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THE TRIAL OF THE JURORS – A COMMENTARY ON *12 ANGRY MEN*

JONATHAN K. VAN PATTEN[†]

The movie, 12 Angry Men, is a fictionalized portrayal of a deliberation in a murder case from inside the jury room. It provides a memorable treatment of the difficulty of deciding a case solely on the evidence admitted, as well as illuminating the dynamics of argument, emotion, and persuasion, particularly where deep-seated passions preclude honest evaluation of the evidence.

I. INTRODUCTION

In the Book of Daniel, there is a curious story.¹ Belshaz’zar, king of Babylon in 539 BC, held a great feast to celebrate with his family and a thousand of his lords.² He commanded that sacred gold and silver vessels taken from the Temple in Jerusalem be brought to the feast to serve as goblets for wine.³ Ah, the fruits of victory! Amidst this sacrilege, the fingers of a man’s hand appeared, writing on a wall the words: “Mene, Mene, Tekel, Parsin.”⁴ This naturally put a damper on the gala and Belshaz’zar immediately summoned his astrologers and fortune-tellers, but they were of no use for understanding these words.⁵ Eventually, Daniel, a young Israelite in service to the king, was summoned and he provided this interpretation:

Mene, God has numbered the days of your kingdom and brought it to an end; *Tekel*, you have been weighed in the balances and found wanting; *Peres*, your kingdom is divided and given to the Medes and the Persians.⁶

That night, Belshaz’zar died, and with that, his kingship and kingdom came to an abrupt end.⁷

The story is a reminder that no one escapes judgment, no matter how powerful. We are all on trial. We are measured in many ways. But what is being

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1. *Daniel* 5 (RSV).
2. *Daniel* 5:1 (RSV).
3. *Daniel* 5:2-3 (RSV).
4. *Daniel* 5:25 (RSV).
5. *Daniel* 5:7-8 (RSV).
6. *Daniel* 5:13, 26-28 (RSV).

7. *Daniel* 5:30-31 (RSV). This story is the origin of the phrase “the writing on the wall,” used to suggest a warning of something about to fail or no longer existing. *The writing is on the wall*, CAMBRIDGE DICTIONARY, <https://perma.cc/L6DW-YZNR> (last visited Jan. 20, 2024). It is also the subject of a famous painting by Rembrandt, which is housed in the National Gallery in London. See Rembrandt, *Belshazzar’s Feast*, THE NATIONAL GALLERY, <https://perma.cc/KVQ6-A5GV> (last visited Jan. 20, 2024).

measured and who is doing the measuring is not always clear. Yet, in any context, one would not want to hear these words: “You have been weighed in the balances and found wanting.”⁸ In the movie, *The Shawshank Redemption*, the Warden had in his office a needlepoint display, which read: “His judgement cometh, and that right soon.”⁹ It was highly ironic that he ignored this warning (along with: “Watch ye therefore, for ye know not when the master of the house cometh.”).¹⁰ By the time that the Warden realized he had been judged and found wanting, it was too late. As with Belshaz’zar, execution of that judgment swiftly followed (albeit by the Warden’s own hand).¹¹ It had not occurred to either man that despite their great powers, they could be judged, and found wanting.

Jurors are empowered to be judges of the facts and they are accorded a good deal of deference in making decisions. “[T]he jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence[,]” and a reviewing court “will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.”¹² The jury’s verdict will be upheld “unless it is clearly ‘unreasonable, arbitrary and unsupported by the evidence.’”¹³ Jurors take an oath to follow the law, as instructed by the judge, and to base their decision solely on the evidence admitted in the case.¹⁴ The parties are entitled to have their case tried on the basis of evidence properly in the record.¹⁵ This presents a conundrum because jurors are not a blank slate. They bring their knowledge and experience, which is proper,¹⁶ but also their biases and resentments, which is not

8. *Daniel* 5:27 (RSV).

9. *THE SHAWSHANK REDEMPTION* (Castle Rock Entertainment 1994).

10. *Mark* 13:35 (King James).

11. *THE SHAWSHANK REDEMPTION*, *supra* note 9, at 2:00:00. See Jonathan K. Van Patten, *The Trial and Incarceration of Andy Dufresne*, 62 S.D. L. REV. 49 (2017).

12. *State v. Peneaux*, 2023 SD 15, ¶ 24, 988 N.W.2d 263, 269 (quoting *State v. Bausch*, 2017 SD 1, ¶ 33, 889 N.W.2d 404, 413).

13. *Zahn v. Musick*, 2000 SD 26, ¶ 31, 605 N.W.2d 823, 830 (quoting *Kusser v. Feller*, 453 N.W.2d 619, 621 (S.D. 1990)).

14. *State v. Volk*, 331 N.W.2d 67, 70 (S.D. 1983) (“Jurors in our system of jurisprudence must take an oath before they serve. This oath requires that a juror as the finder of fact base his decision solely upon the evidence introduced at trial.”).

15. See, e.g., *Schoon v. Looby*, 2003 SD 123, ¶ 22, 670 N.W.2d 885, 891 (reversing jury verdict because defense counsel’s final argument asked the jury to consider matters outside of the evidence); *Russo v. Takata Corp.*, 2009 SD 83, ¶¶ 37, 40, 774 N.W.2d 441, 451-52 (reversing jury verdict due to juror misconduct of introducing extraneous information into the jury deliberations).

16. *State v. Long Soldier*, 2023 SD 37, ¶ 13, 994 N.W.2d 212, 217 (“[T]he jury was instructed to consider ‘the evidence in light of your own observations and experience in the affairs of life’ reminded to use common sense in determining whether the elements were met.”); *Jensen v. Menard, Inc.*, 2018 SD 11, ¶ 21, 907 N.W.2d 816, 823 (“[A] jury need not take ‘the plaintiff at his word, but . . . may instead test [him] . . . [using] principles of credibility and common sense.’”) (quoting *Westover v. E. River Elec. Power Coop., Inc.* 488 N.W.2d 892, 900, n.15 (1992)).

proper.¹⁷ A jury verdict is generally not reviewable, except where it is the product of passion or prejudice, or the jury has palpably mistaken the rules of law.¹⁸

The movie, *12 Angry Men*,¹⁹ is a fictionalized portrayal of a deliberation in a murder case from inside the jury room. While in real life the jury functions in virtual secrecy, here, we get to listen in, watch, and judge the individuals, as well as the process itself. The jury in this memorable film is by no means a typical jury, but the movie raises many important questions, including the difficulty of deciding a case solely on the evidence admitted, juror misconduct, how the dynamics of argument, emotion, and persuasion play out, particularly where deep-seated passions preclude honest evaluation of the evidence, and the impact of a single juror on the final decision. This review will weigh the jurors “in the balances.” And some will be found wanting.

II. THE CASE AGAINST THE DEFENDANT AND THE GAMBLE

The movie opens with a view of the impressive exterior of the New York County Courthouse with its motto “The Administration Of Justice Is the Firmest Pillar of Good” inscribed on the façade. We are quickly taken inside courtroom 228, where a jury trial is winding up. The judge finishes his instructions to the jury in words that belie his evident boredom:

To continue, you’ve listened to a long and complex case, murder in the first degree. Premeditated murder is the most serious charge tried in our criminal courts. You’ve listened to the testimony, you’ve had the law read to you and interpreted as it applies in this case. It’s now your duty to sit down and try and separate the facts from the fancy. One man is dead. Another man’s life is at stake. If there is a reasonable doubt in your minds as to the guilt of the accused, a reasonable doubt, then you must bring me a verdict of not guilty. If, however, there is no reasonable doubt, then you must, in good conscience, find the accused guilty. However you decide, your verdict must be

17. SDCL 23A-20-13.1:

Challenges for cause may be taken on any of the following grounds:

* * * *

(21) A challenge for actual bias showing the existence of a state of mind on the part prospective juror, in reference to the case or to the defendant, the prosecution, alleged victim, or complainant that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially, without prejudice to the substantial rights of the party challenging.

See also *State v. Darby*, 1996 SD 127, ¶ 34, 556 N.W.2d 311, 320 (“A potential juror should be excused for cause if that juror is unable to set aside preconceptions and render an impartial verdict.”).

18. *Morrison v. Mineral Palace Ltd. Partnership*, 1999 SD 145, ¶ 10, 603 N.W.2d 193, 196 (quoting *Gilkyson v. Wheelchair, Exp., Inc.*, 1998 SD 45, ¶ 15, 579 N.W.2d 1, 5) (“[A] jury’s verdict should not be set aside ‘except in extreme cases where it is the result of passion or prejudice or the jury has palpably mistaken the rules of law’”).

19. *12 ANGRY MEN* (MGM 1957). This film had only modest success after its release. PHIL ROSENZWEIG, *REGINALD ROSE AND THE JOURNEY OF 12 ANGRY MEN* 137-41 (2021). Over time, however, it has become one of the most popular movies of all time, ranking number 5 on the IMDb Top 250 Movies list. *IMDb Top 250 Movies*, *IMDb*, <https://perma.cc/SZX4-PP3Y>.

unanimous. In the event that you find the accused guilty, the bench will not entertain a recommendation for mercy. The death sentence is mandatory in this case. You are faced with a grave responsibility. Thank you, gentlemen.²⁰

This jury is composed of white, middle-aged and older men.²¹ The Defendant²² is a young man, apparently Puerto Rican, who sits apprehensively as he views the “jury of his peers” about to deliberate on his fate. As they leave the courtroom, some jurors take a last look at the Defendant; most depart, however, without looking back.²³ The scene then shifts to the jury room as the men enter and begin to settle in. After the bailiff determines all jurors are in the room, he locks the door.²⁴ The jury is now sequestered until they reach a verdict, but we remain, as secret observers, to observe and judge as they deliberate.

As the jurors find their seats, there are individual conversations, which suggest a certain predisposition:

Juror No. 3:²⁵ What gets me is the way those lawyers talk and talk and talk, even when it’s an open and shut case like this one. I mean, did you ever hear so much talk about nothing?

No. 2: Well I guess they’re entitled.

No. 3: They’re entitled. It’s the system, but if you ask me, I’d slap those tough kids down before they start any trouble. It saves a lot of time and money.²⁶

A little later, we hear the following:

No. 10: . . . you had to sort out all that junk. Like that thing with the movies.

No. 7: Yeah, you can say that again. What about the business with the knife? I mean, asking grown-up people to believe that kind of jazz.

No. 10: You expect that. You know what we’re dealing with.

No. 7: Yeah, I guess so.²⁷

* * * *

The foreman (“Balsam”²⁸) asks the jurors to take their seats.

20. 12 ANGRY MEN, *supra* note 19, beginning at 01:16.

21. There was a remake of this film forty years later. 12 ANGRY MEN (MGM 1997). That jury was ethnically and racially more diverse. This commentary will focus solely on the original film, which was directed by Sidney Lumet, adapted from a 1954 teleplay of the same name by Reginald Rose.

22. We are never told the name of the Defendant.

23. 12 ANGRY MEN, *supra* note 19, beginning at 2:30.

24. *Id.*, beginning at 3:30.

25. The jurors will be identified by number until there is enough foundation to give them each a better introduction.

26. 12 ANGRY MEN, *supra* note 19, beginning at 6:04.

27. *Id.*, beginning at 7:35.

28. The role of the foreman was played by Martin Balsam, who had a prolific career in character roles in film, in theatre, and on television. He won an Academy Award for Best Supporting Actor in *A Thousand Clowns* (1965). He also had roles in *Psycho* (1960), *Breakfast at Tiffany’s* (1961), *Catch-22* (1970), *The Taking of Pelham One Two Three* (1974), *Murder on the Orient Express* (1974), and *All the President’s Men* (1976). *Martin Balsam Biography*, *IMDB*, <https://perma.cc/5TPV-YTGV>; *Martin*

The first order of business is to decide whether to discuss, deliberate, or simply take a vote and be done, if there is unanimity. Juror No. 4 suggests that it is customary to take a vote first.²⁹ This is done by a show of hands.³⁰ Most raise their hands right away for a guilty verdict, although a few do so with some hesitation. But Juror No. 8 is the lone holdout for not guilty.

Balsam: Eleven guilty. One not guilty. Well, now we know where we are.

No. 10: Boy, oh boy. There's always one.

No. 7: So what do we do now?

No. 8 ("Fonda"³¹): Well, I guess we talk.³²

When asked directly, "Do you really think he is innocent?," Fonda admits, "I don't know."³³ He expresses his reluctance to send the young man to the electric chair without more discussion. "I just think we owe him a few words, that's all."³⁴ That sets off Juror No. 10 (whom we may safely call "The Bigot"³⁵) who responds: "I don't mind telling you this, mister. We don't owe him a thing."³⁶ The Bigot then launches into a tirade ending with: "You're not going to tell me that we're supposed to believe this kid, knowing what he is. Listen, I've lived among them all my life. You can't believe a word they say. You know that. I mean, they're born liars."³⁷ This draws a sharp response from Juror No. 9 ("Sweeney"³⁸): "Only

Balsam, IMDB, <https://perma.cc/4L2C-HQMS>. He was also married at one time to Joyce Van Patten (m. 1957-1962), a distant cousin of mine. In *12 Angry Men*, Balsam's character revealed he was an assistant high school football coach. *12 ANGRY MEN*, *supra* note 19, beginning at 1:05:17.

29. *12 ANGRY MEN*, *supra* note 19, beginning at 10:39.

30. *Id.*, beginning at 11:09.

