

WAS HE GUILTY AS CHARGED? AN ALTERNATIVE NARRATIVE
BASED ON THE CIRCUMSTANTIAL EVIDENCE FROM *12 ANGRY
MEN*

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In *12 Angry Men* a young Hispanic man was charged with killing his father and put on trial for his life. After stormy deliberations, the jury found him not guilty. The theme of the film is that Juror #8 prevented a miscarriage of justice by his stubborn persistence in adhering to the almost religious belief that a criminal defendant should be accorded the benefit of “proof beyond a reasonable doubt” and his nagging insistence on closely examining all of the evidence. The important message is that one person can make a difference. The message is, of course, to be applauded. The burden of proof in a criminal trial and the importance of each individual juror form the cornerstone of the American jury system.

But the story, as so often happens, is more complicated than that simple message suggests. A careful review of the evidence and the jury’s analysis of the evidence suggest that the twelve angry men may have produced an injustice: specifically, they may have acquitted a guilty man. A jury is instructed to consider all of the relevant trial evidence and the implications of that evidence, but that was not done during the deliberations. Viewed from this perspective, the message of *12 Angry Men* can be seen as very different than the conventional interpretation as a vindication of innocence. Through the leadership of Juror #8 the other jurors confronted their ethnic and personal prejudices as they deconstructed the evidence favoring the prosecution. Yet, we contend, in their deconstruction efforts the jurors failed to consider an alternative story favoring guilt, a story that focuses on circumstantial evidence.

There may be a larger lesson from looking at the movie in this way. Legal rules for criminal trials are intentionally slanted toward giving the benefit of doubt to the defendant, and we should hope that the rules have

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even more sway when the defendant is charged with murder (although often they do not). Nevertheless, despite legitimate concerns about convicting innocent persons, society has an equally strong interest in ensuring that guilty persons are convicted.

In the body of this essay we build the case for a story favoring guilt. We then leave the fictionalized story to consider a real-life case whose factual elements show a striking parallel to those of the movie and involve an alleged false acquittal based on the jury's failure to consider the circumstantial evidence. Finally, we contrast that case with another case resulting in a conviction based entirely on circumstantial evidence. Our essay poses important questions bearing on how jurors use direct and circumstantial evidence.

I. THE "STORY MODEL" OF JUROR DECISION MAKING

Criminal trials involve a dispute about an historical event: either the defendant did it or he didn't.¹ As Bennett and Feldman have pointed out, the dispute is about competing narratives.² Under Anglo-American adversary procedure, the prosecution produces evidence consistent with a story pointing to guilt. In turn, the defense lawyer attempts to show that the prosecution's story is flawed and incomplete or inconsistent with alternative evidence suggesting that the defendant is not guilty. The jurors' task is to evaluate these competing narratives and decide which side's version is correct by applying their experience and inferential abilities to the trial evidence.

Building upon this insight, Pennington and Hastie proposed that jurors impose a narrative story structure on the trial evidence using three types of knowledge.³ First, they draw upon case specific information learned at trial, that is, testimony from witnesses about the contested past events. Second, the jurors reason from this information by analogizing it to their personal knowledge about events that are similar in content to the issues in

1. Sometimes, of course, the dispute involves whether a crime actually occurred and other times the trial involves the degree of culpability or whether culpability should be assessed at all, as in cases involving insanity defenses. However, to simplify matters for this essay we consider only cases of identity of an offender.

2. See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981) (providing a fuller description of competing story development in the adversary system).

3. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519, 522 (1991). The story model and narrative reasoning by jurors is discussed in more detail in NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 41-86 (2000), and in NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT*, at ch. 6 (2007).

dispute. These events might include similar crimes of which jurors are aware or similar situations. Finally, the jurors incorporate generic expectations about what makes a complete story, for instance, that human actions are usually driven by goal-directed motives. In a set of experiments in which certain facts had been omitted, Pennington and Hastie found that jurors filled in the gaps by speculating about facts external to the trial in order to develop a complete narrative. In additional experiments those authors examined the effects of variations in the order in which the facts were presented. They found that more coherent orders of evidence tended to correlate with the ability to persuade jurors toward a specific verdict.⁴

Combining their various findings, the authors developed what they called the “story model” of juror decision making. The decision-making process consists of three stages: developing stories (or “narratives”) from the trial evidence; considering the verdict alternatives from the legal instructions provided by the judge (such as guilty versus not guilty)⁵; and, finally, matching the various stories to these verdict categories. The verdict is derived from the best fit between narrative and verdict category.⁶

The law expects that jurors will set aside their personal biases and restrict their deliberations to the parameters set by the trial evidence; then they are expected to combine their personal experiences about life in weighing the evidence. A competent jury will weigh all aspects of the evidence for completeness and consistency, and consider alternative narratives that might be derived from the evidence before it renders its verdict.

In the following analysis of the evidence we suggest that the “twelve angry men” demonstrated reasoning consistent with the story model but failed to develop (and thus to consider) very plausible alternative scenarios based on the circumstantial evidence.

II. THE TRIAL EVIDENCE AND THE DELIBERATIONS OF TWELVE ANGRY MEN

A. *The Trial Evidence*

As movie viewers we have access only to the issues that were brought up in deliberations. Here is a nutshell view of the evidence against the un-

4. Pennington & Hastie, *supra* note 3, at 536, 543.

5. In some cases additional options such as guilt of a lesser offense, self defense, or insanity are involved.

6. Pennington & Hastie, *supra* note 3, at 521.

named Hispanic defendant, age 19, who is the defendant, and of the jury deliberations.

