

## ANGER AT ANGRY JURORS

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Even after fifty years, *12 Angry Men* remains the most probing drama ever written on the American jury. Legal thrillers are a staple of American popular culture; television, theatres, and bookstores offer a seemingly endless number of fictional and nonfiction accounts of murder trials, forensic breakthroughs, and unsolved mysteries. But with a few notable exceptions, the legal genre focuses on action outside the jury room: there are the bad cop, good cop variety; the genre starring shrewd and stalwart forensic investigators; and the thrillers featuring ambitious district attorneys dueling with crusading defense lawyers. Meanwhile, the jurors remain faceless, reduced to the occasional and obligatory reaction shot.

The paucity of dramatic depictions of the jury is not surprising, because what jurors do inside the jury room is talk. From the theatrical point of view, the slow process of jurors deliberating the evidence presents an artistic challenge. Some writers, such as John Grisham solve the problem by focusing not so much on jury *deliberation* as on conspiracies that take the action beyond the walls of the jury room.<sup>1</sup> When it comes to dramatizing the actual *conversation* over evidence that a jury might have, *12 Angry Men* stands alone.<sup>2</sup>

I. A BRIEF SYNOPSIS OF JURY THEMES IN *12 ANGRY MEN*

From the strictly legal point of view, *12 Angry Men* was never an accurate portrayal of juror behavior. The drama centers on the ability of one lone holdout juror, played by Henry Fonda, to persuade eleven jurors hell-bent for conviction to vote in the end for acquittal. Written originally in 1954 as a television play for the acclaimed *Studio One Series* and adapted

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1. See JOHN GRISHAM, *THE RUNAWAY JURY* (1996); see also *SUSPECT* (TriStar Pictures 1987) (telling the story of a juror who saves the day not through jury deliberations but by teaming up with the public defender to comb the city for evidence to exonerate an accused murderer).

2. For a compilation of jury depictions in movies, television shows, and popular literature, see Gwyneth E. Hambley, *The Image of the Jury in Popular Culture*, 12 LEGAL REFERENCE SERVICES Q. 171, 172-73 (1992) ("Jurors rarely play starring roles in movies. In most courtroom dramas, the jury is just another audience, sitting quietly in the corner of the courtroom . . ."); see also Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497 (2000).

as a movie in 1957, the drama was roughly contemporaneous with the massive empirical research on jury trials undertaken at the time by the University of Chicago jury project. That project, culminating in the publication of the classic work, *The American Jury* in 1966, presented national data showing that a single dissenting juror from an initial straw vote to convict had slim chances of “flipping” the jury to an opposite verdict.<sup>3</sup>

Contemporary research tends to bear out the paucity of *12 Angry Men* juries,<sup>4</sup> although interestingly enough, one study finds that instances of one juror turning around the others do crop up in “a small but not insignificant” number of cases.<sup>5</sup>

What the film captures is the ideal of the jury system, the difference one person can make, the importance of standing up against others, and the triumph of reason over prejudice. In an institution where eleven persons can simply outvote one, there is no drama—the first vote is conclusive. But *12 Angry Men* brings to the fore the distinctive feature of an institution where power can ultimately flow to the persuasive, rather than the numerous. And as a psychological study of what it takes to be persuasive in a small group setting, the film is a gritty portrait in psychological realism. Behavior in the jury room is not pretty and all manner of vices are on display. Henry Fonda’s character finds that he needs to play tricks, set traps, break the law, smuggle in evidence, build factions, provoke enemies, flatter, cajole, and shout, all in the service of ferreting out the truth.

In tune with its populist sentiments, the film depicts judge and lawyer with open disdain. In fact, one of the dramatic darings of the screenplay is to essentially write judge and lawyer out of the action. We see the judge

3. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 488 (1966) (“[W]ith very few exceptions the first ballot decides the outcome of the verdict.” (emphasis omitted)); see also Richard H. Menard, Jr., *Ten Reasonable Men*, 38 AM. CRIM. L. REV. 179, 196 (2001) (“Under the two-way unanimity rule, the dissenters will have to persuade all . . . of the others, which no one can believe seriously is very likely outside of the movies. The most the dissenters can realistically hope to achieve is a hung jury . . . . [I]ndeed, the hopelessness of playing Henry Fonda under the circumstances is likely to induce the dissenters after a short while to shut up . . .”).

4. See PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, NAT’L INST. OF JUSTICE, *ARE HUNG JURIES A PROBLEM?* 1, 66 (2002) [hereinafter *ARE HUNG JURIES A PROBLEM?*], available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesProblemPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf).

5. Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott & G. Thomas Munsterman, *The Hung Jury: The American Jury’s Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33, 47 (2003) [hereinafter *The Hung Jury*]. Out of 89 cases with a “strong majority” favoring conviction on the first ballot, the jury acquitted in 11 trials, or about 12% of the time. In another 71 cases with strong initial majorities for acquittals, the jury ended up convicting in 3 cases, or 4% of the time. *Id.* This study does not specify what it means by a “strong majority” on the first ballot and thus it may not exactly parallel the one-person holdout dramatized in *12 Angry Men*. Interestingly enough, Kalven and Zeisel’s own data established that initial strong majorities are overcome in roughly 10% of cases. KALVEN & ZEISEL, *supra* note 3, at 488.

only once, in the opening scene, barely able to stay awake while droning on through the jury instructions. He has been through this a thousand times and cannot even feign interest. The lawyers we never see but we know what the jury made of the public defender's performance. Even he could not muster much enthusiasm for a case that brought him little income and less opportunity for career advancement.<sup>6</sup> Judge and lawyer have essentially cued the jury that the defendant is no doubt guilty as charged.

Does the jury come off any better? Here *12 Angry Men's* populist sentiments become halting. To be sure, at the end of the day the jury awakens but the awakening is largely the work of one person with the rare stamina to stand against the eleven. We cannot help but wonder what happens on most juries, where no Henry Fonda is on hand to save the group from its own tendencies.

