

A JURY BETWEEN FACT AND NORM

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INTRODUCTION

A filmmaker, like a trial lawyer, knows that the “rhetoric of fiction”¹ relies on the ordering and characterizing of details. Because the things that are closest to us and most obvious are often the hardest see, I will begin by noting eight details in *12 Angry Men*² which are so obvious that their significance for the understanding of the film may be difficult to discern. I will then discuss the significance of the film being a *drama*, and, as we will see, a drama about a drama about a drama. Finally, I will identify six dramatic tensions that define the film’s meaning.

I. EIGHT DETAILS SO OBVIOUS THAT THEY ARE HARD TO SEE

First, of course, the film is set in the fifties. There are pay phones with rotary dials. Everyone smokes, usually cigarettes. The jury is composed exclusively of white males, mainly middle-aged. One juror seems to be a recent immigrant from communist Eastern Europe where, we are told, there is no real freedom of expression. There is a reference to Mussolini which would be rare today. One actor offers a Jimmy Cagney imitation to taunt another. (I haven’t seen a Jimmy Cagney imitation in decades.) Finally, Baltimore, a decade before Frank and Brooks Robinson, is a team whose dismal quality is worth a comment.

The jury room is a bit shabby. One juror complains about the lack of air conditioning in the steamy New York summer. The fan doesn’t work initially. One of the pull-down towel dispensers in the men’s washroom fails. The windows are stuck and hard to open. There are no screens. Through those windows the jurors can see the monumental structures of New York’s neoclassical architecture: perhaps government and commercial

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1. I borrow the phrase from Wayne Booth. See WAYNE C. BOOTH, *THE RHETORIC OF FICTION* (2d ed. 1983) (1961). Indeed, it has been suggested that all rhetorical persuasion depends on the accumulation and sequencing of detail, one of the reasons that legal education has to be unlearned before becoming a passable trial lawyer.

2. *12 ANGRY MEN* (Orion-Nova Productions 1957).

buildings. (One juror points out the Woolworth Building and comments that he has never been inside.) Compared to the solid establishment just outside, the jury room appears to be particularly marginal, and the jury itself an afterthought, an underfunded appendage to “the system.”

Second, we see almost nothing of the trial itself. Decades of social science research has shown that the trial itself and the “discipline of the evidence”³ that it offers is the most important aspect of the jury system. The initial majority remains the most important predictor of the verdict, though the significant, albeit minority, number of cases where that is not the case shows the importance of jury deliberation.⁴ The film shows us the judge droning on through a few final jury instructions in a thoroughly disengaged and bureaucratic style—a perfect illustration of Chesterton’s justly famous rationale for the institution of the jury⁵—and a short cameo of a silent defendant—young, dark-skinned, and in the context of the entire film, probably Puerto Rican. We have access to the trial events only through the accounts of—and sometimes controversies among—the jurors. In this, we, the audience, are in the same position as are the jurors in their dependence on the witnesses for their access to the underlying events of the crime.

Third, the trial is a whodunit. The legally defined issue is the identity of the killer. The jury must decide either/or, as is true in most criminal trials, but here the underlying reality seems most congruent⁶ with that either/or. The trial concerns a “brutally elementary fact.” The defendant did the killing or he didn’t. There appears to be no more subtle issues of the defendant’s state of mind—no insanity or diminished capacity defense. Now, this is only one kind of trial, even only one kind of criminal trial. The underlying reality itself in other cases requires a higher level of interpretation: Did the defendant “possess” a firearm in violation of federal law? Was he “knowingly” in possession? Did he “intend” the victim’s death? Was the victim “reasonably” in fear of his safety when the defendant shook his fist and uttered certain words? There is a continuum here from “interpretation” of what the action *was* to a determination of how it ought to be evaluated,⁷ either “before” the legal categories are brought into play (decid-

3. JEFFREY ABRAMSON, *WE, THE JURY* 162 (1994).

4. See ROBERT P. BURNS, *A THEORY OF THE TRIAL* 145 (1999).

5. Chesterton wrote that most abuses occurred not because legal officials were stupid or evil, but only because they had gotten used to it. See G.K. CHESTERTON, *TREMENDOUS TRIFLES* 56 (1968).

6. See Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 *MICH. J. GENDER & L.* 1, 8, 12–28, 31–34 (1998) (explaining that mental state determinations are highly interpretive).

7. Iris Murdoch emphasized that the proper evaluation of human events involved the “accurate” predication of mid-level descriptions of the events or actions. See generally IRIS MURDOCH, *THE*

ing, for example, whether the defendant acted “rudely” or “suspiciously”) or in the application of those categories. A trial that is simply about identity is a particular kind of trial, as Professor D. Michael Risinger has emphasized.⁸ I believe that juries in those kinds of trials are particularly dependent on the pre-trial efforts of various legal actors—witnesses and investigators prominent among them—whose errors and sometimes crimes can have a sometimes deadly effect. They can subvert both the jury’s own common sense and the devices of the trial itself—usually very sure tools—in a number of ways.⁹ We will see that even here, however, the practical intelligence of the jurors contains important resources to resist that subversion.