Around 8:00 p.m. on the evening of the murder the defendant and his father had an argument. The father hit the defendant at least twice. The father apparently had hit the defendant many times prior to this night. Shortly after this violent encounter the defendant left the apartment.

The defendant, whose mother had died when he was nine, had a troubled past. He had been in reform school. He had been arrested for a mugging. Twice he had been in knife fights. At approximately midnight a woman who lived in an apartment across the elevated train tracks from the father's apartment awoke from her sleep. Through the windows of a noisy passing train, she saw a man stabbing the father in the chest. Immediately after the attack ended, the lights in the father's apartment went out. The woman called the police and identified the defendant as the assailant.

An old man who lived in the apartment below the father's apartment testified that at approximately the same time that the woman witnessed the stabbing, he heard the defendant yell "I'll kill you" and a "second" later heard a body hit the floor. He got up from his bed, went to the door, and saw the defendant running down the stairs.

The defendant returned to his father's apartment at approximately 3:00 a.m. in the morning. The police questioned him in the kitchen. He claimed he had gone to see some friends shortly after leaving the apartment following the 8:00 p.m. argument with his father. He later testified at trial that he went to the movies alone at about 11:00 p.m., returning home at 3:00 a.m. to find the police in his father's apartment. He could not remember the titles of the movies or their plots and he could not identify any witnesses who saw him at the theatre.

The defendant admitted that shortly after the 8:00 p.m. fight with his father he went to a store and bought an "unusual" switchblade knife that appeared identical to the one found embedded in his father's chest. When he later met his friends he showed them the knife. After leaving his friends to go to the movies alone, he lost the knife when it fell through a hole in his pocket. His friends testified at trial that the knife removed from the father's chest was the one that the defendant had shown them.

B. The Jury Deliberations

Led by Juror #8 (Henry Fonda) the jury slowly but systematically identified major problems with the prosecution's evidence. In an evening walk during the trial Juror #8 found and bought a knife identical to the one used to kill the father. He brought it to the jury room to show that the

weapon was not as unique as the prosecution contended. Following a demonstration by one juror, the jurors concluded that because the boy was much shorter than his father, it would have not been possible for him to stab his father with a downward thrust of the knife as the evidence indicated had happened—and besides, one juror pointed out, a person using a switchblade thrusts upward into the victim, not downward. The old man who lived below the father was discredited because the jurors concluded that the train noise would have prevented him from clearly identifying the boy's voice. In addition they concluded the old man *may* have fabricated seeing the boy run down stairs after the thump of the body hitting the floor—or at least may not have obtained a good look at the person running down the stairs. They conducted an experiment based on his testimony that it took fifteen seconds to get to the door and concluded that he could not have traveled the distance in such a short time interval. The female eyewitness was discredited on the assumption that she was not wearing glasses and therefore could not accurately identify the assailant given the circumstances under which she witnessed the murder. The defendant's inability to remember the movies he saw when he was questioned by the police in the kitchen of the apartment was dismissed as the product of the highly charged emotional setting. Finally, setting aside their prejudices against the defendant and assorted other personal baggage exposed during deliberations, the jury voted to acquit.

III. SOME OF THE PROBLEMS WITH THE ACQUITTAL

Juror #8's unsanctioned stroll through the defendant's neighborhood, his search to find a similar knife, and, finally, his production of the knife in the jury room were highly inappropriate behaviors. Indeed, it is likely the judge admonished the jurors to avoid such conduct. If discovered before the verdict, the conduct would have resulted in a mistrial. But put this substantial legal problem aside.

Is it not a strange coincidence that some other assailant would use a knife identical to the one the defendant admitted he bought earlier that evening following the fight with his father? Although the knife may not have been unique as the prosecution contended, it appears to have been an unusual knife. Indeed, the evidence suggested it was at least rare. What is the probability that the murderer would have gone to the father's apartment and attacked him with a knife identical to the one the defendant bought *and* "lost" that very night? Even more unlikely is a narrative scenario in which a stranger found the knife that had fallen out of the defendant's pocket, by chance went to the defendant's apartment, was admitted, and then stabbed

the father. A slightly more probable alternative story is that the defendant bought the knife and persuaded one of his friends to stab his father while he went to the movies to establish an alibi for himself. However, in that case, how likely is it that the defendant would forget the names of the movies that he presumably watched?

What was the likely motive for the homicide? There appears to be no evidence of a robbery or some other person having a grudge against the victim. In contrast, the defendant clearly had a motive to kill his abusive father. And, by his own testimony, immediately after the fight with his father earlier that evening, he went to a store and bought a knife identical to the one found in his father's chest. Surely this should be powerful circumstantial evidence. Moreover, while the jurors' analysis of the credibility of the motives of the eyewitnesses was thorough, none of the jurors questioned whether the defendant's pant pocket in fact had a hole in it through which the knife could have fallen. It also would have made a difference whether the pockets on the pants worn by the defendant were inside the pants or outside the pants. If the former, he likely would have felt the knife pass down his leg.

