

Chicago-Kent College of Law

From the Selected Works of Nancy S. Marder

2007

The Banality of Evil: A Portrayal in “12 Angry Men (symposium editor) (forthcoming)

Nancy S. Marder, *Chicago-Kent College of Law*

April 2007

The Banality of Evil: A Portrayal in 12 Angry Men

Nancy S. Marder

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Nancy S. Marder, *The Banality of Evil: A Portrayal in 12 Angry Men*, 82 Chi.-Kent L. Rev. 887 (2007).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol82/iss2/21>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

THE BANALITY OF EVIL: A PORTRAYAL IN *12 ANGRY MEN*

NANCY S. MARDER*

INTRODUCTION

Popular culture thrives on a portrayal of evil as murder, mayhem, and violence. Today's movies try to "outdo" predecessors with gruesome acts committed by egregious monsters.¹ Unfortunately, this media depiction of evil has lost its power to explore the much greater evil that humankind faces when societies destroy, impoverish, and enslave on a massive scale as a result of small actions taken by ordinary citizens. Hannah Arendt captured this evil in her phrase "the banality of evil."² Ironically, the phrase and its meaning have become banal—too often repeated to form the basis for depictions by the media, which must always strive for the new and different.

In 1957, however, a black-and-white film, having virtually no action, and taking place in a locked room, created a portrait that more chillingly reveals the evil around us that, but for constant vigilance, can unleash the worst forms of terror.

This film, *12 Angry Men*,³ offers a portrayal that allows us to explore the evil of indifference that is far more pervasive and powerful than the evil of monsters common in film but rare in life. *12 Angry Men* is best known for its portrayal of a highly charged jury deliberation. It is also recognized for its fine ensemble cast, including Henry Fonda. What it is not known for, however, and which I intend to take as my focus, is its depiction of everyday acts by ordinary men that have the potential to lead to unspeakable evil. The lesson is made more poignant by the setting: our legal system. My intent is to show how indifference, whether through haste, bias, or bore-

* Professor of Law, Chicago-Kent College of Law. I want to thank the audiences who heard this paper at The Law and Society Annual Meeting in Berlin, Germany (July 28, 2007) and the Perspectives on Evil and Human Wickedness: Fifth Global Conference in Prague, Czech Republic (March 22, 2004) for their lively exchange and thoughtful comments. I also want to thank Lucy Moss for her excellent library assistance.

1. See, e.g., *SILENCE OF THE LAMBS* (Orion Pictures Corp. 1991).

2. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963); *id.* at 287–88 (Postscript).

3. *12 ANGRY MEN* (Orion-Nova Productions 1957).

dom, of individuals can so easily allow the machinery of the state to murder a boy and how only a keen sense of individual responsibility can keep such evil at bay.

I. THE SETTING

Almost the entire setting for the film *12 Angry Men* is a single, stark room. The film opens with the jury receiving its final instructions from the judge before it is escorted by the bailiff to the jury room. There the jurors will remain for the rest of the film, engaged in fairly acrimonious deliberations.⁴

One significant feature of the jury room is its starkness. The room consists of a large, rectangular table with ashtrays and several pieces of paper and pencils, twelve chairs around the table, three windows, a closet with some hangers, a clock, a water-cooler, a fan that does not work initially, and an adjoining washroom. The bareness of the room means that the jurors will have few distractions or diversions. They will have little choice but to focus on the task at hand, which is to decide whether a young man is or is not guilty of the murder of his father.

The starkness of the room intensifies the jurors' physical discomfort. It is a sweltering summer day in New York City: the windows are difficult to open; the fan does not seem to work; and the jurors are constantly wiping their brows and complaining about the heat.⁵ The jurors' physical discomfort contributes to their sense of wanting to be done with their task as quickly as possible.