All kinds of persons have made it onto the jury who should not have. One juror is in a rush to get to the night's ballgame, another is openly prejudiced against "those kinds." A third has some ax to grind, but it is difficult to know what it is. An old man seems, well, old. The Madison Avenue junior executive lacks appreciation for the difference between an advertising campaign and a trial. The most "intellectual" of the jurors is among the most blind. Other jurors seem decent but ill-equipped to resist the dominant mood. *12 Angry Men* may ultimately affirm the triumph of reason over prejudice in the jury room, but it is an anxious affirmation.<sup>7</sup>

*12 Angry Men* offers the jury as a foil to the prevailing McCarthyism of the 1950s. The conformist politics roiling the national stage are presented in miniature; far from being an exception to the contagions of group thinking, the jury at first seems to be the epitome of it. And yet, in the end the jury alone triumphs over the prejudices that make witch hunts possible. This does not prove easy. After all, the state *seems* to have massive evidence against the defendant. Admittedly, he had quarreled with his father earlier in the day and stormed out after shouting, "I'm going to kill you." That very night, the father is killed. The murder weapon, a switchblade with distinctive markings, matches a switchblade the defendant was seen carrying on many occasions. When asked to explain what happened to his

6. *12 Angry Men* premiered some six years before the Supreme Court ruled that indigent criminal defendants had a constitutional right to have attorneys appointed for them. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is telling to compare the heroic portrait of the right to counsel in Anthony Lewis's recounting of the *Gideon* case, *Gideon's Trumpet*, with *12 Angry Men's* dismissal of the difference a public defender makes. See ANTHONY LEWIS, *GIDEON'S TRUMPET* (Vintage Books 1966) (1964).

7. A Broadway revival of *12 Angry Men* took place in 2005, with a national tour in 2006. At least at the performance I attended in November 2006 at the Colonial Theatre in Boston, the audience loudly rooted and cheered for the "good" jurors to beat the "bad" jurors.

switchblade, the defendant can only offer, all too conveniently, the coincidence that he happened to have lost his knife that very day. Two eyewitnesses place the defendant in the house at the time of the murder. An elderly neighbor is awakened by a fight; despite a heavy limp, he manages to get to his door in time to see the defendant fleeing down the stairs. A woman testifies that she actually witnessed the murder and saw the defendant striking his father with a knife. The defendant relied on an alibi that he was at the movies at the time but he could neither corroborate this nor even remember the films he had allegedly seen.

Of course, it turns out that all this evidence can be subject to reasonable doubt. The “distinctive” switchblade turns out not to be so distinctive at all—Henry Fonda’s character surprises the others by producing an identical switchblade he easily purchased to test out the prosecution’s case (of course, it is jury misconduct for a juror to conduct his own investigation and to bring new evidence into the jury room but we will leave this aside). The limp of the elderly witness was so great that it would have been exceedingly difficult for him to have traversed the distance from bed to door in time to catch a look at a fleeing suspect. The woman who claimed to see the defendant wore eyeglasses (she didn’t wear them to court but the elderly juror—dismissed by the others as if he were not just old but a fool—turns out to be the only one who noticed the pinch marks on her nose); she would not have been wearing her eyeglasses to bed and hence it seems doubtful she could, without glasses, clearly have seen the defendant, especially with the additional obstacle of having to look through the cars of a passing train. Jurors grill themselves on whether they routinely remember the names of movies they see. The significance of a son yelling at his father, “I’m going to kill you,” is seen for what it is, especially after it is revealed that the most adamant juror for conviction is one who is trying to get back at his own son, with whom he has had a falling out.

No juror ever reaches the conclusion that the defendant is actually innocent. Through various reenactments in the jury room, they simply find reason to doubt that the state has done its job. The evidence is sloppy and the supposition has to be that prejudice against a Puerto Rican defendant is doing more work than it should.

Judged by contemporary standards, the jury of twelve angry men seems quaint and outdated. To begin with, it is an all-white and all-male jury sitting in judgment of a young Puerto Rican defendant (one juror seems to have some ethnic affinity with the defendant but it is not clear what it is). Whatever screening of the jury took place (before the action

opens) was not sufficient to pick up on the prejudices, grudges, disinterest and hurry that jurors openly express once they are inside the jury room.

In the half century since the screenplay was written, legal and cultural changes have aimed at making juries more representative of the community. Now jurors are probed for bias during *voir dire*, especially in a capital trial involving a minority defendant, as is the situation in *12 Angry Men*. To take account of these changes, various productions of the drama over the years have experimented with bringing women and minorities onto the jury, even changing the play's title on occasion to *12 Angry Jurors*. But the original screenplay is centrally about the behavior of white males called upon to judge the guilt of a Puerto Rican defendant. The play's quaintness stems from its heroic image of the white man's burden.

## II. THE HOLDOUT JUROR'S FADING REPUTATION

With the passage of time since *12 Angry Men* played in the theatres, the holdout juror has lost his hold on the popular imagination. Instead of hero, the holdout has become a villain blamed for a supposed surge in hung juries. Instead of the embodiment of reasonable doubt, the holdout is variously described as "unreasonable," "unreachable," "eccentric and disengaged." Instead of forcing a runaway jury to deliberate, the holdout is pictured as "disengaged" and "undeliberative." Instead of rational argument, the holdout invokes "religious scruples" and "God's will." Instead of being a white man, the holdout is said more likely to be an African American woman.

Consider the difference between the contribution Henry Fonda's holdout makes to justice in *12 Angry Men* and the roadblock *she* has become in Jeffrey Rosen's 1997 *New Yorker* article, purposively entitled *One Angry Woman* to invite comparisons to *12 Angry Men*.<sup>8</sup> Relying on anecdotal evidence from trials in Washington, D.C., where the juror pool at the time was estimated at over seventy percent African American, Rosen recounted four trials where a single African-American woman succeeded in hanging a jury in ways that fellow jurors, prosecutors, and presiding judges found unreasonable.<sup>9</sup> In two of the cases, the jurors cite religious scruples, one hearing God tell her, "I have forgiven him." In the other two, mistrust of

8. Jeffrey Rosen, *One Angry Woman*, NEW YORKER, Feb. 24 & Mar. 3, 1997, at 54.

9. *Id.* I am unclear what the source is for the article's estimate that the D.C. jury pool is seventy percent African American. A recent study of felony criminal trials in the District identified the race of 826 jurors: 398 were African American, 381 were white, and 47 were Hispanic. Stephen P. Garvey, Paula Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, G. Thomas Munsterman & Martin T. Wells, *Juror First Votes in Criminal Trials*, 2004 CORNELL LEGAL STUD. RES. PAPER SERIES 372, 392, <http://lsr.nellco.org/cornell/lrsp/papers/3> [hereinafter *Juror First Votes*].

the police leads the jurors to concoct conspiracy theories involving planting of evidence, theories considered ludicrous by every other juror in the room.<sup>10</sup>

Unlike the denouement in *12 Angry Men*, these four juries hang 11–1 for conviction. The policy implication is obvious: we should abandon the unanimous verdict rule in favor of a less stringent requirement that 11–1 verdicts (perhaps also 10–2) are sufficient to convict, in order to avoid situations of “unreasonable doubt.”