Now consider the stabbing. The father was stabbed in the upper chest from above. The jurors speculated that it was not likely that the defendant could have inflicted such a wound because his father was considerably taller. The jurors never considered the possibility that the father could have been leaning forward to strike the defendant or to ward off the knife thrust. Moreover, the juror who pointed out that a switchblade user stabs underhanded provided no probative evidence. To be sure, most of the time a switchblade user uses an underhanded thrust that goes to the gut or makes an upward wound into the chest. But in fact *whoever* stabbed the father with the switchblade didn't do that! The wound was the result of a *downward thrust* into the chest. The jury never explored this inconsistency, which made the demonstration irrelevant.⁷ No fingerprints were found on the knife, but the jurors speculated that the perpetrator must have wiped his prints from the knife but left it sticking in the father's chest. There is an alternative explanation for the lack of fingerprints—the defendant planned the murder and wore gloves. There are other possible unexplored alternative scenarios, but the jurors simply rejected this part of the prosecution's story without articulating a credible alternative.

7. The jurors also did not take into consideration evidence that the defendant had been convicted of being in previous knife fights. Presumably they would have been instructed that the prior convictions bore on his credibility, not his guilt. Yet, the jurors never revisited the issue of his credibility using this evidence.

Next, consider the female eyewitness. From untested circumstantial evidence, namely marks on her nose, the jurors speculated that she wore glasses. Based on this fragile observation the jurors concocted a story scenario in which she was a desperate, nearsighted woman afraid of being a spinster. They never explored the possibility that she may not have worn glasses at all; the red marks could have been from nervous rubbing of her eyes. Or, if they indeed were from wearing glasses they could have been non-prescription sunglasses. Or she may have worn prescription glasses for reading only. But even if the jurors were correct in their guess that she was nearsighted and needed glasses to see into the father's apartment, they never considered the likelihood that regular wearers of glasses keep their glasses handy on a bedside table and automatically put them on before looking anywhere—to see what went bump in the room or to see what was going on outside the windows, in this case a murder. In any event, however, this speculation by the jurors about the woman's vision is like the demonstration that a stab with a switchblade likely would be an upward thrust; it is contradicted by actual fact. The woman had clear enough vision to see the altercation, call the police, report that the father had been stabbed, and identify the defendant.

Similar faulty consideration of the trial evidence involved the challenges to the old man's credibility. The jurors engaged in untested speculation about his need to feel important, constructing a scenario that because he was old and poor he must have designed his testimony to take advantage of this being the first time in his life he was the center of attention. They accorded scientific accuracy to his estimate of fifteen seconds, not considering it may have been only an estimate, and then dismissed other aspects of his testimony as likely being inaccurate. His estimate of the time it took to get to the door reflected his judgment that it didn't take too long. It was a relative judgment. But the jurors constructed a story scenario accepting part of his testimony as valid and not testing the plausibility of the assumptions they made from that starting point.

More could be said, more alternative inculpatory stories developed, but our point now should be obvious: the jury deconstructed the evidence in a biased way. Led by Juror #8, they systematically dismantled inculpatory evidence without considering the plausibility of the deconstruction. Motives of eyewitnesses were manufactured from whole cloth, but the plausibility of the defendant's story was not tested for internal consistency or against the circumstantial evidence pointing to guilt.

Is *12 Angry Men* an anomaly, especially in the jurors' treatment of the circumstantial evidence? Consider a real trial.

IV. A REAL LIFE TRIAL: THE MORENO MURDERS

The late Richard Uviller described and analyzed two murder trials resulting in acquittals, arguing that the totality of evidence, especially the circumstantial evidence, pointed toward guilt.⁸ In his terminology “a verdict is ‘false’ when it inaccurately reflects the ‘true’ historical facts of the incident.”⁹ One of the trials he analyzed, the Moreno murders, has a rough similarity to the fact situation depicted in *12 Angry Men*. Following is an abbreviated description of that case.

Mr. and Mrs. Moreno were Hispanic immigrants in their 60s. A retired chef, Mr. Moreno went to meet his wife at a bus stop after midnight to walk her home as she was returning from her job as a maintenance worker in an office building. As the couple walked from the bus stop, a man with a gun confronted them a few doors from their home and shot both dead.

Two people witnessed the murder: a young actress and a visitor from Chicago. They did not know each other or anyone else connected to the case, including the victims. They were in different apartments overlooking the scene and thus had different viewing perspectives. Both had looked out their windows upon hearing gunshots. Each had an unobstructed view of the face of the assailant, illuminated by the streetlight as he was standing over the victims, and each described the assailant as wearing a white shirt and black trousers. There were no other immediate leads to the identity of the assailant.

A few months later the police stopped a car for a traffic violation. The driver jumped out of the car with a shotgun, started running, stopped, turned, and fired at the police. Miraculously, he failed to hit anyone. After a chase the police captured him. His name was Manuero Rojas. A couple of days later, Maria Torres, a frightened woman on parole for a drug offense, called her parole officer because she had heard her ex-boyfriend, Manuero Rojas, was out looking for her armed with a shotgun. Maria also told her parole officer that Manuero was involved in “the shooting of the old couple,” as well as an unrelated killing in front of a bar in the Bronx. Rojas was charged with Mr. and Mrs. Moreno’s murders.

As the case proceeded to trial, new pieces of inculpatory evidence were developed. Maria Torres said that Rojas had brought a briefcase containing a pistol to their apartment and put it in the hall closet. She also said that on the night the Morenos were killed, Rojas told her that he had to kill

8. H. Richard Uviller, *Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof*, 2 CRIM. L. F. 1 (1990).

9. *Id.* at 3.

the old couple because the man had reached for a gun in his belt. In fact, the police had found a chef's knife in Mr. Moreno's belt and the handle could have been mistaken for a gun. A search warrant produced the briefcase with the gun. The slugs taken from the Morenos' bodies were too disfigured for a ballistics test, but the shell casings recovered at the murder scene matched the weapon's caliber, and scratch marks on the casings were consistent with being fired from the gun. Police arranged a lineup with Rojas's lawyer in attendance. The two eyewitnesses independently picked Rojas without hesitation. The jury saw pictures of the lineup at trial.

