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## Foreword

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## FOREWORD

D. GRAHAM BURNETT\*

In January and February of 2000 I spent several weeks serving as a juror, and eventually as the foreman of the jury, in a Manhattan murder trial. It was a deeply affecting experience. I was twenty-nine years old at the time, and in the throes of completing my first book, a revision of my Ph.D. dissertation (on the history of cartography), upon which I hoped to launch a respectable academic career. My wife had recently finished her law degree, and we were together in that tender phase of life: finished with school; subletting the apartment of friends (on a month-to-month basis); trepidatiously embarking on professional careers through veils of financial uncertainty, juvenescent bravado, and plain old fear for what the future would bring. There were tears, at times, together with a few nights when I walked out into the big rushing sounds of a midtown evening, my head swimming with some mad, roiling idea about the history of time or consciousness or language, and felt so impossibly alive, so crazed and vigorous and ecstatic, that I thought I glimpsed how one might need to be hospitalized for glee.

Henry Fonda I was not. My intellectual energies were mostly without populist enthusiasm, and if graduate school in England had inoculated me against the allure of the mandarin scholar, I nevertheless nurtured a mostly private contempt for people I deemed unserious. And yet. In thinking back to that period, I am reminded of Melville's *The Confidence-Man*, and specifically the notorious chapters on "The Metaphysics of Indian-Hating." Recall that Melville's Indian-hater cleaves to his solitary misanthropy but imperfectly, and rather teeters at the edge of a binge-appetite for fellowship:

[A]fter some months' lonely scoutings, the Indian-hater is suddenly seized with a sort of calenture; hurries openly towards the first smoke, though he knows that it is an Indian's, announces himself as a lost hunter, gives the savage his rifle, throws himself upon his charity, embraces him with much affection, imploring the privilege of living a while in his sweet companionship.<sup>1</sup>

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1. HERMAN MELVILLE, *THE CONFIDENCE-MAN: HIS MASQUERADE* 150 (Northwestern Univ. Press 1984) (1857).

So it was with my studied austerity, my nasty distaste for television and the people who watched it, my pseudo-monkish devotion to the world of the past and its books: all of this was wobbled now and again by an overwhelming hunger for this actual world and its veritable, fleshy, foot-sore and divine-souled inhabitants. At times—on the subway, say, my eye wandering around some dozen or so faces—I felt as if I could not stand the silence for another moment; felt as if, like Whitman of old, I loved each and every citizen of the Metropolis with a bottomless passion, and that I was going to rise from my seat and turn to the lurching room like a busker of spiritual alms, and say, “Good evening ladies and gentlemen, excuse me for the interruption. We are going to be together for such a short time, and I feel so much sweetness for all of you—I just know we have so much to learn from each other. Who wants to start? How shall we cut right to the most important things, and bind our new fellowship with bright and silken threads?” Though such things were in my throat, the closest I ever came was once asking an angry-looking blonde woman next to me about the tattoo of a troll on her shoulder. It went nowhere.

In this sense, my jury summons answered a quiet prayer, my heart-hidden fantasy come to life: we would be a room of perfect strangers, and we would have so much to learn from each other, and we would cut right to the most important things—truth, freedom, justice, duty, death.

Those concerned about the resolution of an actual murder trial through such a miasma of metaphysics and megalomania may find their fears either allayed, or possibly confirmed, in my account of what followed, *A Trial By Jury*, published by Knopf in 2001. It was very much an accidental book, poured onto the page in six weeks from hands still trembling. I had, at the time, no idea what I was writing, but simply followed the advice of a friend who had heard me tell the story over lunch: “Just write it—you can figure out what to do with it when you’re done.” For a while it had seemed like it might be a magazine piece, but 40,000 words later that looked unlikely.<sup>2</sup> By the time the book actually appeared on shelves there were many other things to worry about: I had a tenure-track job at Princeton, and felt considerable pressure on campus to downplay an exercise in non-scholarly writing; and (to go from the solipsistically ridiculous to the grotesquely sublime) the entire nation—indeed, the globe—had been convulsed by the disasters of 9/11.

2. Shortly before the book came out I did re-write the whole story at the scale of a magazine story. This ran under the cover title *We, the Jury* in the *New York Times Magazine* of August 26, 2001 (the interior title was *Anatomy of a Verdict: The View from a Juror’s Chair*).