One of Rosen’s major points, on which he takes the author of the present article to task, is that the traditional notion that holdout jurors contribute to *deliberation* is false.<sup>11</sup> In *12 Angry Men*, the jury comes in and takes an immediate straw vote. Had the vote been unanimous, we suspect the jury would have wrapped things up in quick order. What permits the Henry Fonda character to power up his arguments is the unanimous verdict rule—eleven jurors cannot simply outvote the one; they must find a way to persuade all.

Rosen’s anecdotal evidence suggested that the holdout’s desire to force dialogue might be more mythic than real. His holdout jurors do *not* deliberate but rather sulk, withdraw, and “merely [dig] in their heels.”<sup>12</sup> One juror busied herself clipping discount coupons. Another put on earphones and listened to music to avoid hearing the others. A third read a book called *Masonry and Its Symbols* throughout the trial.<sup>13</sup> Examples such as these persuaded Rosen to “resist the temptation to paint hanging jurors as epigones of Henry Fonda in the *12 Angry Men* model, trying to sway their skeptical fellow jurors through reasoned persuasion.”<sup>14</sup> They were more likely to be eccentrics or crackpots.

Rosen’s article was hardly alone in demoting the holdout or hanging juror. Throughout the infamous O.J. Simpson trial, speculation mounted that the jury would split and hang along racial lines. In anticipation, the California District Attorneys Association (“CDAA”) mounted a campaign for legislation approving verdicts by a 10–2 margin; the CDAA cited evidence for an alleged dramatic increase in hung juries throughout the state.<sup>15</sup> As it turned out, of course, the Simpson jury returned a unanimous verdict

10. Jeffrey Rosen, *After ‘One Angry Woman,’* 1998 U. CHI. LEGAL F. 179, 182–87.

11. *Id.* at 193–94.

12. *Id.*

13. *Id.* at 187, 189.

14. *Id.* at 187–88.

15. CAL. DIST. ATTORNEYS ASS’N, NON-UNANIMOUS JURY VERDICTS: A NECESSARY CRIMINAL JUSTICE REFORM (1995) (claiming that about fourteen percent of criminal trials end in hung juries in California’s nine most populous counties).

of not guilty, but this only fueled suspicion in many quarters that “unreasonable doubts” were triumphing in the jury room, especially when it came to the unwillingness of African-American jurors to convict African-American defendants.

On the day after the jury acquitted O.J. Simpson, *The Wall Street Journal* ran a front page story, reporting that, in three urban areas where the jury pool was predominantly African American the *acquittal* rate was running two to three times the national average.<sup>16</sup> Although the data were subject to refutation,<sup>17</sup> the idea took hold in many quarters that racial tensions were destroying the ability of African-American jurors in particular to deliberate in an impartial fashion.

To explain why African-American jurors might be especially prone to acquit, the *Journal* hypothesized that such jurors were engaged in acts of nullification. They might know a defendant was guilty and yet still vote to acquit, in order to send a protest against the prevalent racism in the criminal justice system. The image of the angry and nullifying juror soon came to replace the image of the holdout juror offered by *12 Angry Men*. In the latter, the anger seems justified and served to focus the jury on critical examination of the evidence. In the former, the anger seems irrational and serves to distract the jury from reasonably considering the evidence at all.

Rosen’s article offered a variant on the nullification theme that raised more exact parallels to the themes of *12 Angry Men*. Focusing exclusively on juries with *one* final holdout, Rosen argued that 11–1 verdicts were more likely than not to be cases where a just conviction was thwarted by the unreasonable doubts of one. He called for critical, empirical research (on a greater sample than his four anecdotes) on a number of intriguing questions, including (1) whether hung juries generally were on the rise; (2) whether juries hung by the holdout of one or two jurors were specifically on the increase; (3) whether the lone holdout was most likely to be African American; and (4) whether the holdout was motivated by reasonable doubts of the *12 Angry Men* sort or by the unreasonable doubts of his four cases.<sup>18</sup>

Ten years later, and a half century after *12 Angry Men*’s exploration of the holdout juror, we still lack reliable data on almost all of the above questions. In the remainder of this paper, I will offer an overview of what potential answers we may have by way of judging just how accurate *12 Angry Men*’s exploration of the psychology of the holdout might or might

16. Benjamin A. Holden, Laurie P. Cohen & Eleena de Lisser, *Color-Blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1, A5. The three urban areas were the Bronx, the District of Columbia, and Wayne County (Detroit).

17. See Roger Parloff, *Race and Juries: If It Ain't Broke . . .*, AM. LAW., June 1997, at 5.

18. See Rosen, *supra* note 10, at 192–93.

*Men's* exploration of the psychology of the holdout might or might not be. Even though *12 Angry Men* dramatizes the ability of one holdout to convert a jury from conviction to acquittal, I will focus on the more likely possibility that one or two holdouts manage only to stymie the majority and achieve a hung jury.<sup>19</sup>

### III. GENERAL DATA ON HUNG JURIES

There are both empirical and normative questions to ask about hung juries. The empirical questions include (1) what percentage of juries hang today; (2) does the frequency vary from jurisdiction to jurisdiction; and (3) how do current rates compare to historical averages—are hung juries on the increase or decrease or does the percentage stay static, despite all the changes in jury selection since *12 Angry Men*? The normative question is : what value, if any, should we place on unanimous verdict requirements that make the frequency of hung juries greater than it would be under rules permitting majorities—or supermajorities—to rule on juries?

Hung jury rates in state courts are notoriously difficult to calculate because the definition of a hung jury varies from jurisdiction to jurisdiction.<sup>20</sup> A survey by the National Center for State Courts (“NCSC”) of felony criminal trials from 1996 to 1998 in thirty state courts found that the hung jury rate was 6.2%, with higher rates ranging from 8 to 14.8% in five of six California counties.<sup>21</sup> Federal data, far more uniform, indicates a lower incidence of deadlock in federal trials, averaging 2.5% from 1980 to 1997 in the U.S. District Courts. An exception is the federal D.C. Circuit Court, which recorded a hung jury rate of 9.5%.<sup>22</sup>

The data itself cannot resolve the debate over whether there are too many or too few hung juries, because this depends on further knowledge of the causes of deadlock. But it does indicate that the rate of hung juries has remained rather constant over time. In 1966, the University of Chicago jury project calculated the hung jury rate in state courts at 5.5%.<sup>23</sup> Interestingly enough, the Chicago project was already picking up evidence that the inci-

19. It bears repeating that the exact scenario depicted in *12 Angry Men*—one juror flipping eleven others—may not be frequent but does occur in “a small but not insignificant group of . . . cases.” *The Hung Jury*, *supra* note 5, at 47.