Shortly before the trial began, Maria Torres spontaneously confessed to police that on the night of the killings she had accompanied Rojas and a driver the night of the murder. They had dropped off Rojas near the subsequent murder scene to attempt a robbery. They picked him up shortly afterward. When he entered the car, according to Torres, he told Maria and the driver that he had had to shoot the couple. The prosecutor also offered an explanation for Rojas being in the Morenos' neighborhood. Mrs. Moreno's adult son from a previous marriage testified at trial that he had been in the drug trade in Florida and had welshed on a drug deal. Rojas likely had been looking for him.

In short, the evidence against Rojas included two solid eyewitnesses, credible evidence that the pistol found in Rojas's closet probably produced scratch marks on the shell casings found at the murder scene, the testimony of the former girlfriend, and an explanation for why Rojas might have killed the Morenos. To the shock and dismay of the prosecutors, however, the jury acquitted Rojas.

Professor Uviller tried to explain how this came about. When deliberations began, the jury was split with the majority favoring conviction. A highly-educated member of the jury who favored acquittal provided leadership for the other jurors who favored acquittal. Early in the deliberations he used the lineup photograph to point out that of the six men in the lineup only the defendant was wearing a white shirt and dark trousers, similar to the clothes that the two eyewitnesses had said the assailant was wearing. Moreover, he argued the lineup had taken place some months after the shooting. Like Henry Fonda in *12 Angry Men*, this juror became an amateur defense lawyer, unrestrained by the law or the lack of evidence. He argued as fact things that, at best, were speculation. For example, he argued that both eyewitnesses had unconsciously identified Rojas in the lineup based solely on what he was wearing and not because they recognized his face. The false identification in the lineup, he asserted further, might have accounted for the witnesses' identification of Rojas at trial. This, he con-

cluded, created the real possibility that the prosecution's entire case rested upon a false identification. Based upon that assumption, the confident juror deconstructed other pieces of evidence. Unable to match the highly articulate leader of the group of jurors arguing for acquittal, the majority of jurors who initially favored conviction eventually subscribed to his logic and voted not guilty.

Uviller argued that the Rojas verdict was likely a false acquittal. In his words,

The extraordinary thing about Rojas's acquittal was not the jurors' doubt concerning the accuracy of the independent, detached identification testimony of the two eyewitnesses. It was their disregard for the corroborating evidence. Torres's testimony putting Rojas at the scene of the killing and recounting his confession immediately afterward was dismissed by the jury as the fury of a woman scorned. In a look of contempt that Torres gave Rojas from the stand when she was asked about the couple's breakup, the jury read a level of anger that undermined her testimony entirely. Again, taken by itself, doubt founded on the perceived hostility of a witness toward the defendant is altogether reasonable. Together, however, the evidence from the eyewitnesses and Maria Torres strengthen each other since it seems unlikely that the person identified by the two witnesses would be the very man whom a scorned lover sought to convict by perjury. Yet, the way the case evolved, the possible combination of false inculpatory evidence is hardly too remote for fair consideration.

But how about the gun? Is it reasonably likely that the same man erroneously identified by the eyewitnesses, falsely inculpated by a vengeful former lover, would be in possession of the gun used in the murder? In the corridor after the verdict, the prosecutor asked the jurors whether they doubted the ballistics expert who linked the weapon to the killing by matching scratches on the ejected shells. No problem with the expert, they replied, but since Maria had shared the apartment with the defendant, they simply included the gun in her discredited evidence. Perhaps, the jurors told the prosecutor, she was the killer herself; perhaps she got the gun from the true killer and planted it among the defendant's belongings.¹⁰

Thus, in Uviller's opinion, the jury ignored a substantial body of circumstantial evidence that pointed to Rojas's guilt.

Professor Uviller also discussed a second trial that had features similar to the Moreno murder case. He argued that the two cases demonstrated how difficult a jury's task is.¹¹ Jurors are faced with trying to recreate a historical incident through the unfamiliar procedures of trial, procedures that are formal, not narrative as in ordinary discourse, and under constraints that do

10. *Id.* at 14.

11. *Id.* at 17-23.

not allow them to ask questions of the witnesses or to discuss the evidence among themselves as it unfolds. Furthermore, both judicial instructions and cultural knowledge set a very high standard of belief in factual certainty applied only to the prosecution's case before a guilty verdict is appropriate. As the Moreno murder case shows, however, the deconstruction of the prosecutor's case is not bound by a similarly high standard of factual certainty; articulated speculation alone may do the trick.

Uviller's intuitive explanation is consistent with the story model of juror decision making in that it suggests the failure of the prosecution's case to effectively provide the jurors with a sufficient body of evidence necessary to develop plausible scenarios pointing to guilt. Uviller's explanation did not, however, closely examine the nature of circumstantial evidence compared to direct evidence and the role the difference plays in jury deliberations. If Uviller was correct in his analysis, why was the apparently compelling circumstantial evidence in the Rojas case—and *12 Angry Men*—undervalued?

