tension builds. The slum kid bursts out angrily at the bigot (p. 21). When the foreigner suggests that one of the jurors might not understand the concept of reasonable doubt, the juror shouts, “How do you like this guy? He comes over here running for his life, and before he can even take a big breath he’s telling us how to run the show. The arrogance of him!” (p. 53). Henry Fonda calls Lee J. Cobb a “beast” and a “sadist” and Lee J. Cobb threatens to kill him (p. 43). Although this jury is undoubtedly more passionate than most, the suspense is not produced by the emotional tension. It is produced by rational argument and careful scrutiny of the facts, as one by one each of the apparently irrefutable proofs of guilt dissolves and reasonable doubt prevails.

There are numerous changes in the script from the 1955 published version to the 1957 film to the 1997 film. Important pieces of evidence are redistributed so that the “good” jurors make more valuable contributions and the “bad” jurors fewer. The boy’s criminal record becomes less and less damning, and the father’s (the victim’s) character becomes more brutal. Juror Three (Lee J. Cobb’s character) becomes increasingly emotional and “psychological.” Most important, the evidence changes. In the script the jury times two crucial events: the time it takes the aged witness to get to where he could see the boy fleeing (which creates reasonable doubt), and the time it would

15. See supra note 8. If students do learn anything about the jury in high school, this movie is likely to be the starting point.

16. In the film version there is a little extra business at the end, where Henry Fonda and his first ally tell each other their names as they are leaving the courthouse. It’s a nice touch, suggesting the anonymous and ephemeral nature of the jury.
actually take to commit the murder and clean up the traces (which
moves several jurors back to a guilty verdict). In the film, wisely, the
second is dropped. In the script, jurors move back and forth: after the
six-six split, several are persuaded back towards guilt. In the film, the
inexorable progress towards the not guilty verdict is much steadier.
Finally, in the script one of Juror Eight's (the Henry Fonda character)
capstone arguments is that a person must be perfectly consistent to be
believable: if the boy did some smart things in committing the murder
he couldn’t have done any stupid things, if the old man couldn’t be
trusted on the time it took him to get to the door, he can’t be trusted
on anything. These are silly arguments, introduced late and in
desperation, and they make it look as though Juror Eight is more
interested in winning than getting at the truth. While perhaps realistic,
these arguments are inconsistent with the message of the story, and so
were dropped in the film.

I can think of no better orientation for prospective jurors than the
1957 movie. It is the jury as our ideal, and Henry Fonda (Juror Eight)
is our ideal juror. According to the “Notes on Characters and
Costumes” in the 1955 script, “He is a quiet, thoughtful, gentle man —
a man who sees all sides of every question and constantly seeks the
truth. He is a man of strength tempered with compassion. Above all,
he is a man who wants justice to be done, and will fight to see that it
is” (p. 5). He persuades by reason and, in the 1957 film, Henry Fonda
perfectly embodies this description.

This is no easy task. Juror Eight may seem like a dream role for
actors, but unless he is perfectly played, he runs the risk of arousing
our irritation rather than our admiration. The voice of integrity is
often expressed in a tone that comes perilously close to sounding
whiny or sanctimonious, as Jack Lemmon sometimes does in the 1997
version. Analogously, the line between being resolute and being
obstinate is a thin one, and it is not easy to carry on a one-against-all
fight for justice without becoming pushy and aggressive.

Even the character as written in the 1955 script falls short of the
Henry Fonda ideal, and in fact the movie script removes some of Juror
Eight's more whiny, sanctimonious, and obstinate lines. Right after
the first vote, for example, the following exchange takes place in the
original script:

THREE. I never saw a guiltier man in my life.

EIGHT. What does a guilty man look like? He is not guilty until we say
he is guilty. Are we to vote on his face?

THREE. You sat right in court and heard the same things I did. The
man's a dangerous killer. You could see it.

EIGHT. Where do you look to see if a man is a killer?