31. The appropriately white-suited Juror No. 8 was played by Henry Fonda. Fonda was an American actor whose career spanned five decades on Broadway and in Hollywood. He was born and raised in Nebraska. His major films included *Young Mr. Lincoln* (1939), *The Grapes of Wrath* (1940), *The Ox-Bow Incident* (1943), *Mister Roberts* (1955), and *On Golden Pond* (1981). *Henry Fonda Biography, IMDB*, <https://perma.cc/X8BR-KFQG>. Fonda co-produced *12 Angry Men* with its scriptwriter and original playwright, Reginald Rose. ROSENZWEIG, *supra* note 19, at 99-100. Of particular interest to students of the law is Fonda's one-man show on the life of Clarence Darrow. Keywslt, *Clarence Darrow, Henry Fonda, Made for TV 1974*, YOUTUBE, <https://perma.cc/ET3U-SGAX>. If you have not seen this magnificent and deeply moving play, please do so. You will be glad you did.

32. *12 ANGRY MEN*, *supra* note 19, beginning at 11:40.

33. *Id.*, beginning at 11:55.

34. *Id.*, beginning at 14:06.

35. Juror No. 10 was played by Ed Begley, a veteran actor of theatre, radio, film, and television. He won an Academy Award for Best Supporting Actor in *Sweet Bird of Youth* (1962) and a Tony Award for his portrayal of Matthew Harrison Brady (think William Jennings Bryan) on Broadway in *Inherit the Wind*. *Ed Begley Biography, IMDB*, <https://perma.cc/M2WK-3U7A>. Begley was a late replacement for Edward Arnold, one of three holdover actors from the television version, who died suddenly from a cerebral hemorrhage less than two months before rehearsals were to begin. ROSENZWEIG, *supra* note 19, at 120.

36. *12 ANGRY MEN*, *supra* note 19, beginning at 14:09.

37. *Id.*, beginning at 14:22.

38. The important role of Juror No. 9 was played by Joseph Sweeney. He was a veteran actor who worked in stage productions, television, and movies. He is best known for this role, one he originated in the 1954 live teleplay of which this film was an adaptation. *Joseph Sweeney Biography, FANDANGO*, <https://perma.cc/XG7E-TJF2>. He also had a long-standing connection with director Sidney Lumet, who acted with Sweeney when Lumet was a child actor. See Frank Cunningham, *Sidney Lumet's Humanism: The Return to the Father in Twelve Angry Men*, 14 LITERATURE/FILM Q., no. 2, 1986, at 115 n.2.

an ignorant man can believe that.”³⁹ This is the first sign that Fonda may have an ally.

It is finally decided that the discussion should allow each juror to express why they voted for guilty. The foreman starts with the juror to his immediate left, Juror No. 2, a shy, nervous bank clerk (“Fiedler”⁴⁰), who said, “It’s hard to put into words. I just think he’s guilty. I thought it was obvious from the word go. I mean nobody proved otherwise.”⁴¹ This brings a quick reply from Fonda: “Nobody has to prove otherwise. The burden of proof is on the prosecution. The defendant doesn’t have to open his mouth. That’s in the Constitution.”⁴²

Juror No. 3 (“Cobb”⁴³) jumps in and we get the first statement of facts about the case:

Okay. Here’s what I think, and I have no personal feelings about this.⁴⁴ I just want to talk about facts. Number one. The old man lived downstairs under the room where the killing took place. At ten minutes after twelve on the night of the killing, he heard loud noises. Said it sounded like a fight. And he heard the kid yell out, “I’m going to kill you.” A second later, he heard a body hit the floor. Ran to the door, opened it up, saw the kid running down the stairs and out of the house. Called the police. They came in and found the old man with the knife in his chest. The coroner fixed the time of death around midnight. Now, these are facts. You can’t refute facts. The kid is guilty.⁴⁵

Juror No. 4 (“Marshall”⁴⁶) follows:

It is obvious to me, anyway, that the boy’s entire story was flimsy. He claimed he was at the movies during the time of the killing, and yet one hour later, he couldn’t remember the names of the films he saw or who played in them And no one saw him going in or out of the theater.⁴⁷

39. 12 ANGRY MEN, *supra* note 19, beginning at 14:35.

40. John Fiedler was Juror No. 2. His career lasted more than fifty-five years in stage, film, television, and radio. He is best known as the voice of Piglet, as well as for voices in other Disney animated films, such as *The Rescuers* (1977). *John Fiedler*, WIKIPEDIA, <https://perma.cc/3D4W-R2G7> (last visited Jan. 25, 2024).

41. 12 ANGRY MEN, *supra* note 19, beginning at 15:44.

42. *Id.*, beginning at 15:55.

43. Juror No. 4 was Lee J. Cobb, a veteran actor, known for originating the role of Willy Loman in Arthur Miller’s play *Death of a Salesman*. He was twice nominated for an Academy Award for Best Supporting Actor and played the director of a CIA-like spy group in *Our Man Flint* (1966) and *In Like Flint* (1967). *Lee J. Cobb*, WIKIPEDIA, <https://perma.cc/6ZT6-8PXR> (last visited Jan. 25 2024).

44. It becomes obvious later on that this gratuitous editorializing (“I have no personal feelings about this”) is simply not true.

45. 12 ANGRY MEN, *supra* note 19, beginning at 16:13.

46. Juror No. 3 was played by E.G. Marshall, another veteran actor, who was probably best known for the lead role in *The Defenders*, a TV series in which he played a trial lawyer and also as the host of the long running radio series, *The CBS Radio Mystery Theater*. *E.G. Marshall*, WIKIPEDIA, <https://perma.cc/BXF7-XTXV>.

47. 12 ANGRY MEN, *supra* note 19, beginning at 17:07.

The Bigot then jumps in (out of turn): “Listen, what about the woman across the street? If her testimony don’t prove it, nothing does.”⁴⁸ Juror No. 11 (“Voskovec”⁴⁹) agrees: “That’s right. She was the one who actually saw the killing.”⁵⁰ Balsam attempts to restore order, but the Bigot ignores him and goes on:

Here’s a woman who’s lying in bed. She can’t sleep. She’s dying with the heat [S]he looks out the window, and right across the street she sees the kid stick the knife into his father. The time is 12:10 on the nose. Everything fits. Look, she’s known the kid all his life. His window is right opposite her across the L tracks.⁵¹

Fonda asks the Bigot directly: “You don’t believe the boy’s story. How come you believe the woman’s? She’s one of *them*, too, isn’t she?”⁵² The Bigot is stung by this observation, as the woman was evidently of the same ethnicity as the Defendant. He replies sullenly: “You’re a pretty smart fellow, aren’t you?”⁵³ If this were a fencing match, Fonda would have drawn first blood.

The discussion moves on to Juror No. 5 (“Klugman”⁵⁴), who is the youngest member of the jury. He is reluctant to speak and asks if he could pass for the moment.⁵⁵ Juror No. 6 (“the Painter”⁵⁶) is also not accustomed to speaking. He struggles to articulate his reasons and seizes upon motive as a basis, citing testimony about a fight between the Defendant and his father, though he backs down quickly and admits that it does not prove that the Defendant did the homicide.⁵⁷ It was just part of the overall picture. He is an honest juror but clearly not a leader in this group.

Juror No. 7 (“Warden”⁵⁸), who had been the most vocal when it came to jokes and barbs, is virtually speechless when it is his turn to give his position, “I don’t know. It’s all been said. You can talk here forever. It’s still the same

48. 12 ANGRY MEN, *supra* note 19, beginning at 17:19.

49. George Voskovec played the role of Juror No. 11. He was a Czech (Bohemian) actor, writer, and director, who emigrated to the United States in 1939 to escape the Nazis and then again in 1948 to escape the Soviet regime in his native Czechoslovakia. *George Voskovec*, WIKIPEDIA, <https://perma.cc/QKP4-JNQ5>.

50. 12 ANGRY MEN, *supra* note 19, beginning at 17:23.

51. *Id.*, beginning at 17:30.

52. *Id.*, beginning at 18:10.

53. *Id.*, beginning at 18:18.

54. Juror No. 5, the last surviving member of the jury, was played by Jack Klugman. He starred on Broadway in the original version of *The Odd Couple* and was best known for his role in the popular TV series *Quincy, M.E.* See *Jack Klugman*, WIKIPEDIA, <https://perma.cc/4XHE-FLYE>.

55. 12 ANGRY MEN, *supra* note 19, beginning at 18:35.

56. Juror No. 6 was played by Edward Binns. Director Sidney Lumet used him again as the Archbishop in *The Verdict* (1982). *THE VERDICT* (20th Century Fox 1982); See also *Edwin Binns*, WIKIPEDIA, <https://perma.cc/299X-SJX4>.

57. 12 ANGRY MEN, *supra* note 19, beginning at 18:53.

58. Juror No. 7 was played by Jack Warden, another veteran actor, whom Sidney Lumet used in *The Verdict*. *THE VERDICT* (20th Century Fox 1982) as Paul Newman’s mentor, Mickey Morrissey. He had many other memorable roles, including the President of the United States in *Being There* and a wealthy political donor in *Shampoo*. *BEING THERE* (Warner 1980); *SHAMPOO* (Sony Pictures 1975); *Jack Warden*, WIKIPEDIA, <https://perma.cc/SRWA-Q8AR>.

thing.”⁵⁹ He has tickets to the baseball game at Yankee Stadium and doesn’t hesitate to let the others know that he would like the deliberation to end as soon as possible.⁶⁰ He offers the Defendant’s prior bad acts as another reason for a quick guilty verdict:

This kid is 5 for 0. Well look at his record. When he was ten, he was in children’s court. He threw a rock at a teacher. When he was fifteen, he was in reform school. He stole a car. He’s been arrested for mugging. He was picked up twice for knife fighting. They say he’s real handy with a knife. Oh, this is a very fine boy.⁶¹

Fonda responds: “Ever since he was five years old his father beat him up regularly. He used his fists.”⁶² And Warden replies: “And so would I. A kid like that?”⁶³ This leads to a discussion about kids and a general lack of respect for their parents, a perpetual lament.⁶⁴

Marshall tries to pull the discussion back from the personal,⁶⁵ but his statement that we should not put the full blame on today’s kids because everyone knows that “slums are breeding grounds for criminals”⁶⁶ only serves to ignite a protest from Klugman: “Listen, I’ve lived in a slum all my life I’ve played in backyards that were filled with garbage. Maybe you can smell it on me.”⁶⁷ Balsam tries to calm things down, ineffectively claiming that the clear insult should not be taken personally.⁶⁸ Voskovec, who recently emigrated from Europe, understands Klugman’s sensitivity.⁶⁹

Balsam makes another attempt to bring back the discussion back to the point, but stumbles again when he calls on Fonda as the next one to speak.⁷⁰ Fonda

59. 12 ANGRY MEN, *supra* note 19, beginning at 20:03.

60. *Id.*, beginning at 8:31.

61. *Id.*, beginning at 20:12. See generally SDCL §§ 19-19-403, 404 (circumscribing the admissibility of prior bad acts); JOHN W. LARSON & MARY CHRISTINE HUTTON, SOUTH DAKOTA EVIDENCE §§ 403.1 – 404.2[2] (2d Ed. 2013).

62. 12 ANGRY MEN, *supra* note 19, beginning at 20:35.

63. *Id.*, beginning at 20:40.

64. Although the discussion appears to wander, Cobb’s personal story about his son becomes important later on: “It’s these kids, the way they are nowadays. When I was a kid, I used to call my father ‘Sir.’ That’s right, ‘Sir.’ Do you ever hear a kid call his father that anymore?” *Id.*, beginning at 20:43. He pulls out a picture of his son and goes on:

Twenty-two years old. When he was nine years old, he ran away from a fight. I saw it. I was so embarrassed I almost threw up. I said, “I’m going to make a man out of you if I have to break you in two trying.” Well, I made a man out of him. When he was sixteen, we had a fight. Hit me in the jaw. He was a big kid. Haven’t seen him for two years. Kids. You work your heart out [Fonda looks at him thoughtfully.]

Id., beginning at 21:07.

65. “I think we’re missing the point here. This boy, let’s say he’s the product of a broken home and a filthy neighborhood. We can’t help that. We’re here to decide whether he’s innocent or guilty. Not to go into the reasons why he grew up the way he did.” *Id.* beginning at 21:55.

66. *Id.*, beginning at 22:09.

67. *Id.*, beginning at 22:26.

68. *Id.*, beginning at 22:35.

69. *Id.*, beginning at 22:42. We are beginning to see pushback from the less vocal jurors, as they gain confidence through agreement or disagreement with the various points made.

70. *Id.*, beginning at 22:50.

reminds him that the agreement was to hear from everyone else why they believed the evidence supported their guilty vote.⁷¹ Corrected, Balsam agrees, but the Bigot jumps in and demands that Fonda speak: “He’s the one who’s keeping us in here.”⁷² Losing control of the discussion, Balsam sarcastically offers to let the Bigot take over the foreman’s duties.⁷³ And then he offers to let Juror No. 12 (the “Ad Man”⁷⁴) assume the role, who instead tries to soothe the hurt feelings.⁷⁵ Balsam then sits down, turns his back on the conversation, and sulks.⁷⁶

And so, it comes back to Fonda to begin to explain the basis for his doubt.⁷⁷ Up to this point, he had simply expressed a desire to talk and, where appropriate, offered corrections or counterpoints. He starts with his sense that the Defendant’s lawyer had not done a very good job, and that if he were the defendant, he would have asked for another lawyer.⁷⁸ “I mean, if I were on trial for my life, I’d want my lawyer to tear the prosecution’s witnesses to shreds, or at least try to.”⁷⁹ What should have been done differently? Fonda frames the case in terms of the two principal witnesses: the woman who said she saw the Defendant stab the father and the neighbor down below who heard the shouting, the body fall, and the Defendant hurrying out of the building.⁸⁰ He asks the question, could those two witnesses have been wrong?⁸¹ Was it possible? Fonda begins to explore this rhetorical question seriously.