Fourth, in contrast with the brutally elementary nature of the issue¹⁰ before the jury, the case involves an accusation of patricide. Patricide was the most heinous of crimes under Roman law, most subversive of sacred tradition and the social order, and most brutally punished.¹¹ It is, of course, an act of massive mythic significance, evoking the wild terrors of tragedy. It turns out that much of the film is about the tension between the jury’s obligation to fairly try the question of brutally elementary fact within the horizon imposed by the meaning of the event and the process of deliberation itself. They must move between fact and norm. Norm is mediated by meaning. These tensions will turn out to be enormously complex.

Fifth, we have no omniscient narrator (or director). We are not shown by such a *deus ex machina* what “really happened,” “already out there now” real.¹² Our access to the event being tried is necessarily mediated through the stories and arguments of the jurors, just as theirs is mediated through the stories and arguments of the absent trial. Even the “brutally elementary fact” of the death of the victim is mediated to us through these stories and arguments. Thus the interplay between truth as correspondence (or “accuracy”) and truth as coherence or “integrity” of the processes of narrative and argument is very subtle. Because our intelligences are “discursive”—dependent on the construction of narratives and arguments—and

SOVEREIGNTY OF GOOD (1971). Kovesi emphasizes the continuity between descriptive terms and evaluative terms. See generally JULIUS KOVESI, *MORAL NOTIONS* (1967).

8. See D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004).

9. See BRIAN FORST, *ERRORS OF JUSTICE* 66–133 (2004).

10. I am putting aside the complexity, discussed below, introduced by the jury’s obligation to find guilt only if the defendant has been proven guilty “beyond a reasonable doubt.”

11. See Peter Gamsey, *The Criminal Jurisdiction of Governors*, 58 J. ROMAN STUD. 51, 55 (1968).

12. BERNARD J.F. LONERGAN, *INSIGHT: A STUDY OF HUMAN UNDERSTANDING* 424–25 (Philosophical Library Inc., 3d ed. 1970) (1957).

not intuitive—capable of an immediate identity with the object of knowledge¹³—they may miss the mark. But because we can both construct and then deconstruct our stories and arguments—and the devices of the trial do just that—we are not fully prisoners of those stories and arguments. As we see in the film, they can be self-corrective and can end with a practical truth. We can never achieve an absolutely certain identity between our beliefs and the event being tried, but we may achieve certainty about what we ought to do given the evidence we have.

Sixth, the jurors conclude that they must deliberate based on an underlying proceeding, which was not a well-tried case. At several crucial points the jurors judge that the defendant seems not to have been well-served by his lawyer. They consider what explanation for the apparent failure is more likely—that the lawyer was indifferent and underpaid or that he avoided an inquiry or argument because it was damaging to his client—and judge that the former seems the more likely explanation.¹⁴ This means that the jurors are left to do much of the work of construction and deconstruction that the lawyers do in a well-tried case.¹⁵ We will see that this often involves placing eyewitness testimony in the narrative context that allows them to judge its plausibility. This means that the jurors have to perform *two* operations, the first of construction and the second of evaluation.¹⁶ Hannah Arendt argued that judgment on political matters is fairly widely distributed among human beings.¹⁷ But that commonsense judgment has to be *actualized* or *realized*.¹⁸ The ability to realize human judgment through the artistry of deft speech is, on the other hand, much more narrowly distributed.¹⁹ The trial, in its ideal form, takes advantage of these differential distributions of talent. It allows trial lawyers to engage in the operations of construction,

13. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 155–57 (Norman Kemp Smith trans., 1968).

14. Jurors #8 and #7 had the following discussion regarding the defendant's attorney:

#8: He was court-appointed.

#7: So what does that mean?

#8: Well, it could mean a lot of things. It could mean he didn't want the case. It could mean he resented being appointed. It's the kind of case that brings him nothing. No money. No glory. Not even much chance of winning. It's not a very promising situation for a young lawyer. He'd really have to believe in his client to make a good fight. As you pointed out a minute ago, he obviously didn't.

#7: Sure he didn't! Who in the heck could, except God come to earth or somebody.

Reginald Rose, *Twelve Angry Men*, in *FILM SCRIPTS TWO* 156, 248–49 (George P. Garrett, O.B. Hardison & Jane R. Gelfman eds., Irvington Publishers 1989) (1972) (screenplay version of the film *12 ANGRY MEN*, *supra* note 2).

15. See BURNS, *supra* note 4, at 34–72.

16. Lonergan calls the former “direct understanding” and the latter “reflective understanding.” LONERGAN, *supra* note 12, at 279.

17. See HANNAH ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* 62–64 (1982).

18. See PETER J. STEINBERGER, *THE CONCEPT OF POLITICAL JUDGMENT* 230–31 (1993).

19. See ARENDT, *supra* note 17, at 62–64.

narrative, and argumentation—all of which enhance commonsense judgment—and gives the power of judgment to the collective common sense of the jury. In this case, this wise distribution of functions seems to have at least partially broken down. If, as I have argued elsewhere,²⁰ the trial at its best forces the mind downward toward the concrete, intensifies the competition over the meaning of the events being tried, and cultivates the suspension of judgment until all the aspects of a situation are explored, it is perhaps not surprising that a jury that did not have the benefit of such a trial almost goes badly wrong, at least initially.