Another significant feature of the jury room is the way in which it isolates the jurors from others in the courthouse and society at large. When the bailiff leaves the jurors, he locks the door to the jury room. One of the jurors remarks that he had not realized that the door would be locked, while another explains that of course the door must be locked.⁶ The only way that

4. Throughout the deliberations, the jurors keep reminding each other to calm down, and yet, arguments and fights keep erupting. See, e.g., Reginald Rose, *Twelve Angry Men*, in *FILM SCRIPTS TWO* 156, 181 (George P. Garrett, O.B. Hardison & Jane R. Gelfman eds., Irvington Publishers 1989) (1972) (screenplay version of *12 ANGRY MEN*, *supra* note 3); *id.* at 188 ("Let's calm down now. I mean we're not gonna get anywhere fighting." (quoting Juror #1)); *id.* at 194 ("All right, let's stop all this arguing. We're wasting time here." (quoting Juror #1)); *id.* at 195 ("Don't tell me to calm down! . . . You keep it goin' smooth and everything." (quoting Juror #1)); *id.* at 216 ("All right, let's calm down. . . ." (quoting Juror #4)); *id.* at 233 ("All right, let's take it easy." (quoting Juror #12)); *id.* at 240 ("Hey let's not get into any fist fights in here." (quoting Juror #7)); *id.* at 276 ("Pardon. This fighting. This is not why we are here, to fight. We have a responsibility." (quoting Juror #11)); *id.* at 290 ("Let's stop the arguing for two minutes in here. Who's got something constructive to say?" (quoting Juror #1)).

5. See, e.g., *id.* at 164 ("I phoned up for the weather this morning. This is the hottest day of the year. . . . You'd think they'd at least air condition the place." (quoting Juror #7)).

6. *Id.* at 165 (describing the exchange between Juror #5 and Juror #10).

the jury can communicate with the outside world is through a note or request from the foreman to the bailiff, who stands on guard outside the jury room. The locked door, the oppressive heat, and the sparring jurors all contribute to a sense that they have entered purgatory—a judicially created version of Sartre's *No Exit*.⁷

Indeed, this is no ordinary room, but a jury room. The twelve men who have entered, while ordinary men, have been summoned to serve in an official capacity as jurors. The state has required them to determine through their deliberations whether a young man, charged with the murder of his father, is guilty or not guilty. If the jury finds the young man guilty, then he will be put to death by the state; the death penalty is mandatory in this case.⁸ The death penalty, the most severe punishment that man can inflict on fellow man, is governed by procedures, and in this case they are followed according to the letter, if not the spirit, of the law. There are safeguards in place, such as a defense attorney, a judge, and a jury. Yet, all of these institutional roles are played by men, and men can be blinded by their own concerns. It is all too easy to succumb to indifference to the defendant, as do almost all of the jurors, as well as the judge and defense attorney. Although these individual acts of indifference seem insignificant, and indeed commonplace, the cumulative effect has the potential to lead to the ultimate evil: the murder of a boy who has not been proven guilty by the state in the name of the state.

II. INDIVIDUAL ACTS OF INDIFFERENCE

In this film, the jury serves as a microcosm of society. The jurors, cut off from the rest of society yet charged with a weighty task, have to decide how to conduct their deliberations. As is the practice in most courtrooms, even today, the judge has given them little guidance about deliberations on the theory that jury deliberations are within the province of the jury alone to structure.⁹ As a result, these jurors allow themselves to be guided by their own small, individual concerns, and to be indifferent to the plight of the defendant.

7. JEAN-PAUL SARTRE, *NO EXIT AND THREE OTHER PLAYS* (Vintage International 1989) (1946).

8. See Rose, *supra* note 4, at 163.

9. Courts typically give jurors so little guidance as to deliberations that the American Judicature Society has produced a pamphlet that it hopes judges will give to jurors to give them some ideas as to how to proceed with their deliberations. See AM. JUDICATURE SOC'Y, *BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATIONS* (1999).