But first, Cobb wants to direct the discussion to what he feels is the strongest piece of evidence—the switch knife found in the father’s chest.⁸² The Defendant admitted he bought one the night of the killing.⁸³ Fonda is receptive to this: “Alright, let’s talk about it. Let’s get it in here and look at it. I’d like to see it again. Mr. Foreman.”⁸⁴ Cobb objects: “We all saw what it looks like. Why do we have to see it again?”⁸⁵ Marshall states, impartially, that Fonda has a right to call for examination of the evidence.⁸⁶

71. *Id.*, beginning at 22:52.

72. *Id.*, beginning at 23:00.

73. *Id.*, beginning at 23:20.

74. Robert Webber played the role of Juror No. 12, an advertising executive. He was a veteran actor whose movie credits included *The Silencers* (1966), *The Dirty Dozen* (1967), *10* (1979), and *Private Benjamin* (1980) and whose television credits included *The Rifleman* (1959), *The Fugitive* (1964), *Moonlighting* (1986-88), *The Rockford Files* (1975-79), and *Quincy, M.E.* (1977-79) <https://perma.cc/C5SR-K4WD>.

75. 12 ANGRY MEN, *supra* note 19, beginning at 23:35.

76. *Id.*, beginning at 23:55.

77. *Id.*, beginning at 23:58.

78. *Id.*, beginning at 24:21.

79. *Id.*, beginning at 24:52.

80. *Id.*, beginning at 24:59.

81. *Id.*, beginning at 24:14.

82. *Id.*, beginning at 25:43.

83. *Id.*, beginning at 25:56. Fiedler objects for the first time to this change but is swatted down rudely. *Id.*, beginning at 25:46. However, this is the first evidence of his investment in the discussion.

84. *Id.*, beginning at 26:00.

85. *Id.*, beginning at 26:04. Although we soon see why Fonda asked for the knife, we should also note the effect thereafter that the tangible piece of evidence has on the discussion. It was indeed a very effective prop. Perhaps there is a lesson there for trial lawyers.

86. *Id.*, beginning at 26:07.

While they are waiting for the knife, Marshall takes the lead on the discussion, his voice rising with excitement as if he were making a closing argument:

The knife and the way it was bought is pretty strong evidence, don't you think? [Fonda agrees.] Now suppose we take these facts one at a time. One, the boy admitted going out of the house at 8:00 on the night of the murder after being slapped several times by his father. [The Painter objects to "slapped"]⁸⁷ After being hit several times by his father. Two, he went directly to a neighborhood junk shop where he bought one of those . . . [he hesitates and Klugman supplies "switch knives"] switch blade knives. This wasn't what you would call an ordinary knife. It had a very unusual carved handle and blade. The storekeeper who sold it to him said it was the only one of its kind he had ever had in stock. Three, he met some friends of his in front of a tavern about 8:45. Am I right so far? [Fonda: "Yes, you are."] He talked with his friends for about an hour, leaving them at 9:45. During this time, they saw the switch knife. Four, they identified the death weapon in court as that very same knife. Five, he arrived home at about 10:00. Now this is where the stories offered by the State and the boy begin to diverge slightly. He claims that he went to a movie at about 11:30, returning home at 3:10 to find his father dead and himself arrested . . . Now, what happened to the switch knife? He claims it fell through a hole in his pocket on the way to the movie, sometime between 11:30 and 3:10 and that he never saw it again. Now, there is a tale, gentlemen.

I think it's quite clear that the boy never went to the movies that night. No one in the house saw him go out at 11:30. No one at the theater identified him. He couldn't even remember the names of the pictures he saw. [The bailiff delivers the knife to Balsam who hands it to Marshall.] What actually happened is this. The boy stayed home, had another fight with his father, stabbed him to death and left the house at ten minutes after 12:00. He even remembered to wipe the knife clean of fingerprints.⁸⁸

Now fully embracing this scenario, Marshall challenges Fonda to refute his summation.⁸⁹ Fonda, almost defensively, resists: "No, I'm just saying it's possible the boy lost his knife and that somebody else stabbed his father with a similar knife. It's just possible!"⁹⁰ Marshall, now with the assurance of a poker player sitting on a full house, plants the knife into the wooden table and says:

87. A small step, but it is an indication that the Painter has become invested in the discussion.

88. *Id.*, beginning at 26:16. At this point, Marshall looks pretty satisfied with his summation. *Id.*, beginning at 28:04.

89. *Id.*, beginning at 28:08.

90. *Id.*, beginning at 28:18.

“Take a look at this knife. It’s a very unusual knife. I’ve never seen one like it. Neither had the storekeeper who sold it to the boy. Aren’t you asking us to accept a pretty incredible coincidence?”⁹¹ Fonda, almost desperate: “I’m just saying a coincidence is possible.”⁹² Cobb takes the bait and jumps in: “And I say it’s not possible.”⁹³ With that, Fonda’s expression softens like one who is holding a straight flush, reaches into his pocket, and plants a virtually identical knife in the table next to the evidence knife.⁹⁴

The room erupts with shock.⁹⁵ “Where did that come from?”⁹⁶ Fonda says: “I went out walking for a couple of hours last night. I walked through the boy’s neighborhood. I bought that at a little pawn shop just two blocks from the boy’s house. It cost six dollars.”⁹⁷ Cobb begins to recover: “Listen, you pulled a real, bright trick. Now supposing you tell me what it proves.”⁹⁸ Fonda is less forceful here and goes no further than to assert that it is possible the Defendant lost his knife and someone else stabbed the father with a similar knife.⁹⁹ “But not probable,” Marshall quickly counters.¹⁰⁰

As the jurors settle back in, Cobb and the Bigot play their best card at this point—mistrial. Cobb: “There are still eleven of us here who think he’s guilty.” The Bigot: “Right, what do you think you are going to accomplish? You’re not going to change anybody’s mind. So if you want to be stubborn and hang this jury, go ahead. The kid will be tried again and found guilty, sure as he’s born.”¹⁰¹ Fonda gets up slowly and walks toward a window, acknowledging: “You’re probably right.”¹⁰² Warden asks: “So, what are you going to do? We could be here all night.” And Sweeney adds, helpfully: “It’s only one night. A boy could die.”¹⁰³

Thoughtfully, Fonda turns slowly from the window, moves to the center of the room, and makes a statement:

I have a proposition to make to all of you. I’m going to call for another vote. I want you eleven men to vote by secret written ballot. I’ll abstain. If there are eleven votes for guilty, I won’t stand alone. We’ll take in a guilty verdict to the judge right now.

91. *Id.*, beginning at 28:23.

92. *Id.*, beginning at 28:37.

93. *Id.*, beginning at 28:39.

94. *Id.*, beginning at 28:41.

95. *Id.*, beginning at 28:47.

96. *Id.*

97. *Id.*, beginning at 28:54. Well, here is a flaw in Fonda’s shining armor. As dramatic and essential it is to the story, this is clear juror misconduct. He did his own research and brought in evidence not properly vetted in court. *See, e.g., Russo v. Takata Corp.*, 2009 SD 83, 774 N.W.2d 441 (holding juror misconduct required reversal of the jury verdict due to a juror’s revelation during jury deliberations of conducting an internet search).

98. 12 ANGRY MEN, *supra* note 19, beginning at 29:08.

99. *Id.*, beginning at 29:27.

100. *Id.*, beginning at 29:28.

101. *Id.*, beginning at 29:45.

102. *Id.*, beginning at 29:57.

103. *Id.*, beginning at 29:59.

But if anyone votes not guilty, we stay here and talk it out. Now that's it. If you want to try it, I'm ready.¹⁰⁴

One might question whether this is a mere story ploy for dramatic purposes. Fonda has held out for a careful deliberation and now he is willing to gamble the outcome on the chance that he has persuaded at least one other juror to continue. Isn't that reckless? Or possibly irresponsible in light of his stated objections to a guilty verdict? Fonda evidently calculated that he had played it out as far as he possibly could and the prospect of a hung jury is very real. The Defendant's most realistic chance lies with continuing the deliberation with Fonda and one ally, if one exists, rather than with retrial before a brand-new jury.¹⁰⁵ A sensible gamble, all things considered.

Amid general acclamation, Balsam says: "That sounds fair. Everyone agreed? Anyone doesn't agree?"¹⁰⁶ Fonda stands in the corner, uncertain of the outcome, as the ballots are passed in.¹⁰⁷ Balsam reads off the ballots, each time "guilty," until almost the last one. Balsam rises and announces, "not guilty." Fonda is relieved.¹⁰⁸ His gamble has paid off. The recriminations begin, with Cobb accusing Klugman of being the lone "not guilty" vote.¹⁰⁹ After some nasty exchanges, Sweeney ends the speculation by announcing that he was the one:

This gentleman has been standing alone against us. Now he doesn't say the boy is not guilty. He just isn't sure. It's not easy to stand against the ridicule of others. [Looking directly at Warden.] So he gambled for support, and I gave it to him. I respect his motives. The boy on trial is probably guilty, but I want to hear more. Right now, the vote is ten to two.¹¹⁰

Fonda wants to talk and Sweeney wants to hear more. Fonda now has an ally.

III. THE JURORS BEGIN TO DELIBERATE IN EARNEST

By the barest of margins, the jury deliberation continues. This natural break point, however, leads the jurors to have one-on-one conversations. Cobb tries to mend fences with Klugman, unsuccessfully.¹¹¹ Fonda goes into the restroom and Warden engages him in talk and banter. Fonda wards off the insults with humility. Nothing is accomplished, but this is the first time that Warden actually talks without ridicule, albeit interspersing with his customary barbs as well.¹¹² The

104. *Id.*, beginning at 30:56.

105. Although a new trial with better defense counsel would be a possibility.

106. *Id.*, beginning at 31:30.

107. *Id.*, beginning at 31:45.

108. *Id.*, beginning at 32:08.

109. *Id.*, beginning at 33:00. At one point, Cobb loses his temper and shouts: "'Excitable?' You bet I'm excitable. We're trying to put a guilty man in the chair, where he belongs." *Id.*, beginning at 33:30.

110. *Id.*, beginning at 33:41.

111. *Id.*, beginning at 35:47.

112. *Id.*, beginning at 36:19. Warden identifies himself to Fonda as a successful marmalade salesman. How he was able to sell marmalade had to be a product of his at times whimsical, joking approach. One thing Warden's character lacked was the ability to read other people, usually a fatal flaw for a salesman.

road to agreement begins with a first step, and we see Fonda in his understated way engaging with Warden.¹¹³ The Painter then comes in the restroom and is friendlier, but still solidly in the guilty camp.¹¹⁴ He is not resentful, however, about taking more time to discuss. “It beats working.”¹¹⁵ This leaves room for later movement because he is not dug in as a matter of principle. The Painter leaves with this question: “Supposing you talk us all out of this, and the kid really did knife his father, huh?”¹¹⁶ Fonda doesn’t have a quick answer for that.

When they reconvene at the table, Cobb wants to talk about the neighbor below:

The old man who lived downstairs says he heard the kid yell out “I’m going to kill you.” A second later, he heard the body hit the floor. Now he ran to the door and he saw the kid running down the stairs and out of the house. What does that mean to you?¹¹⁷

Fonda begins to work on this puzzle: “I was wondering how clearly the old man could have heard the boy’s voice through the ceiling.” It was a hot night. The windows were open.¹¹⁸ Okay. Fonda tries another angle. The neighbor across the L track said she witnessed the murder across the way. He will deal with her testimony later, but here Fonda takes the part of her testimony he believed to be true—that she saw the murder through the last two cars of the passing L train. He asks the jurors, “Has anybody any idea how long it takes an elevated train at a medium speed to pass a given point?”¹¹⁹ “I wouldn’t have the slightest idea,” Marshall scoffs. Fonda looks at Klugman, who has more experience in these things. How long? “Ten, twelve seconds,” says Klugman. “I think that’s a pretty good guess. Anyone else?” asks Fonda. “That sounds right to me,” says Voskovec. And Fiedler agrees. Even Marshall agrees, for the sake of argument.¹²⁰

Fonda starts putting it together. “It takes a six car L train ten seconds to pass a given point. Now, let’s say the given point is the open window of the room where the killing took place . . . Now let me ask you this. Has anyone here ever lived near the L tracks?”¹²¹ He gets agreement from the Painter that the noise on a job by the train line over a three-day period made him punchy. “Oh, brother,” is the honest response. Fonda says he once lived in an apartment near an L line. “When the windows are open and the train goes by, the noise is almost unbearable. You can hardly hear yourself think.”¹²² What does this mean? Fonda explains:

113. *Id.*, beginning at 36:28.

114. *Id.*, beginning at 37:58.

115. *Id.*, beginning at 38:01.

116. *Id.*, beginning at 38:59.

117. *Id.*, beginning at 39:32.

118. *Id.*, beginning at 39:45.

119. *Id.*, beginning at 40:53.

120. *Id.*, beginning at 41:01. By getting participation from Klugman, Voskovec, and Fiedler, Fonda is beginning to build their investment in this question.

121. *Id.*, beginning at 41:15.

122. *Id.*, beginning at 41:31.