Seventh, unlike in many criminal trials, the jurors know the actual consequences of their “factual”²¹ determination, either freedom or death in the electric chair. The trial judge tells them that the death penalty is mandatory on apparently the only charge on which the defendant is being tried. The jurors are not kept in the dark and left to guess about the actual consequences of their judgment. The imagined consequences of a guilty verdict provide the normative horizon within which the “factual” determination of guilt or innocence²² takes place. The latter judgment is based on our discursive powers and, for reasons that we will examine at greater length below,²³ always “underdetermined” by the evidence, from which competing inferences may be drawn. This is the space for what Kalven and Zeisel called the “liberation hypothesis”—the notion that factual uncertainty could liberate the jury’s moral sentiments from the consequences of the mechanical imposition of the rules in the jury instructions to an accurately constructed (and value-free) narrative of events.²⁴ In the face of normative discomfort with the consequences of conviction, they would then avoid direct nullification by taking “a very merciful view of the facts.”²⁵ For the jurors in the film, the legal obligation to find the defendant guilty only on proof beyond a reasonable doubt is not a matter of assigning a numerical probability to that phrase. Rather, it is the more concrete judgment for which they must take an inevitably moral responsibility, at least as to whether the evidence is of a character that would justify the defendant’s execution. Juror #2, the bank teller, ultimately puts it this way: “You can’t

20. See BURNS, *supra* note 4, at 132.

21. On the jurors as triers of fact, not of law, see *id.* at 18.

22. The jurors show they understand that the prosecution bears the burden of proving the defendant guilty beyond a reasonable doubt, but by the end of the deliberations, the ever increasing number of jurors voting for acquittal tends to speak of their conviction that the defendant is “innocent.”

23. See *infra* text accompanying notes 35–40.

24. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 166 (1966). I have argued that the “liberation hypothesis” takes a traditional paradigm of trial decision making, which is quite partial as the full truth. BURNS, *supra* note 4, at 148 n.98.

25. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 21 (1959).

send someone off to die on evidence like that.”²⁶ Though there is mention of the defendant’s poverty and the burdens of being raised by a criminal and abusive father, these do not function directly as reasons to acquit out of sympathy. Rather, they seem to provide reasons to respect him enough to offer him their allegiance to the internal norms of deliberation. They require attention to the details of the case and adherence to the intellectual “discipline of the evidence”²⁷ that leads them to acquit.

Eighth, in the script of the movie, we never learn the names of any of the jurors, though we do learn each man’s occupation. (In the film version, we learn two names at the very end of the film.) They are Everyman. Henry Fonda’s character tells us pointedly that they are like everyone else, no better, no worse. Each person’s individuality plays an important role in the deliberation, but it provides diversity of perspective rather than diversity of individual interest.²⁸ What the deliberation achieves is the emergence of their *common* sense.

II. THE DRAMATIC FORM OF THE FILM

The film is, of course, a drama. Indeed, it is an on-screen drama about an unseen courtroom drama, which may, if only by analogy, be said to be about an unseen family drama. A drama is a multivoiced or “polyphonous” medium. “It is the art form truest to life and the manifestation of complex, pluriform, multiply-interpreted truth in changing circumstances.”²⁹ It proceeds through time, and time is essential to it, as it is to the meaning of human lives. In the best drama, no one character or voice represents the truth the artist seeks to manifest. Indeed, that truth can only be expressed in a multivoiced medium. It is also the medium best suited to express a form of justice that can exist only as a tension of opposites.³⁰ As such, it is inconsistent with the “propositional” form of truth that holds dominance in the American legal academy³¹ in which truth is a correspondence of propositions to the “facts” asserted. More broadly, it has been suggested that “the

26. Rose, *supra* note 14, at 331.

27. ABRAMSON, *supra* note 3, at 162.

28. *See id.* at 118–27.

29. Ben Quash, *Drama and the Ends of Modernity*, in BALTHASAR AT THE END OF MODERNITY 139, 165 (1999).

30. *See generally* STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000). I have argued that this is precisely the kind of justice that is consistent with our broader forms of life and that is well represented at trial. BURNS, *supra* note 4, at 220–44.

31. James Boyd White has offered a critique of the propositional view of language and truth. *See* JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 55 (1999).

dramatic structure of truth” is at odds with certain temptations of modern thought to single-voiced “epic” or “scientific” approaches to truth.

Drama does not seek to picture or mirror reality:

Works of art are not reproductions of a reality that can be identified independently of the work of art and used to judge the adequacy of its representation; rather, the features of the objects works of art represent . . . are illuminated only by means of the representation itself; certain events or features are exaggerated, the importance of others minimized and the like. Hence the representation does not provide a mirror of reality that exactly reflects it; rather, on Gadamer’s view, artistic representation shows the “truth” of “reality.” As he puts it, “‘Reality’ is defined as what is untransformed and art as the raising up of this reality into its truth.”³²

I have argued that the trial does something quite like this, though, in a sense, the jury is offered two competing portrayals of what is essential or most important about the case and it is up to the jury to *determine* through its judgment the “truth of what is.”³³ In a sense the jury members are the artists of the piece, though in a well-trying case they need offer only judgment.