A. *Haste*

Juror #7 (Jack Klugman) has tickets for the baseball game that evening.¹⁰ He is a Yankees fan, and his foremost concern is that he not miss the game. As he tells some of the other jurors before they begin deliberating, he believes that they can be out of there in no time. He is not a very thoughtful man or critical thinker. In fact, he believes everything that the prosecutor has said about the defendant and that there is nothing more to say on the defendant's behalf. Even though the trial has taken six days, and the ball game does not begin until that evening, he wants the jury to vote and to discharge its duty immediately.

In his haste, Juror #7 is willing to condemn the defendant to death so that he can reach the ball game on time. Although this juror's desire to attend a baseball game does not seem so unusual, in the context of deciding a boy's fate it does reveal a shockingly misplaced sense of priorities. Thus, the film takes an ordinary, everyday desire—to attend a baseball game—and turns it on its head, revealing how easy it is to allow our ordinary, everyday concerns to lead to unspeakable acts of violence and evil.

The other jurors, with the exception of Juror #8 (Henry Fonda), are not immune to this desire for haste. The foreman, Juror #1 (Martin Balsam), points out that they can either discuss the case first and then vote or vote right away to see where everybody stands.¹¹ Juror #4 (E.G. Marshall) suggests that a preliminary vote is customary, even before any discussion has taken place, and the other jurors agree.¹² It is a public vote, and the camera pans across the table, as one juror's hand after another is raised to indicate a vote of guilty. Even though the judge would have instructed the jurors to keep an open mind and to refrain from forming an opinion until they share their views as a jury,¹³ by the time they enter the jury room, it is

10. See Rose, *supra* note 4, at 170 (describing Juror #7).

11. See *id.* at 174. Some social scientists have described the first approach, in which there is discussion long before a vote is taken, as an "evidence-driven" deliberation, and have described the second approach, in which a vote is taken almost immediately and then there is discussion if it is necessary, as a "verdict-driven" deliberation. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 163–65 (1983). Verdict-driven deliberations are more likely to lead to the creation of coalitions and a more adversarial style of discussion because each side is intent upon winning the point and stifling dissenters. In contrast, evidence-driven deliberations are more likely to encourage the participation of jurors because the emphasis is on story construction and recollection of facts and evidence without individual jurors having to align themselves with a particular position. See *id.*

12. See Rose, *supra* note 4, at 174–75 (describing Juror #4's suggestion).

13. Trial judges typically instruct jurors to keep an open mind until they have listened to the other jurors' views. For example, a trial judge in New York would advise jurors as follows: "Each of you must decide the case for yourself, but only after a fair and impartial consideration of the evidence with the other jurors." N.Y. STATE UNIFIED COURT SYS., CRIMINAL JURY INSTRUCTIONS 2D, *Deliberations*, <http://www.courts.state.ny.us/cji/1-General/cjigc.html>.

clear that the jurors, other than Henry Fonda, have already formed an opinion.¹⁴ Indeed, the other jurors chastise Fonda for his vote of not guilty. Juror #10 (Ed Begley) laments that there is always one juror who slows down the proceedings.¹⁵ Fonda explains to the others that before they send a boy off to die they owe him a little "talk."¹⁶ The others have little choice but to acquiesce because their verdict must be unanimous. The jurors agree to go around the table and have each juror explain how he reached his verdict in an effort to show Fonda why his vote was in error.¹⁷

B. Bias

As the jury engages in deliberations, it becomes clear that haste is not the only way in which the jurors reveal their indifference to the defendant's plight; bias also impairs some jurors' capacity to assess the case against this particular defendant. Juror #10 suffers from bias against Puerto Ricans; he cannot view the defendant as a human being, but only as a Puerto Rican, as "one of them."¹⁸ Juror #3 (Lee J. Cobb) suffers from bias against young men because they remind him of his son with whom he has not spoken in two years.