First, the old man in the apartment downstairs. He says he heard the boy say, "I'm going to kill you," and a split second later heard a body hit the floor. One second later, right? ["That's right," chimes in Fiedler.¹²³] Second, the woman across the street swore positively she looked out of the window and saw the killing through the last two windows of a passing elevated train, right? The last two cars We've agreed that it takes ten seconds for a train to pass a given point. Since the woman saw the killing through the last two cars, we can assume that the body hit the floor just as the train went by. Therefore, the train had been roaring by the old man's window a full ten seconds before the body hit the floor. The old man, according to his own testimony "I'm going to kill you," body hitting the floor a split second later, would have to hear the boy make this statement with the L roaring past his nose! It's not possible he could have heard it.¹²⁴

So there is the challenge. Could the old man below have heard and identified the boy's voice as the killing was taking place? Cobb says yes because the boy was shouting.¹²⁵ Fonda keeps asking, could the old man have heard and identified the boy's voice?¹²⁶ Cobb scrambles desperately to save the argument and says: "You're talking about a matter of seconds. Nobody can be that accurate."¹²⁷ Fonda quickly replies, "Well, I think that testimony that could put a boy into the electric chair should be that accurate."¹²⁸ Klugman immediately turns to the Painter and says, "Can I tell you something? I don't think he could have heard it."¹²⁹ The Painter, starting to come around, seems to agree.¹³⁰

If the two key witnesses conflict on this point, why would the old man lie? "What's he got to gain?" asks Cobb.¹³¹ "Attention, maybe," says Sweeney.¹³² Cobb mocks him and the Painter comes to Sweeney's aid: "You say stuff like that to him again, I'm going to lay you out."¹³³ The Painter wants to hear more and asks him to explain.¹³⁴ Sweeney elaborates, giving one of the great speeches of the movie:

It was just that I looked at him for a very long time. The seam of his jacket was split, under the shoulder. Did you notice that? I mean, to come to court like that. He was a very old man in a torn

123. With undoubtedly a lifetime of longing to be one of the boys, Fiedler is being affirmed and empowered through his participation in the deliberation.

124. *Id.*, beginning at 41:56.

125. *Id.*, beginning at 42:54.

126. *Id.*, beginning at 42:00.

127. *Id.*, beginning at 43:02.

128. *Id.*, beginning at 43:05.

129. *Id.*, beginning at 43:11.

130. *Id.*, beginning at 43:15.

131. *Id.*, beginning at 43:20.

132. *Id.*, beginning at 43:23.

133. *Id.*, beginning at 43:41.

134. *Id.*, beginning at 43:54.

jacket, and he walked very slowly to the stand. He was dragging his left leg and trying to hide it because he was ashamed. I think I know this man better than anyone here. This is a quiet, frightened, insignificant old man who has been nothing all his life. Who has never had recognition or his name in the newspapers. Nobody knows him. Nobody quotes him. Nobody seeks his advice after seventy-five years. Gentlemen, that's a very sad thing, to mean nothing. A man like this needs to be quoted, to be listened to. To be quoted just once, very important to him. It would be so hard for him to recede into the background.¹³⁵

Warden interrupts and challenges him: "What are you trying to do? Tell us he'd lie just so he could be important once?"¹³⁶ "No," responds Sweeney, "[h]e wouldn't really lie. But perhaps he made himself believe he heard those words and recognized the boy's face."¹³⁷ "That's the most fantastic story I've ever heard. How can you make up a thing like that? What do you know about it?" retorts the Bigot.¹³⁸ Sweeney simply looks down and shakes his head.¹³⁹ Fiedler tries to break up this sour moment and leaps up to get cough drops to offer for the good of the order.¹⁴⁰ Fonda, wisely, accepts the offer.¹⁴¹ Fiedler is delighted with this subtle confirmation as a member of the club.¹⁴²

Fonda now goes on the offensive: "I think we've proved that the old man couldn't have heard the boy say, 'I'm going to kill you.' But . . . [s]upposing he really did hear it? This phrase, how many times have all of us used it? Probably thousands That doesn't mean we're really going to kill anybody."¹⁴³ Cobb counters, "The kid yelled it at the top of his lungs. Don't tell me he didn't mean it. Anybody says a thing like the way he said it, they mean it!"¹⁴⁴ Fonda demurs: "[D]o you really think the boy would shout out a thing like that so the whole neighborhood could hear him? I don't think so. He's much too bright for that."¹⁴⁵ The Bigot, of course, can't restrain himself: "Bright? He's a common, ignorant

135. *Id.*, beginning at 44:02. Like Fiedler, Sweeney is not just listening anymore. He is growing in confidence and brings his knowledge and experience to bear on the assessment of the old man's credibility.

136. *Id.*, beginning at 45:14.

137. *Id.*, beginning at 45:17.

138. *Id.*, beginning at 45:26. In his crude way, the Bigot is denying Sweeney's use of knowledge and experience.

139. *Id.*, beginning at 45:32.

140. *Id.*, beginning at 45:40.

141. *Id.*, beginning at 45:45.

142. *Id.*, beginning at 45:40. It doesn't take much. Here, a simple act of human kindness—acceptance of a cough drop—went a long way. Some are starving for a sign that they are acknowledged as valued and are deserving of respect. The contrast with the constant derision from Cobb, Warden, and the Bigot is clear.

143. *Id.*, beginning at 45:54.

144. *Id.*, beginning at 46:16. Note that by now, Cobb uses finger pointing to punctuate each phrase. Not a good visual, but highly revealing of character. He is a confirmed bully, we know now.

145. *Id.*, beginning at 46:35.

slob. He don't even speak good English."¹⁴⁶ He is quickly corrected by Voskovec, an immigrant from Europe: "He doesn't even speak good English."¹⁴⁷

Klugman, rejoining the discussion after several minutes of deep thought, announces: "Mr. Foreman, I'd like to change my vote to not guilty."¹⁴⁸ The rest of the room erupts.¹⁴⁹ Finally, Balsam announces: "The vote is nine to three in favor of guilty."¹⁵⁰ More recriminations ensue.¹⁵¹ What Fonda has been doing is exactly what defense counsel should have been doing during the trial.

After more bickering among the jurors about the defense lawyer, Voskovec stands to ask another question: "Now, my question is, if he really had killed his father, why would he come back home three hours later? Wouldn't he be afraid of being caught?"¹⁵² This question stimulates discussion, mostly about the factual possibilities, which is helpful.¹⁵³ Marshall gives a reasoned answer: "The boy knew the knife could be identified as the one he had just bought." He had to get it before the police did."¹⁵⁴ Voskovec: "But if he knew the knife could be identified, why did he leave it there in the first place?"¹⁵⁵ Marshall: "Well, I think we can assume the boy ran out in a state of panic after having just killed his father. When he finally calmed down, he realized he'd left his knife there."¹⁵⁶ Voskovec comes back: "This, then, depends on your definition of panic. He would have had to be calm enough to see to it that there were no fingerprints left on the knife. Now, where did this panic start and where did it end?"¹⁵⁷

This is just the type of discussion that should have occurred earlier. It continues with more discussion about the facts leading to a summation by Fonda:

Maybe the boy did kill his father. Didn't hear the scream, did run out in a panic, did calm down three hours later and come back to get the knife, risked he'd be caught by the police. Maybe all those things happened, but maybe they didn't. I think there's enough doubt that we can wonder whether he was there at all during the time the killing took place.¹⁵⁸

More ranting by the Bigot follows.¹⁵⁹

Another vote is called.¹⁶⁰ It looks like they are stuck on nine to three, but after a long look at Fonda, Voskovec announces: "Pardon. I vote not guilty."¹⁶¹

146. *Id.*, beginning at 46:42.

147. *Id.*, beginning at 46:47. Touché.

148. *Id.*, beginning at 46:52.

149. *Id.*, beginning at 46:57.

150. *Id.*, beginning at 47:03.

151. *Id.*, beginning at 47:05.

152. *Id.*, beginning at 48:53.

153. *Id.*, beginning at 49:04.

154. *Id.*, beginning at 49:14.

155. *Id.*, beginning at 49:19.

156. *Id.*, beginning at 49:24.

157. *Id.*, beginning at 49:33.

158. *Id.*, beginning at 50:46.

159. *Id.*, beginning at 51:03.

160. *Id.*, beginning at 51:37.

161. *Id.*, beginning at 52:10. Voskovec and Fonda share a quiet, satisfied smile.

Cobb is exasperated: “The kid is guilty. Why don’t you listen to the facts?”¹⁶² Ironic here, because whenever factual points are brought up, Cobb, as well as Warden and the Bigot, resort to contempt and ridicule. Among the guilty “hardcore,” Marshall is the only one who stays with a discussion of the facts. Now it is eight to four in favor of guilty.

Cobb challenges Voskovec.¹⁶³ He wants to hear the reasons why he changed his vote.¹⁶⁴ Voskovec refuses and says, simply: “There is a reasonable doubt in my mind.”¹⁶⁵ For once, Warden tries to be helpful and asks: “[N]ow what about the old man? Are we supposed to believe that he didn’t get up and run to his door and see the kid tearing down the steps fifteen seconds after the killing?”¹⁶⁶ Klugman is not sure the old man could have *run* to the door.¹⁶⁷ Fonda reacts as if he had not seen that issue and calls for a look at the exhibit showing the layout of the apartment: “I’d like to find out if an old man who drags one foot when he walks ‘cause he had a stroke last year can get from his bedroom to his front door in fifteen seconds.”¹⁶⁸ Cobb tries to move the time to twenty seconds but is contradicted by Fonda, Voskovec, and Sweeney.¹⁶⁹ Cobb loses his temper and goes on another rant: “How does he know how long fifteen seconds is? You can’t judge a thing like that.”¹⁷⁰ Sweeney (who has proven many times to be more observant of key details) remarks: “He said fifteen seconds. He was very positive about that.”¹⁷¹ Cobb goes on: “He was an old man. Half the time he was confused.”¹⁷² Oops! Cobb realizes, too late, that he has made a tactical error by trashing his own witness.¹⁷³ Sweeney looks at him in disbelief.¹⁷⁴ Marshall is still not sure what the old man’s disability proves.¹⁷⁵

Fonda proposes a demonstration.¹⁷⁶ Using the exhibit, he shows the path that the old man had to take from his bed (where he heard the body hit the floor), down the hallway to the front door (where he unlocked it and pulled the chain lock), which he had to open to see the killer fleeing down the stairs.¹⁷⁷ The

162. *Id.*, beginning at 52:17.

163. *Id.*, beginning at 52:27.

164. *Id.*, beginning at 52:31.

165. *Id.*, beginning at 52:38.

166. *Id.*, beginning at 53:10.

167. *Id.*, beginning at 53:28.

168. *Id.*, beginning at 53:48. The exhibit shows the apartment where the killing took place, but Fonda says the apartment below had the same dimensions and set-up. *Id.*, beginning at 55:09.

169. *Id.*, beginning at 54:11.

170. *Id.*, beginning at 54:16.

171. *Id.*, beginning at 54:20.

172. *Id.*, beginning at 54:22.

173. Cobb is a bulldog-type arguer. He is mostly reactive, grabbing on and not letting go. More than once he held on to the argument long enough to refute himself, as here. The man who pleads for others to pay attention to the facts, abandons the facts when they do not support him and always returns to *ad hominem* attacks at the end. He relies on tactics, not strategy, and is no match for Fonda who usually has the larger picture in mind.

174. *Id.*, beginning at 54:26.

175. *Id.*, beginning at 54:35.

176. *Id.*, beginning at 55:08.

177. *Id.*, beginning at 55:09.

demonstration occurs with the stated dimensions of the rooms and hallway and Fonda dragging the impaired leg through it all.¹⁷⁸ The result? Forty-one seconds.¹⁷⁹ Not close to fifteen or even twenty seconds.

Fonda quickly provides his interpretation of what it means:

Here is what I think happened. The old man heard the fight between the boy and his father a few hours earlier. Then when he is lying in his bed, he heard the body hit the floor in the boy's apartment, heard the woman scream from across the street, got to his front door as fast as he could, heard somebody racing down the stairs and *assumed* it was the boy.¹⁸⁰

Cobb is not impressed:

Brother, I've seen all kinds of dishonesty in my day, but this little display takes the cake. You all come in here with your hearts bleeding all over the floor about slum kids and injustice. You listen to some fairytales . . . Well, you're not getting through to me. I've had enough. What's the matter with you guys? You all know he's guilty. He's got to burn. You're letting him slip through our fingers.¹⁸¹

Fonda responds: "Slip through our fingers? Are you his executioner?"¹⁸² "I'm one of them," Cobb shouts back.¹⁸³ "Perhaps you would like to pull the switch," Fonda dares.¹⁸⁴ "For this kid, you bet I would," sneers Cobb.¹⁸⁵ Fonda concludes:

I feel sorry for you. What it must feel like to want to pull the switch. Ever since you walked into this room, you've been acting like a self-appointed public avenger. You want to see this boy die because you personally want it, not because of the facts. You're a sadist.¹⁸⁶

Cobb loses it. He rushes at Fonda and has to be restrained: "Let me go! I'll kill him. I'll kill him."¹⁸⁷ Demonstrating his earlier point, Fonda observes: "You don't really mean you'll kill me, do you?"¹⁸⁸ Cobb finally realizes what he has done as he breaks away from the restraining arms.¹⁸⁹ The bailiff enters the room, asking: "Anything wrong, gentlemen? I heard some noise." Balsam diffuses the situation: "No. Everything's all right. We're just . . . Friendly little

178. *Id.*, beginning at 57:20.

179. *Id.*, beginning at 57:55.

180. *Id.*, beginning at 57:58 (emphasis added).

181. *Id.*, beginning at 58:16.

182. *Id.*, beginning at 58:40.

183. *Id.*, beginning at 58:43.

184. *Id.*, beginning at 58:46.

185. *Id.*, beginning at 58:48.

186. *Id.*, beginning at 58:50.

187. *Id.*, beginning at 59:05.

188. *Id.*, beginning at 59:09.

189. *Id.*, beginning at 59:14.

argument.”¹⁹⁰ Cobb finally recovers from his rage and asks: “What are you looking at?”¹⁹¹ The other jurors just stare back.