The film as we have it portrays a jury in this process of determination. We have already seen that the jury has to take on more of the burden of construction than would be true in a well-trying case. So we see a bit more of that process than would be the case had the defense lawyer done his job. We are watching the jury as artist. Of course, we have a dramatic portrayal of the jury. The author and the director are offering their determinations of “the truth” about jury deliberation. So it is not a representation of an empirical average of jury deliberation, but rather of the truth of jury deliberation, its “essence.” And, because this is drama, we should expect that the truth exists in the interstices of the strong positions taken by the twelve antagonists. And we should expect that we can actually dwell in those tensions, though we cannot easily represent or picture the truths that we can discern there.³⁴

We can say as an empirical matter that this jury is an “idealized” jury, but drama is always about portraying the “ought” in the “is.” And really *in*

32. GEORGIA WARNKE, *GADAMER: HERMENEUTICS, TRADITION AND REASON* 57 (1987).

33. Many opening statements begin with “This is a case about . . .” This is an appeal to the jury’s interpretive “as structure,” the inevitability of even seeing an event *as* a kind of event. Trial lawyers will typically identify (1) a legal theory of the case, an argument that under the fair meanings of the legal rules and the facts of the case, they are entitled to prevail or at least receive a jury determination; (2) a factual theory of the case, a single coherent narrative of events and motives; and (3) a persuasive theory of the case, the moral basis for the jury’s hoped-for action.

34. Charles Taylor uses the very helpful term “personal resonance” for our ability to discern a truth that exists in a manner that we cannot easily gain “objective knowledge” of, but which “resonates” with a reality that is not subjective. See CHARLES TAYLOR, *SOURCES OF THE SELF* 510 (1989).

the “is.” It is about a portrayal of “situated ideals,” ideals that are situated in actual institutions and practices and need not be imported from “heaven knows where.” The jury portrayed is then, we would expect, not completely inconsistent with all of the empirical jury studies, but is not simply a mirror held up to the least common denominator of actual juries. And, of course, the appeal of drama to sensibilities beyond formal logic allows us to see the “truth of what is” in the jury system. The drama wants us to *respond* to the portrayal we see and, I believe, to approve of the jury we see acting. Drama says that we can only approach the truth from the middle of things and that a science that proceeds from Cartesian aloofness can only be a resource, and not an ultimate touchstone of truth, for our ultimately dramatic selves. The practical is primary for us as we try to understand the trial, just as it is primary for the jury in entering its verdict. The film is then successful if it reveals what is essential about jury deliberation in a manner that evokes the feelings toward the institution that lead us to act appropriately toward our jury system. In the same way, a trial is itself successful if it absorbs the jurors in the drama of a human event in a way that allows them to act appropriately in response to that absorbing drama. Put palely, the truth it seeks is pragmatic.

It may be a weakness of the film that Fonda’s character seems so central. With the possible exception of the E.G. Marshall character, the stock broker and rationalist, he is not really balanced strongly by any other voice in the room. On the other hand, he declares at the start that he does not really know the truth of the situation at all. He simply wants to talk about it. As the film goes on, it seems that his Socratic ignorance generally acts as the midwife for the emergence of the democratic knowledge of the entire jury. Initially, he simply wants to give the case time and attention and allow the jury’s own practical reason to emerge in that process of deliberation. His questioning allows the “democratic knowledge” of the entire jury to emerge.

III. WHAT IS DRAMATIZED IN THE FILM

First, the film portrays the paradox of elevation of the jury’s common sense through its absorption in the finest of detail offered by the absent trial. Anthropologist Clifford Geertz argued that understanding of human events and practices requires “a continuous dialectical tacking between the most local of local detail and the most global of global structure in such a

way as to bring both into view simultaneously.”³⁵ Or in Iris Murdoch’s words, “What looks like mere accuracy at one end looks more like justice or courage, or even love at the other.”³⁶ The moral task, in her view, requires “an exercise of justice and realism that is really *looking*. The difficulty is to keep this attention fixed upon the real situation and to prevent it from returning surreptitiously to the self”³⁷ (In the film, the Lee J. Cobb figure, Fonda’s principal antagonist, is, it seems, absorbed with *his own* disastrous relationship with his son and reduces the trial to that relationship.) The jury begins, as we all usually do, with the “anxious, usually self-preoccupied, often falsifying veil” over what they have seen.³⁸ However, the worldliness of the public discussion of the facts of the case continually disciplines this lazy first take on the matter before it. Time and again, members of the jury, with their extraordinary collective memory for the most refined details, come to understand that the specific details of the case make it impossible for them to accept the easiest stories that form the “falsifying veil” that individual members try to fabricate. Did the defendant’s father “hit” or “punch” him? Did the old man in the apartment below “walk” or “run” to the door? Did it take him “fifteen” or “twenty” seconds? The decisive significance of those small shifts in detail demonstrate that common sense provides the jury with an extremely refined medium by which to assess the plausibility of different narratives, *if it is provided with a disciplined* access to brutally elementary data. That common sense can move closer and closer to an accurate account of this particular case as it moves away from the lazy generalities within which we usually move—and which the mass media generally leave unchallenged.