V. CIRCUMSTANTIAL EVIDENCE VERSUS DIRECT EVIDENCE

Professor Kevin Heller has drawn attention to the substantial body of empirical literature suggesting that jurors routinely underestimate the probative value of circumstantial, as opposed to direct, evidence.¹² Circumstantial evidence is inherently probabilistic.¹³ It is evidence from which jurors are asked to infer whether disputed facts did or did not exist. For example, a series of studies by William Thompson and his collaborators found that mock jurors in experiments presenting statistical information about probabilities had major problems understanding scientific evidence presented in the form of base rates, such as matches between hair samples.¹⁴ Many other studies have shown similar results.¹⁵ Faigman and Baglioni found that mock jurors generally underutilized statistical informa-

12. Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241 (2006).

13. To be clear in the distinction between direct and circumstantial evidence we offer the following discussion from *McCormick on Evidence*:

Direct evidence is evidence which, if believed, resolves a matter in issue. Circumstantial evidence . . . may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion.

. . . [D]irect evidence from a qualified witness offered to help establish a provable fact can never be irrelevant. Circumstantial evidence, however, can be offered to help prove a material fact, yet be so unrevealing as to be irrelevant to that fact.

1 MCCORMICK ON EVIDENCE 641–42 (John W. Strong ed., 5th ed. 1999) (footnotes omitted).

14. See William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, 52 LAW & CONTEMP. PROBS. 9 (1989).

15. Much of this research is reviewed in Heller, *supra* note 12.

tion in making decisions about matching samples involving blood groupings.¹⁶ Wells found that mock jurors, psychology students, and trial judges were prone to acquit defendants even when what they subjectively believed to be the probability of guilt was sufficient to convict.¹⁷

Heller argues that the problem extends beyond forensic evidence such as fingerprint matches or DNA to all other evidence that requires an inference bearing on the defendant's guilt, such as "the gun used in the crime or a shirt stained with the victim's blood; partial eyewitness identification . . . ; testimony about motive; and so on."¹⁸ He argues that while a criminal case based primarily on circumstantial evidence is far less likely to lead to a false conviction than one based on direct evidence, such cases also raise the opposite problem, namely a greater likelihood of a false acquittal.¹⁹

Heller points out that the traditional explanation for the lack of weight given to circumstantial evidence is that jurors simply do not understand it.²⁰ According to this view, DNA analyses, fingerprint comparisons, and similar evidence are undervalued simply because jurors cannot properly estimate the relevance of probabilities. However, Heller further points out that researchers have found that mock jurors are still likely to acquit even when they accept that the objective probability of guilt is sufficient to convict.²¹ He reasonably argues from this research that the tendency to undervalue circumstantial evidence is more of a psychological problem than a cognitive one. Drawing on a number of bodies of psychological research, he asserts that the problem is centered around the ability to imagine different scenarios that are more or less probable.²² Consistent with the story model described above, he argues that jurors develop multiple scenarios of how a crime may, or may not, have occurred from the trial evidence and arguments.²³ They must confront at least two irreconcilable accounts: inculpatory scenarios based on the prosecution's evidence and exculpatory

16. David L. Faigman & A.J. Baglioni, Jr., *Bayes' Theorem in the Trial Process: Instructing Jurors on the Value of Statistical Evidence*, 12 LAW & HUM. BEHAV. 1, 13 (1988).

17. See Gary L. Wells, *Naked Statistical Evidence of Liability: Is Subjective Probability Enough?*, 62 J. PERSONALITY & SOC. PSYCHOL. 739 (1992); see also Keith E. Niedermeier et al., *Jurors' Use of Naked Statistical Evidence: Exploring Bases and Implications of the Wells Effect*, 76 J. PERSONALITY & SOC. PSYCHOL. 533 (1999).

18. Heller, *supra* note 12, at 251–52.

19. *Id.* at 252, 299.

20. *Id.* at 255–56.

21. *Id.* at 245 (citing Wells, *supra* note 17, at 744; Niedermeier et al., *supra* note 17, at 534; Faigman & Baglioni, *supra* note 16, at 16).

22. See, e.g., Daniel Kahneman & Amos Tversky, *The Simulation Heuristic*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 201 (Daniel Kahneman et al. eds., 1982).

23. Heller, *supra* note 12, at 261–64.

scenarios based on the defense's evidence or the defense's attack on the prosecution's evidence.

Heller argues that in cases based primarily on circumstantial evidence it is easier for jurors to develop exculpatory rather than inculpatory narratives. He identifies four basic differences between direct and circumstantial evidence that account for this result.²⁴ It is not necessary here to consider these differences in great detail. A summary will suffice for our present purposes. Direct evidence is a verbal representation of the crime itself. In contrast, circumstantial evidence is an abstraction about the connection between the defendant and a physical trace, such as blood or fingerprints. The latter does not allow the jurors to imagine as readily how the defendant committed the crime, in comparison to the testimony of an eyewitness who claims she saw the alleged crime transpire. Direct evidence is narrative in nature whereas circumstantial evidence is rhetorical, that is, it requires the jurors to infer the specific causes of an historical event from general facts. Third, circumstantial evidence permits both inculpatory and exculpatory inferences whereas direct evidence suggests a single cause.²⁵ Finally, direct evidence is unconditional versus probabilistic. That is, the probability of the thing inferred is always less than 1.0, whereas direct evidence implies 1.0 probability, i.e., certainty.²⁶ In short, circumstantial evidence does not lend itself as easily to the development of inculpatory scenarios. If the primary evidence is circumstantial, juries are less likely to develop inculpatory scenarios in which they are confident beyond a reasonable doubt.