Juror #10, who dislikes Puerto Ricans, quickly makes known his views. He describes Puerto Ricans ("them") as not valuing human life and as not capable of telling the truth.¹⁹ He is willing to condemn the defendant to death, not based on what he has heard at trial, but based on what this juror believes is true of all Puerto Ricans. This juror knows all he needs to know about the defendant as soon as he identifies him as Puerto Rican. How this juror survived voir dire—the questioning of prospective jurors to screen out those who cannot be impartial—is never explained. In light of the judge's and defense lawyer's boredom with the case, however, perhaps this juror's presence on the jury is not so surprising.

Although Juror #10 does not recognize his own bias, some of the other jurors recognize it. They attempt to challenge the biased juror's view, but

14. See, e.g., Rose, *supra* note 4, at 177 ("It's pretty obvious [the defendant killed his father]. I mean I was convinced from the first day." (quoting Juror #6)).

15. See *id.* at 176 ("Boy-oh-boy. There's always one." (quoting Juror #10)).

16. See *id.* at 177 ("I just want to talk." (quoting Juror #8)).

17. See *id.* at 183 ("I'm just thinking out loud, but it seems to me it's up to us to convince this gentleman [indicating #8] that we're right and he's wrong. Maybe if we each took a minute or two." (quoting Juror #12)).

18. See *id.* at 187 ("You don't believe the boy. How come you believe the woman? She's one of 'them' too, isn't she?" (quoting Juror #8, speaking to Juror #10)).

19. See *id.* at 180 ("Now you're not going to tell us that we're supposed to believe that kid, knowing what he is. . . . I mean they're born liars." (quoting Juror #10)).

he does not hear their message.²⁰ Only after he has engaged in a lengthy diatribe against Puerto Ricans do the other jurors respond en masse. They stand and turn their backs on him, so that eventually he has only one juror left to address.²¹ He finally understands his isolation and the reason for it. At this point, Fonda offers a few words on the need to resist group bias.²²

Juror #3, who is biased against the defendant because of his own failed relationship with his son, takes longer to understand that he is condemning the defendant, not because of anything he heard at trial, but because of his feelings toward his son. He is the last juror to insist upon a vote of guilty. He knows that he is within his rights to stand firm on his vote. Ultimately, however, he changes his vote to not guilty, both because it is difficult to remain a hold-out in the face of eleven other jurors' confidence in their not-guilty vote and because he has begun to understand that he had judged the defendant guilty based on his own feelings of resentment and anger toward his son. As he changes his vote, he tears his wallet-size photo of himself and his son.

C. Boredom

The jury is not the only protection afforded to the defendant; a fair trial also includes an impartial judge and representation by a zealous advocate. However, both judge and defense attorney are suffering from boredom or frustration with this case and both seem to be indifferent to the defendant's case.

After opening shots of the courthouse activity, the film focuses on a single courtroom in which a bored judge gives final instructions to the jury. After delivering these instructions in a monotone voice, the judge sends the jury to the jury room to begin its deliberations. Before he does so, however, his voice and facial expressions clearly convey to the jury that he is bored with the case. It is not surprising, then, that the jury is willing to vote without any deliberation, even though a guilty vote will condemn the defendant to death. The message the jury has taken from this judge's body language is that there is nothing worthy of attention in this case. The judge, a figure of authority in the courtroom, has conveyed to the jury his own ennui with the

20. For example, after Juror #10, the biased juror, says that Puerto Ricans are "born liars," Juror #9, the elderly juror, explains that "[o]nly an ignorant man can believe that." *Id.* However, Juror #10 rejects the message: "All right that's enough!" *Id.* at 181.

21. *See id.* at 312-16 (depicting Juror #10's tirade).