THREE. [irritated by him]. Oh, well ! . . .
EIGHT. [with quiet insistence]. I would like to know. Tell me what the facial characteristics of a killer are. Maybe you know something I don’t know. (p. 14)

These are not the words of a quiet, thoughtful, gentle man who sees all sides of every question and constantly seeks the truth. First, Juror Eight pretends to take Juror Three’s casual comment literally. Second, he persists in this officious, rhetorical bullying even after Three backs off. Granted, Juror Three is Eight’s prime adversary, an intolerant bully himself, “within whom can be detected a streak of sadism,” the last holdout for guilt. But it is too early in the play for Eight to know what Three is like. If this exchange had occurred much later, after Three’s ugly character had been developed, it might have seemed like a well-deserved rebuke. Here it just seems like a gratuitous put-down. To be simultaneously right, moral, and pleasing is a prodigious accomplishment, requiring both an actor and a script that make no mis-steps.

Could there be a juror like Henry Fonda? Yes, of course. Human nature is infinitely variable, once in a while we recognize such a person in our daily life, and as Henry Fonda repeatedly states, when his point of view is rejected as implausible, “It’s possible” (pp. 23, 24). Over the years there have undoubtedly been many people called for jury duty who shared Juror Eight’s gentleness and integrity, and many others who consciously tried to model themselves on this character.

But could there be a jury like the jury in Twelve Angry Men? This too, of course, is possible, but less possible, less attainable. Many would-be Henry Fondas fail to persuade anyone, and are outvoted, so that the jury hangs or ends up with a unanimous guilty verdict that includes one disgruntled, reluctant member.

This is not to say that Twelve Angry Men is pure fantasy. One of the reasons for the success of the film is that it seems real, the outcome seems attainable. Even though each of the jurors represents an obvious stereotype, we recognize them and feel that we’ve encountered people like them — perhaps because they are familiar stereotypes. The deliberation is real in many ways: there is dead time when the discussion stagnates, there are conversations that are off the point, there is bickering as well as serious argument. There is no Perry Mason denouement, where somehow the identity of the real killer is revealed; the evidence that persuades the last few holdouts is very much like the rest of the evidence: the recognition that the key eyewitness would not have been wearing her glasses in bed after midnight and thus could not have identified the killer, whom she saw through the windows of a passing el train. When we watch the movie, it doesn’t seem like an impossible jury, or even an implausible one.

17. P. 4. Actually it takes very little “detection” to be struck by Juror Three’s sadism, and Juror Eight actually calls him a sadist at the end of Act II. P. 43.
So in what ways is this jury an unrealistic ideal, and in what ways is it realistic? Before we can address this question, there are the obvious background questions, “How do we know what is realistic? How do we know how real juries behave?” Attempts to observe real jury deliberations have been strenuously resisted, as have attempts to inquire about the deliberation process before a verdict is reached. By the late 1990’s there were only four videorecordings of real jury deliberations available, one of which was highly edited. Researchers, as well as legal practitioners and the general public, are unable to find out what happens in jury deliberations by actually observing them, so most of our knowledge is indirect.

Much has been learned, however, by the creative use of indirect methods. Social scientists use three primary strategies in studying the jury. First, examination of public records and other archival data can be used to answer certain simple questions, such as the relation between the plaintiff’s requested damages and the actual damages awarded, or between the number of experts on each side and the verdict. This method can test hypotheses about the effects of particular variables, but it cannot tell us anything about the actual deliberation process.

Second, judges, lawyers, and/or jurors can be questioned about the case (and, in the case of jurors, about the deliberation) after the verdict has been delivered. Some jurors also write articles or books describing their experience. In The American Jury, Kalven and Zeisel questioned judges and found that the judges agreed with the jury’s verdict in seventy-five percent of criminal cases. Therefore, Kalven and Zeisel determined that juries are generally competent. Post-trial interviews with jurors are useful for many purposes, such as assessing levels of juror satisfaction, discovering issues that were unexpectedly salient in jurors’ minds, illuminating the nature of the conflict in difficult or hung juries, and indicating whether the jury misunderstood a
crucial fact or element of law, but they are unreliable indicators of how juries actually reach their decisions. The problems with this method are problems of faulty recollection, including errors of hindsight and other self-serving biases. For example, jurors may under-estimate the extent to which they actually changed their position or overestimate their own contribution to the discussion. In some cases, jurors differ in their memory of basic facts, such as the number of people voting to convict in the initial vote.\(^{25}\)