20. For instance, some jurisdictions count a jury as hanging only if it deadlocks on all charges. Other jurisdictions record a hung jury whenever the jury hangs on at least one charge; still others peg the definition to whether the jury hung on the most serious charge. See ARE HUNG JURIES A PROBLEM?, *supra* note 4, at 2.

21. *Id.* at 2, 25.

22. *Id.* (citing to data provided by the Administrative Office of the United States District Courts).

23. KALVEN & ZEISEL, *supra* note 3, at 56 tbl.11, 456 tbl.119.



dence of deadlock was far greater in Los Angeles County than the national average. In 1956, for instance, Los Angeles reported a hung jury rate of 15%.<sup>24</sup> Thus, despite reports to the contrary, there does not appear to be any sudden dramatic rise in hung juries.

We cannot, then, explain the fading reputation of the holdout juror by tracing it to an actual and alarming increase in the frequency with which juries deadlock.

#### IV. THE HOLDOUT JURORS ON 11–1 OR 10–2 HUNG JURIES

New and specific problems may exist today with juries that hang by the refusal of one or two members to go along with evidence strong enough to convince eleven others to acquit or to convict. Is the profile of the solitary holdout juror somehow different today, as Rosen's *New Yorker* article suggested, than it was when *12 Angry Men* celebrated the lonely juror's contribution to justice?<sup>25</sup>

We first consider the data in *The American Jury*, gathered around the time of *12 Angry Men*. Analyzing a small sample of forty-eight hung jury cases, Kalven and Zeisel found that forty-two percent of those juries hung with only one or two jurors holding out for either conviction or acquittal.<sup>26</sup> The authors concluded that roughly half of hung juries would be eliminated by abandoning the unanimous verdict requirement in favor of accepting 10–2 or 11–1 decisions, a conclusion loosely corroborated by the fact that the two states which had abandoned unanimous verdicts (Oregon, requiring ten for a verdict in non-capital crimes; Louisiana, requiring nine in cases involving less than the death penalty) reported half the incidence of hung juries as the national average.<sup>27</sup>

In a limited number of cases, the Chicago jury project had information on first-ballot votes. The data showed that “juries which begin with an overwhelming majority in either direction are not likely to hang.”<sup>28</sup> Instead, hung juries tended to spring from situations where jurors began deeply divided. As one commentator put it, “[e]ven though the final vote of hung juries might show only one or two dissidents, Kalven and Zeisel concluded that ‘for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations.’”<sup>29</sup>

24. *Id.* at 508 tbl.142.

25. Rosen, *supra* note 8.

26. KALVEN & ZEISEL, *supra* note 3, at 460–62.

27. *Id.* at 461.

28. *Id.* at 462.

29. *The Hung Jury*, *supra* note 5, at 37 (quoting KALVEN AND ZEISEL, *supra* note 3, at 463).

In *12 Angry Men*, there is a moment early in the story that loosely tracks Kalven and Zeisel's findings on the psychological need of holdouts to have company. Alone on the first ballot for acquittal, Henry Fonda's character gambles. He asks for another ballot, this time secret, and announces that he will give up the fight if he remains the sole dissenter. The gamble pays off, an ally is achieved, and together they mount a successful resistance.

The fact that holdouts need company to resist group pressure was crucial to Kalven and Zeisel's generally positive portrait of the hanging juror. Far from being eccentrics, holdout jurors espouse reasoning that at least had *some* support early on during the deliberations.<sup>30</sup>

Fleshing out the positive portrait, Kalven and Zeisel reported that evidence factors were most important in explaining the kind of disagreements that lead jurors to hang.<sup>31</sup> And these disagreements over the evidence seemed reasonable, because judges were more likely to agree that the evidence was "fairly close" in cases where juries hang than when they do not.<sup>32</sup> Finally, Kalven and Zeisel noted that deliberation times were also longer in hung juries, indicating the obvious effects of disagreement but also perhaps a *responsible* attempt by jurors to talk through their differences.<sup>33</sup>

Summarizing their overall positive account of holdouts, Kalven and Zeisel wrote that the primary cause of a hung jury is the ambiguity of the case, not "an eccentric juror . . . refus[ing] to play his proper role."<sup>34</sup> In many ways, *12 Angry Men* dramatizes that very portrait of the holdout juror. But there was one issue where the film was far more positive than the authors of *The American Jury* were. Kalven and Zeisel concluded that deliberation on a jury did not much matter, since "[w]ith very few exceptions, the first ballot decides the outcome of the verdict." In that sense, "the real decision is often made before the deliberation begins."<sup>35</sup>

By contrast, *12 Angry Men* is the story of how deliberative behavior can triumph in the jury room and change minds.<sup>36</sup> While the jurors cer-

30. KALVEN AND ZEISEL, *supra* note 3, at 463.

31. *Id.* at 456 tbl.120.

32. Juries hung in ten percent of the case where the judge considered the evidence as fairly close. By contrast, juries hung in two percent of the cases where the judge felt the evidence definitely favored one side. *Id.* at 457 tbl.121.

33. *Id.* at 457-60.

34. *Id.* at 462.