22. *Id.* at 316 ("It's very hard to keep personal prejudice out of a thing like this. And no matter where you run into it, prejudice obscures the truth." (quoting Juror #8)).

case.²³ Whether he has intended to or not, he has led the jury to be similarly inclined.²⁴

The viewer never sees the defense attorney, but learns from some of the jurors that the defense attorney has done a poor job in representing the defendant. Fonda speculates that the defense attorney may have been remiss because he saw no chance for glory with this case.²⁵ He might have been assigned the case by the court, and he might have resented it. A proper defense would take time, but without the possibility of adequate recompense he did not wish to invest the time, or perhaps he just viewed it as a no-win case.²⁶ Consequently, he did not try to poke holes in the prosecutor's case against the defendant, even though it is his job to do so. Instead, this task falls to Fonda, and to the other jurors once Fonda persuades them that the defense attorney has fallen short and it is up to the jury to perform the defense attorney's job as well as its own. Some jurors, however, resist; they take the defense attorney's indifference to his role as a signal to be equally indifferent to their role. If the defendant's own attorney does not believe in the defendant, why should they?

III. WHY THIS TYPE OF EVIL IS SO DISTURBING

One reason the jurors' response to the defendant, whether based on indifference through haste, bias, or others' boredom, is so troubling is that it is so ordinary that it does not seem evil. To be blasé, to be hasty, to categorize someone according to a preconception, all seem like such commonplace, everyday reactions to which we are all susceptible that we resist recognizing this as evil. This is where Hannah Arendt's observation about evil being carried out, not by a monster committing egregious misdeeds, but by a bureaucrat engaged in mundane, everyday acts,²⁷ is particularly insightful.

23. See, e.g., Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1278 (1975) (describing the judge as a figure of authority to whom jurors turn for guidance including guidance conveyed through nonverbal behavior).

24. See, e.g., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985) (describing the ways in which judges may convey their expectations for trial outcomes to jurors through nonverbal cues, such as facial expressions and tone of voice).

25. See Rose, *supra* note 4, at 248–49 (providing reasons why defendant's attorney may not have defended him very zealously).

26. See *id.*

27. See HANNAH ARENDT, *Thinking and Moral Considerations, in RESPONSIBILITY AND JUDGMENT* 159, 159 (Jerome Kohn ed., 2003) ("However monstrous the deeds were, the doer [Eichmann] was neither monstrous nor demonic, and the only specific characteristic one could detect in his past as well as in his behavior during the trial and the preceding police examination was something entirely negative: it was not stupidity but a curious, quite authentic inability to think.").

Like the other jurors, the viewer initially questions why Henry Fonda is slowing down the proceedings. If everyone else has been able to reach a decision, why is Fonda unable to do so? As he himself admits, it is not that he has some brilliant insight to contribute to the deliberation.²⁸ Rather, he simply feels that before the jury makes a decision that will have such a dire consequence for the defendant, the jurors owe the defendant a little discussion. The other jurors express their impatience with Fonda, and their impatience does not seem so misplaced. Like the person who slows down a line at a checkout counter because he cannot find the correct change or the person who slows down the bus because he needs to ask directions, Fonda slows down the deliberations, and we, and the other jurors, regard him with the same annoyance as we would the laggard at the checkout counter or at the bus stop. Why is he unable to make a decision when the other jurors are able to do so?

What is so disturbing then about the jurors' willingness to let the defendant die is that they are responding with their everyday concerns in a context where everyday concerns must be put aside. One juror wants to attend a baseball game²⁹; another juror has a messenger service to run³⁰; and another juror has three garages to manage.³¹ Although these would be reasonable pursuits ordinarily, they are quite unreasonable in the face of a life-or-death decision. The difficulty is that the jurors, with the exception of Fonda, fail to distinguish between the ordinary and the extraordinary; they allow their ordinary concerns to predominate in an extraordinary situation. What is particularly insidious about their initial vote to condemn the defendant, then, is that they make it as they would an everyday decision in which they are governed by everyday concerns, and therefore, they do not recognize that in this context such quotidian concerns will lead to the commission of unspeakable evil. The jury has to engage in serious thinking, and "thinking's chief characteristic," Arendt reminds us, "is that it interrupts all doing, all ordinary activities no matter what they happen to be."³² The jurors fail to put aside ordinary concerns and to engage in serious thought until Fonda's dissenting vote forces them to do so.