Third, social scientists study mock juries. This method can range from extremely simple, stripped-down studies in which individuals (often students) are given brief written descriptions of a case (varying strength of the evidence, race of the defendant, type of expert testimony, or some other variable of interest to the investigator) to elaborate simulations in which jury-eligible citizens, sometimes even citizens called for jury duty and studied at the courthouse, are shown videotaped trials, complete with judge’s instructions, and are themselves videotaped while they deliberate. Even in the most realistic of these studies the mock jurors know that they are not real jurors, and it is always an empirical question whether real jurors would behave in the same way. What little empirical research exists is encouraging, indicating similar processes on real and simulated juries.\(^{26}\) Our confidence in the validity of a conclusion is of course greatly increased when studies using different methods produce the same pattern of results, because that rules out the possibility that a finding was an artifact associated with a specific methodological approach.

Empirical research on juries barely existed at the time Twelve Angry Men was written, but over the last thirty years juries have been extensively studied using all three of these methods, and many of the findings have been replicated over and over again. We now know much more about how juries deliberate than we did a half century ago, enough to begin to evaluate the ways in which the play and the movies mirror real behavior, and the ways in which they portray an ideal that is rarely achieved. Of course, realism is not the mark of artistic quality. A perfectly realistic portrayal of an hour and a half of jury deliberations would be far more boring and far less coherent. Few if any of the jurors would be memorable. As E.M. Forster points out, fictional characters “are real not because they are like ourselves (though they may be like us) but because they are convincing.”\(^{27}\) A more realistic movie would not be a better movie, trust me; I have watched dozens of mock-jury deliberations. But still, it is useful to describe some of the


\(^{27}\) E. M. Forster, Aspects of the Novel 97 (1927).
most strikingly unrealistic qualities of the jury in *Twelve Angry Men*, as well as some of the ways in which it does reflect reality.

**A Lone Juror Persuades Eleven Others to Change Their Votes**

One of the oldest and most frequently confirmed findings in research on juries is that first ballot (or, in much of the research, predeliberation) votes are an excellent predictor of the final jury verdict, particularly on juries like the one in *Twelve Angry Men*, which has only two choices — guilty and not guilty. A jury with a majority of guilty verdicts on the first ballot is likely to reach a guilty verdict, and the larger the initial majority, the higher the likelihood. Kalven and Zeisel went so far as to claim that “the deliberation process might well be likened to what the developer does for an exposed film: it brings out the picture, but the outcome is pre-determined.” Of course this is not true — jurors do change their minds during the process of deliberation, and minority factions sometimes prevail, but this is more likely to be true (1) when there are several verdict choices, so that compromise is possible, or (2) when there is a competing story of the facts.

A jury split 11-1 for guilt, with only two choices and no alternative explanation of the facts is virtually certain to convict. Even before *Twelve Angry Men* was written, Solomon Asch had found strong social-psychological evidence that the pressure to conform was nearly irresistible when a single person was faced with a unanimous majority. Even for very easy perceptual judgments, such as comparing lines

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28. For a review, see HANS & VIDMAR, supra note 25, at 97-112.
29. KALVEN & ZEISEL, supra note 9, at 489. Kalven and Zeisel claim that eighty-six percent of juries with an initial majority for guilty end up voting guilty, and of course this percentage would be much higher for majorities of eleven. Id. at 488. Their claims were based on post-trial interviews with jurors, and so may not be completely reliable. Id. at 487. However, it is safe to say that the vast majority of 11-1 juries end up with a guilty verdict, a few hang, and hardly ever does the jury return a not guilty verdict.
30. Cf. HANS & VIDMAR, supra note 25; REID HASTIE ET AL., INSIDE THE JURY (1983). Most juries are divided on the first ballot, and most reach unanimous verdicts; therefore, some jurors must change during deliberation.
31. HASTIE ET AL., supra note 30.
33. S. E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in *GROUPS, LEADERSHIP, AND MEN* 177-90 (Harold Guetzkow ed., 1951). All of the subjects in Asch's initial study were male, hence the masculine pronoun, but the effect has been replicated many times with groups of women and mixed-gender groups. This study was cited by the Supreme Court in *Williams v. Florida*, 399 U.S. 78 (1970); but the Court
that clearly differed in length, a unanimous majority could induce a person to deny the evidence of his senses and agree that two lines were the same length when he "knew" they were different. Asch also found that a minority of two is capable of resisting in this simple but powerful situation; it is vastly more steadfast than a minority of one. When he investigated the group dynamics over time, Asch found that if one other person defects from the majority, the lone holdout's ability to withstand the pressure to conform is restored, even if the defector takes a third position, matching neither the majority's nor the holdout's. We see this psychological phenomenon beautifully illustrated in *Twelve Angry Men*.