We have not fully described Heller's insightful article, but the thrust of it is clear: circumstantial evidence is less likely to provide the kind of vivid scenarios bearing on guilt or innocence that direct evidence provides. Heller's theory is not incompatible with Uviller's theory of a heightened burden of proof that leads to false acquittals. Indeed the two explanations are complementary. Yet, given the right conditions, jurors do convict solely upon circumstantial evidence. We explore this matter with another real case example.

24. *Id.* at 264–68.

25. We do note that in James A. Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 *LAW & HUM. BEHAV.* 83 (1985), a study examining how deliberating jurors developed stories, jurors favoring acquittal of a defendant developed multiple scenarios for acquittal, a finding that is possibly contrary to Heller's claim on this point.

26. Note that the Holstein findings, *id.*, and perhaps intuitive logic prevent us from assuming that direct evidence will be necessarily viewed as certain. After all, cross-examination and the jurors' commonsense knowledge may cause jurors to see the testimony as less than absolutely certain—indeed the eyewitness on his own may admit to less than absolute certainty.

VI. A CONVICTION BASED SOLELY ON CIRCUMSTANTIAL EVIDENCE

On December 9, 2001, at 2:40 a.m. the 911 dispatcher in Durham, North Carolina, received a call: "1810 Cedar Street. My wife's had an accident. She's still breathing. She fell down the stairs." The caller was Michael Peterson, a successful novelist who had received more than a million dollars in advances for his writings, including the novels *A Time of War*, *A Time of Peace* and *The Immortal Dragon*. When he and his wife, Kathleen, met she was a rising executive at Nortel Networks. They were married in 1997. The couple had a prominent social life and entertained at big parties held in their mansion.²⁷

When police, firefighters, and paramedics arrived at 1810 Cedar Street they found Kathleen's sprawled body at the foot of the stairs. Peterson and his wife were at home alone when she died. The local medical examiner initially ruled the death accidental, but eleven days later, after a special grand jury met to review the case, the district attorney charged fifty-nine-year-old Michael Peterson with non-capital murder in the death of his forty-eight-year-old wife. Peterson protested that he found his wife in a pool of blood after she fell down a staircase. The case engendered a great deal of national as well as local publicity (e.g., the eventual trial was covered from gavel to gavel on Court TV). An Academy Award-winning French production company covered the trial and produced a critically acclaimed documentary shown in Europe and the United States.²⁸

On July 1, 2003, the prosecutor opened the trial with a photograph of Kathleen Peterson and a plastic bag from which he took a long brass pipe, explaining that it was a blow poke (a fireplace tool consisting of a hollow metal tube through which the holder blows air to fan flames; a combination poker and bellows). "They say it's an accident, a fall down the stairs, and we say it's not. We say it's murder." In his short twenty-four-minute address the prosecutor said that the jury would hear about a storybook marriage but warned them that "appearances can be deceiving." He told the jurors that the blow poke that he held belonged to Kathleen's sister, but the one that Kathleen owned had disappeared and he believed that the missing instrument was the likely murder weapon. He said the paramedics who arrived at the scene would describe the large amount of blood they found and there would be testimony about Michael Peterson's bloody footprint on

27. The Michael Peterson case description is derived from coauthor Vidmar's notes as the trial occurred, live broadcast on local television channel WRAL, articles in the *Raleigh News and Observer* and *Durham Herald Sun*, and a television documentary of the case, NBC's *Dateline: Mystery on Cedar Street*, broadcast on February 13, 2004.

28. THE STAIRCASE (Sundance 2005).

Kathleen's sweat pants. He suggested a marriage under financial stress. He also said that while the defense likely would argue that the case was about forensic evidence, "I couldn't disagree more. I think it's about the exercise of your reason and common sense."

As the prosecutor had forecast, the defense argued that Kathleen died from an accidental fall down the stairs which forensic evidence would demonstrate, and that despite the prosecution's suggestion of a marriage under stress, the Peterson and Atwater marriage was loving and successful. With a photograph of a laughing Kathleen on Michael's lap projected onto a screen behind him, the defense attorney concluded his opening statement by reminding the jury that the prosecution had to prove its case for murder "beyond a reasonable doubt."

The courtroom battle was waged solely around circumstantial evidence. During the fifty-four days of testimony between July and October 2003, the jurors heard from a parade of prosecution experts that included paramedics, police detectives, financial investigators, crime technicians, accident reconstructionists, a molecular geneticist, pathologists, neuropathologists, a meteorologist, and a computer expert. The prosecution also called a number of civilian witnesses, including Kathleen's sisters and a man with whom Michael Peterson attempted to arrange a homosexual liaison. A controversial witness for the prosecution was a German nanny who was allowed to testify about the death of a close female friend of Michael Peterson in Germany where Peterson was stationed in the military. The woman was found dead in a pool of blood at the bottom of stairs in Germany sixteen years before Kathleen died. Michael Peterson was the last known person to see her alive and the person who reported finding her body, as had been the case with his wife's death. German officials had ruled the death an accident.

