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## DELIBERATION IN *12 ANGRY MEN*

BARBARA ALLEN BABCOCK & TICIEN MARIE SASSOUBRE\*

### INTRODUCTION

Men in a jury-room, like those scientifically demonstrated atoms of crystal which scientists and philosophers love to speculate upon, like finally to arrange themselves into an orderly and artistic whole, to present a compact, intellectual front, to be whatever they have set out to be, properly and rightly—a compact, sensible jury.<sup>1</sup>

Few moments are more inherently dramatic than the return of a verdict, especially in a criminal case. Lawyers and defendants know this well, and so too does anyone who watches movies or television. In the familiar representation, the jurors, having struggled with the evidence and each other offstage, file into the courtroom, and take their ordered seats. The camera pans across each unrevealing face in anticipation until the verdict is read, then pulls back to show them all in the box, a microcosm of the community their verdict has them to be, together for the last time. Cut from the return of the verdict to the defendant descending the courthouse steps, breathing the air of sweet liberty.

Of course, there are no scenes like these in *12 Angry Men*.<sup>2</sup> The return of the verdict is not shown at all, and in the last frames, it is two jurors who breathe the sweet air of liberty on the courthouse steps after hours in a small, stuffy room, exchanging names for the first time in symbolic acknowledgment of the end of the experience. *12 Angry Men* has no return of the verdict scene because it is not about guilt or innocence, or even really about reasonable doubt. Instead the film is about deliberation, the process by which a group of strangers compose themselves into “a compact, sensible jury.”

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1. Eric J. Sundquist, *Introduction: The Country of the Blue*, in *AMERICAN REALISM: NEW ESSAYS* 3, 12 (Eric J. Sundquist ed., 1982) (quoting THEODORE DREISER, *THE FINANCIER* ch. XLIV (1912)).

2. Reginald Rose, *Twelve Angry Men*, in *FILM SCRIPTS TWO* 156 (George P. Garrett, O.B. Hardison & Jane R. Gelfman eds., Irvington Publishers 1989) (1972) (screenplay version of the film *12 ANGRY MEN* (Orion-Nova Productions 1957)).

We celebrate the anniversary of this iconic film at a time when juries are under attack for their cost and inefficiency, for their mistaken verdicts and biased composition.<sup>3</sup> Juries make an easy target largely because we do not really understand why or how they work. The institution comes to us with certain historical attributes: the mystical number twelve; the absolute power, without accountability, to acquit; the judicial filtering of the evidence jurors will hear; the absence of qualifications of education or training for service; the requirement that jurors engage each other to the point of total agreement. But no one knows which of these features, if any, is essential to the proper functioning of a jury.<sup>4</sup>

Not only are we unsure how juries actually operate, we do not imagine them very well either. In most trial films, “the jury is a kind of visual and narrative blank, viewed as so much human furniture when present, but mostly just absent” until the moment of verdict.<sup>5</sup> *12 Angry Men* remains one of the very few films to fashion a compelling account of how and why juries work. No one tells the twelve men in the film how to perform their task, yet most of them enter the jury room with some idea—or ideal—of what a jury does.<sup>6</sup> The procedures that evolve over the course of their de-

3. Despite academic research discrediting claims that civil juries make excessive awards and criminal juries nullify willy-nilly, the American jury has been lately much maligned in public discourse. This was true even before the uproar over the Simpson verdict, though mistrust of the jury surely responded, in part, to the first Rodney King case and the Menendez hung jury. Legislation designed to do away with the unanimity requirement, to reduce the number of jurors, and to abolish the peremptory challenge have all been proposed. The basic problem with these proposals is twofold: they rest on a faulty premise that the jury system is broken and they have the potential to change profoundly its operation in unpredictable ways. On jury nullification, see generally Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

4. Although the U.S. Supreme Court has found that the number twelve is not constitutionally required in civil cases, see, e.g., *Colgrove v. Battin*, 413 U.S. 149, 160 (1973), and unanimity is not necessary in criminal cases, see, e.g., *Williams v. Florida*, 399 U.S. 78, 96 (1970), federal and many state courts have retained both these attributes in criminal cases. The Court has also indicated that the deliberative function of the jury is impaired at some point by the combination of reduced size and non-unanimity. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (jury of five substantially threatens guarantees of Sixth and Fourteenth Amendments concerning fair cross-section of community).