The most difficult challenges for Juror Eight — the ones that almost no juror can meet — are (1) to speak out for a deviant position when confronted by a unanimous majority and (2) to persuade at least one other juror to change. As Asch's research demonstrates, the defection of even one member of the majority eases the burden of the first juror enormously. A minority of two is many times stronger than a minority of one.

The jury in *Twelve Angry Men* also has one important structural feature that makes Juror Eight's success possible (although, as we have seen, not at all probable), and that is the requirement that the verdict be unanimous. Without it, there would have been no story. As soon as the initial vote was taken, the jury would have realized that it had accomplished its task, announced its verdict, and gone home. In an unusually realistic mock-jury study, using citizens called to the courthouse for jury duty and requiring them to deliberate until they reached a verdict or declared themselves hung, Hastie, Penrod, and Pennington compared the deliberations of juries with a unanimity requirement, a 10-2 majority rule, and an 8-4 majority rule. They found that the deliberations of the juries with a unanimity rule took more time and covered more of the facts and issues, and that on the majority-rule juries discussion came to an end soon after the necessary majority was reached. With an 8-4 rule, once a majority of 8 was reached, that was the verdict; but with a unanimity verdict, one out of four juries actually changed their verdict after the group had reached an 8-4 split.

One of the fundamental messages of *Twelve Angry Men* is that the minority's point of view may be the reasonable point of view, even if the minority is just one person, and that with full discussion, that view

misunderstood the central finding that the absolute, not the relative size of the minority is the more important influence on conformity. A version of the Asch experiment was shown on *Only Human* (Discovery Channel television broadcast, June 19, 2002).

34. HASTIE ET AL., supra note 30.
35. Id. at 83-98.
36. Id. at 95-96.
may prevail. This inspiring message is rejected by current critics of jury unanimity and in the Supreme Court’s decisions on the unanimity requirement. The juror who opposes the majority is seen as essentially unreasonable, “the obstinate loner, the obsessive individual, the morally-challenged individual,” and dismissed as a “flake.” The majority jurors, on the other hand, are seen as reasonable, willing to spend time sifting through the issues and listening carefully to the arguments of the minority even if the initial verdict is 11-1 and they have enough votes to declare a verdict. In Johnson v. Louisiana, writing for the majority, Justice White stated that, “A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose — when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position.” This logic is echoed in current criticisms of the unanimity requirement: “If they are reasonable and sensible, there will be give and take. They will arrive at the unanimity which is required. If they are not reasonable, or if two of them are not, and will not listen to sensible argument, then a verdict of ten surely will suffice.” The possibility that ten of them are not reasonable seems inconceivable.

Justice Douglas, dissenting in Johnson v. Louisiana and anticipating the findings of Hastie, Penrod and Pennington and other researchers, was contemptuous of the majority’s idealistic view of human nature: “nonunanimous juries need not debate and deliberate as fully as must unanimous juries... human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity.”

And it was by invoking the need for earnest and full deliberation — or at least some deliberation — that Juror Eight overcomes his second challenge: persuading one person in the unanimous majority to change his vote. When asked to justify his “not guilty” vote, he doesn’t come up with arguments for innocence. Instead he says, “There were eleven votes for guilty — it’s not so easy for me to raise my hand and send a boy off to die without talking about it first.”

