

## 12 ANGRY MEN: A REVISIONIST VIEW

MICHAEL ASIMOW\*

The film *12 Angry Men*<sup>1</sup> has achieved the status of a true classic, particularly in the law and film canon.<sup>2</sup> I am delighted and honored to contribute this brief essay to a symposium devoted to the fiftieth anniversary of its release. I am a big fan of the movie, particularly Sidney Lumet's direction (what an achievement to set an entire film within a stifling jury room—and this in Lumet's first feature film!<sup>3</sup>), Reginald Rose's crackling script, and the inspired ensemble acting.

*12 Angry Men* is considered the iconic jury film<sup>4</sup> and it has done more than any movie, television show, or other cultural work to enshrine the jury as the central and indispensable element of the American criminal justice system.<sup>5</sup> For generations of film watchers, Henry Fonda as Juror #8 has

\* Professor of Law Emeritus, UCLA School of Law. Thanks to Paul Bergman for his help and editorial suggestions.

1. 12 ANGRY MEN (Orion-Nova Productions 1957).

2. The discerning users of the Internet Movie Data Base rank *12 Angry Men* as the 15th best film of all time. It is far ahead of any other law-related film. *To Kill a Mockingbird* ranks 42nd. Others barely made the cutoff of 250: *Judgment at Nuremberg* comes in 193rd just ahead of *Witness for the Prosecution* (207), *Anatomy of a Murder* (221), and *Inherit the Wind* (246). IMDb Top 250, <http://www.us.imdb.com/chart/top> (last visited Jan. 16, 2007). For a brilliant treatment of the film (and of the jury in the courtroom genre), see Carol J. Clover, *God Bless Juries!*, in REFIGURING AMERICAN FILM GENRES 255 (Nick Browne ed., 1998). For other thoughtful treatments of the film, see 2 ADAM GARBICZ & JACEK KLINOWSKI, CINEMA, THE MAGIC VEHICLE: A GUIDE TO ITS ACHIEVEMENTS 297–99 (1979); STEVE GREENFIELD, GUY OSBORN & PETER ROBSON, FILM AND THE LAW 161 (2001); THOMAS J. HARRIS, COURTROOM'S FINEST HOUR IN AMERICAN CINEMA 1–21 (1987); TIMOTHY O. LENZ, CHANGING IMAGES OF LAW IN FILM & TELEVISION CRIME STORIES 54–66 (2003); Nancy S. Marder, *Why 12 Angry Men? (1957): The Transformative Power of Jury Deliberations*, in SCREENING JUSTICE—THE CINEMA OF LAW 157 (Rennard Strickland, Teree E. Foster & Taunya Lovell Banks eds., 2006); Peter Robson, *The Justice Films of Sidney Lumet*, in READINGS IN LAW AND POPULAR CULTURE 185 (Steve Greenfield & Guy Osborn eds., 2006).

3. Lumet had plenty of experience in television direction before making *12 Angry Men*. Through his choices of lenses and camera angles, Lumet made the jury room seem more and more claustrophobic as the movie progressed. SIDNEY LUMET, MAKING MOVIES 81 (1995).

4. *12 Angry Men* is humorously parodied in JURY DUTY (TriStar Pictures 1995), starring Pauly Shore. Tommy Collins desperately wants to prolong jury deliberations because he is homeless and he loves the hotel, free food, and five dollars per day. Thus he holds out in an apparent slam-dunk murder case. Just in case anybody missed the connection, we see him watching *12 Angry Men* on the television in his hotel room.

5. A survey commissioned by the American Bar Association revealed that 78% of respondents agreed with the statement “The jury system is the most fair way to determine the guilt or innocence of a person accused of a crime.” Only 12% disagreed. Sixty-nine percent of respondents thought that juries are the most important part of our judicial system. AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE

exemplified the heroic anti-conformist juror, a common man standing alone against the other eleven, changing an 11–1 vote for conviction into a unanimous and correct verdict of not guilty.<sup>6</sup> I would like to suggest a contrary reading of the film. In my opinion, the defendant should have been found guilty.

On one level, the movie serves as an argument against the jury system because it is so unlikely to be replicated in any real jury room. If one assumes that the defendant should have been acquitted, how often would such a defendant be fortunate enough to have somebody like Henry Fonda battling for him in the jury room? How often does one holdout juror turn the other eleven around? Well, almost never, according to studies of the jury system.<sup>7</sup> Holding out in these circumstances requires more courage and tenacity than most of us can muster.<sup>8</sup> Indeed, the end of the movie illustrates this well, as the final holdout jurors crumble, not because they are convinced the defendant should be acquitted but because of the social pressure to give in to the emerging consensus.