Paradoxically, these corrections of detail serve to change the meaning of the entire story and challenge and deepen “the most global of global structures.” This is, I believe, where the “religious” dimension of the film appears. Several times, the Lee Cobb character associates the questioning that Fonda initiates as akin to “Sunday School” or preaching the gospel. He finally tells his fellow jurors that the only person who could believe the defendant is “God come down to earth.” And, of course, *the jury itself* comes to believe (or at least not to disbelieve) the defendant. It arrives at this posture of belief by working through the details of the absent trial, by taking them seriously. As one theologian put it, “we can only think toward

35. Clifford Geertz, *From the Native’s Point of View: On the Nature of Anthropological Understanding*, in INTERPRETIVE SOCIAL SCIENCE 225, 239 (Paul Rabinow & William M. Sullivan eds., 1979).

36. MURDOCH, *supra* note 7, at 90.

37. *Id.* at 91.

38. *Id.* at 82.

the truth ‘from the middle’ of creaturely existence, and that this necessarily involves a continuous activity of imaginatively constructive participation, in which we develop our own interpretive readings of God’s ways in the world along with the readings of other people.”³⁹

Second, the film dramatizes the tensions involved in action under uncertainty about matters of fact. This kind of uncertainty is intrinsic to our finitude⁴⁰ and can never be eliminated in the practical contexts that are concerned at trial. The individual “bits” of evidence that are supplied during trial are “relevant” if they have a defensible relationship to one party’s narrative theory of the case, concretely, the God’s-eye narrative of events that his lawyer is likely to tell in opening statement. In opening statement, a lawyer will tell the jury not primarily what the evidence will be, but what the evidence will *show*. The doctrine of materiality will require, as a condition of offering evidence to prove it, that the lawyer has correctly concluded that the particular narrative theory of the case is legally significant, that its major features serve to support or disprove the elements of the crime or claim identified concretely in the jury instructions.

The doctrine of logical relevance requires that each “bit” of evidence be supported or “warranted,” as Stephen Toulmin put it,⁴¹ to change the probabilities that a material fact is or is not the case. (Material facts are features or episodes in a legally significant story.)⁴² The warrants that supply the links between the detailed evidence offered and the theory of the case are usually commonsense generalizations.⁴³ A prosecutor may urge, for example, that the defendant’s mother’s alibi testimony for her son ought not to be believed because “generally and for the most part, mothers will lie to protect their children from serious harm.” Notice that commonsense generalizations have an open-ended character that require a further insight into their applicability to the particular question before the court.⁴⁴ For these generalizations contain a necessarily incomplete inventory of intensifiers (“... especially when ...” e.g., her son is on trial for his life) and qualifiers (“... but not when ...” e.g., the victim is the mother’s beloved husband). Once a threshold of admissibility is reached, it will be up to the jury to determine the probative value of each “bit” of evidence by deter-

39. D.C. SCHINDLER, HANS URS VON BALTHASAR AND THE DRAMATIC STRUCTURE OF TRUTH: A PHILOSOPHICAL INVESTIGATION 22 (2004).

40. See Robert P. Burns, *How Law Knows in the American Trial Court*, in HOW LAW KNOWS 126, 150–52 (Austin Sarat et al. eds., 2007).

41. STEPHEN E. TOULMIN, THE USES OF ARGUMENT 124–25 (updated ed. 2003).

42. They may also be material by virtue of their relationship to issues of the credibility of witnesses.

43. In a small number of situations, scientific “laws” may supply this link.

44. See LONERGAN, *supra* note 12, at 173–81.

mining the relative strength of the commonsense generalizations that warrant the relevancy of that evidence *in the concrete circumstances of the particular case*.

But there is more to it than that. The facts that support the qualifiers and the intensifiers are often themselves disputed and their likelihood dependent on other commonsense generalizations which contain intensifiers and qualifiers, so that the strength of a party's case depends on an interlocking and mutually supporting web of inferences. Trial lawyers like to say that "every fact has two faces." Each important fact in a triable case can be connected by different commonsense generalizations to competing material facts. The jury may be persuaded that the certainty of a witness about an identification may be evidence of its trustworthiness or its suspicious character. In our film, the fact that the woman who testifies against the defendant has seen the defendant through her window in his apartment with his father many times can be urged to show that her testimony is reliable or that it is the result of her presuppositions. The fact that the defendant has been slapped around by his father in the past makes it more likely that he may have reached the breaking point, but also that it was hard to see "two slaps in the face provoking him to murder."⁴⁵ The fact that the old man in the apartment below heard the victim hit the defendant earlier in the day provides a motive to the defendant but also an explanation for why the witness may have assumed the person he glimpsed coming down the stairs "must" have been the defendant. The defendant's experience with knives made it more likely that he would have confidence to use one against his father, but the further detail that *this* knife was a switchblade, it turns out, makes it less likely that *this* experienced user would have used it in the particular way that the evidence suggested it was used.