The state's circumstantial case was comprehensive, but not overwhelming. A state medical examiner showed autopsy pictures with gashes on the back of Kathleen Atwater's head and opined that these proved that Kathleen likely died from blows consistent with a weapon like the blow poke the prosecutor had displayed. A neuropathologist testified about red neurons found in Atwater's brain during the autopsy. He explained that when a person slowly bleeds to death oxygen diminishes, causing brain cells to take on a red or pink hue that are identifiable in brain tissue slides. The implication of this testimony was to shift the time of Kathleen's injury back as much as two or three hours before Peterson reported it. If true, Peterson's claim that Kathleen was still alive when he placed the 911 call at 2:40 a.m. was doubtful. On cross-examination, however, the neuropatholo-

gist conceded that his finding could be consistent with a range of causes, including cardiac arrest and head trauma consistent with an accidental blow. Another prosecution expert underwent seven days of cross-examination.

The defense also put on a spirited case. The defense demonstrated that due to violations of standard investigation protocols by police, technicians, and investigators, the death scene and possibly crucial evidence might have been contaminated. Policemen and Michael Peterson's son wandered through the house. Michael Peterson's clothing was not immediately seized or photographed, as it should have been. Two bloody towels were never seized as evidence and standard chemical tests were never conducted. The defense asserted that someone had moved the bloody towels to the stairs, which might have produced bloodstains that altered the death scene. A technician admitted that although he conducted some crucial tests with Luminol, a blood detection chemical, he was not adequately trained to do so. The defense established that after police arrived, Michael hovered around Kathleen's body, embracing her and perhaps attempting to place her body in a more comfortable position, providing an exculpatory explanation of how bloody footprints on her clothes could have been made. In a bold move the defense obtained permission to take the jurors to the staircase where Atwater was found, in part to prove that there was no room in the narrow confine to swing a blow poke in the manner the prosecution claimed Peterson had assaulted his wife.

The defense also called its own experts to counter those of the prosecution, including Dr. Henry Lee, the widely respected forensic expert famed for his participation in numerous high profile trials, including that of O.J. Simpson. An accident reconstruction specialist presented a video reconstruction of how Kathleen could have fallen backwards and struck her head.

Finally, near the end of the trial the defense staged a reverse "Perry Mason moment." They produced a blow poke found in the garage of the mansion sometime during the trial that the police apparently had overlooked in their multiple searches of the house and grounds. The tool was covered in insect detritus and was undented. This may have been the missing blow poke that the prosecution claimed was the murder weapon. The clear implication of this evidence was that the prosecution's central theory that Atwater had been beaten with a blow poke was wrong.

The only living witness who could provide direct evidence of what happened that night, Michael Peterson, exercised his constitutional right and did not testify.

The defense gave its closing arguments first. Pacing in front of the jury, the defense lawyer emphasized ten points: (1) The missing blow poke wasn't missing and it wasn't the murder weapon. (2) The prosecution identified no credible motive for a killing. (3) The Petersons were happily married with no history of violence. (4) Michael's grief was sincere. (5) Kathleen Peterson's injuries were not consistent with a beating. (6) The bloodstain evidence was not consistent with a beating. (7) The evidence from the crime scene was tainted and not reliable. (8) The state relied on "junk science" to try to prove its case. (9) The state's case rested on emotion and conjecture, not proof beyond a reasonable doubt. (10) The state's investigation was based solely on circumstantial evidence and suffered from tunnel vision, ignoring evidence that did not support its theory. In short, the best explanation for what happened that night at 1810 Cedar Street was that Kathleen Peterson tragically fell down the stairs and died accidentally.

In their closing arguments the prosecution weaved the circumstantial evidence into a tale of murder, arguing that the defendant had motive and opportunity and that the forensic evidence pointed to homicide. The prosecution dismissed the defense discovery of a blow poke by saying they had never definitively said the murder weapon was a blow poke, only that it could have been.

All legal commentators agreed that the defense's four-hour closing was powerful and persuasive. In particular they commented on the fact that both sides and the trial judge agreed that the judge should instruct the jury that it had only two choices: first degree murder or not guilty; all lesser included offenses were ruled out. Some commentators went so far as to predict that there would be an outright acquittal, but certainly no more than a deadlocked jury. They were wrong. After fourteen hours of discussion over three days, the jury found Michael Peterson guilty of first degree murder.

Several of the jurors in the Peterson case later provided insight into their reasoning. Near the beginning of deliberations, jurors said they had dismissed the woman's death in Germany as irrelevant. The jurors decided they had enough to focus on regarding Kathleen Peterson's death. Likewise, they also dismissed Michael Peterson's sexuality as irrelevant. The blow poke was similarly eliminated from consideration; jurors were not convinced it was the murder weapon, and they had concerns about it com-

ing into evidence near the end of the trial.²⁹ One of the three nurses on the jury explained, “We didn’t feel that the blowpoke was necessarily what was used in this case, or possibly anything like it.”³⁰

The jurors found the physical evidence from the crime scene the most compelling proof. They were especially impressed by the amount of blood on the staircase when they visited the home. As one juror said, “I can’t imagine a fall that would cause that much blood [on the staircase].”³¹ Throughout the deliberations they examined, re-examined, and discussed the autopsy photos showing the seven gashes in Kathleen’s head and the photos of her body. They eventually concluded that there was no way that so many head lacerations and bruises on her arms and legs could have resulted from an accidental fall.

The jurors integrated their perceptions of the physical evidence with expert testimony from the medical examiner and the medical expert who described finding red neurons in Kathleen’s brain cells, suggesting that Kathleen died slowly from bleeding. This evidence contradicted Michael Peterson’s claim that he discovered his injured wife shortly after she fell and that she died in his arms after he placed the 911 call. The jurors were also critical of some of the prosecution’s testimony. They believed the medical examiners “could have done a better job” and were highly critical of the state’s forensic experts’ attempts to recreate blood spatter patterns by beating on a styrofoam head topped with a bloody sponge. Nonetheless, many jurors felt that the state medical examiner’s testimony was the “turning point of the trial” and rang the truest of all the medical examiners and forensic specialists.