The jurors return to their seats. Voskovec decides to address them: “I beg pardon.”¹⁹² Still irritated, the Bigot interrupts: “What are you so polite about?” Voskovec has the perfect response: “For the same reason you’re not. It’s the way I was brought up.”¹⁹³ He goes on:

This fighting That’s not why we are here, to fight. 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 to 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. We should not make it a personal thing Thank you.¹⁹⁴

This helps to clear the air and brings the jurors back to the task at hand in a better frame of mind. As they regroup emotionally, Klugman looks at Marshall and inquires: “Pardon me, but don’t you ever sweat?”¹⁹⁵ “No, I don’t,” is his curt reply.¹⁹⁶ Anticipating a change on his part, the Painter calls for another vote.¹⁹⁷ They decide to do so by open ballot, with each juror called upon in order. The result? The Painter and Fiedler change their vote to “not guilty.” It is now six to six.¹⁹⁸

IV. THE ANGER GROWS

With the now even split, the recriminations and insults become even worse. The Bigot naturally, leads off: “Six to six. I’m telling you, some of you people in here must be out of your minds. A kid like that.”¹⁹⁹ Sweeney doesn’t let that pass: “I don’t think the kind of boy he is has anything to do with it. The facts are supposed to determine the case.”²⁰⁰ The Bigot just keeps on rolling: “Don’t give me that. *I’m sick and tired of facts.* You can twist them anyway you like.”²⁰¹ Sweeney, his anger rising, stands and says: “That’s exactly the point this gentleman is making.” The Bigot turns and walks away. Sweeney, visibly shaken, sits down at the gentle urging by Fonda.²⁰²

190. *Id.*, beginning at 59:19.

191. *Id.*, beginning at 59:36.

192. *Id.*, beginning at 1:00:02.

193. *Id.*, beginning at 1:00:04.

194. *Id.*, beginning at 1:00:12.

195. *Id.*, beginning at 1:01:23.

196. *Id.*, beginning at 1:01:26.

197. *Id.*, beginning at 1:01:29.

198. *Id.*, beginning at 1:02:02.

199. *Id.*, beginning at 1:03:09.

200. *Id.*, beginning at 1:03:16.

201. *Id.*, beginning at 1:03:21 (emphasis added).

202. *Id.*, beginning at 1:03:26.

Fiedler and Warden converse by a window. Warden asks him: “How come you changed your vote?”²⁰³ “It just seemed to me there is room for doubt.”²⁰⁴ Warden comes back: “You haven’t got a leg to stand on. You know that, I hope.”²⁰⁵ Although he is grateful for the attention, Fiedler now is confident enough to hold his position: “I don’t feel that way. There were a lot of details that never came out.”²⁰⁶ By comparison, Fiedler has grown while Warden has not learned a thing. Fiedler came in extremely timid, a follower. By listening, he acquired knowledge, confidence, and power through an understanding of the facts. Warden came in caring mostly about his ball game and never advanced beyond jokes and insults. He had nothing to say by this point in the deliberation. The Bigot came by and offered more of his “wisdom”: “Come on. You’re like everybody else. *You think too much, you get mixed up.*”²⁰⁷ Both Warden and the Bigot had nothing to offer anyone else in this deliberation.

It begins to rain. As several go over to shut the windows, Balsam joins Fonda for a conversation.²⁰⁸ Balsam does all the talking, off-topic, but it is a welcome relief from the yelling and nastiness. Fonda listens, with respect. Simple human kindness can cultivate persuasion at times. Another welcome change occurs when the fan finally begins to operate.²⁰⁹ Marshall goes over to the water cooler and Cobb tries to explain his last outburst: “Anyone in his right mind would blow his stack. He was just trying to bait me.” Marshall bluntly observes: “He did an excellent job.”²¹⁰

The Bigot again raises the specter of a hung jury.²¹¹ Fonda thinks it is too early for that and the jurors bicker over whether there is reasonable doubt. Addressing Warden, Voskovec states: “Pardon. Maybe you don’t fully understand the term ‘reasonable doubt.’”²¹² This provokes Warden: “How do you like this guy? I’m telling you, they’re all alike. They come over here, running for their life, and before they can take a deep breath, they’re telling us how to run the show.”²¹³

Balsam pleads for a stop to the fighting and asks if anyone has something constructive to say.²¹⁴ Fonda wants to go over the problem with the Defendant’s alibi, the fact that he could not remember anything about the movies he said he

203. *Id.*, beginning at 1:04:00.

204. *Id.*, beginning at 1:04:02. Fiedler’s face actually lights up a bit when he is asked. It may have been one of the few times he had ever been asked for his opinion.

205. *Id.*, beginning at 1:04:05.

206. *Id.*, beginning at 1:04:07.

207. *Id.*, beginning at 1:04:11 (emphasis added).

208. *Id.*, beginning at 1:05:05.

209. *Id.*, beginning at 1:06:55.

210. *Id.*, beginning at 1:07:53.

211. *Id.*, beginning at 1:08:19.

212. *Id.*, beginning at 1:08:45.

213. *Id.*, beginning at 1:08:53. Given Voskovec’s real life story, there is considerable irony in this line. *See supra* note 43.

214. *Id.*, beginning at 1:09:05.

saw.²¹⁵ This was particularly important for Marshall and so Fonda begins to test his memory.

Fonda: Putting yourself in the boy's place, do you think you could remember details after an upsetting experience such as being slapped in the face by your father?

Marshall: I think so, if there were any special details to remember. The boy couldn't remember the names of the movies he saw because he wasn't there that night.

Fonda: According to the police testimony in court, the boy was questioned by the detectives in the kitchen of his apartment, while the body of his father was lying in the bedroom. Do you think you could remember details under those circumstances?

Marshall: I do.

Fonda: Under great emotional distress?

Marshall: Under great emotional distress.

* * * *

Marshall: I'll take the testimony of the policeman who interrogated the boy right after the murder when he couldn't remember a thing about the movies, great emotional stress or not.

Fonda: I'd like to ask you a personal question.

Marshall: Go ahead.

Fonda: Where were you last night?

[Marshall is okay until Fonda gets to four nights ago.]

Marshall: [Beginning to hesitate] Monday night? Monday night, my wife and I went to the movies.

Fonda: What did you see?

Marshall: *The Scarlet Circle*. It is a very clever who-done-it.

Fonda: What was the second feature?

Marshall: [Hesitating again, while he lights another cigarette.] Mrs. Bainbridge. *The Remarkable Mrs. Bainbridge*.

Fiedler: I saw that. It's called *The Amazing Mrs. Bainbridge*.

Marshall: Yes. *The Amazing Mrs. Bainbridge*. I think that's right.

Fonda: Who was in *The Amazing Mrs. Bainbridge*?

Marshall: Barbara Long. I think it was. A dark, very pretty girl. Ling or Long. Something like that.

Fonda: Who else?

Marshall: I've never heard of them before. It was very inexpensive second feature, with unknown . . .

Fonda: And you weren't under an emotional distress, were you?

Marshall: No. [Wiping the sweat off his forehead.] I wasn't.

215. *Id.*, beginning at 1:09:15.

Sweeney: I think the point is made.

Bigot: Big point. [Coughing.] You can talk till your tongue is dragging on the floor. The boy is guilty. Period. Know what I mean, my friend. You got those cough drops?

Fiedler: They're all gone, my friend.²¹⁶

The next topic of discussion is the knife. This time it is Fiedler who initiates it, asking to see the knife. He was bothered by the testimony about the stab wound being down and in. He questioned that, given the height difference between the Defendant (5'7") and the father (6'2").²¹⁷ Cobb thinks there is no problem and offers to demonstrate. He asks for another stand-in for the father, sees Fonda standing in the corner, and goes over to him.²¹⁸ Adjusting for height, Cobb raises the knife as if to stab down, while Fonda does not flinch. But the rest jump out of their seats and yell. An emotional Cobb stops: "Now, nobody's hurt. Right?"²¹⁹ Everybody is relieved, and Cobb is a little sheepish, as if the thought of going through with the stabbing had actually crossed his mind. He then completes the act in slow motion: "Now, this is the way I'd stab a man who was taller than I was. Look at the angle. Down and in. And this is the way it was done. Now tell me I'm wrong."²²⁰ The Ad Man tries it and agrees: "Down and in. I guess there's no argument."²²¹

"Hold on a minute, will you?" Klugman jumps up and asks for the knife.²²² Apparently, he is the only one of the jurors who had ever used a knife. "Switchblades came with the neighborhood where I lived."²²³ He demonstrates what would be the proper use by one who is familiar with it. Not down and in, because it would take too long to switch the position of the knife. He demonstrates. Flip the knife open and stab up, underhanded. "Anyone who's ever used a switch knife wouldn't handle it any other way."²²⁴ Demonstrating the flip again, Klugman says, "That's why there're made to open like that."²²⁵ Fonda asks if the Defendant could have made the kind of wound that killed his father. Klugman replies, "No. Not with the experience he got all his life handling these things. I feel he would have gone for him underhanded."²²⁶

Fonda asks the Ad Man: "What do you think?" After hesitation, he answers: "I don't know."²²⁷ Fonda walks over to Warden and asks: "How about you?" The answer is a surprise: "I don't know about the rest of them, but I'm getting a little

216. *Id.*, beginning at 1:09:35. And so ends the side story of the cough drops.

217. *Id.*, beginning at 1:12:40.

218. *Id.*, beginning at 1:13:09.

219. *Id.*, beginning at 1:13:38.

220. *Id.*, beginning at 1:13:53.

221. *Id.*, beginning at 1:14:04.

222. *Id.*, beginning at 1:14:09.

223. *Id.*, beginning at 1:14:27.

224. *Id.*, beginning at 1:14:34. Suggesting that it was not the Defendant who used it, but perhaps someone who was unfamiliar with its use.

225. *Id.*, beginning at 1:14:44.

226. *Id.*, beginning at 1:14:54.

227. *Id.*, beginning at 1:15:21.

tired of all this yakkety-yakking back and forth. It's getting us nowhere. So, I guess I'll have to break it up. I'm changing my vote to not guilty."²²⁸

Astonishment follows. Cobb doesn't accept this.²²⁹ Neither does Voskovec:

That's not an answer. *What kind of a man are you?* You have sat here and voted guilty with everyone else because there are some baseball tickets that are burning a hole in your pocket. Now you say you have changed your vote because of all the talking here? Who tells you that you have a right to play like this with a man's life. Don't you care [Warden objects.] I can talk like that to you. If you want to vote not guilty, then do it because you are convinced the man is not guilty, not because you've had enough. And if you think he is guilty, then vote that way. Or don't you have the guts to do what you think is right? [Warden objects again.] Guilty or not guilty?²³⁰

Warden answers: "I told you, not guilty." Voskovec: "Why?" Warden: "Look, I don't have to . . ." Voskovec, adamant: "You do have to. Say it. Why?" Warden: "I don't think he's guilty." Voskovec shakes his head in exasperation.²³¹

With a quiet look of confidence on his face, Fonda calls for another vote.²³² Balsam asks for a show of hands for not guilty. Seven hands go up. And then there is a shaky, but definite, eighth vote, the hand belonging to the Ad Man. And then, Balsam announces he is voting not guilty.²³³ The remaining guilty votes are Cobb, Marshall, and the Bigot.²³⁴ It is now nine to three. It appears that the jury is now hopelessly deadlocked, as the "hardcore" guilty votes appear to be immovable.

V. TWELVE ANGRY MEN REACH A VERDICT

Ironically, it is the Bigot who triggers further movement among the jurors. The nine-to-three vote causes the Bigot to go on a rant:

I don't understand you people! I mean all these picky little points you keep bringing up, they don't mean nothing! You saw this kid just like I did. You're not gonna tell me you believe that phony story about losing the knife and that business about being at the movies.²³⁵ Look, you know how these people lie. It's born in them. What the heck? I don't have to tell you. They don't know what the truth is! And let me tell you, they don't need any real big reason to kill someone, either. No, sir. They get drunk. [Quincy gets up from the table.] They're real big drinkers, all of

228. *Id.*, beginning at 1:15:32.

229. *Id.*, beginning at 1:15:44.

230. *Id.*, beginning at 1:15:55.

231. *Id.*, beginning at 1:16:42.

232. *Id.*, beginning at 1:17:04.

233. *Id.*, beginning at 1:17:10.

234. *Id.*, beginning at 1:17:38.

235. Here ends the Bigot's discussion of the evidence. But he is not finished, unfortunately.

them. You know that. And bang! Someone's lying in the gutter. Nobody is blaming them for it. That's the way they are, by nature. You know what I mean? Violent. [Sweeney stands up.] Where are you going? Human life don't mean as much to them as it does to us. [Voskovec stands up.] Look, they're lushing it up and fighting all the time, and if somebody gets killed, so somebody gets killed! They don't care! Sure, there's some good things about them, too. [Cobb, who was already standing, turns his back.] Look, I'm the first one to say that. [Fonda stands up.] I've known a couple who were okay. But that's the exception [Fiedler stands up.] Most of them, it's like they have no feelings! They can do anything! [the Painter stands up.] What's going on here? I'm trying to tell you. You're making a big mistake, you people. This kid is a liar. I know it. I know all about them. [the Foreman stands up.] Listen to me. They're no good. [Warden turns away.] There's not one of them that's any good. I mean, what's happening in here? I speak my piece [the Ad Man stands up] and you Listen to me. We're This kid on trial here. His type. Well, don't you know about them? There's a There's a danger here. These people are dangerous. They're wild. Listen to me. [to Marshall.] Listen to me.²³⁶

Marshall finally speaks: "I have. Now, sit down and don't open your mouth again." The Bigot leaves the table, staggers over to a table and chair away from the main table, and sits down, broken.²³⁷

The jurors return to their seats, and Fonda comments on what they have just witnessed:

It's always difficult to keep personal prejudice out of a thing like this. Wherever you run into it, prejudice always obscures the truth. I don't really know what the truth is. I don't suppose anybody will ever really know. Nine of us now seem to feel that the defendant is innocent. But we're just gambling on probabilities. We may be wrong. We may be trying to let a guilty man go free. I don't know. Nobody really can. But we have a reasonable doubt, and that's something that's very valuable in our system. No jury can declare a man guilty unless it's sure. We nine can't understand why you three are still so sure.²³⁸

Fonda asks Marshall to explain, as he is the only one that can reason at this point.²³⁹ Marshall says he will try:

236. *Id.*, beginning at 1:17:43. I apologize for quoting the Bigot in full. It is vile and nasty stuff. But I think it is important to know what we are dealing with. We need to shine light on the words, which are the most rotten, disgusting, loathsome, hideous, despicable, appalling, and horrific words ever uttered by one who had purportedly taken an oath to judge the case on the basis of the facts in the record.