There are more complex sorts of competing warrants. We learn that the defendant has had a hard life. The E.G. Marshall character, for most of the film, is the embodiment of logic and detached reason. He is a stockbroker, a profession where success involves the weighing of largely quantitative evidence and making predictions guided by the "laws" of economics. He takes a social scientist's view of the significance of the defendant's background: it supplies an empirical generalization that predicts that the defendant is likely to have killed:

I think we're missing the point here. This boy, let's say he's a product of a filthy neighborhood and a broken home. We can't help that. We're here to decide whether he's guilty or innocent, not to go into the reasons why

45. Rose, *supra* note 14, at 190.

he grew up this way. He was born in a slum. Slums are breeding grounds for criminals. I know it. So do you.⁴⁶

And the attitude he has toward the defendant is a logical conclusion from the sociological generalization that he announces. It coheres nicely with the “Crime Control”⁴⁷ model of criminal law: “It’s no secret. Children from slum backgrounds are potential menaces to society.”⁴⁸

The Fonda character offers another significance of his background, a moral significance:

Look, this boy’s been kicked around all his life. You know, living in a slum, his mother dead since he was nine. He spent a year and a half in an orphanage while his father served a jail term for forgery. That’s not a very good headstart. He’s a wild, angry kid and that’s all he’s ever been. You know why he got that way? Because he was knocked on the head by somebody once a day, every day. He’s had a pretty terrible nineteen years. I think maybe we owe him a few words. That’s all.⁴⁹

It may be true that all the great dramatic portrayals of trial scenes depict both justice and mercy, but Fonda is not suggesting that acquittal is appropriate because the defendant has had a hard life. He is saying something different. He is offering, in competition to the scientific account of the Marshall character, a moral account that urges that the defendant’s past suffering deserves the respect that comes from the jury following in its own deliberations its own internal norms. Those are some of the “most global structures” that attention to the details of the case evokes.

Third, the film dramatizes what my colleague, Ron Allen, has called the “democratization of inference” in the American jury trial.⁵⁰ As we have

46. *Id.* at 192.

47. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 152 (1968).

48. Rose, *supra* note 14, at 192. His far less rationalistic colleague puts it differently in response: “Brother you can say that again. The kids who crawl outa [sic] those places are real trash. I don’t want any part of them, I’m telling you.” *Id.* at 192–93.

49. *Id.* at 180.

50. Conversations with Ron Allen. Juror #11, who is a watchmaker and recent arrival apparently from Middle or Eastern Europe puts it broadly:

Pardon. This fighting. This is 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, uh, what is the word?

(A pause)

notified. We are notified by mail to come down to this place and decide on the guilt or innocence of a man we have never heard of before. We have nothing to gain or lose by our verdict. This is one of the reasons why we are strong. We should not make it a personal thing.

Rose, *supra* note 14, at 276. His statement could almost be taken as a paraphrase of De Tocqueville’s classic celebration of the American jury:

The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be

said, the judgment the jury makes depends on the strength of strands of the vast web of interdependent commonsense generalizations as they are refined by specific evidence offered at trial. This judgment is both empirical and normative. The film dramatizes the pluralism of perspective and experience the jury brings to bear. We've seen the collective powers of memory of the details of the trial which the jury possesses. The film also shows the breadth of the jury's "common sense and experiences in life," to use the words of a commonly given jury instruction. One juror knows about the effective use of switchblade knives. Another knows about the effects of wearing glasses on the skin of the nose. Another knows from experience about the patterns of motivations of lonely old men pushed into a public forum. Another knows about the ways of detectives investigating a murder case. Another knows about the motivations of young lawyers assigned cases they do not want. The jury lacks the diversity of perspective that participation of women might have offered,⁵¹ but the considerable diversity of class, age, and occupation contributes to the quality of the deliberation.

Fourth, the film dramatizes the way in which even the relatively uninterpreted narrative of "underlying" perceptual fact is necessarily a construction of the jury's practical reason. E.G. Marshall's character calls for the application of cool logic: "Listen! I think it's about time we stopped behaving like kids in here. We can't continue to allow these emotional outbursts to influence us. Gentlemen, this case is based on a reasonable and logical progression of facts. Let's keep it there."⁵²

Initially, the assumption of the jurors is that "logic" operates on the facts as supplied by the eyewitnesses. Juror #10 invokes a kind of positivism of testimony, suggesting that witnesses' testimony ought to be taken at face value:

You're makin' out like it don't matter what people say. . . .What you want to believe, you believe, and what you don't want to believe, so you don't. What kind of way is that? . . . What d'ya think these people get up on the witness stand for, their health? I'm telling you men the facts are

judged. . . . The jury teaches every man not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which no political virtue can exist. It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284–85 (Henry Reeve trans., 1945) (1835).