We do not offer an opinion on the verdict. A few commentators believe the verdict was a false conviction.³² One of the forensic scientists who testified for the defense in the trial suggests that perhaps the jury did not understand the evidence or (despite their claim otherwise) were influenced by the extraneous evidence about the defendant’s sexuality and the similar death of Peterson’s female friend in Germany.³³ What is clear is that the jury found no compelling alternative story that Kathleen Peterson’s death

29. For a time line of the jury’s deliberations, see CourtTV.Com, *N.C. v. Michael Peterson—Deliberations*, http://www.courtTV.com/trials/novelist/jury_box_penalty.html (last visited Aug. 27, 2007); see also DIANE FANNING, *WRITTEN IN BLOOD* (2005).

30. Matt Bean, *Novelist Convicted of First-Degree Murder in Wife’s Staircase Death*, COURTTV.COM, Oct. 10, 2003.

31. Anne Saker, *A Complex Drama Ends with a Simple Conclusion*, RALEIGH NEWS & OBSERVER, Oct. 15, 2003, at A1.

32. John Stevenson, *Peterson Friends Suggest Owl Did It: Galifianakis, Pollard Say Gashes Are Talon Marks*, DURHAM HERALD SUN, Dec. 13, 2003, at A1.

33. HENRY LEE & JERRY LABRIOLA, *DR. HENRY LEE’S FORENSIC FILES 178* (2006).

was the result of an accidental fall and in the end their only credible alternative story was the circumstantial evidence pointing to murder.

VII. THOUGHTS ON CIRCUMSTANTIAL EVIDENCE PROVOKED BY *12 ANGRY MEN*

We are left with some puzzles. We have presented some case studies that are selective and possibly not representative of ordinary trials. There are no systematic data on conviction rates as a function of the degree to which circumstantial evidence plays a role in jury verdicts—for acquittal or for guilt. But the case studies provoke thought about possible differences in the impact of circumstantial evidence on jurors and about widespread beliefs that circumstantial evidence is less persuasive than direct evidence. Henry Fonda, playing Juror #8, articulates the view that the defense lawyer did not do his job in deconstructing the testimony. We raise another view, namely that the prosecutor did not do his job in helping the jury imagine a scenario based upon the circumstantial evidence in which the defendant was guilty. Perhaps the prosecutor relied too heavily on the direct evidence provided by the eyewitnesses, at the expense of articulating the case in a way to provide the jurors with a narrative in which the circumstantial evidence was central. Reading Richard Uviller's analysis of the real-life case studies, there is a hint that he also suspected that the prosecutors in his real-life trials did not do a thorough job of developing the arguments necessary to show jurors why the weight of the evidence favored guilt.

Nevertheless, it is noteworthy that Uviller's Rojas case (and the other case that he reported but that we did not discuss in this brief essay) offered the jury both direct (eyewitnesses) as well as circumstantial evidence. Is it possible in such cases that jurors tend to focus too much on the direct evidence, perhaps because that is what the prosecutors emphasize, causing them to undervalue the circumstantial evidence? Does the Peterson case suggest that jurors are less inclined to devalue the circumstantial evidence when the whole case is about circumstantial evidence? Professor Heller recognized the mixed evidence cases and proffered hypotheses for them that are similar to what we are suggesting here.³⁴ However, we offer still another hypothesis that is somewhat contradictory of the Heller hypothesis about circumstantial evidence being less likely to produce a narrative of guilt. It is possible that the autopsy photos, expert testimony from the medical examiner, the visit to view the blood on the staircase, testimony

34. Heller, *supra* note 12, at 300–02.

about the red neurons, and the other circumstantial evidence were in total sufficiently vivid to allow the jurors to create a narrative of murder.³⁵

We are left with some intriguing research questions. How often do prosecutors proceed with cases based primarily or exclusively upon circumstantial evidence? Are jurors inherently prone to devalue circumstantial evidence as Professor Heller and others before him have suggested, or do they devalue such evidence because prosecutors oversell direct evidence? To what degree, and when, can circumstantial evidence alone create a sufficiently vivid picture to allow a narrative pointing to guilt?

In the fifty years since *12 Angry Men* was made, it has been embraced as a powerful story of how one determined juror prevented an injustice by persuading other jurors to acquit. That is an important message for those who will serve on juries and, in fact, for all of us: one person can make a difference. However, in contrast we offer an iconoclastic perspective. Watching the movie again and paying careful attention to the evidence and to Juror #8's deconstruction of the prosecutor's case leads us to a very different conclusion about the appropriateness of the outcome. The jury very arguably acquitted a guilty man because they concocted alternative narratives that were not critically assessed for plausibility, and they ignored circumstantial evidence pointing to guilt.

In this light, *12 Angry Men* suggests many other important things about juries and their deliberations. It reminds us of the importance of small group dynamics in jury decision making and how one person, for better or for worse, can influence the verdict. It confirms important work about juries and how they construct stories—or fail to construct stories—to explain the evidence they have heard. Perhaps most important, it suggests the need for more research into the weight that juries accord circumstantial evidence.

35. Alternatively, the defense argued that the death was an accidental fall. Thus the jury was presented with two narratives: murder or an accident. They believed the amount of blood, the number of lacerations, and other evidence were inconsistent with an accident.