237. *Id.*, beginning at 1:19:32.

238. *Id.*, beginning at 1:20:00.

239. *Id.*, beginning at 1:21:11.

You've made some excellent points, but I still believe the boy is guilty of murder, and I have two reasons. One, the evidence given by the woman across the street, who actually saw the murder committed. [Cobb, interjecting, "As far as I'm concerned, that's the most important testimony."] And two, the fact that she described the stabbing by saying she saw the boy raise his arm over his head and stab down into his father's chest. She saw him do it, the wrong way.²⁴⁰

Cobb agrees.²⁴¹ Note that these are not two reasons, but two essentially similar statements amounting to: the woman saw him do it. Okay, we are down to the woman's testimony, which up to this point had only been used to establish that an L train was going past the father's apartment just as the murder was being committed.²⁴²

Marshall accepts the challenge and begins to look more carefully at that crucial point. His summation of the basic facts relating to the woman's testimony—she looked out her window at the precise time the murder was committed and saw the Defendant strike his father with a knife in a manner consistent with the fatal wound—appears persuasive. "As far as I can see it, this is unshakable testimony."²⁴³ The Ad Man thereupon changes his vote back to guilty.²⁴⁴ Back to eight to four. With that, Cobb renews his demand they tell the judge they are deadlocked and cannot reach a verdict.²⁴⁵

Marshall suggests they set a deadline for discussion. Looking at the clock, which reads 6:15, he suggests 7:00 p.m. as a deadline. After he looks at the clock, he takes off his glasses and rubs the sides of his nose.²⁴⁶ Sweeney notices this and interrupts Marshall.²⁴⁷ He says that Marshall rubbing the sides of his nose reminds him of something. Why did Marshall rub his nose? Because it bothered him a little. Is that because of the eyeglasses? Yes, replies Marshall.²⁴⁸ The eyeglasses made two deep impressions on the sides of his nose and these were similar to marks on the nose of the woman who testified she saw the killing.²⁴⁹ Other jurors had noticed the marks on the woman's nose, including the Foreman, who sat the closest to her.²⁵⁰ But what does that mean? "Could those marks be made by anything other than eyeglasses?" asks Sweeney.²⁵¹ Marshall, deep in

240. *Id.*, beginning at 1:21:14. This is how jury deliberation is supposed to be done. Even this jury can do it when they are not angry with each other.

241. *Id.*, beginning at 1:21:40. I agree as well. *If you believe the woman's testimony, then there is a basis for a guilty verdict, beyond a reasonable doubt.*

242. *See supra* text accompanying notes 119-124.

243. *Id.*, beginning at 1:21:42.

244. *Id.*, beginning at 1:22:57.

245. *Id.*, beginning at 1:23:06.

246. *Id.*, beginning at 1:23:33.

247. *Id.*, beginning at 1:23:50.

248. *Id.*, beginning at 1:23:58.

249. *Id.*, beginning at 1:24:44.

250. *Id.*, beginning at 1:25:35.

251. *Id.*, beginning at 1:26:28.

thought, shakes his head and says, “No they couldn’t.”²⁵² To finish the point, Marshall admits that one would not wear eyeglasses to bed, so when the woman sat up in bed and looked across the way, she was almost certainly not wearing her eyeglasses.²⁵³ Cobb continues to resist, but Fonda now finishes the point: “I only know the woman’s eyesight is in question now.”²⁵⁴ Voskovec observes: “She had to be able to identify a person sixty feet away, at night, without glasses.”²⁵⁵ “You can’t send someone off to die on evidence like that,” Fiedler adds.²⁵⁶

Fonda presses forward: “Don’t you think the woman might have made a mistake?”²⁵⁷ Cobb, still unmoved: “No!” Fonda: “It’s not possible?” Cobb: “No, it’s not possible.”²⁵⁸ Fonda quickly moves to the Ad Man and asks: “Is it possible?” He nods yes, and says, “Not guilty.”²⁵⁹ Fonda approaches the Bigot, who had been sitting disconsolately nearby, and asks: “Do you think he’s guilty?” The Bigot shakes his head to indicate “not guilty.”²⁶⁰ Cobb says, “I think he’s guilty.”²⁶¹ Finally, Fonda goes to Marshall and asks: “Do you?” Marshall turns slowly to face Fonda and says, “No. I’m convinced. Not guilty.”²⁶² “What’s the matter with you?” yells Cobb.²⁶³ “I have a reasonable doubt now,” responds Marshall.²⁶⁴ Smiling, Sweeney proclaims: “Eleven to one.”²⁶⁵ Cobb is now alone.

Cobb remains defiant: “I don’t care whether I’m alone or not. It’s my right.”²⁶⁶ It is also the other jurors’ right to stare at him, silently. Cobb breaks the silence, “Well, what do you want? I say he’s guilty.”²⁶⁷ Fonda responds, “We want to hear your arguments.”²⁶⁸ Cobb: “I gave you my arguments.” Fonda: “We’re not convinced. We want to hear them again. We have as much time as it takes.”²⁶⁹ And so Cobb lets go with a final rant:

Everything. Every single thing that took place in that courtroom, but I mean everything says he is guilty Why don’t you take that stuff about the old man The old man saw him! Right there, on the stairs. What’s the difference how many seconds it

252. *Id.*, beginning at 1:26:36. Cobb yells, “I didn’t see any marks.” Marshall replies, “I did. Strange, but I didn’t think about it before.” *Id.*, beginning at 1:26:38.

253. *Id.*, beginning at 1:27:30.

254. *Id.*, beginning at 1:28:03.

255. *Id.*, beginning at 1:28:06.

256. *Id.*, beginning at 1:28:12.

257. *Id.*, beginning at 1:28:17.

258. *Id.*, beginning at 1:28:19.

259. *Id.*, beginning at 1:28:26.

260. *Id.*, beginning at 1:28:30.

261. *Id.*, beginning at 1:28:38.

262. *Id.*, beginning at 1:28:40.

263. *Id.*, beginning at 1:28:52.

264. *Id.*, beginning at 1:28:54.

265. *Id.*, beginning at 1:28:56.

266. *Id.*, beginning at 1:29:18.

267. *Id.*, beginning at 1:29:36.

268. *Id.*, beginning at 1:29:41.

269. *Id.*, beginning at 1:29:42.

was? Every single thing. The knife falling through a hole in his pocket. You can't prove he didn't get to the door. Sure you can take all the time, hobble around the room, but you can't prove it! And what about this business of the L? And the movies? There's a phony deal if I ever heard one. I'll bet you \$5,000 I'd remember the movies I saw. I'm telling you, everything that's gone on has been twisted and turned! This business with the glasses? How do you know she didn't have them on? This woman testified in open court! And what about hearing the kid yell? Huh? I'm telling you I've got all the facts here. [Pulling out his notes, fumbling with them and slamming his wallet on the table.] Well, that's it. That's the whole case.²⁷⁰

There have been no interruptions. The jurors continue to stare at him, silently. "Well?" he asks for a response. "Say something!" he yells.²⁷¹ More staring. "You lousy bunch of bleeding hearts. You're not going to intimidate me. I'm entitled to my opinion."²⁷² He looks down and sees the picture of himself with his son and comments, mostly to himself: "Rotten kids. You work your life out!"²⁷³ He loses his temper and begins to tear apart the picture of his son.²⁷⁴ Overcome by emotion, he slumps down and begins sobbing.²⁷⁵ Finally, Cobb cries out, "No . . . Not guilty. Not guilty."²⁷⁶ As this shocking ending sinks in, we hear Balsam alert the bailiff that they are done.²⁷⁷ The jurors begin to gather their belongings and leave the room quietly.²⁷⁸ Cobb remains at the table until Fonda brings his coat over and helps him put it on.²⁷⁹ As Fonda leaves, he takes one last look at the room.²⁸⁰

VI. WHAT CAN WE LEARN FROM THIS STORY?

There are many lessons in *12 Angry Men*. A movie widely acclaimed over the span of more than sixty-five years has connected with audiences on multiple levels.²⁸¹ Professors Paul Bergman and Michael Asimow state that "[*12 Angry Men* may be the best film about jury deliberations ever made."²⁸² Supreme Court

270. *Id.*, beginning at 1:29:58.

271. *Id.*, beginning at 1:31:32. The silence seems to have been his undoing. He was a better counterpuncher in argument. When it came to the positive side of the argument, he was less effective.

272. *Id.*, beginning at 1:31:42.

273. *Id.*, beginning at 1:31:52.

274. *Id.*, beginning at 1:32:00.

275. *Id.*, beginning at 1:32:07.

276. *Id.*, beginning at 1:32:10.

277. *Id.*, beginning at 1:32:38.

278. *Id.*, beginning at 1:32:40.

279. *Id.*, beginning at 1:32:40.

280. *Id.*, beginning at 1:34:00.

281. An article in the ABA Journal in 2008 on the 25 greatest legal movies ranked *12 Angry Men* as second on the list, behind only *To Kill A Mockingbird*. Richard Brust, *The 25 Greatest Legal Movies*, ABA JOURNAL (Aug. 1, 2008), <https://perma.cc/SU5Z-EAQ2>.

282. Paul Bergman & Michael Asimow, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES 268 (1996).

Justice Sonia Sotomayor, for example, has acknowledged its influence on her thinking about juries.²⁸³ Professor Nancy Marder has watched the movie numerous times and finds in it new meaning each time.²⁸⁴ Although a realistic portrayal of a jury is not one of its strong points,²⁸⁵ there are many valuable lessons that one can take away from *12 Angry Men*.

A. THE ROLE OF DEFENSE COUNSEL

The deficiencies of the Defendant's appointed counsel were detailed by Fonda, who ended up inserting himself into that role.²⁸⁶ The foundation of the defense had to be laid during cross-examination of the prosecution's witnesses. This was a reasonable doubt case. There was not enough evidence to make a positive case that the Defendant was innocent, or that someone else had done it. The case for winning had to be based on counterpunching the prosecution's case, i.e., demonstrating why the prosecution should not win.²⁸⁷ Final argument is intended to arm jurors with the facts and the law that will be the path to victory.²⁸⁸ But you cannot argue for why you should win unless there is a sufficient factual basis in the record. In this case, the defense had to argue why the prosecution should not win, and that involved counterpunching. And that is what Fonda (and later, Sweeney) did as a juror.

The starting point was the prosecution's positive case that seemingly left no room for any other conclusion. Each time, however, Fonda broke it down and worked through the pieces. He took the adverse evidence and found ways to own

283. Wendy Davis describes this in her article *The Event: At the same time*, portions [of *12 Angry Men*] resonated with Sotomayor. "I had never thought about juries and their functions until I saw this movie," she said. One character in particular, an immigrant who worked as a watchmaker, gave a speech about the jury system that made an impression on the future judge. "It sold me that I was on the right path," said Sotomayor, who served as a prosecutor in her early career. Wendy Davis, *The Event*, 97-Jan A.B.A.J. 44, 48 (2011).

284. Nancy S. Marder, *Introduction to the 50th Anniversary of 12 Angry Men*, 82 CHI.-KENT L. REV. 557, 558 (2007).

I have now seen *12 Angry Men* at least fourteen times, which is more than I have seen any other movie! Yet, I never tire of watching it. One reason is because it has a great ensemble cast. Another reason is that every year I gain something new from watching *12 Angry Men*. Some years, I glean a new insight from my students' reactions to the movie. Other years, I view the movie through the lens of whichever facet of the jury I happen to be focusing on in my own writing.

Id.

285. Realism is not the only virtue. We also learn from fiction (THE VERDICT (1982), PALE RIDER (1985), THE SHAWSHANK REDEMPTION (1994)), satire (BEING THERE (1979)), fantasy (LORD OF THE RINGS (2001-03), STAR WARS (1977-83), and STAR TREK (1966)), satire of fantasy (GALAXY QUEST (1999)), and many other forms of storytelling.

286. See Barbara Allen Babcock & Ticien Marie Sassoubre, *Deliberation in 12 Angry Men*, 82 CHI.-KENT L. REV. 633, 636 (2007) ("*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.>").

287. See Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. REV. 250, 252-54, 262-63 (2004) (No. 2: "There are two ways to win a race—either run faster than everyone else or make sure that no one runs faster than you."; No. 12: "Be aware of when you are on offense and when you are on defense.>").

288. RICK FRIEDMAN & BILL CUMMINGS, THE ELEMENTS OF TRIAL 182 (2013) ("You can look at closing as your last chance to arm your juror allies with arguments and evidence to fight for your cause.>").

it, or at least neutralize it. Importantly, he did not try to win every point. One must figure out what points you need to win and win those. The rest of the points? Just don't lose them.²⁸⁹

The murder weapon was indisputable. It was found in the victim's chest. The prosecution tied it to the Defendant through the testimony of the store owner, who identified it as the same knife he sold to the Defendant. The Defendant showed *a* knife to his friends later in the evening, yet he claimed he had lost it thereafter. Because no one could produce the lost knife, there was no way to win this point. But Fonda came up with a knife that he had purchased the evening before that was eerily similar to the murder weapon. Although this was clearly improper (because it was not vetted through evidentiary foundation requirements),²⁹⁰ it served as a reasonable counterexample to the argument that the Defendant used the weapon admitted into evidence to kill his father. Maybe the knife in evidence was never owned by the Defendant. Pretty thin, but the prosecution's case, which was built upon circumstantial evidence, has to be knocked out or accounted for brick by brick.