51. See ABRAMSON, *supra* note 3, at 119–25.

52. Rose, *supra* note 14, at 243. The watchmaker knows that things are not quite so simple and responds, "Facts are sometimes colored by the personalities of the people who present them . . ." *Id.*

being changed around here. Witnesses are being doubted and there's no reason for it.⁵³

As the deliberations continue, the jury comes to see that they cannot but rely on their own practical reason in determining the *meaning* of even the eyewitness testimony, and therefore its credibility. This is true on the purely empirical level. The jury comes to reject the old man's testimony that he heard the defendant threaten to kill his father because it cannot be integrated into a coherent narrative with the neighbor's testimony that a train was screeching by during those seconds.⁵⁴ And even if one puts aside the "brutally elementary fact" of what the old man heard, there remains the issue of interpretation or inference, the weight to be given to a defendant's uttering those words in deciding whether he had an actual intent to kill. The most obvious explanation offered for the defendant's returning to his father's apartment after he had killed him (other than that he had not in fact killed him) was that the defendant was initially in a panic and so left a knife he needed to retrieve. But that explanation seemed inconsistent with his having wiped the knife clean of fingerprints. And the theory that he thought he could safely return because he thought no one had seen him do the killing was inconsistent with the neighbor's having screamed at the sight of the killing. Of course, as E.G. Marshall's character points out, not one of these considerations is decisive and there remain only deep webs of probability. Fonda concedes this but concludes, "I think there's enough doubt to make us wonder whether he was there at all during the time the murder took place."⁵⁵ Finally, after the jurors conduct their own experiment in the jury room, he is able to construct an alternative factual theory of the case or at least of the witness:

I think this is what happened. The old man had heard the fight between the boy and his father a few hours earlier. Then, while lying in bed he heard a body hit the floor in the boy's apartment, and he heard the woman scream from across the street. He got up, tried to get to the door, heard someone racing down the stairs and *assumed* it was the boy.⁵⁶

Of course, the jury's enterprise is not solely theoretical. It is a practical enterprise suspended between sets of competing norms. Lee J. Cobb's character passionately invokes the norms of retributive justice:

53. *Id.* at 254–55. And again: "Somebody *saw* the kid stab his father. What more do we need?" *Id.* at 211. And with regard to the older neighbor's testimony, "I don't see what we're going to prove here. The man said he *saw* the boy running out." *Id.* at 263. Fonda's character places that testimony in a narrative context in order to assess its credibility. *See id.*

54. On the significance of narrative at trial, see BURNS, *supra* note 4, at 167–76.

55. Rose, *supra* note 14, at 253.

56. *Id.* at 271.

Excitable! You bet I'm excitable. We're trying to put a guilty man into the chair where he belongs, and all of a sudden somebody's telling us fairy tales . . . and we're listening!

. . . .

What do you mean take it easy! D'you feel like seeing a proven murderer walking the streets? Why don't we give him his knife back? Make it easier for him!

. . . .

What's the matter with you people? Every one of you knows this kid is guilty! He's got to burn! We're letting him slip through our fingers here!⁵⁷

We have already seen Fonda's invocation of the respect that the defendant is due. Again, what is due is not acquittal out of sympathy, but the jury's careful discharge of its own responsibilities to treat him as an end in himself and not as a means to some socially defined goal. "Well, I kind of think that testimony which could put a human being into the electric chair should be reasonably accurate."⁵⁸ The Fonda character tells the jury that "every once in a while you read about a convict who's freed ten years after the crime because someone else has confessed."⁵⁹ The jury has no choice but to bear the burden of responsibility for the possibility of error in this capital case and so make the responsible judgment about the level of uncertainty they are willing to bear. The "purely" factual question even in a case such as this cannot but be affected by the jury's sense of the importance that defines the value-field within which that determination takes place.⁶⁰

Fifth, the film shows the only way forward through this seemingly indeterminate value-field is the public nature of the deliberation itself. In the main, it is not the individual virtue of the jurors that leads them to their verdict, but the power of their conversation within a constitutional framework. After Fonda's initial negative vote, they consider how to go forward: "#7: So what do we do now? #8: Well I guess we talk. . . . I think maybe we owe him a few words."⁶¹

As Kant put it, "a good constitution is not to be expected from morality, but, conversely, a good moral condition of a people is to be expected

57. *Id.* at 217, 272.

58. *Id.* at 238–39.

59. *Id.* at 248.

60. On the notion of a value-field in the context of judges' decision making, see Felix S. Cohen, *Field Theory and Judicial Logic*, 59 *YALE L.J.* 238, 243–44 (1950).

61. Rose, *supra* note 14, at 176, 180.

under a good constitution.”⁶² And perhaps most startling of all, given Kant’s notorious “moralism”:

The problem of organizing a state, however hard it may seem, can be solved even for a race of devils, if only they are intelligent. The problem is: “Given a multitude of rational beings requiring universal laws for their preservation, but each of whom is secretly inclined to exempt himself from them, to establish a constitution in such a way that, although their private intentions conflict, they check each other, with the result that their public conduct is the same as if they had no such intentions.”⁶³

There does not seem to be any transforming moral experience among the jurors. They seem to emerge from the deliberations pretty much as they were. But the collective force of the argument seems to move them in the direction that a single wise person might have taken. Is this simple “social pressure” as social psychologists might study it? We can recall the old lament, “He forced me to do it. He used logic on me.” It may be that there is a coercive force of reason, but it is not the *kind* of coercion we are normally concerned about. Here it seems that the legally imposed requirement of unanimity and the social pressure generated by the public nature of the debate produce a result that is “better” than that at least some of the jurors would have embraced as individuals. And recall that Fonda’s character, who seems to be the closest to someone speaking out of individual virtue, is willing to submit to the collective wisdom should he fail to have persuaded at least one other juror. The surrender of individual purely moral conviction (“Here I stand, I can do no other.”) turns out to be the condition to political effectiveness in the public forum of the jury room.