In the case of an 11–1 split, the usual result is that the one switches sides, not the eleven. Or, if the one is truly determined, there is a hung jury.<sup>9</sup> The chance of the one changing the view of eleven is remote. Thus the film hardly serves as a strong argument that the jury can generate a just result and enforce the high burden of proof imposed on the prosecution

SYSTEM 63 (1999). In contrast, only 30% of respondents had confidence in the U.S. justice system, 32% had confidence in judges, and 14% had confidence in lawyers. *Id.* at 49.

6. Nancy Marder, for example, regards the film as a “testimonial to the jury system” and “a tribute to the deliberative process.” Marder, *supra* note 2, at 166.

7. The most famous empirical study of criminal juries was conducted by Kalven and Zeisel. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966). Among their findings was that “with very few exceptions the first ballot decides the outcome of the verdict.” *Id.* at 488. The jury’s deliberations after taking the first ballot had no effect on the final verdict in nine of every ten cases. When there were seven to eleven votes to convict on the first ballot, the ultimate verdict was guilty in 86% of cases, acquittal in 5%, and a hung jury in 9%. This finding shows that the thesis of *12 Angry Men* is unlikely, though not impossible. Where the first vote was lopsided (especially where it was 11–1), peer pressure almost always forced the holdouts to agree with the majority. Yet Kalven and Zeisel found that in about 10% of cases, the minority eventually succeeded in reversing the initial majority or in hanging the jury. However, these ultimately successful minorities usually had four or five votes, not just one. Generally, when there is a single juror who refuses to budge, the result is a hung jury, not the eleven changing their votes to join the one. *Id.* at 488. See *generally* A HANDBOOK OF JURY RESEARCH (Walter F. Abbot & John Batt eds., 1999).

8. Indeed, holdouts are sometimes kicked off the jury after the other jurors complain to the judge that they have refused to deliberate. See, e.g., *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001) (holding that a juror can be excused for refusal to participate in deliberations but not because of disagreement with the other jurors).

9. See STEVE BOGIRA, *COURTROOM 302*, at 103–06 (2005). Bogira’s fascinating book follows events in a single Chicago courtroom for a year. One case involved a single holdout on a jury who used Henry Fonda in *12 Angry Men* as his role model. But he couldn’t change anybody’s mind and the result was a hung jury.

when the rest of the system (prosecutor, defense lawyer, judge) fails to do its job. Quite the contrary.

What does seem real about the film are the racist, ageist, and classist views of some of the jurors. Those are the people who are dispensing justice in the jury room<sup>10</sup> and some of them continue to do so, although most people nowadays have the sense to keep such views to themselves.

On a deeper level, however, I suggest that the jury erred badly. Fonda, of course, never argued that the defendant was innocent, only that the prosecution failed to prove guilt beyond a reasonable doubt.<sup>11</sup> While nobody can say what level of certainty is necessary to surmount the reasonable doubt hurdle, it is probably around 90% and certainly less than 100%.<sup>12</sup> It is in the nature of evidence about a past event that it cannot establish any proposition with absolute certainty.<sup>13</sup> Eyewitnesses can be mistaken or lying. Circumstantial evidence raises an inference, one that could be incorrect. However, despite 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

10. In *TO KILL A MOCKINGBIRD* (Brentwood Productions 1962), a racist all-white jury perpetrates a horrible injustice by convicting a black defendant of a rape of which he was surely innocent. Another all-white jury does just the opposite in *A TIME TO KILL* (Regency Enterprises 1996), acquitting a black defendant who murdered the rednecks who had raped his daughter. The verdict is just as arbitrary and just as wrong.

11. The traditional view of the meaning of "beyond a reasonable doubt" appears in *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850): Reasonable doubt is "not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt." Instead, reasonable doubt exists when the "state of the case . . . leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Modern restatements of the reasonable doubt rule abandon this quaint terminology and indicate that the jury must be "firmly convinced" of guilt in order to convict. See FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1988); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 119–30 (1999) (pointing to empirical evidence showing that jurors are misled by the reasonable doubt standard and may convict in weak cases).

12. See Solan, *supra* note 11, at 126 (reporting results of a poll of federal judges).

13. As Justice Harlan wrote,

[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

*In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

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.<sup>14</sup>

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.