28. See Rose, *supra* note 4, at 197 ("I haven't got anything brilliant. I only know as much as you do." (quoting Juror #8)).

29. See *supra* Part II.A.

30. See Rose, *supra* note 4, at 167 ("Yeah, let's get this over with. We've probably all got things to do." (quoting Juror #3 who has a messenger service)).

31. See *id.* at 211 ("I got three garages of mine going to pot while you're talking! Let's get done and get outa here!" (quoting Juror #10)).

32. ARENDT, *supra* note 27, at 164. I thank one of the audience members at the Law & Society Association Annual Meeting in Berlin, Germany, who heard the presentation of this paper and suggested this point to me.

What makes this decision particularly disturbing is that it will be done in the name of the state. A jury verdict is a decision made on behalf of the larger community. These twelve, ordinary citizens, however their views may differ from each other during the deliberations, speak with one voice and on behalf of the community when they render a jury verdict.³³ Although the jury is only responsible for determining whether the defendant is guilty or not guilty, under the sentencing scheme enacted by this state legislature, the jury's verdict determines the sentence in this case. A verdict of guilty necessarily means a sentence of death for the defendant.³⁴ So, the evil that will flow from this jury's decision, should it erroneously decide that the defendant is guilty and must die, is one that will implicate all of us because it is being done in our name.³⁵

What is also so disturbing is that an erroneous decision can be made in spite of all the safeguards that we, as human beings, erect as part of our legal system. As several jurors note, this defendant is entitled to a fair trial, and they believe he received one.³⁶ The trial was presided over by a judge and the defendant was represented by an attorney. The decision-maker consists of twelve, ostensibly impartial, jurors. Although the defendant received all the institutional safeguards that have been built into our legal system, there is still room for error because the institutional roles are played by men. Judges, jurors, and attorneys are all human beings. As long as they fail to take their task seriously, and succumb to indifference through bias, boredom, or haste, among other weaknesses, then mistakes will be made. But for the vigilance of one juror in this case, the defendant would have been put to death.

IV. FORMS OF RESISTANCE

If one of the lessons of *12 Angry Men* is that great evil can be committed through small acts of individual indifference, another message is that great evil can be avoided through small acts of individual responsibility. Fonda's response to the other eleven jurors' vote of guilty is to urge them

33. See Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 470-73 (1997) (describing the importance of the jury's verdict in speaking with one voice for the entire community).

34. See Rose, *supra* note 4, at 162-63 (providing the judge's instructions as to the mandatory death penalty if the jury finds the defendant guilty).

35. Robert Cover described judges as dealing in "pain and death." Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986). So, too, do juries. The larger community shares that "pain and death" because both judges and juries render decisions on behalf of that community.

36. See, e.g., Rose, *supra* note 4, at 180 ("[The defendant] got a fair trial, didn't he? What d'you think that trial cost? He's lucky he got it." (quoting Juror #10)).

to spend a little time talking about the case. He is not convinced that the boy is innocent; he is only convinced that they should not send a boy off to die without engaging in some discussion. His approach is neither unreasonable nor extreme; rather, it is measured and incremental. He does not set out to persuade the others that he is right and that they are wrong. He simply makes the modest claim that they owe the boy "some talk."³⁷