5. Carol J. Clover, *Movie Juries*, 48 DEPAUL L. REV. 389, 390 (1998). Clover argues that most trial films position the audience as the real jury—as “extradiegetic triers of fact” who “judge the film both as a piece of cinema and as a piece of law.” *Id.* at 403–04. *12 Angry Men* invites the audience to judge the jury’s performance as well as the film’s, but the dynamic here is different from the typical trial film that Clover describes, in which the audience fills in for the (absent or invisible) jury.

6. As Juror #11 observes,

We have a responsibility. This, I have always thought, is a remarkable thing about democracy. . . . That we are notified by mail to come down to this place and decide on the guilt or innocence of a man we have never heard of before. We have nothing to gain or lose by our verdict. This is one of the reasons why we are strong.

Rose, *supra* note 2, at 276. The notes in the screenplay describe Juror #11 as “[a] refugee from Europe who has come to this country in 1941.” *Id.* at 160.

liberations also suggest that the improvisation and flexibility required by the absence of fixed rules make it possible for juries to function as well as they do.

The narrative structure of the film, eschewing a wide array of nonlinear techniques in favor of the virtually real time depiction of the deliberation, is central to the way the film imagines the work of a jury. The filmmakers lock their viewers with the jurors into a hot, airless room. There will be no flashback of the crime, privileging the audience—and one version of events—with certainty. There will be no firsthand view of the scene, or the witnesses for that matter, from which we might draw our own inferences and conclusions. The truth, we soon realize, is unknowable. With a man's life in its hands, the jury must consider the multiple narratives generated by any trial and distinguish not which one is right but which survives the test of reasonable doubt. Throughout their deliberations they must grapple with the question first raised by Juror #8 in the face of the other jurors' initial certainty: "Supposing we're wrong?"<sup>7</sup>

Talking with law students about *12 Angry Men* is a lot like talking with law students about juries generally. The trained certainties drain away as they wonder whether they will be able to convince twelve diverse and unpredictable people of anything. Their responses remind us that this film is not just about juries, but also about lawyering, which helps make it both relevant—and teachable—fifty years after its release. Alexis de Tocqueville, who was a great fan of the American jury, observed that juries are "the most efficacious means of teaching [the people] how to rule well."<sup>8</sup> *12 Angry Men* dramatizes the relationship between the deliberative process in which juries engage and the larger cultural work of law and democratic institutions. In the following pages, we will explore this dramatization, bringing to bear our own experiences: Babcock as trial lawyer and teacher of procedure, Sassoubre as a teacher of cultural studies of law.

## I. TRIAL IN THE JURY ROOM

Eleven jurors take the defendant's guilt for granted at the beginning of *12 Angry Men* because the defense attorney has done so little to challenge the prosecution's narrative. Juror #8 alone has noticed this: "[E]verybody sounded so positive that I started to get a peculiar feeling about this trial. I mean nothing is that positive." He has also noticed that the defense attorney

7. *Id.* at 178.

8. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 128 (Richard D. Heffner ed., 1984) (1835).

did not conduct “thorough enough cross examination[s],” letting too many “[l]ittle things” go. “I had questions I would have liked to ask,” he says, and—assuming the defense attorney’s role—proceeds to ask them of the jury.<sup>9</sup>

Juror #8’s performance as a surrogate defender is instructive with regard to the interlocking ideals of due process and a jury of one’s peers. The defense attorney’s work is to show that competing narratives (the defendant’s alibi, alternatives to the witness accounts, different representations of the weapon) have persuasive force. In this way, *12 Angry Men* openly acknowledges what we all know intuitively to be right: there is no fair trial without effective assistance of counsel. A jury cannot do its job if the lawyers have not done theirs.

The process of considering competing narratives on which Juror #8 insists leads to a recounting of the trial through the jury’s deliberations. These begin, as the trial surely did, with the jurors’ impressions of the prosecutor: an “expert” with “a lot of drive” who “hammered home his points, one by one, in logical sequence.”<sup>10</sup> The case this “impressive” man has made is reproduced primarily by Juror #3 (an “excitable” man certain of the defendant’s guilt for what turn out to be personal reasons)<sup>11</sup> and Juror #4 (a coolly logical man certain of the defendant’s guilt for abstract sociological reasons) through what they call “the facts.” The case entails two eyewitnesses, a murder weapon, and motive, backed up, we are led to suspect, by assumptions based on the defendant’s class and ethnicity.<sup>12</sup> (Most commentaries on the film assume the defendant is Puerto Rican.)