38. Sullivan & Amar, supra note 3, at 1154 (quoting Judge James W. Rant’s arguments for abolition of the unanimity rule in a debate on jury reform).
40. Johnson, 406 U.S. at 361.
42. Johnson, 406 U.S. at 388-89.
43. P. 15. In the original script, the judge does not explicitly mention the death penalty, but says: “One man is dead. The life of another is at stake.” In the 1957 film the death penalty is mandatory, which was true at that time for premeditated murder in New York, where the film takes place. In 1997 we are told that the could face the death penalty.” This is im-
defensive comments by other jurors about their hasty decisions, Juror Eight continues:

I want to talk for a while. Look — this boy's been kicked around all his life. You know — living in a slum — his mother dead since he was nine. That's not a very good head start. He's a tough, angry kid. You know why slum kids get that way? Because we knock 'em over the head once a day, every day. I think maybe we owe him a few words. That's all. (pp. 15-16)

The middle part of this speech raises the first issue of discussion, which persuades no one but advances the plot by identifying the outspoken bigot on the jury; but the opening and the closing are a plea for open-minded discussion, for consideration of the evidence rather than a speedy conviction. And the jurors do begin to talk about the issues. The major pieces of evidence against the defendant are laid out (so that the audience sees how airtight the case appears to be), Juror Eight quibbles about the quality of the defense attorney and expresses vague doubts, but appears to get nowhere. Then he produces a switchblade, identical to the "strange," "unusual" knife that the storekeeper who sold it to the boy claimed was unique in his experience, and says he bought it for a couple of dollars at a junk shop around the corner from the boy's house.\textsuperscript{44} This creates a sensation, and some doubts, but the majority doesn't collapse, and in fact none of the others suggests that he might change his vote. So Juror Eight tries another strategy. At the end of the first Act he calls for another vote, agreeing that if all eleven members of the majority still vote guilty, he will not stand up against them any longer, but will make it unanimous. But they don't. His strength in meeting the first challenge, and his plea for full discussion have persuaded another man, the oldest juror, who has hardly spoken before this:

NINE. This gentleman chose not to stand alone against us. That's his right. It takes a great deal of courage to stand alone even if you believe in something very strongly. He left the verdict up to us. He gambled for support and I gave it to him. I want to hear more. The vote is ten to two. (pp. 28-29)

Juror Eight wins over this ally by his courage and his integrity, and because he is not asking that anyone believe that the boy is innocent, only that the others give a serious case like this the careful attention that it deserves. He achieves the single most important victory,

\textsuperscript{44} Pp. 23-24. And yes, what Juror Eight did was impermissible: buying the knife was extra-record research on the facts creating a competing, factual claim based on facts not in the record. With an alert bailiff or a legally sophisticated juror, \textit{Twelve Angry Men} could have been a mistrial.


demonstrated by Asch's research on resistance to conformity — a member of the unanimous majority has defected. Juror Eight is now no longer a minority of one. And he has done it not by confronting others with the merits of his views, but by shaming them into a recognition of the ideal jury as a forum where all viewpoints are considered and contribute to the decision.

Which leads us to the second major departure from reality, the second grand idealization.

**ROUNGLY EQUAL CONTRIBUTIONS BY ALL JURORS**

All of the jurors in *Twelve Angry Men* are active participants, and almost all of them contribute new information that makes a difference. Although some jurors, most notably Juror Eight, talk more than others, participation rates are far more equal than they are on most juries. On most twelve-person juries, three or four people dominate the discussion, another four or five make occasional contributions, and the rest hardly open their mouths. *Twelve Angry Men* presents the image of an ideal jury, in which everyone has a chance to speak and everyone has a contribution to make. With the exception of the bigot’s extended racist diatribe at the end, when all the other jurors leave the table and walk away, the men listen to each other, and jurors who attempt to silence other jurors are immediately rebuked:

NINE.... He didn’t change his vote. I did ... Maybe you’d like to know why.

THREE. [not giving him a chance]. Let me tell you why that kid’s a —

FOREMAN. The man wants to talk. (p. 28)

It could be argued that this equality of participation may be due in part to the demographics of the jury. It is, after all, composed of twelve angry men, and White men, at that. One of the oldest and most consistent findings in research on jury deliberations is that high-status White males are likely to dominate the discussion, talking more than women (although not necessarily contributing more new information), members of minority groups, and even lower-status White males. They are also more likely to be chosen foreman, and the foreman is usually among the three or four most talkative jurors, in part because the role demands it.\(^47\)

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46. See sources cited supra note 45.