35. *Id.* at 488 (emphasis omitted). "[W]here there is an initial majority either for conviction or for acquittal, the jury in roughly nine out of ten cases decides in the direction of the initial majority." *Id.*

36. Contrary to their own dismissal of the impact of deliberation, Kalven and Zeisel's own data show that the verdict favored by initial majorities is reversed in about ten percent of cases. *Id.*

tainly engage in their full share of psychological gamesmanship, ultimately rational argument over the evidence sets the tone for deliberation. *12 Angry Men* is the drama of those rare but not trivial numbers of juries where rational deliberation has transforming effects on the initial opinions of jurors.<sup>37</sup>

What do we know about criminal juries that deadlock by final votes of 11–1 or 10–2 today? The 2002 study of hung juries published by the NCSC<sup>38</sup> shows that the percentage of juries hung by two or fewer jurors remains about the same as what it was in Kalven and Zeisel's charts. In forty-two hung jury cases, the NCSC had data on the final split vote. In nineteen of those cases, or forty-five percent, one or two jurors remained as the final holdouts.<sup>39</sup>

It is precisely this subset of hung jury cases that Rosen's original *New Yorker* article meant to call into question. A plausible intuition is that *something* must be odd or off about a juror who almost alone remains unconvinced by evidence strong enough to persuade ten or eleven presumably reasonable persons of the defendant's guilt beyond a reasonable doubt.<sup>40</sup> Several commentators have joined Rosen in collecting examples of troubling or troubled holdout jurors,<sup>41</sup> arguing that the time has come to abandon the two-way unanimous verdict rule in favor of a one-way requirement that it takes ten or more persons to convict; anything less would result in an acquittal.<sup>42</sup>

No doubt there are cases where holdouts are unreasonable by any standard. But systematic and scholarly research indicates that popular skewering of today's holdout jurors may be way overblown. The 2002 report of the NCSC offered the following profile of hung juries, based on a

37. See the discussion in Part V, *infra*, for a discussion of how deliberation closes the gap between African-American and white jurors that appears on the first ballot in some jurisdictions in some kinds of cases.

38. ARE HUNG JURIES A PROBLEM?, *supra* note 4.

39. *The Hung Jury*, *supra* note 5, at 48.

40. In its twin 1972 decisions approving non-unanimous verdicts in Oregon (10–2) and Louisiana (9–3), the Supreme Court took note of the anomaly of holdouts arguing reasonable doubt when so many other reasonable persons in the room did not share those doubts. *Johnson v. Louisiana*, 406 U.S. 356, 361–62 (1972) (“[A] dissenting juror should consider whether his doubt was a reasonable one . . . [when it made] no impression upon the minds of so many men, equally honest, equally intelligent with himself.” (alterations in original) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896))); *see also Apodaca v. Oregon*, 406 U.S. 404 (1972).

41. For a collection of recent juries hung by one or two members expressing allegedly unreasonable views, see Jere W. Morehead, A “Modest” Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts, 46 U. KAN. L. REV. 933, 936 n.20 (1998).

42. *See, e.g., Menard*, *supra* note 3, at 181–83. The current rule is “two way” because it symmetrically requires unanimity to convict *or* to acquit. Under a proposed one-way rule, it would take at least ten persons to convict, but it would take only three votes to acquit. *Id.*

survey of 372 felony jury trials from four large urban courts in Los Angeles, Maricopa County (Phoenix), the Bronx, and the District of Columbia:

Jurors are more likely to hang when they consider the evidence to be close or ambiguous.<sup>43</sup>

Jurors are more likely to hang when they consider the evidence to be complex.<sup>44</sup>

Racially diverse juries are no more likely to hang than are juries that are homogeneous by race.<sup>45</sup>

These conclusions are remarkably similar to those offered by Kalven and Zeisel; the major conclusion then and now is that the vast majority of hanging jurors are not eccentrics but persons with evidentiary and case-specific objections. Scholars studying the data compiled by the NCSC have confirmed that even on hung juries, “the evidence matters.”<sup>46</sup>

#### V. IS THE HOLDOUT JUROR A NULLIFYING JUROR?

One of the principal reasons holdout jurors have lost the dignity they enjoyed in *12 Angry Men* is that they are now suspected of jury nullification. Since the O. J. Simpson trial, suspicion has fallen on African-American jurors in particular. Distrust of the police and courts is said to move African-American jurors to acquit obviously guilty persons as a way of protesting the general mistreatment of minorities in the criminal justice system. Rosen’s *New Yorker* article offered a variant of the nullification hypothesis: it is not so much that African-American jurors deliberately resist enforcing the law; it is more that an individual African American now and then gets carried away by distrust of the police and the courts to the point of manufacturing unreasonable doubts based on lavish theories of conspiracies to frame the defendant, plant evidence, and the like.<sup>47</sup>

Authors of the NCSC study on hung juries have scrutinized the 372 felony cases in their database for evidence of jury nullification.<sup>48</sup> The au-

43. ARE HUNG JURIES A PROBLEM?, *supra* note 4, at 49 (“[W]hen the jury’s average rating of evidence ambiguity or closeness is high, the jury is significantly more likely to hang.”).

44. *Id.* at 45 (“In general, most juries do not . . . view their trials as highly complex,” but “juries in cases that hang on at least one charge rate the case as more complex and difficult for the jury to understand than verdict juries.”). It should be noted, however, that presiding judges and trial attorneys did not share the jurors’ perceptions as to the complexity of evidence in cases where the jury deadlocks. *Id.* at 45 tbl.4.4.

45. Nicole L. Mott, Neal B. Kauder, Brian J. Ostrom & Paula L. Hannaford-Agor, Nat’l Ctr. State Courts, *A Profile of Hung Juries*, 9 CASELOAD HIGHLIGHTS (2003).

46. *Juror First Votes*, *supra* note 9, at 396.

47. Rosen, *supra* note 10, at 184–87.

48. See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1263 (2003).

thors found that juror concerns about legal fairness played some role in twelve of forty-six hung juries, although it was the primary factor in only four of the nine.<sup>49</sup> In fifty-three cases where the jurors reported the evidence strongly favored the prosecution, the NCSC authors flagged two particular acquittals, one involving a drug sale and the other a sexual assault, where concern for the harsh consequences of conviction might have triggered nullification.<sup>50</sup> Looking further at a set of 126 cases where presiding judges reported the evidence as strongly favoring the government, the authors found eighteen trials where the jury acquitted on the majority of charges and another twelve where the jury hung.<sup>51</sup> Closely examining this set of thirty cases, the authors flagged seven where juror responses indicated a higher than average level of distrust in the fairness of legal proceedings. But even there, factors other than mistrust of the system were at work, principally expressions about the ambiguity of the evidence.<sup>52</sup>

Putting their assessments together, the authors concluded that it was “unlikely that jury nullification plays a dominant role in the large majority of cases.”<sup>53</sup> Most of the time concerns about the fairness of the law, its application, or about the harshness of punishment did not stand alone and cause jurors defiantly to refuse to convict guilty persons. What happened was presumably more subtle, a bringing of attitudes toward law enforcement to bear on the weight and credibility of the evidence, especially in close cases.<sup>54</sup>

Perhaps most importantly, the NCSC study found “that jurors’ perceptions of legal fairness are *not* clearly tied to juror demographic characteristics as has often been suggested.”<sup>55</sup> In the case of African Americans, the study did find a statistically significant correlation between race and higher than average levels of mistrust in the fairness of the legal system.<sup>56</sup> The authors surmised that background juror attitudes about police and the courts no doubt influence how jurors perceive the evidence, especially in

49. *Id.* at 1273.