Even without bias, however, as the prosecution’s case is laid out, Juror #3’s insistence that “[y]ou can’t refute facts” seems correct.<sup>13</sup> But Juror #3 has confused facts for proof. Juror #8’s lawyerly method gradually induces the others to interpret the meaning of the prosecutor’s “facts” for themselves. The momentum of the deliberations begins to change when Juror #8 questions the motive offered by the prosecution (being hit by his father) when “violence is practically a normal state of affairs for” the defendant.<sup>14</sup> He goes on to produce a knife identical to the murder weapon, undermining the prosecution’s association of a particular weapon with the defendant, and to reenact the elderly witness’s testimony, showing the witness could

9. Rose, *supra* note 2, at 197.

10. *Id.* at 171.

11. *See id.* at 217.

12. Juror #10, for example, asserts that the defendant is lucky to have gotten a trial at all and that people of his class and ethnicity are “born liars.” *Id.* at 180, 312.

13. *Id.* at 185.

14. *Id.* at 190.

not have seen the defendant's face. In the process "certain facts" are revealed as "social facts" shaped by contexts and interpretations.

Juror #8's masterly cross-examination technique only strengthens this point, as he gets jurors to contradict what they have already claimed to be unassailably true over and over again. An early instance is his challenge of Juror #10's reliance on the testimony of a witness when he had previously insisted that everyone of that witness's ethnicity is a liar. When Juror #12 resists the idea that witnesses might be wrong, Juror #8 asks him whether he can know with certainty that they have not made a mistake. With his own imperfect knowledge implicated, Juror #12 is forced to concede that "[t]his isn't an exact science."<sup>15</sup> Later, Juror #8 baits Juror #3 into threatening to kill him, despite Juror #3's earlier claim that people making such threats always mean it. The jury's certainty, and the pro-conviction majority, begins to erode.

In this part of the deliberations, Juror #8 does what the defense attorney failed to do—he tests whether the prosecution's case leaves room for reasonable doubt. But even a more competent defense would not have eliminated the work of the jury. As Juror #8 argues, court-appointed attorneys have little incentive to fight for clients without strong cases, and moreover, "[l]awyers aren't infallible."<sup>16</sup> Both the district attorney and the defense have, for example, apparently missed the physical characteristics of certain witnesses (a limp in one case, bad eyesight in another) that might have undermined their veracity. Even lawyers doing their jobs as well as they can be realistically expected to do them, the film implies, cannot produce an "open and shut case."

Once Juror #8 has established the possibility of reasonable doubt, the peculiar thing that juries do starts to happen: their individual experience and impressions begin to work together. Juror #11 wonders why the defendant would return to the scene of the crime. "From what was presented at the trial the boy looks guilty," he observes, "on the surface. But maybe if we go deeper . . ."<sup>17</sup> Juror #2 wonders about the angle of the stab wound, a part of the prosecutor's story that has been "bothering me a little."<sup>18</sup> Juror #9, an older man himself, explains why the elderly witness might have exaggerated what he saw to be important. Juror #6 has been painting near an el track and knows the deafening sound of a passing train. Juror #5 grew up in a neighborhood like the defendant's and can demonstrate the proper

15. *Id.* at 198.

16. *Id.* at 248.

17. *Id.* at 250.

18. *Id.* at 300.

use of a switchblade knife. In this way, the film reveals the crucial role that the individual experiences and knowledge of jurors plays in what a jury does, as well as the collaborative process through which juries deliberate.

## II. PROCESS AND VALUES

The jury in *12 Angry Men* is given no guidance in its procedures.<sup>19</sup> “We have a job to do,” the foreman asserts, “Let’s do it.”<sup>20</sup> But the nature of the job itself is not immediately clear. In the first moments of the deliberations, the jurors talk about a “fair trial” having been conducted as if their own work were not implicated. By his initial not-guilty vote, Juror #8, corrects this misunderstanding—he insists that their task is to “talk[] about” the evidence offered at trial.<sup>21</sup> Discussing the evidence strikes pro-conviction jurors as a “waste of time,” but as the film unfolds, it becomes increasingly clear that time and talk are the essential tools of a jury.<sup>22</sup> Without actual deliberation there can be no fair trial.