Next was the testimony of the neighbor downstairs who heard the Defendant fighting with his father earlier in the evening. He testified that at 12:10 a.m. he heard the Defendant yell "I'm going to kill you!", followed by a body hitting the floor, and, finally, that he saw the Defendant run out of the building. The Defendant may have yelled that sometime during the evening, but the woman's testimony that she saw the murder just as an L train passed by made it impossible for anyone to make out any statement at that time. Moreover, even if someone could have heard the statement, it may have been an idle threat, as later demonstrated by Cobb's overheated threat to kill Fonda.

The Defendant's return home at 3:10 a.m. was the next subject of discussion. "[W]hy would he come back?" asked Voskovec.²⁹¹ There was no consistent explanation of when the Defendant had panicked and when he was attempting to cover up the crime. Voskovec's thinking through the various steps of deliberation and panic presaged his imminent change to not guilty.

The possibility that the old man could have heard the body hit the floor, gotten out of bed, and rushed to the front door while dragging his foot in time to

289. See Jonathan K. Van Patten, *Twenty-Five Propositions for the Practice of Law*, SOUTH DAKOTA BARRISTER, May-June 2020, at 9.

15. Know when you are on offense and when you are on defense. Probably the best advice I heard on argument was from Professor Ken Graham at UCLA: "There are two ways to win a race: run faster than anyone else or make sure that no one runs faster than you." In terms of argument, it means that you can win by making sure the other side does not win. It also means that you should not try to win arguments you cannot win, just do not lose them. Many lawyers, being naturally aggressive, try to win every argument. This is a mistake.

Id.

290. Professor Michael Asimow correctly asserts that "Fonda's extra-judicial investigation and purchase of the knife was serious juror misconduct. Had it been called to the judge's attention, Fonda would probably have been kicked off of the jury. Since the alternates had been dismissed, this would probably have resulted in a mistrial." Michael Asimow, *12 Angry Men: A Revisionist View*, 82 CHI.-KENT L. REV. 711, 714 n.16 (2007).

291. 12 ANGRY MEN, *supra* note 19, beginning at 48:53.

see the Defendant leave the building became questionable in light of Fonda's recreation of the old man's testimony in the jury room. Sweeney's assessment of the old man's possible motives for his testimony called into question the old man's credibility. The point here is that the jurors could properly evaluate whether the old man could have seen what he testified he saw. His "earwitness" testimony of the threat and his eyewitness testimony of the Defendant's flight were now legitimate questions.

The next brick in the prosecution's foundation was the unconvincing alibi the Defendant gave when questioned by the police. Marshall thought this was a strong part of the prosecution's case, and so Fonda went through it with him. Fonda questioned Marshall about his recollection of recent events and struck gold when Marshall had trouble remembering the title of the second feature he had seen only a few days before, as well as the names of the principal actors who played in it. "And you weren't under an emotional stress, were you?"²⁹²

Fiedler brought up the use of the knife from the point of view of a short guy, like the Defendant. He hadn't thought that through before raising the question, however, and Cobb's presentation of "down and in" was convincing, albeit upsetting. But the physical demonstration triggered a response by Klugman, who offered his experience with switch blade knives in support of the conclusion that the Defendant would not have used the knife in the manner that the killer did.

The final take-down of the prosecution's case came with the eyewitness testimony of the woman who said she saw the actual killing. There was no question she saw it in some form, but whether she was able to identify the Defendant at a distance of sixty feet at night while not wearing her eyeglasses became the doubt that pushed the empirically-minded Marshall over to the not guilty side.

How was defense counsel supposed to find the counterpoint arguments that Fonda was able to make? Although there is limited discovery in criminal cases, defense counsel had all the evidence he needed to do what Fonda and the others did. And they were acting in real-time. Defense counsel had at least a week if not more, to prepare a defense in a death penalty case. I think the answer is what I call "windshield time." It could be "subway time" or any other kind of commuting time that allows for contemplation. Or it could be a long walk in the park, even with a friend (or your dog) to bounce off thoughts.²⁹³ The point is: get your head out of the file, the library books, and your computer and think about what each piece of the prosecution's case means. In other words, slow down and think about the various parts of the case. It is windshield time for me because driving in South Dakota usually does not require full attention to the risks posed by other drivers. I can't be reading a file or texting, of course. It is the perfect time to reflect on the significance of the parts, how they fit together, how they don't fit, what is missing, and how best to own each piece of evidence or at least, not let it defeat you.

292. *Id.*, beginning at 1:11:45.

293. Because cross-examination relies heavily on leading questions, you can practice your cross while walking your dog, as long as you have an agreeable canine.

B. JUROR MISCONDUCT

Apart from the clear misconduct of purchasing a similar knife and bringing it into the jury room, other questions include: (1) whether it was proper to “re-enact” the old man’s trudging from his bed to the stairway door; (2) whether the estimate of an L train’s speed required expert testimony because it was beyond the common experience of the jurors; (3) whether the proper use of a switch blade knife required expert testimony; and (4) whether the jury could base reasonable doubt on speculation, i.e., whether the woman wore glasses and the extent, if any, of her impairment.²⁹⁴ I am less troubled by these arguable claims of misconduct. The line between jurors’ own use of knowledge, experience, and judgment that they properly bring to the jury room and the bringing in of preconceived notions based on race, ethnicity, religion, gender, and class, which are improper, is not as clear as the above questions.

What is clear misconduct is the blatant ignoring of the juror’s oath to decide the case on the basis of the evidence in the record. The most egregious offenders were the Bigot, Cobb, and Warden, each in their own way. The only calling out occurred in the aftermath of the Bigot’s rant, where Fonda deplored the open use of prejudice by the Bigot. But Cobb’s use of stereotypes and other non-evidentiary assumptions, notwithstanding his lip service to the facts, was shameful in its own way. And Warden’s refusal to engage the facts through his constant use of ridicule and mockery was a violation of his oath to fairly determine the case based on the facts in evidence. Evidence Rules 403 and 404 help to channel the use of prior bad acts into a workable format,²⁹⁵ but the safeguards of those sections go out the window when discussions wander over to racial and ethnic groups and stark assumptions about their capacity for truth-telling and other unlawful activities.

C. REASONABLE DOUBT?

The Defendant did not have to show that he did not commit the murder. The defense is that there is reasonable doubt that he did do it. Because this was a celebrated case, it has gained a number of respectable critics who believe the jury wrongly acquitted the Defendant. One of these views comes from one of my former professors, Michael Asimow of UCLA Law School.²⁹⁶ Known for his writings (with Paul Bergman) on legal movies,²⁹⁷ Professor Asimow asserts that the jury got it wrong:

294. Charles D. Weisselberg, *Good Film, Bad Jury*, 82 CHI.-KENT L. REV. 717, 723-26 (2007).

295. See SDCL §§ 19-19-403 to -404. JOHN W. LARSON & MARY CHRISTINE HUTTON, *SOUTH DAKOTA EVIDENCE*, 173-207 (2d ed. 2013).

296. Asimow, *A Revisionist View*, *supra* note 290. I took at least one course from Professor Asimow (it was over fifty years ago) and was fortunate to experience his approach to analytical thinking. I do not remember any specifics, but I have the sure memory that he was a great teacher. He, along with many others at UCLA (undergrad and law school), changed my life, which is what an excellent educational experience should do. I have been shaped in many ways that I cannot now explain, but I know that I have been empowered by these teachers. Thank you.

297. REEL JUSTICE, *supra* note 282.

[D]espite the objections raised by the jurors to the prosecution's case, I believe that the mass of circumstantial evidence presented against the defendant was overwhelming and the probability that he killed his father is close to 100%. In other words, *the prosecution met and far exceeded its burden of proving its case beyond a reasonable doubt.*

The circumstantial evidence against the defendant was overwhelming and was easily enough to convict by itself, even if one disregards the testimony of the two eyewitnesses. Let's start with the fact that there was no other known suspect. Who killed the father if it wasn't the defendant? To find the defendant not guilty, we would have to assume that someone unknown (with an unknown motive) sneaked into the upstairs apartment soon after the defendant left for the movies and stabbed the father to death. Yet there was no sign of a forced break-in and no indication of robbery or theft. This account is conceivable, of course, but seems highly implausible.²⁹⁸

Asking who else could have killed the father, if it wasn't the Defendant, is not a good place to start. The defendant does not have to answer the question of who did it. The prosecution must show beyond a reasonable doubt that the defendant committed the crime charged.²⁹⁹ This is not a case, for example, where four people are alone on a tropical island and two of them leave and the other two are found murdered.³⁰⁰ Nor is it like the classic circumstantial evidence case where two people are alone together in a mountain cabin and the next morning the victim is found murdered and only one set of tracks in the fresh snow, belonging to the defendant, leads away from the cabin. In this case, there is no evidence that the father's room was locked off to friends, visitors, or even intruders. Law enforcement investigations, of course, must start with the most likely suspect or suspects. In this case, it was the Defendant. But the investigation should not end there without accounting for other possibilities. This is the problem of tunnel vision, well-known to *aficionados* of Michael Connelly mysteries,³⁰¹ where the police focus on the prime suspect and neglect other evidence that might lead elsewhere. In any event, the prosecution's task—proving that the defendant committed the crime beyond a reasonable doubt—is different than law enforcement's investigative job.

298. Asimow, *A Revisionist View*, *supra* note 290, at 713-14 (emphasis added).

299. Much the same argument is made in Neal Vidmar, Sara Sun Beale, Erwin Chemerinsky & James E. Coleman, Jr., *Was He Guilty As Charged?: An Alternative Narrative Based On Circumstantial Evidence*, 82 CHI.-KENT L. REV. 691, 695-96 (2007).

300. See VINCENT BUGLIOSI & BRUCE B. HENDERSON, *AND THE SEA WILL TELL* (1991).

301. See MICHAEL CONNELLY, *RESURRECTION WALK* (2023); MICHAEL CONNELLY, *THE CROSSING* (2015); MICHAEL CONNELLY, *THE GODS OF GUILT* (2013); MICHAEL CONNELLY, *THE FIFTH WITNESS* (2011).

The prosecution's prima facie case can include the rhetorical, "Who else could have done it?" question, but it must meet reasonable doubt issues, such as the neighbor's ability to hear a shout over the noise of an L train, his ability to "run" to the stairwell to observe the Defendant fleeing the building, and the credibility of the neighbor lady's eyewitness account in light of a vision issue. The prosecution, of course, had no chance for rebuttal because these issues were not raised by the Defendant's counsel. But it needed to tie down loose ends in order to preclude the rise of reasonable doubt in the jurors' minds. In this case, I believe the jurors had reasonable doubt, based on the evidence.

Looming throughout the whole process was the fatal consequence of a guilty verdict. The jurors were told that the court would not entertain a plea for mercy along with a guilty verdict. The specter of the death penalty had to affect the deliberation.³⁰² And it did, although not at the beginning. The deliberation came perilously close to none at all, as the first vote was taken before any discussion. Fortunately, Fonda held out for more debate, followed thereafter by Sweeney, who replied to those who wanted to get out of there, "It's only one night. A boy could die."³⁰³ "You can't send someone off to die on evidence like that," Fiedler stated later.³⁰⁴

D. PERSUASION—DIFFERENT PATHS TO NOT GUILTY

The movement of the jury deliberation from a near guilty verdict to a unanimous not guilty verdict created the drama of the story. No one juror shared the same way of thinking with another. We observed in each juror an instructive process. Taking them in numerical order, we witness how the interaction of the individual's personality, bias, information, and judgment figured in the final decision.

Juror No. 1 – Balsam. Put in the position of foreman through the draw of the jury venire, not through election by his fellow jurors, Balsam was familiar with meetings. He was organized and, for the most part, did a competent job of leading this meeting. He was a little thin-skinned emotionally, as his background had not prepared him for the roughness of this jury. He was fair-minded and sought out Fonda for conversation during a break. He appeared to be motivated by consensus, perhaps from school meetings. In any event, when he switched positions, it was only after Warden had changed his vote, thereby resulting in a clear majority for not guilty. We never heard his reasons either for or against the guilty verdict.

Juror No. 2 – Fiedler. A lowly bank clerk, Fiedler was a follower. He was happy to be there, but unsure of his own opinion. He was accustomed to being disrespected, both at work and in this deliberation. But there was a mind at work inside that insecure head, and we gradually detect it as he gained confidence. By

302. As a matter of law, it does not change the reasonable doubt standard, but, practically, it may be a factor where the evidence of guilt is not completely clear. *See, e.g., Noonan v. State*, 907 S.W.2d 677, 687 (Ark. 1995) (holding the United States Constitution does not require burden of proof in death cases to be higher than standard of beyond reasonable doubt).

303. 12 ANGRY MEN, *supra* note 19, beginning at 30:02.

304. *Id.*, beginning at 1:28:12.

the end, he was strong on the facts and unafraid of the bullies. One feels his evolution was based in part upon his acceptance by Fonda and the newly forming coalition of not guilty voters. He brought his heretofore hidden skills with him as he emerged in the discussion.

Juror No. 3 – Cobb. A small business owner, he was used to being the boss, and when he did not immediately get his way, he was also a bully. Despite his initial statement that he had no personal feelings involved and only cared about the facts, he either lacked self-awareness or was a liar. He was a terrible listener and had no feel for different opinions, other than to lash out with *ad hominem* attacks. He had no patience when it came to going over the evidence one more time. He was very careless with his words and often wound up refuting his own argument. His hold-out as the last guilty voter seemed immovable until he collapsed in the end from emotion and regret.³⁰⁵ This was triggered by bringing his deep-seated anger toward his son to the surface. He had viewed the Defendant's actions as a reenactment of his own son's striking him and subsequent estrangement. This would have been apparent to the perceptive observer, but Cobb's lack of self-understanding made him among the last to know.