Fonda has limited tools with which to resist the others' efforts to be done with the case and to send the defendant off to die. One tool available to Fonda is his vote. The jury's verdict in this criminal case must be unanimous.³⁸ Fonda's vote of not guilty prevents the jury from achieving unanimity. In doing so, Fonda slows down the proceedings and affords the jurors time to reconsider, even though they resent that time. In response to Fonda's vote, the other jurors decide that they must persuade him to their point of view. They begin by going around the table, with each juror explaining which piece of evidence persuaded him that the boy was guilty. Fonda makes a deal: he asks that they deliberate for an hour; after all, the ball game does not begin until 8:00 p.m.³⁹ When the jurors feel that they are not making progress, Fonda calls for another vote. To win more time, Fonda strikes a bargain: if no other juror votes not guilty, then he will capitulate and the verdict will be unanimous; however, if one other juror votes not guilty, then the jurors will continue to deliberate.⁴⁰ Juror #9 (Joseph Sweeney), the elderly juror, votes not guilty and the jury continues its deliberations. Time is one tool that Fonda puts to good use. If he can slow down the proceedings, he might have a chance of getting the jury to engage in careful, thoughtful deliberations.

Another tool that Fonda has is his appeal to argument and reason. In a cool, understated manner, he asks the group to consider each piece of evidence presented by the prosecutor. Each piece of evidence has a weakness, which he, ultimately aided by other jurors, uncovers. For example, the prosecutor had argued that the defendant's switch-blade knife was distinctive; however, Fonda purchased a similar knife from a pawnshop in the defendant's neighborhood, thus, undercutting the prosecutor's claim that the defendant's knife was unique, and therefore, identifiable as his.⁴¹ With each of his arguments, Fonda wins over another juror or two. As Fonda's arguments leave other jurors with reasonable doubt, these other jurors be-

37. See *id.* at 176-78.

38. For a listing of many of the states that require a unanimous verdict in a criminal jury trial, see Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 945 n.308 (1999).

39. See Rose, *supra* note 4, at 178.

40. See *id.* at 212-13.

41. See *id.* at 200-06.

gin to contribute their insights to the group review of the prosecutor's evidence. For example, Juror #9, the elderly juror, is able to explain why the elderly witness may have been unreliable⁴² or why the eyewitness might not have seen what she claimed to have seen.⁴³ Juror #5, who had grown up in a slum, is able to explain the correct way to hold and use a switchblade knife.⁴⁴ Fonda, with his keen sense of individual responsibility, is able to hold out until the other jurors are prepared to perform their role as jurors and to engage in careful, well-considered deliberation.

CONCLUSION: NO PANACEA

In the end, Henry Fonda persuades eleven other jurors to vote not guilty; in this case, the defendant will go free. One interpretation of the film's ending is that good will triumph over evil. Another interpretation is that we cannot count on having a Fonda on our jury, or in our society, so it behooves each of us to play this role and to guard against our own indifference, whether manifested as haste, bias, or malaise. Although this second ending is less comforting than the first, it is more realistic.

Consider, for example, all of the obstacles that a Fonda-like juror must confront on an actual jury if he is the only one willing to take a critical and unpopular point of view. First, it is difficult to withstand group pressure. Social scientists' empirical studies suggest that whenever the vote is 11-1 or 10-2, the hold-out juror (or jurors) usually capitulates.⁴⁵ In order to turn a jury around, there must be several hold-outs. Second, eyewitness evidence is usually very persuasive to jurors.⁴⁶ Even when jurors are told about the unreliability of eyewitness testimony, there is still a tendency to trust what others have said they have seen with their own eyes.⁴⁷ Third,

42. See *id.* at 239, 241-42.

43. See *id.* at 325-31.

44. See *id.* at 305-07.

45. See, e.g., VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 110 (1986) (describing the "[p]ressures to conform to the group [as] strong" and suggesting that "only when a minority juror has initial support, in the form of other jurors with similar views, that the probability that juror will sway the majority or hang the jury improves"); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 182 (1988) ("To begin with, the stor[y] of Henry Fonda . . . [is] atypical. The majority almost always wins."); Rita J. Simon, *Jury Nullification, or Prejudice and Ignorance in the Marion Barry Trial?*, 20 J. CRIM. JUST. 261, 263 (1992) ("There were no instances [in the data from the University of Chicago Experimental Jury Project] in which one juror or even two held out against the other ten or eleven and then succeeded in persuading them to adopt their position.").