On the night of the murder, neighbors across the hall from the father's apartment heard the father and son having a fight around 8:00 p.m. and heard the father hit the defendant twice. The defendant was often physically punished by the father. Just before the murder, the landlord testified that he heard the boy say "I'm going to kill you." This item of circumstantial evidence was thrown into some doubt because the words could have been inaudible. An elevated train was passing at the time the father was stabbed, and the words could have been spoken during the ten seconds or so that the train was passing. The fight between father and son and the physical violence accompanying it provided ample demonstration of motive. In addition, the defendant had numerous previous brushes with the law because of violent behavior—generally a pretty good indication that he was prone to violence.<sup>15</sup>

The father was killed with an unusual knife identical to a knife purchased by the defendant on the night of the killing. He claimed he lost it when it fell through a hole in his pocket. This account is highly implausible. The objections to this evidence raised by Fonda and the other jurors are far from convincing. True, the knife was not unique because Fonda found another just like it at the local pawnshop.<sup>16</sup> So what? It was still an unusual knife and chances that the true killer had one just like it are extremely re-

14. Needless to say, the fact that the most repulsive members of the jury were among the last holdouts does not mean that their evaluation of the evidence was wrong. We naturally tend to accept the views of the reasonable and civilized Henry Fonda and the likable jurors who take his side, and we tend to reject the views of the bigoted or crude jurors. But this is a serious logical error. People with bad manners and detestable prejudices may still make arguments more logically persuasive than those made by people with good manners and an absence of prejudices.

15. The jury should not have heard about the defendant's past crimes, particularly not those committed while a juvenile. *See* FED. R. EVID. 404.

16. Of course, 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.

mote (it is even less likely that the real killer picked up the knife after the defendant lost it and used it to kill the father).

Furthermore, the defendant could not remember anything about the movie he claimed to have just seen. Fonda attempted to cast doubt on this evidence by questioning another juror about a movie he had seen days before. The juror remembered the name and actors of both films in a double feature, but not perfectly. This “demonstration” hardly diminishes the strong inference of guilt raised by the fact that the defendant could remember nothing at all about the movie he claimed to have just seen. And nobody saw him at the theater. His alibi, therefore, is highly suspect.

Another juror claimed that an experienced knife fighter would not have stabbed downward with an overhand motion, especially against a taller victim. But a demonstration quickly dispelled that idea. An overhand, downward stabbing motion was perfectly possible. The juror claimed that a switchblade is used for underhanded, upward jabs. Well, perhaps; but perhaps not. What made the juror such an expert on knife fighting? Regardless of how switchblade knives were usually used in knife fights, the knife could have been used either to stab upwards or downwards. The murder did not occur during a knife fight, so the comparison to knife fighting technique was of little utility. The knife could easily have been used to stab downward when the boy impulsively grabbed it from his pocket and struck out against his father. And, of course, if there were an unknown killer instead of the boy, that person also stabbed downward.

In this view, the testimony of the two eyewitnesses is cumulative and entirely unnecessary. If you believe either or both of the eyewitnesses, the probability moves even closer to 100%; if you disbelieve both of them, it does not reduce the probability below the very high level of certainty already produced by the circumstantial evidence. The two eyewitnesses were disinterested and had no motive to lie, but of course, like any eyewitnesses, they could have been mistaken.

One eyewitness claimed she saw the boy kill his father through the windows of a moving elevated train. The jurors refuted this testimony because the witness had little indentations on her nose indicating that she wore glasses. Because she saw the killing while lying in bed, she wouldn't have been wearing her glasses, hence could not have identified the boy as the killer. But perhaps she wore reading glasses or sunglasses, not distance glasses; or perhaps she was far-sighted. Even if she were near-sighted and usually wore distance glasses, her vision might still have been good enough without them to make the identification.

The landlord who lived directly below the victim's apartment testified he rushed to the door of his apartment after he heard the victim's body hit the floor and somebody start down the stairs. He claims he saw the defendant running down the stairs and out the door. Fonda refuted this by noting that the landlord was dragging his leg and thus was disabled. It would have taken the defendant only fifteen seconds to run out the door and down the stairs, but would have taken the witness forty-one seconds to get from his bed to the door and open it. Thus he probably saw only the back of the fleeing killer, not his face. One juror speculated that the landlord embellished his story so that people would pay attention to him for once, but this was pure guesswork. Fonda makes a fair point here, but it is also possible the landlord started toward the door as soon as he heard the body fall and the defendant might have hesitated before running down the stairs, thus giving the landlord enough time to see the face of the person descending the stairs.

In short, the jurors do an effective job of casting doubt on the eyewitness testimony, but I suggest that the probability that the defendant was guilty, based on circumstantial evidence, was already close to 100%. Throw out the eyewitnesses, and you are still close to 100%.

*12 Angry Men* richly deserves its acclaim as a classic of legal popular culture. It is an inspiring tribute to a common man holding out against lynch mob mentality. It is also a strong argument that juries can make serious errors in evaluating evidence. Whether or not we believe in the jury system as presently constituted, we should not rely on *12 Angry Men* as popular cultural evidence that jury deliberation produces accurate and logical results.