50. *Id.* at 1274–75.

51. *Id.* at 1274 tbl.6.

52. *Id.* at 1275–76; *see also Juror First Votes, supra* note 9, at 387 tbl.7 (confirming that jurors who tended to believe that the law was unfair, that the consequences of convicting the defendant were too harsh, or that the police officers were less believable were more likely to vote not guilty on the first ballot).

53. Hannaford-Agor & Hans, *supra* note 48, at 1276.

54. *Id.* at 1277.

55. *Id.* at 1276 (emphasis added).

56. *Id.* at 1268. Interestingly, the study found that race is not especially predictive of juror concerns about “outcome fairness”—namely, the consequences for the defendant of a guilty verdict. *Id.* at 1270.

close cases, but this is true for jurors of *all* races.<sup>57</sup> It is also a far cry from saying that jurors with higher than average levels of distrust of the legal system deliberately set out to disregard the evidence and the law. In the vast majority of cases where concerns about legal fairness came into play, the authors found that the jury verdict (or deadlock) was best explained by a combination of factors, including reasonable doubts raised by ambiguities in evidence and problems in group dynamics.<sup>58</sup>

In all, the NCSC survey includes data on over 3,000 jurors in felony trials in Los Angeles, Maricopa County (Phoenix), the Bronx, and the District of Columbia. Reviewing data on *first*-ballot voting, scholars have looked for race of juror—or race of juror in combination with race of defendant—effects on the initial verdict preference of jurors.<sup>59</sup> They found such effects only in the District of Columbia.<sup>60</sup> In the cases in their sample, the defendants in District trials were overwhelmingly either African American or Hispanic. The jurors were African American or white, with few Hispanics.<sup>61</sup> Thus, what they looked for were differences in first-ballot preferences of African-American and white jurors sitting in judgment of minority defendants. In one category of cases, those involving victimless drug crimes, they were able to document that “African-American jurors, . . . in comparison to white jurors sitting on the same cases, are less likely . . . to cast a first vote for conviction.”<sup>62</sup> But, just as crucially, the study found that “even this isolated effect disappears after jurors have had an opportunity to deliberate.”<sup>63</sup> They could find “no evidence that a D.C. juror’s race is related to the jury’s decision to convict.”<sup>64</sup> This conclusion is telling against Rosen’s anecdotal account in *The New Yorker* singling out

57. The Henry Fonda character in *12 Angry Men* is white but he is the one portrayed as starting with a high level of suspicion about whether the police have done a competent job of investigating the murder. In the most dramatic moment in the screenplay, while other jurors are examining the murder weapon—a supposedly distinctive switchblade—and emphasizing the importance that the defendant was known to own exactly such a switchblade, Fonda produces a look-alike knife that he easily bought on the street the night before. Of course, it is a violation of the jurors’ oath to bring new, unexamined evidence and exhibits into the jury room, but Fonda commits this illegality to save the jury from committing a greater wrong. In one fell swoop, the Fonda juror exposes the carelessness with which the police investigated the murder. It is doubtful that anyone comes out of the theatre after seeing *12 Angry Men* thinking that the Fonda character should have been discharged from the jury for misconduct. The strength of the screenplay is to persuade us that it took a juror with initial suspicions about police attitudes toward Puerto Rican suspects to check the propensity of other jurors who either shared those attitudes or else placed too much trust in the police.

58. Hannaford-Agor & Hans, *supra* note 48, at 1275–76.

59. *Juror First Votes*, *supra* note 9.

60. *Id.* at 392–96.

61. *Id.* at 392.

62. *Id.* at 394.

63. *Id.* at 398.

64. *Id.*

black women for irrationally hanging jurors in D.C. trials. Analysis of the NCSC data confirmed that not race but “evidence matters” to the final verdict.<sup>65</sup>

It is highly significant that deliberation appears to have bridged whatever racial gap existed in first-ballot voting. The half-truth in the popular perception that race matters on juries is that first votes and first impressions of the credibility of police testimony in particular do show a distinction between the reactions of African-American and white jurors. But the fact that these differences disappear on the final vote indicates that deliberation over evidence is the primary influencing factor on the verdict.

#### VI. SHIFTING JUDICIAL ATTITUDES TOWARD THE HOLDOUT JUROR AS A NULLIFIER

Concern about jury nullification has caused trial and appellate judges to approve investigations into behavior in the jury room that were uncommon at the time of *12 Angry Men*. The 1995 case *United States v. Thomas* is illustrative of the new rules.

In *Thomas*, five African-American defendants went on trial in federal court in New York on multiple charges of drug possession, distribution, and conspiracy.<sup>66</sup> While the defense was presenting its closing arguments, six jurors complained to the judge about the “distracting” behavior of “Juror No. 5,” the panel’s only black member.<sup>67</sup> Jurors complained “that Juror No. 5 was distracting them in court by squeaking his shoe against the floor, rustling cough drop wrappers in his pocket, and showing agreement with points made by defense counsel by slapping his leg and, occasionally during the defense summations, saying, ‘[y]eah, yes.’”<sup>68</sup> In short, Henry Fonda he was not.

The trial judge conducted separate private interviews with each juror, asking them (without mentioning Juror No. 5 specifically) “whether anything had happened during the course of the trial that would interfere with [your] ability to deliberate and decide the case properly.”<sup>69</sup> Although many jurors found Juror No. 5 a distraction, only one felt that he might possibly interfere with deliberations. Juror No. 5 described himself as getting “car-

65. *Id.* at 396.

66. *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997).

67. *Id.* at 609–10. The prosecutor had attempted to use a peremptory challenge to remove this juror but the judge refused to allow the challenge, citing the *Batson v. Kentucky*, 476 U.S. 79 (1986) rules. *Thomas*, 116 F.3d at 609.

68. *Id.* at 610.