It could further be argued that the composition of the jury in *Twelve Angry Men* is itself highly unrealistic, and that would be true today, but in the 1950's it would not have been particularly unusual. Even today the citizens called for jury duty are not a perfectly representative sample of the population, and in the 1950s they were far less so. Many jurisdictions used a “key man” system to draw up the jury lists: the jury commissioners (mostly White men) simply generated lists of respectable citizens based on their own club and church memberships and other local connections. Obviously this method led to the underrepresentation of nonwhites. In some states women were not even called for jury duty; in others women could opt out simply by checking a box on the jury summons. In the early 1970s women were underrepresented on the jury lists in nine out of ten jurisdictions. It was not until 1968, with the passage of the Federal Jury Selection and Service Act, that voter-registration lists became the required source for federal jury-panel selection, and not until the 1970s that the Supreme Court required that the venire be a representative cross section of the community. And of course these measures still did not ensure that the jury itself would be representative. Attorneys routinely struck Black people from the jury during voir dire, a practice that continued to be legal until 1986, when it was struck down in *Batson v. Kentucky*.

And yet the 1957 film of *Twelve Angry Men* powerfully communicates the ideal of jury diversity. It is one of its central messages. Each juror was written to represent a different type of person, even a stereotype. They are described as types in the Notes on Characters and Costumes:

JUROR NO. FOUR: He seems to be a man of wealth and position.

JUROR NO. SEVEN: He is a loud, flashy, glad-handed salesman type.

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JUROR NO. NINE: He is a mild, gentle old man, long since defeated by life. . .

JUROR NO. ELEVEN: He is a refugee from Europe. (pp. 4-5)

Henry Fonda, an architect (in the movie), and Juror Four (Edward G. Marshall) have high-status occupations; there's an advertising man and a salesman; a young man who was born and raised in a slum; a working-class bigot; and the refugee, who is given most of the lines about the glories of American democracy and the jury system. On a real jury the high-status jurors would doubtless do most of the talking, but in the play and the movie participation rates are much more equal. Each juror has a distinctive point of view, and each makes a different contribution, often based on his own experience. It is the old juror who points out that the aged witness probably embellished his story in order to get some attention and recognition (in the original script he actually says, "I am the same man" (p. 34)), and the slum kid who describes the right way to use a switchblade. No one in the 1950s would have seen the movie as a movie about White male juries; no sensible person should today. It is a paean to the jury's power to extract truth from diverse viewpoints, biases, and personalities.

In the 1997 version, four of the jurors are Black: the foreman, the relatively meek Juror Two, the slum kid, and in a misguided attempt to be daring, the bigot.\textsuperscript{53} Still, the diversity message seems as clear or clearer in the 1957 version as in the 1997 version. By adding Black jurors, the 1997 filmmakers were confronted with the difficult choice of either trying to reflect a distinctly African-American point of view (mistrust of the police investigation, possibly a leniency bias),\textsuperscript{54} or eschewing stereotypes and conveying the message that African Americans are as diverse as Whites. They try to play it both ways, typecasting one Black as the slum kid (it would have strained credibility to give the slum kid role to a White when there were four Blacks on the jury), but compensating by casting another as a bigot, and casting the other two as jurors without strong viewpoints. No attempt is made to reflect the dynamics of interracial deliberations,\textsuperscript{55} and indeed it would be difficult to do so, given the constraints of the script.

\textsuperscript{53} Of course African Americans are capable of bigotry, but the bigot's lines in this script were written for a White person and are full of the criticisms typically expressed by White bigots against African Americans. It is hard to imagine that a Black juror could use these same phrases unselfconsciously, without recognizing that they are usually directed at Blacks.


Finally, the presence of the Black jurors actually undercuts the diversity message by making the absence of women far more conspicuous.

THE COMPETENCE OF THE JURY AND THE PROCESS OF DELIBERATION

The jury in *Twelve Angry Men*, as I have said before, has come to represent an ideal jury, a model that we would like real juries to emulate. How might a real jury deliberate in this case? As it turns out, this is exactly the sort of case where we would expect a real jury to excel. Almost all researchers agree that juries do well at determining the facts, but very poorly at understanding the law as given to them in the judge’s instructions. This case depends entirely on a careful examination of the factual evidence to determine which parts of the testimony can be trusted and which cannot. There is no highly technical or scientific evidence; the issues involve the capacities and motives of the witnesses in context. Since the basic question is whether the boy did it, rather than a question about his state of mind, there are no legal complexities, and discussion of the law is minimal, focusing primarily on the concept of reasonable doubt. In research studies, reasonable doubt is one of the legal concepts that juries are most likely to get right. It is the kind of case that is most likely to bring out the best in a real jury.