Although their procedures will evolve over the course of the deliberations, the jury assumes certain values from the beginning. One is disinterest or impartiality—the sense that the deliberations ought not become personal. A general rule of civility is also assumed, though frequently tested.

Another important value that emerges more slowly from the deliberations is integrity. Juror #8 explains his not-guilty vote in terms of integrity—“It’s not so easy for me to raise my hand and send a boy off to die without talking about it first”<sup>23</sup>—as does Juror #9, when he changes his vote in support of Juror #8 out of “respect” for his “motives.”<sup>24</sup> By the time that Juror #7 attempts to change his vote merely to expedite a verdict, the majority of the jury rejects the shift because it lacks conviction. A juror must believe in his vote. As the central importance of integrity is established in the group, its connection to the democratic values of dissent and independence also emerges.

Each man has a voice as well as a vote, and the group enforces the mandate that no individual should be silenced. (The one exception is the exclusion of Juror #10 during his racist rant—and the group here is rejecting Juror #10’s position as not merely ignorant but undemocratic.) This

19. What we are shown is the judge’s dispassionate reminder that a guilty verdict will result in a capital sentence (a reminder the foreman repeats at the beginning of the deliberations), with the additional information that the verdict must be unanimous. *See id.* at 162–63.

20. *Id.* at 182.

21. *Id.* at 178.

22. *Id.* at 268.

23. *Id.* at 178.

24. *Id.* at 219.

procedure puts the integrity of each juror very much on the line—as the group discovers when it attempts to employ a secret ballot on the second vote, “[t]here are no secrets in a jury room.”<sup>25</sup> Each man has to own his position publicly.

It is significant, however, that only those who vote guilty are required to justify their position. Just as the defendant is not required to prove his innocence, no juror with reasonable doubt must defend that doubt. Only guilt must be proved, and in this way the process the jury employs further reveals the “job” the jury must do—to reach a verdict when it is not possible to know with certainty.

The collaborative process of interpreting the evidence that begins once Juror #8 has successfully questioned the prosecution’s narrative has two effects. One is to generate a sense of community among the group of strangers. In the breaks in the deliberation, moments of interpersonal intimacy—the acceptance of an offered cough drop, the sharing of a personal anecdote—replace previously defensive and hostile asides. By the time Juror #10 launches into his bigoted tirade, the jury moves in unison physically to isolate and reject him. And by the end of the film the formal process of voting has been woven informally into the conversation, indicating just how much the conversation has changed.

The second effect of the group’s collaborative interpretation of the evidence—exploring alternative narratives—provokes pro-conviction jurors to accuse Juror #8 and others of inventing “fables” and “stories” and “fairy tales,” of manipulating the “facts.”<sup>26</sup> Juror #6 articulates the danger starkly when he asks Juror #8, “Supposing you talk us all outa [sic] this, and the kid really did knife his father?”<sup>27</sup> But as Juror #6 himself comes to recognize, ignoring these alternative narratives leads to the dogmatic certainty that ultimately reveals itself as destructive to personhood. Both Juror #10, whose bigotry breaks down into insecurity, and Juror #3, whose anger dissolves into heartbreak, embody the human cost of blind certainty.

Blind certainty—whether it derives from sociological generalization or personal experience—is as much on trial in *12 Angry Men* as the young man accused of killing his father. This trial of prejudice—which first appears as a diffuse and dispassionate presumption of guilt uniting the jurors, but erupts into divisive and unproductive anger—ends not in a verdict but in renunciation. Gradually, the members of the jury jettison their prejudices and assumptions as they confront the complexity and ambiguity of lived

25. *Id.* at 216.

26. *See id.* at 216–17, 253.

27. *Id.* at 225.



experience. In the process, the meek are empowered and the powerful are brought low. The disrespected old man backs Juror #8's gamble, setting the deliberations in motion; the confident stockbroker discovers that logic has blinded him to experience; the timid bank clerk stands up to the knowing business owner; the immigrant schools the all-American salesman in citizenship.