What about *12 Angry Men*? Truth is, I had never seen the film. Or, to speak more carefully, I had never seen the whole film. In grammar school I caught a few minutes of the conclusion on a PBS station rerun, and retained in memory only the scene where the character played by Joseph Sweeney confronts E.G. Marshall's "stockbroker" with the larger significance of his rubbing the bridge of his nose: those who rub their nose like that do so because they wear glasses; the eyewitness had thusly rubbed her nose on the stand; therefore she wore glasses; therefore (since odds were she had not worn her glasses to bed) her testimony was suspect. Cue melodramatic revision to the verdict. It was this (admittedly fragmentary) version of the film that I invoked at the conclusion of our trial, by way of disanalogy. Alluding to the movie as an example of how real trials—as we had learned over sixty-five hours of deliberations—do *not* work, I said to my fellow jurors on the morning of the fourth day in a small room, "I think we have all figured out that there are no trick endings here, no surprise discovery that will suddenly swing down and change everything."<sup>3</sup> The "swing down" bit was very much meant to invoke the *deus ex machina*, since by this point in our painful deliberative ordeal, I think we would all have been delighted to see such a god appear, so as to give dramatic coherence and divine sanction to a denouement none of us seemed to like very much. That no such god (or, to update the narrative conventions from classical tragedy to the nineteenth-century novel, no such *clue*) was in the offing, seemed to me the central lesson of the trial. As I put it in the magazine version of the story, "In the jury room, you discover that the whole edifice of social order stands, finally, on handicraft—there is no magic, no mathematics, no science, no angelic fixer who checks our juridical homework."<sup>4</sup>

This still feels right to me, though I would now add that there are a variety of other places where a thoughtful person might learn the same lesson. Lawyers learn it early, as do judges—though my limited experience suggests the latter can sometimes forget it after years on the bench.<sup>5</sup>

But was this version of *12 Angry Men*—for all its rhetorical importance at that moment in our struggles—fair to the film itself? Someone buttonholed me several years ago after a lecture about *A Trial By Jury* to say that I had mischaracterized the movie: it was not that a magic discovery resolved everything at the eleventh hour, but rather that many different

3. D. GRAHAM BURNETT, *A TRIAL BY JURY* 165 (2001).

4. *We, the Jury*, *supra* note 2, at 32–34.

5. I will not soon forget one state appellate court judge, in his cups after dinner at a judicial retreat, who gave me a solid dressing down—not having read the book, or knowing anything about the case—concerning the miscarriage of justice over which he supposed me to have presided.

concerns, raised by different jurors, slowly whittled away at the near-consensus for a conviction. So which was it?

On the occasion of Nancy Marder's kind invitation to pen this foreword (and owing to her still-kinder gift of a DVD of the film), I went ahead and watched the movie, and am grateful for this opportunity to set the record straight by correcting myself: the nose-rubbing business only turns three votes in the endgame. Admittedly, two of these looked to be among the staunchest proponents of a conviction, but even so, some seventy minutes of film have unrolled before we get to this point, and the numbers have gradually swung, on account of a host of gathering doubts, from 11-1 to 8-4. A *deus ex machina* the nose divots are not. After all, the real melodrama is yet to come, in the form of Lee J. Cobb's filicidal soliloquy and collapse.

Conceding this point, I still find myself moved to object to the particular dramatic cleanliness of the progress toward a verdict in this film. Perhaps no single god appears on a crane at the very end, but a mess of little godlets get lowered into the room at convenient intervals: an el-train takes *ten seconds* to pass a given point (aha! if the killing happened as the last two cars passed the window, then the old man could not have heard the boy shout "I'm going to kill you" over the train noise); the old man had a limp and his apartment was forty-three feet long (aha! he could not have made it to the door in the fifteen seconds necessary to see the perpetrator run down the steps). All of this makes good drama, but amounts to a correspondingly poor account of collective decision making in a complicated situation. Indeed the very game of precision metrics in these examples buttresses a kind of collective fantasy about participatory judicial rationality from which, it seems to me, we would do better to awake. There really is no mathematics to the business. Really. Not even if you have an "architect" (wink, wink) like Fonda's Mr. Davis in the room.

People sometimes ask me how I would feel, having seen the way a jury works, if I were accused of a crime. And the answer is easy: terrified (though I certainly have no better ideas about how we might administer a punitive regime). Committed to an ennobling vision of American civic ritual, *12 Angry Men* does not teach that terror, and in my view this detracts from its value as a work of art—though not from its value as an exercise in a certain kind of vernacular democratic ideology. Having said that, however, I feel I should confess the power the film had over me as I watched: for our view out the windows of our jury room in the New York Supreme Court in lower Manhattan was very much like the view of Fonda and his peers from the window of their jury room in the New York Supreme Court

in lower Manhattan. A moral and physical claustrophobia held sway in both spaces, and outside, the skyline had hardly changed.