After a little small talk in which we are briefly introduced to most of the jurors and learn that the general consensus is that the defendant is obviously guilty (Juror Eight is looking out the window and takes no part in this discussion) the jurors get down to business and begin by taking a vote. About half of all juries, once a foreperson is chosen, begin with a vote, and it is especially likely in cases like this where the jurors have reason to believe that they might be able to return a unanimous verdict immediately. Ordinarily, starting off with a vote tends to inhibit thorough discussion of the issues, because an early public commitment makes it more likely that jurors will invest their energies in defending their position, rather than in an open-minded exploration of the evidence. Juries that vote early are referred to as

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57. The 1997 version implausibly includes psychiatric evidence introduced by the prosecution to demonstrate the defendant’s “homicidal tendencies,” but it plays a very minor role.

58. Ellsworth, *Are Twelve Heads Better Than One?*, supra note 45, at 221.

59. See supra note 12 on the selection of the foreman in *Twelve Angry Men*.

60. HANS & VIDMAR, supra note 25, at chapter 7; Ellsworth, *Are Twelve Heads Better Than One?*, supra note 45, at 214.

"verdict driven," because the discussion is shaped by battles between factions defending their early verdict choices.61

Juries that postpone their initial vote generally begin by bringing up points that struck them as especially telling or confusing, sometimes even going around the table in an orderly way. These juries are referred to as "evidence driven" because more facts and issues are discussed and participation is more equal than it is on verdict-driven juries.62 Despite its early vote, the jury in Twelve Angry Men manages to get back on track and follow this productive course of action. A somewhat more plausible response to the vote might have been for the unanimous majority to gang up on Juror Eight and ask him to justify his deviant position,63 but that move doesn't really make sense here, because Juror Eight does not take any position on the boy's innocence; all he asks is that they spend some time discussing the case. Then another juror (the foreman, in the movie versions) recommends the effective, evidence-driven procedure:

I may have an idea here. I'm just thinking out loud now, but it seems to me that it's up to us to convince this gentleman — [Motioning toward Eight.] — that we're right and he's wrong. Maybe if we each talk for minute or two. You know — try it on for size. (p. 17)

The discussion that follows, despite its occasional passionate outbursts, is far more orderly than most jury deliberations. With next to no guidance on how to organize their task, most juries start off with chaotic confusion. Kalven and Zeisel referred to this initial phase as a "buzzing, blooming confusion,"64 and I have called it "a random walk through the facts and issues,"65 with crucial topics and trivial topics raised and dropped and raised again with no attempt at resolution. This jury first raises each of the key pieces of evidence against the defendant, each juror contributing something new, and towards the end of Act 1, begins to re-examine each piece more thoroughly and critically (finding it shakier than it first appeared) before moving on to the next. The jury proceeds systematically, creating the sort of clear cumulative plot traditionally important for good drama. But even though the fact-finding process on real juries is much messier, in time it accomplishes the same ends. The trivial and irrelevant issues are


62. See sources cited supra note 61.


64. KALVEN & ZEISEL, supra note 9, at 486.

65. Ellsworth, Are Twelve Heads Better Than One?, supra note 45, at 216.
eventually dropped, the jury identifies the crucial issues and spends more and more time on them, and ultimately a decision is reached.

One of the great strengths of the jury is its ability to correct errors of fact; the collective memory of a group is superior to that of any of its members in this regard, arguably better than that of a single judge:

EIGHT: We're going to find out how a man who's had two strokes in the past three years and who walks with a pair of canes could get to his front door in fifteen seconds.

THREE: He said twenty seconds.

TWO: He said fifteen.

NINE: He said fifteen. He was very positive about it. (p. 38)

Exchanges like this, ending up with the correct fact, occur over and over again in jury deliberations. Here the play captures one of the jury's routine but supreme achievements.