69. *Id.*

ried away” but affirmed his commitment to deciding the case according to the evidence and the law. He remained on the panel.<sup>70</sup>

After deliberations began, some jurors renewed their complaints about Juror No. 5. Partly they cited distracting behavior, such as yelling at jurors, calling them racists, nearly coming to blows, and feigning nausea while others ate lunch.<sup>71</sup> But they coupled their complaints with accusations that Juror No. 5 was preventing them from reaching a proper verdict and was simply unwilling to convict any of the defendants of drug crimes.<sup>72</sup> The judge interviewed the jurors again. While Juror No. 5 stressed that his reservations were based on the sufficiency of the evidence, several jurors felt that Juror No. 5 was against convicting the defendants out of personal beliefs that had nothing to do with the evidence or the law. One juror complained that Juror No. 5 was for acquittal because the defendants were “his ‘people.’”<sup>73</sup> Some others said his holdout was rooted in his personal belief that drug dealing was both commonplace and an economic necessity for these defendants.<sup>74</sup> These sentiments were not universal; at least one juror told the judges that others were “picking” on Juror No. 5 and another reported that the tensions had quieted down.<sup>75</sup>

After interviewing the complaining jurors as well as Juror No. 5, the trial judge concluded that Juror No. 5 was intent on nullifying and he dismissed the juror for just cause pursuant to Rule 23(b) of the Federal Rules of Criminal Procedure.<sup>76</sup> The remaining eleven jurors convicted all defendants on the majority of counts.

On the defendants’ appeal, the United States Court of Appeals reached a mixed decision. On the one hand, as a matter of law, the court emphatically agreed with the trial judge that nullification was a form of misconduct subjecting an offending juror to discharge. Nullification, they stressed, makes jurors incapable of “perform[ing] their duties properly” and hence is on a par with factors such as illness that traditionally provide “just cause” for dismissing jurors during deliberation under Rule 23(b).<sup>77</sup> But how is a

70. *Id.* at 610–11.

71. *Id.* at 611.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 612. The court found that Juror No. 5 was refusing to convict “because of preconceived, fixed, cultural, economic, [or] social . . . reasons that are totally improper and impermissible.” *Id.* (alterations in original).

77. *Id.* at 613–14. Although it has long been settled that federal juries have no lawful right to nullify, *see Sparf & Hansen v. United States*, 156 U.S. 51 (1895), still the *Thomas* decision authorizing *dismissal* of nullifying jurors during deliberation broke new legal ground. For the most part, federal courts have practiced a kind of “don’t ask, don’t tell” policy toward jury nullification. While it might be



judge to find out, as a matter of fact, whether a juror is expressing nullification arguments inside the jury room, without compromising the traditional privacy and secrecy of jury deliberations? As the court noted,

As a general rule, no one—including the judge . . . —has a “right to know” how a jury, or any individual juror, has deliberated or how a decision was reached . . . . The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system. . . . [T]he mere suggestion that the views of jurors may be conveyed to the parties and the public . . . understandably may cause anxiety and fear in jurors, and distort the process by which a verdict is reached . . . .<sup>78</sup>

Not only was there a need to balance the state’s interest in preventing juror misconduct with the jury’s interest in the secrecy of its deliberations; the Second Circuit also emphasized the difficulties inherent in distinguishing a holdout based on improper nullification from a holdout rooted in reasonable doubts about the evidence.

As a way of striking a balance and keeping trial courts from inquiring into jury deliberations too widely and frequently, the court announced that no juror should be dismissed for advocating nullification unless the record leaves “no doubt” of intent to disregard the law or the evidence.<sup>79</sup> In the particular case before it, the appellate court reversed the defendants’ convictions, concluding that no such unambiguous evidence existed that Juror No. 5’s lone vote for acquittal was unambiguously an act of nullification.<sup>80</sup>

The *Thomas* decision acknowledged that the very feature of jury deliberations that makes improper acts of nullification possible—their secrecy—is also a feature indispensable to the independence of juries. The court tried to resolve the tension between the good and the bad in jury secrecy by authorizing some, but not too much, investigation of complaints about holdout jurors.

It is still an open question what the practical effects on jury deliberation will be of the Second Circuit’s approval of limited judicial interroga-

a fact that secrecy gives jurors the raw *power* to nullify, they do not have the legal *right* to do so. *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). Applying this distinction, trial judges traditionally refuse to inform jurors (or permit counsel to do likewise) about nullification, because this might encourage jurors to do what they ought not to do. *Id.* at 1137–38. But, prior to *Thomas*, if jurors or a juror decided spontaneously to nullify, then courts treated it with either a grudging respect or at least acceptance of the criminal jury’s raw power to acquit for any reason. *Id.*; see also Jeffrey Abramson, *Jury Deliberation: Fair and Foul*, in *JURY ETHICS: JUROR CONDUCT AND JURY DYNAMICS* 181, 194–95 (John Kleinig & James P. Levine eds., 2006).

78. *Thomas*, 116 F.3d at 618–19; see also *People v. Engelman*, 28 Cal. 4th 436, 443 (2002); *People v. Cleveland*, 25 Cal. 4th 466, 481–82 (2001).

79. *Thomas*, 116 F.3d at 625.

80. *Id.*

tion of jurors accused of nullification. As commentators have noted,<sup>81</sup> there is a danger that majority-faction jurors can turn the new judicial vigilance to their advantage during deliberations. With good or bad intentions, the majority can report, or merely threaten to report, holdouts as a way of intimidating them into capitulation. Even in the best of circumstances, it is difficult for one or a small number of jurors to resist majority sentiment in favor of conviction but it becomes even more difficult when resistance could trigger a judge's investigation of the basis of the holdout.<sup>82</sup> The holdouts themselves may harbor confusion about the basis of their refusal to convict and may be susceptible to suggestions they differ from the majority only because they are reasoning improperly.<sup>83</sup>

One court that has systematically explored these dangers is the California Supreme Court, in a 2002 decision about the propriety of a jury instruction that read as follows:

The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.<sup>84</sup>

While the court held that this instruction was constitutionally permissible, it exercised its supervisory powers to disapprove of its continued use. The court specifically worried that "the instruction . . . [could] be used by one juror as a tool for browbeating other jurors."<sup>85</sup> A shrewd juror "could . . . without ever actually communicating with the court, place undue pressure on another juror by threatening to accuse that juror in open court of reasoning improperly or of not following the court's instruc-

81. See, e.g., *Criminal Law—Jury Nullification—Second Circuit Holds that Juror's Intent to Nullify Is Just Cause for Dismissal*, 111 HARV. L. REV. 1347 (1998).

82. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 951 (1999) ("Research has shown that when there are only one or two holdouts, they have a hard time maintaining their position in the face of pressure from other jurors. The position of holdouts . . . has become even more precarious now that the majority can threaten to describe any holdouts as potential nullifiers, even if they are not." (footnote omitted)); see also Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 482 (1998); Ran Zev Schijanovich, Note, *The Second Circuit's Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence*, 20 CARDOZO L. REV. 1275 (1999) (criticizing judicial attempts to detect and stamp out expressions of nullification during deliberation as threatening judicial control of juries in deprivation of jury's historic power to nullify).

83. In *United States v. Brown*, 823 F.2d 591, 597 (D.C. Cir. 1987), the appellate court found the trial judge erred in removing a juror who himself asked to be dismissed and said he was unable to continue deliberating; the record left open the possibility that his refusal to deliberate was based on honest convictions about the insufficiency of the evidence.

84. *People v. Engelman*, 28 Cal. 4th 436, 441–42 (2002) (alteration in original) (quoting CALJIC No. 17.41.1(2)).

85. *Id.* at 445.

tions.”<sup>86</sup> In the same vein, the court went on to worry that “[t]he instruction could cause jurors to become hypervigilant during deliberations about *perceived* refusals to deliberate or other ill-defined ‘improprieties’ in deliberation.”<sup>87</sup>

In short, even though the instruction was correct in telling jurors that they were subject to dismissal for misconduct during deliberations, the court thought it a bad idea to encourage jurors to report one another during the heat of deliberation battle. It would be difficult for even a well-intentioned juror to know whether another juror’s holdout was motivated by nullification or by reasonable doubts about the evidence.<sup>88</sup> It would be easy for a less well-intentioned juror to jump to the conclusion that any opposition to conviction must be a form of nullification. And it would be difficult for a judge to investigate complaints without “chill[ing] the free exchange of ideas that lies at the center of the deliberative process.”<sup>89</sup>

The California Supreme Court’s decision in *Engelman* is notable for its sensitivity to the way the fight over nullification can recruit judges onto the majority faction’s side during an ongoing jury deliberation. But, even though the court disapproved of this particular instruction, it noted with approval the position of the Second Circuit that nullification was misconduct and that judges should respond to complaints jurors might make about fellow jurors in future trials, even when not prompted by the disapproved instruction.<sup>90</sup>

## CONCLUSION

While the specific drama unfolding in *12 Angry Men*—one juror persuading eleven initially convinced of a defendant’s guilt to acquit—does not occur with frequency in real trials, recent data confirm that even strong

86. *Id.* at 446.

87. *Id.* at 447.

88. In *United States v. Symington*, 195 F.3d 1080, 1083, 1092 (9th Cir. 1999), jurors complained that one juror was unable to comprehend the evidence and engage in deliberation. The trial judge dismissed the juror after finding that he was unable or unwilling to deliberate, but since the record was ambiguous as to why the juror had withdrawn from deliberation, the appellate court found it was possible that the withdrawal spoke to views on the insufficiency of the evidence and therefore it was error to dismiss the juror.

89. *Engelman*, 28 Cal. 4th at 447.

90. *Id.* at 442. In two decisions in the years immediately prior to *Engelman*, the California Supreme Court had held in no uncertain terms that jurors do not have any right of nullification. See *People v. Cleveland*, 25 Cal. 4th 466 (2001); *People v. Williams*, 25 Cal. 4th 441 (2001). While the *Engelman* court disapproved of the particular instruction calling on jurors to report suspected nullifiers, it quoted with approval pattern instructions informing the jury that, “you must accept and follow the law as I [the judge] state it to you, regardless of whether you agree with the law.” *Engelman*, 28 Cal. 4th at 449 (quoting CALJIC No. 1.00 and CALJIC No. 0.50).

majorities are overthrown “in a small but not insignificant number” of cases.<sup>91</sup>

The importance we attach to this phenomenon, however, has considerably waned in the past half century. Popular accounts of the one holdout or few holdouts are now more likely to regard the very ability to sustain opposition to strong majority support for conviction as evidence of unreasonable hostility to the law, courts, and police, or as gestures of racial loyalty to a same-race defendant.

Evidence correlating race with being a holdout or nullifier is shallow at best. The racialized portrait of jury behavior now seems an unfortunate, and, one hopes, passing overreaction to the singularities of the O.J. Simpson trial. It may well be the case, as the study of first balloting in drug cases in Washington, D.C., indicates, that African-American jurors are less likely than white voters to cast an initial vote for conviction.<sup>92</sup> The difference in initial opinions may well be rooted in diverging attitudes toward the credibility of police testimony.<sup>93</sup> But it is a long jump from evidence of racial effects on pre-deliberation opinions to claims that these racial factors control the outcome, irrespective of the strength or ambiguity of evidence in the case. As we have seen, even in the sample of cases from Washington, D.C., which showed a racial difference in first-ballot voting, that gap did not survive deliberation and did not show up in the final votes giving a verdict.<sup>94</sup> The best reading of the evidence, therefore, is that jurors bring preconceptions and attitudes linked partly to race, but these attitudes do not operate free from the facts of a particular case or overwhelm the ability of jurors to abide by their oaths and to faithfully subject the evidence to scrutiny for reasonable doubts.

In hindsight, one of the striking features of *12 Angry Men* is the struggle it took an almost all-white jury to cast aspersions on the police investigation that led to the arrest of the defendant for murdering his father. The screenplay is understated on this point; it may be that the police are never even mentioned by name. And yet the whole case for reasonable doubt depends on the ability of the jury to consider the possibility that the police did less than a thorough job of investigating a crime in a minority

91. *The Hung Jury*, *supra* note 5, at 47.

92. *See Juror First Votes*, *supra* note 9, at 394. There were insufficient cases involving white defendants for the study to consider whether there was any difference in the first-vote balloting of jurors depending on whether they shared a racial identity with the defendant.

93. *Id.* at 396 (“[V]ariation in juror beliefs about police credibility is a key determinant of [initial] verdict preferences.”).

94. *Id.* at 394.

2007]

ANGER AT ANGRY JURORS

611

neighborhood. A more racially diverse jury might have taken a less tortuous path to this conclusion.

Yet, now that we strive for racial diversity on juries, and sometimes achieve it, we hear that diversity comes with a price, that jurors vote their race and not the evidence. It is a sad commentary that for fifty years *12 Angry Men* has moved moviegoers and theatre audiences to cry tears for the ability of one white juror to stand firm against pressures to convict and yet we cry wolf when it is a minority juror who assumes the same role.