The spectral presence of forensic certainty—embodied in shows like *CSI* and *24*—is presently waxing in the American imagination. *12 Angry Men* reminds us that the jury is necessary for the many cases in which there is not a definitive piece of evidence, in which the truth cannot be known for sure. That the jury may make mistakes, or may express through its verdict community sentiments that are—at best—extra-legal, is part of the system, part of the price we pay to vest the community with absolute power to protect the accused from the state.<sup>28</sup>

#### CONCLUSION: THE REALISM OF *12 ANGRY MEN*

Although fifty years ago, and for most of our history, juries looked much like the one in the film, it is safe to say that today an all-white, all-male jury would be an anomaly not only in New York City, but in most places in the country. By statute and constitutional doctrine, it is now well established that a jury pool must reflect a fair cross section of the community, including ethnic and racial minorities, men and women. But it has been a long and continuous struggle to achieve this diversity, with the action in recent years focused on the abuse of the peremptory challenge.<sup>29</sup>

Showing *12 Angry Men* to students, it is impossible not to worry that the jury's outdated appearance will interfere with the drama and interest of the movie—making it seem less authentic, less in keeping with our ideals. We think, however, that the absence of explicit race or gender tension invites, rather than discourages, discussion of the role of diversity in jury deliberation and the dangers of its absence. Moreover, the values, assumptions, and class positions of *12 Angry Men's* jurors are different in ways that capture or at least serve as proxies for the competing interests and ex-

28. There is certainly something counterintuitive about locating the people's check on the state's power to deprive its citizens of liberty in an opaque and anonymous jury. But as *12 Angry Men* makes clear, opening jury deliberation to public scrutiny would make the deliberative process—in which people are insulated from external judgment as they change their stories, their assumptions, and their minds—impossible.

29. The literature on jury selection and the peremptory challenge is voluminous. See, e.g., Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139 (1993); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683 (2006).

periences of more racially diverse and gender-balanced juries. Over the course of the film, the homogeneity of the jury is revealed to be entirely superficial. They may all be white men, but the film shows just how shallow that similarity can prove.

There is also the question of the basic plotline: one juror bringing eleven others to his position by the force of reason and the invocation of due process ideals. Does that ever really happen? Many years ago in Washington, D.C., one of us—Barbara Babcock—tried a hard-fought case with an insanity defense. If convicted, my client, who had already spent most of her adult life in prison, faced a mandatory twenty-year sentence (without the possibility of probation or parole).

For tactical reasons, I did something I never dared before or after and accepted the first twelve jurors called—exercising neither cause nor peremptory challenges. During the trial, I came to regret this decision simply because I grew so to dislike the looks of the jury. They were diverse enough, heaven knows, but regardless of race or gender they shrugged and sneered and slept as I presented the evidence of my client's horrendous childhood on the streets, her terrible addiction to heroin, and its toll on the development of her personality,

Juror #6 in particular distressed me. I can see her today—a large Germanic woman whose hair looked like she cut it herself with a bowl over her head. During my closing pleas for mercy and understanding, she rolled her eyes and shook her head. The only thing that sustained me during the dreary days of the trial was the expectation that the judge would grant a directed verdict.

But instead he sent them out to deliberate and they took three long days. The marshal reported hearing a lot of yelling, and maybe some crying. They finally came back with the verdict of not guilty by reason of insanity, which meant that my client would go to a mental hospital instead of a prison and probably for a short time. As my client and I embraced in the joy of the moment, Juror #6 joined us: "Well, we went out 11-1 for conviction, but I was finally able to bring them around."

She was white and well-educated, with a life as different from my client's as possible to imagine growing up in the same city. Yet, her eye-rolls had been signs of empathy, and her head-shakings of understanding. She had led the group to the common judgment that my client should be treated and not punished. I have believed in the ultimate goodness and wisdom of juries ever since. The transformation of the jury in *12 Angry Men* may not be typical, but neither is it chimerical.

*12 Angry Men* is teachable today because juries remain as inscrutable and essential as they were fifty years ago. And it is hard to imagine a better dramatization of deliberative process as we hope it will work, in which bias and indifference yield to integrity, in which strangers listen to one another, in which difference is a strength.