Finally the film is about anger. Cobb’s character reduces the deliberation to an expression of his own anger towards the world and his son in particular. Juror #10’s character remains absorbed in his fear of and then anger towards the slum dwellers from whose number the defendant comes. But anger has positive uses as well. Fonda is indignant about the tic-tac-toe game two of the jurors decide to play. Juror #6 angrily tells Lee Cobb that he “oughta have some respect” in talking to the older man on the jury: “A guy who talks like that to an old man oughta really get stepped on, y’know.”⁶⁴ The watchmaker is indignant when the sports enthusiast changes his vote apparently just to end the deliberations:

What kind of man are you? You have sat here and voted guilty with everyone else because there are some baseball tickets burning a hole in your

62. ARENDT, *supra* note 17, at 17 (quoting IMMANUEL KANT, *Perpetual Peace*, in ON HISTORY 112–13 (Lewis White Beck ed. & trans., 1963)).

63. *Id.*

64. Rose, *supra* note 14, at 240.

pocket. Now you have changed your vote because you say you're sick of all the talking here.

. . . .

Who tells you you have the right to play like this with a man's life? This is an ugly and terrible thing to do! Don't you care

. . . .

If you want to vote not guilty then do it because you're convinced the man is not guilty . . . not because you've had enough! And if you think he's guilty . . . then vote that way! . . . Or don't you have the . . . the guts to do what you think is right⁶⁵

Even E.G. Marshall's rationalist is so repulsed by #10's prejudices that he finally reacts: "If you open your mouth again I'm going to split your skull."⁶⁶ Anger functions in other ways too. It breaks through the strategic positions of the characters to reveal a truth they would like to hide, as when Lee J. Cobb's character shouts at Fonda's that he will kill him and then stands silent when Fonda says, "You don't *really* mean you'll kill me, do you?"⁶⁷

Sophocles's *Antigone* is also a drama about the demands of justice, both "natural" justice and the justice of the state. In the second great choral ode in the play, the Ode of Man, the chorus sings of man as *deinos*, a word sometimes translated as "wondrous."⁶⁸ The word, though, has a connotation of "alien" or "frightening." The chorus tells us that man has achieved an astounding level of control over the threats of nature through his cunning and skills, powers that can lead him to good or ill.⁶⁹ The chorus then sings, in Martha Nussbaum's translation, "Speech, too, and thought . . . swift as the wind, and the temper . . . that builds cities, he has taught himself."⁷⁰ The word she translates "temper" (*orgais*) is often given the tamer meaning of "dispositions," and the phrase, "the temper that builds cities" can be so translated "the social dispositions."⁷¹ But there is no doubt that the term also can have the meaning Nussbaum gives it: anger, wrath,⁷² or perhaps even rage. She argues that the dramatist is suggesting that our

65. *Id.* at 309–10.

66. *Id.* at 315.

67. *Id.* at 274.

68. SOPHOCLES, *Antigone*, in THE THREE THEBAN PLAYS 55, 76, 1378 (Robert Fagles trans., Penguin Books 1984).

69. *Id.* at 76–77, ll.386–416.

70. MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 72 (1986).

71. HENRY GEORGE LIDDELL & ROBERT SCOTT, A GREEK-ENGLISH LEXICON 1246 (1985). The term *astunomous*, which Nussbaum translates "that builds cities" can be translated "abiding the laws of the city" or "that rules cities." One might then have "the anger that rules cities."

72. *Id.*

drive for “civil control” is rooted in the rage we feel at our vulnerability⁷³ before the social as well as the natural world.

Our film displays the centrality of anger “for good and ill” in our civic life. By the end of the film almost every juror, with the possible exception of the pathologically disengaged ad man, has grown angry. Some jurors are furious over personal and social forces that the defendant represents. But for others, anger serves purposes that build and rule the democratic city. It stands in stark contrast to the indifference of the bureaucratic judge. It provides the indignation that demands that jurors pay attention to the specific details of *this* case and to the internal norms of the jury deliberation itself. The drama is the art form “truest to life and the manifestation of complex, pluriform, multiply interpreted truth” and perhaps the most powerful medium by which we can begin to understand trial by jury:

[D]rama awakens impulses in us which are beyond any notion we may have of individual rational control (and the “control” of “reason”, we may note, is a particularly dominant conception in certain strands of modern thought). But there is more to take account of. Our agency is also conditioned by the related fact of being ineluctably *social* (it involves entanglement with the things experienced by other people). In this way drama raises with a particular, authoritative urgency *the question of what it is not only to be free, but (more than that) to be free in the company of others.*⁷⁴

73. NUSSBAUM, *supra* note 70, at 75.

74. Quash, *supra* note 29, at 144 (emphasis added).