46. See, e.g., John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 27 (1983) (noting that jurors find eyewitness testimony extremely persuasive).

47. See, e.g., ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 9 (1979) ("Jurors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence." (emphasis in original)).

criminal juries have a tendency to convict in about 75–85% of the cases they hear.⁴⁸ Although this may be attributable to prosecutorial discretion to proceed with only the strongest cases, it also may be attributable to an all-too-human tendency to think the worst of a person, especially one whom the prosecutor has said is guilty.

Although there are many safeguards built into the jury system, including a venire drawn from a fair cross section of the community, a voir dire to select an impartial jury, the judge's instructions, the deliberation process, and the unanimity requirement,⁴⁹ this film suggests that these safeguards are only as good as the people who participate in the process. So, while one interpretation of the ending is that we, as a society, can count on jurors like Henry Fonda for good to triumph over evil, another interpretation is that we all have to play the Fonda role because otherwise, it is merely happenstance whether a Fonda juror will be present, and so much turns on his presence—life or death.

There is no grand solution to the problem of evil in this film. Rather, there are only small steps that individuals can take.⁵⁰ As Fonda acknowledges, he is not very different from his fellow jurors. He does not know whether the boy is guilty or not guilty. He does not have any brilliant ideas about how to resolve the case.⁵¹ However, unlike his fellow jurors, he is willing to take whatever time is necessary to reach a decision. He believes that they owe the defendant a thorough, careful, dispassionate deliberation in light of the consequences of their decision. He also believes that only

48. See, e.g., BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at iv (2006) ("Eighty-five percent of [state] trials [in the seventy-five largest counties in the U.S.] resulted in a guilty verdict, including 88% of bench trials and 80% of jury trials."); BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 59 (2006) ("[During 2004, o]f defendants who exercised their right to a trial [in federal court], 2,630 (79%) were convicted either by a jury or a bench trial."); Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 686 (2002) (finding that among the twenty-six juries in this empirical study, 77% of the juries had convicted the defendant(s)); see also Diane L. Bridgeman & David Marlowe, *Jury Decision Making: An Empirical Study Based on Actual Felony Trials*, 64 J. APPLIED PSYCHOL. 91, 94 (1979) (finding, in a study of ten felony cases in Santa Cruz, California, a conviction rate of 82% and an overall Santa Cruz County conviction rate in felony trials of about 90%).

49. See Nancy S. Marder, *The Medical Malpractice Debate: The Jury as Scapegoat*, 38 LOY. L.A. L. REV. 1267, 1282–88 (2005) (describing several of the civil jury's institutional safeguards).

50. For a description of how this message is consistent with other films from this period, see Jessica Silbey, *A History of Representations of Justice: Coincident Preoccupations of Law and Film*, in REPRESENTATIONS OF JUSTICE (Masson & O'Connors eds., 2007), available at <http://ssrn.com/abstract=959278> ("While criticizing the legal system for failing its subjects, the legal hero adds strength to that system by showing how truth and justice through law depends on the participation of individual men.").

51. See Rose, *supra* note 4, at 197 ("I haven't got anything brilliant. I only know as much as you do." (quoting Juror #8, Henry Fonda)).

with the contributions of all the jurors⁵² will the jury emerge with a verdict that is just. Fonda does not pretend that he knows the truth and the film does not pretend that there is a panacea. Instead, Fonda stands for Everyman and all he can do is guard against the very human tendency to reach a hasty or poorly considered judgment when called upon to decide another's fate.

52. Henry Fonda seems to anticipate James Surowiecki's concept of "the wisdom of crowds." See JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 31 (2005) ("[I]f you can assemble a diverse group of people who possess varying degrees of knowledge and insight, you're better off entrusting it with major decisions rather than leaving them in the hands of one or two people, no matter how smart those people are.").