In the play, legal errors are corrected in exactly the same manner:

TWO. I just think he's guilty. I thought it was obvious.

EIGHT. In what way was it obvious?

TWO. I mean that nobody proved otherwise.

EIGHT. [quietly]. Nobody has to prove otherwise; innocent until proven guilty. The burden of proof is on the prosecution. The defendant doesn't have to open his mouth. That's in the Constitution. The Fifth Amendment. You've heard of it. (pp. 17-18)

Exchanges like this, ending up with the correct understanding of the law, are not so common in jury deliberations. Errors of law often go uncorrected, mistaken interpretations often prevail over the correct interpretations. On tests of their understanding of the law, jurors' accuracy is often no better than chance.66

On the other hand, this does not seriously distort the realism of the play's depiction of jury deliberation, as there are no difficult questions of law to decide. Most of the discussion of law focuses on reasonable doubt, which is a concept most jurors do understand, and which is frequently (and appropriately) raised by jurors who favor acquittal and find themselves in the minority. Raising it can prolong discussion and encourage the jury to examine the evidence more carefully. In Twelve Angry Men, it is reasonable doubt that prevails, not evidence of innocence. Juror Eight never argues that the boy is innocent, only that "it's possible," that "I have a doubt in my mind" (p. 25). And as

the story unfolds, and each piece of evidence is considered, the doubt becomes more reasonable and more general until the juror who was most effective in presenting the arguments for conviction is persuaded, not of innocence, but of reasonable doubt:

FOUR [rising].... I'm convinced. I don't think I'm wrong often, but I guess I was this once. There is a reasonable doubt in my mind. (p. 62)

CONCLUSION

I usually favor movies about ambiguity, and my favorite director is Francois Truffaut. But there are exceptions, movies that are as spare and inexorable as Greek tragedies, that speak for truth and justice, without cynicism, but with great sophistication: High Noon, The Seven Samurai, Twelve Angry Men. I would like to throw out all the vague and pompous jury-orientation films I've ever seen, and instead show prospective jurors this film. It would probably make for more concerned and careful juries; it would certainly make jury duty a more rewarding experience. Twelve Angry Men is an Ideal, but it is an achievable Ideal; real juries already take their job very seriously, and would be better equipped for their duty if they were reminded of this Ideal.

There are three important messages in Twelve Angry Men.

One is that reasonable doubt means Not Guilty. The play was written not long after the heyday of McCarthyism in which innuendo was enough to condemn. Although never explicitly stated, it stands for the idea that convicting the innocent is a far greater miscarriage of justice than acquiting the guilty, an idea that needs constant and vigilant reinforcing, since it runs somewhat counter to human nature. The true killer is never identified in Twelve Angry Men, there is no definitive evidence that the boy didn't do it; he is "not guilty" because the prosecution's evidence is insufficient to prove guilt beyond a reasonable doubt.

Another is that diversity of viewpoints is one of the glories of the jury. Nancy Marder argues that there are two basic conceptions of a fair jury. The "reasonable person" view, articulated by Justice Rehnquist, "assumes that people are fungible as jurors as long as they are impartial. According to this view, whether the jury venire, or pool, is diverse makes little difference. All that is required is that twelve impartial jurors can be drawn from the venire to constitute a petit jury." A White can replace a Black, a man a woman, a laborer a
captain of industry — it makes no difference as long as each one says he or she can be fair. The alternative view, exemplified in *Twelve Angry Men*, is that all jurors have different life experiences, perspectives, and even biases — few are blessed (or cursed) with a sterile “impartiality” — and that the counterbalancing and juxtaposition of these different points of view results in a jury that is far more thorough, more accurate, and more fair than a jury of twelve impartial clones could ever hope to be. In the original script, even the “bad” jurors, Lee J. Cobb and the bigot, bring up pieces of evidence not raised by other jurors. We are satisfied with the verdict because we believe that *all* the evidence has been raised, and all has been closely scrutinized.

Finally, and again perhaps as a protest to McCarthyism, we are reminded that the minority view can be the right view, even if the minority is only one, and that the only way to find out is by full discussion of every issue. Every jury should remember that it is wrong to send a boy off to die without talking about it first.