Juror No. 4 – Marshall. A stockbroker, Marshall was the leader of the rational guilty voters. He was not unbiased, as evidenced by an early statement that we should not put all the blame on the kids because everyone knew that "slums are breeding ground for criminals."³⁰⁶ Still, he could be reached with facts and good arguments. He was not a very empathetic person (and probably not a warm father, if he had any children), but he ultimately was fair. Demanding of evidence and argument, but fair.

Juror No. 5 – Klugman. He was one of those who hesitated a little before raising his hand on the first vote.³⁰⁷ Initially uncomfortable with speaking in this situation, he eventually came out of his shell because he was angered by the rude and, frankly, bigoted comments that were directed at those who lived in slums. He actually was fairly articulate, as his explanation of how one uses a switch knife demonstrated. He was third to vote not guilty, and it came after reflecting on whether the old man downstairs could have heard the woman scream as the L train was going past. He was thereafter more convinced with each successful counterpunch by Fonda. It also appeared that he was alienated by the boorish manners and *ad hominem* tactics of the bullies.

Juror No. 6 – The Painter. Similar to Klugman, he was initially hesitant to raise his hand, uncomfortable with arguing his position, and ultimately alienated by the rudeness of Cobb and the Bigot. The short conversation with Fonda in the bathroom was as much as he gave of his thought process. He was a follower but could be moved by the facts, once he understood their significance. An honest fellow and a good, solid jury member.

305. See Cunningham, *supra* note 38, at 120.

306. 12 ANGRY MEN, *supra* note 19, beginning at 22:09.

307. *Id.*, beginning at 11:20.

Juror No. 7 – Warden. A loud-mouth bully. It is hard to imagine him as a salesman, but that is how he was cast. A self-centered jerk.³⁰⁸ He has no command of the facts, he simply responded with jokes and insults. Very shallow and unprincipled, he changed his vote in a death penalty case because he wanted to go to the ballgame. “What kind of man are you?”³⁰⁹ Indeed.

Juror No. 8 – Fonda. The man in the white suit. A classic liberal, open-minded, intelligent, and an architect by profession.³¹⁰ He was a good listener and observer, perceptive, shrewd, inquisitive, and articulate. Tactically sound, he always came back to the reasonable doubt anchor. Strategically, he used the soft sell, as Warden observed. He did not go for more than an understanding of the evidence would allow, but always with an eye toward the prize. I think he probably had made up his mind by the time he took that walk the night before the deliberation. He would be a good poker player.

Juror No. 9 – Sweeney. He also hesitated to raise his hand on the initial vote, but his early remarks gave Fonda some hope that his gamble would pay off. His observations were spot on as he grew in confidence. He drew on his knowledge and experience in watching people. Once he got his bearings inside the jury room, he was not afraid to stand up to the bullies. His last contribution on the chief witness’s vision issue was crucial, as even Fonda initially had no answer on that one. If Fonda was the conscience of the jury, Sweeney became his first sergeant.

Juror No. 10 – The Bigot. Ugh. His biases and decision-making process were clear enough. The Bigot exhibited the symptoms of a bad cold in addition to the inner moral sickness that his views displayed. Ultimately, he trusted his prejudices more than the facts. “I’m sick and tired of facts. You can twist them anyway you like.”³¹¹ He folded, however, after it became clear that no one would listen anymore. That he had alienated everyone, including Cobb and Marshall, was the final blow that broke him.

Juror No. 11 – Voskovec. A marvelous portrayal of how immigration has enriched us and made us stronger. Although initially hesitant in raising his hand for guilty, he became a great juror. He did it through listening until he had something to say. It is possible he became even more persuasive, through example, than Fonda, who had possibly alienated some along the way, as Fonda grasped for the right argument. It took an “outsider,” as Warden would have put it, to show the others the right way. The fact that in real life he had *twice* left his native land, rather than live under dictatorships, earned him *gravitas* for this role. He knew first-hand the character of tyranny.³¹²

308. It pains me to write this because Jack Warden has always been one of my favorite actors, especially from his roles in *The Verdict*, *Being There*, and *Shampoo*. See *supra* text accompanying note 58. Always a good actor, he made me hate him in this role.

309. 12 ANGRY MEN, *supra* note 19, beginning at 16:00 (Juror No. 11 says this to Juror No. 7 when he changes his mind based on the ballgame).

310. Although not mentioned in the movie, he is described in the casting notes by Reginald Rose, author of the original play and screenplay for the movie, as an architect. Reginald Rose, *Twelve Angry Men*, DAILY SCRIPT 3 (1996), <https://perma.cc/A3GA-8SJG>.

311. 12 ANGRY MEN, *supra* note 19, beginning at 1:03:21.

312. See *supra* note 49.

Juror No. 12 – The Ad Man. In contrast to the “foreigner” seated next to him, the Ad Man was the soulless American, who seemingly bounced around like a tennis ball. He was adept at reading the “pulse” of meetings. He could entertain with silly jokes and remain uncommitted until he figured out which way the wind was blowing. No principle was involved in his voting, one way or the other.

*Summary – “There are many roads, but only one Path.”*³¹³ Look at the diversity on this jury in terms of knowledge, experience, bias, personality, and decision-making.³¹⁴ Clearly, persuasion occurs in many different ways—both in style and substance. One cannot be all things to all people, but you should be sensitive to the fact that there are numerous roads on the way to persuasion. To keep your focus where it should be, it is helpful to keep in mind Joshua Karton’s admonition: “There is no jury. There are only jurors.”³¹⁵ You should not talk *at* the jury; you should talk *with* the jurors. The former approach sweeps the jury box with a gaze; the latter engages individual jurors with eye contact. You must look for and think about the various roads that lead to the path of persuasion. The path of persuasion should also be the path to justice. You need to convince jurors that what you are asking for is the right thing to do.³¹⁶

One final observation about persuasion with this jury is that they walked into the jury room with the prosecution’s case well in mind. Despite the length of this trial and the complaints about lawyers’ incessant talking, the jurors were able to articulate the prosecution’s main points succinctly and precisely. Contrast that with their sense of the defense’s case. Nothing. And you can’t beat something

313. *Buddha’s Global Positioning System* in FRANK POMMERSHEIM, *BUDDHA’S FALL PENTANGLE, A COLLECTION OF POEMS* (2023) (copy on file with the author).

314. This all-white, all-male jury has been much decried by the academic critics. *See, e.g.*, Judge Nancy Gertner, *12 Angry Men (and Women) in Federal Court*, 82 CHI.-KENT L. REV. 613, 613-14 (2007) (noting the irony of the lack of racial and gender diversity in this supposed New York City jury); Babcock & Sassoubre, *supra* note 286, at 640 (observing the dated composition of the jury in the film); Stephan Landsman, *Mad About 12 Angry Men*, 82 CHI.-KENT L. REV. 749, 753 (2007) (declaring the film “reflects the prevailing sexism of America in the 1950s”). Nonetheless, these jurors were remarkably diverse in what they brought to the decision-making process.

315. CARL BETTINGER, *TWELVE HEROES, ONE VOICE: GUIDING JURORS TO COURAGEOUS VERDICTS* 66 (2011).

316. How does one argue that a not guilty verdict is the right thing to do when a preponderance of the evidence weighs in favor of guilt? One answer is provided in my fictional account of a motorcycle theft-ring prosecution:

Wade asked, “You’ve been very focused on my case. Why?”

“What do you mean?” responded Ian.

“Well, you’re not like the other lawyers I’ve dealt with.”

“I am just doing my job.”

“But you seem to really care about my case. And I’ve already told you that I did it. It’s not like you’re working hard to save an innocent person. How come you’re working this hard for someone who is guilty?”

“Ah, now I get what you are asking. It’s because I believe in our system of justice. *I believe that the State should not be able to put someone in prison unless it follows its own rules.* The rules say the State must prove beyond a reasonable doubt that you have committed the crimes it has charged you with. Right now, it isn’t even close. They have to show that the bikes are stolen, and they refuse to do that. *I’m the one who makes sure they follow the rules. That is for everybody’s protection and I can get behind that.*”

Jonathan K. Van Patten, *At the Sturgis Rally: A Story*, 64 S.D. L. REV. 383, 402 (2019) (emphasis added).

with nothing. Fonda was starting from scratch. Never leave your client essentially undefended. You are not ready for trial until you can provide the jurors with a roadmap that shows the path to persuasion, which is also the path to justice.

E. JURY SELECTION

It is too late to undo jury selection here. But it is not too late to learn from it. One needs to find out who they are first. You must get them to talk. Hopefully, you will be able to find the rattlesnakes, the ones who are dead against you.³¹⁷ The fact that Juror No. 10 was on this jury is a clear indictment of the defense lawyer. Unless the Bigot was a more clever snake than he appeared in the jury room and was able to hide in the tall grass during *voir dire*, the inability of defense counsel to flush him out fell below the standard of care.³¹⁸

It may be difficult to detect and dismiss all the snakes. You should at least try to neutralize them by getting them to commit to the words of the jurors' oath so that others can remind them of the promise they made in open court. At a minimum, the jurors should not carry their "resentments right into the jury box."³¹⁹ That is the antithesis of a fair trial. And yet, it still happens. When Scout asked Atticus Finch whether he would win the trial, he said no. "Then why [try]?" asked Scout. Atticus gave the best answer he could give: "Simply because we were licked one hundred years before we started is no reason for us not to try to win"³²⁰

It is important to get prospective jurors to talk during the jury selection process. The more you know about your jury, the better chance you have to deliver what they need in order to decide in your favor.³²¹ For these reasons, focus groups are an important tool in discovering important perspectives on your case and in making the transition from thinking like a lawyer to talking to real people.³²²

317. See generally DON KEENAN & DAVID BALL, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009).

318. See Henry G. Miller, *The Necessary Peremptory Challenge*, 87 N.Y. ST.B.J. 38, 38-39 (June 2015); Jeffrey Abramson, *Anger at Angry Jurors*, 82 CHI.-KENT L. REV. 591, 594-95 (2007) ("Whatever screening of the jury took place (before the action opens) was not sufficient to pick up on the prejudices, grudges, disinterest and hurry that jurors openly express once they are inside the jury room.").

319. See Jonathan K. Van Patten, *The Trial of Tom Robinson*, 61 S.D. L. REV. 51, 74 (2016).

320. HARPER LEE, *TO KILL A MOCKINGBIRD* 86-87 (1960).

321. One technique I have used in jury selection is to ask each prospective juror to give two words (or phrases) that a close friend would use to describe them. Honesty in their response is good, but not completely necessary. I am more interested in what they say about themselves, true or not. So, I get "honest," "hard-working," "loyal," "easy-going," "trustworthy," "kind," "funny," "thoughtful," "smart," "passionate," "opinionated," and so on. Think of the jury venire as your last focus group before trial. They are telling you their values. You can even weave a few of them into your closing argument as themes or at least craft the argument in light of those values. You have to get them to talk in order to do this. In front of a group of strangers, talking about themselves in positive and sometimes light-hearted terms is a less threatening type of inquiry. It opens up conversation much more than, "how many of you think that just because the defendant is accused of wrongdoing, he must have done something wrong?" or "how many of you think there are too many lawsuits?"

322. See Jonathan K. Van Patten, *Twenty-Five Propositions for the Practice of Law*, SOUTH DAKOTA BARRISTER 8, 21 (May-June 2020) ("25. Think like a lawyer, talk like a real person. The practice of law is not just mastery of a set of rules. It requires many additional skills, including understanding yourself, careful listening, ability to synthesize law and fact, working smart, exercising good judgment, reflection

Think of the jury venire as the last focus group before trial. If you do not get in the way by talking too much, they will tell you their values. And a little follow-up might give you insight into their decision-making process.

VII. CONCLUSION

The jury presents us with a conundrum. The juror's oath requires the decision to be based on the evidence in the record and the applicable law.³²³ But jurors are not required to be "empty-headed." Jurors' minds are not blank slates upon which the record is written. It is proper for jurors to "take into consideration '[m]atters of common knowledge and experience . . . in arriving at [a judgment] and in drawing inferences and reaching conclusions from the evidence.'"³²⁴ As a consequence, there can be no "perfect" jury, that is, untainted by matters outside of the record. It is especially difficult when there is a party whose very *identity* seems to preclude an honest evaluation of the facts by those who are deeply invested in a non-factual narrative. The juror's oath is not a toothless caution, however. It serves as a reminder to all jurors about the importance of the record.

12 Angry Men illustrates the interaction between evidence and inference, the weighing of testimony and credibility, and the clash between assumption and proof. It continues to provide guidance and inspiration as we follow our own roads that lead to justice. "[Y]ou have been weighed in the balances and found wanting."³²⁵ We should all remember that warning and act as if we are accountable. We do not want to cut it too close.

on experience, and tenacity. While this is a complex mix, the outcome also needs some translation back to simple terms. The one who makes it the simplest generally wins. And that outcome must make sense. If the law is to continue to command respect, it must make basic common sense.").

323. See *supra* note 14 and accompanying text.

324. *Gross v. Connecticut Mut. Life Ins. Co.*, 361 N.W.2d 259, 270 (S.D. 1985) (quoting 89 C.J.S. Trial § 463(b), at 99 (1955)). See also *State v. Robertson*, 2023 SD 19, ¶42, 990 N.W.2d 96, 106 ("[J]urors can take into account matters of common knowledge.").

325. Daniel 5:27 (RSV).