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STANDING ALONE: CONFORMITY, COERCION, AND THE PROTECTION OF THE HOLDOUT JUROR

Jason D. Reichelt*

The holdout juror in felony criminal trials is a product of the near-universal decision rule in federal and state courts of a unanimous verdict. In recent years, courts have increasingly inquired into a jury's deliberations when a holdout juror has been identified amid allegations of misconduct. This Article helps bridge the considerable gap between cognitive psychology and legal scholarship, analyzing the thought processes of the holdout juror through the application of empirical evidence and psychological modeling, to conclude that the improved protection of the holdout juror is a necessary and critical component to the preservation of a defendant's right to a fair trial.

"So how come you vote not guilty?"

"Well, there were 11 votes for guilty. It's not easy to raise my hand and send a boy off to die without talking about it first."

—Henry Fonda in 12 Angry Men[1]

INTRODUCTION

The lone dissenter—sometimes referred to as the "voice of reason"[2]—is held in high esteem in American culture. Across the spectrum of contemporary political and social culture, an idealistic notion has developed that the underdog who stands alone against an overwhelming majority and bears the courage of conviction deserves to prevail. In politics, we empathize with Jimmy Stewart as he stands alone on the floor of the U.S. Senate in *Mr. Smith Goes to Washington*,[3] and we lionize the legends described in John F. Kennedy's famous *Profiles in Courage*.[4] To advance the protection of civil rights, supporters rallied to Rosa Parks for refusing to move to the

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1. 12 ANGRY MEN (United Artists 1957).
2. *See* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1746 (2005).
3. MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939).
4. JOHN F. KENNEDY, PROFILES IN COURAGE (1955).

back of the bus in Montgomery, Alabama.[5] Who, after all, would not want to be Henry Fonda in *12 Angry Men*, standing firm as the sole voice for acquittal against the majority that eventually spares the life of a hopeless defendant?[6] As one scholar recently noted, "Everyone, it seems, believes in dissent."[7]

The value placed on dissent, however, is juxtaposed against a social force that is just as strong, if not stronger: the pressure to conform. The natural desire to fit in, to avoid the stigma of being labeled an outsider or outcast, and the impetus to go along with the majority as a means of earning social acceptance all conspire to suppress the frequency and forcefulness of dissent. One of the most controlled environments for analyzing the expression of and interaction between conformity and dissent is in the examination of the decision-making process of a trial jury. The federal criminal trial system and every state, with the exception of two, require unanimous verdicts for conviction or acquittal in felony trials.[8] The tension between conformity and dissent, coupled with the unanimity requirement, result in the regular, although infrequent, occurrence of deadlocked juries that are unable to reach a decision on guilt or innocence.[9] From a societal and historical standpoint, we have come to accept that a certain number of criminal trials will seat juries that, for one reason or another, are unable to reach a verdict in a particular case. It is certainly not unexpected that from time to time, twelve strangers who hear conflicting evidence and argument will be unable to reach a unanimous opinion on the defendant's guilt or innocence.[10]

The most perplexing hung juries, and the ones that receive the most attention, are those that are deadlocked because of a lone dissenter. Whenever a jury of twelve people cannot reach a unanimous verdict on a vote of 11–1, the immediate assumption is that there must be something wrong with the holdout or that the dissenter was simply being stubborn. Intense public scorn is inflicted

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5. *See* HERBERT KOHL, SHE WOULD NOT BE MOVED (2005).

6. 12 ANGRY MEN, *supra* note 1.

7. Gerken, *supra* note 2, at 1746. *See generally* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003) (discussing the benefits of dissent in a wide variety of political and social contexts).

8. Louisiana and Oregon are the exceptions. *See* LA. CODE CRIM. PROC. ANN. art. 782 (2006); OR. REV. STAT. § 136.450 (2005). *See also infra* Part I.A.

9. For a description of the frequency of hung juries in criminal cases, see *infra* Part I.B.

10. At least one author would likely disagree that there is ever an acceptable rate of hung juries, arguing that whenever "a jury is unable to reach such a [unanimous] verdict, a mistrial wastes both time and resources and further debilitates faith in the judicial system." Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933, 935 (1998) (footnote omitted).

upon the holdout following the disclosure of an 11–1 deadlock, to the extent that legal scholars, often in the context of calls for the elimination of the unanimity requirement, have referred to holdout jurors as "eccentric" or "irrational,"[11] "crackpots" or "screwballs,"[12] "the obstinate loner," "obsessive," or "morally-challenged."[13] One scholar has even referred to the occurrence of holdout jurors as the "flake factor."[14]

These labels and images are further reinforced by anecdotal evidence—usually reported by people other than the holdout juror—of jurors who behave in apparently irrational or irresponsible ways.[15] The anecdotal evidence, however, is little more than that, and can always be countered by contrary anecdotes. The empirical evidence of jury decision-making, however, tells a different story. The popular conception of the eccentric, unreasonable, or irrational juror preventing the jury's unanimous verdict is simply wrong.[16] In the last forty years, through empirical research by social psychologists in the area of jury decision-making, it has become clear that juries that start deliberations with an overwhelming majority voting either to convict or to acquit will likely not result in a

11. Michael H. Glasser, Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 675 (1997).

12. Jeremy Osher, Note, *Jury Unanimity in California: Should it Stay or Should it Go?*, 29 LOY. L.A. L. REV. 1319, 1347 (1996).

13. Phoebe C. Ellsworth, *One Inspiring Jury*, 101 MICH. L. REV. 1387, 1398 (2003) (internal quotation marks omitted). Another author bemoans the difficulty of removing "extreme or bizarre personalities from the jury." Morehead, *supra* note 10, at 937.

14. James Kachmar, Comment, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 PAC. L.J. 273, 299 (1996).

15. In one such report, the holdout juror stuck to her position that someone other than the defendant had committed the crime of stabbing an unarmed man, despite the fact that the defendant's attorney had conceded in argument that the defendant had, in fact, stabbed the man. Kachmar, *supra* note 14, at 299. Other examples abound, including a juror who refused to listen to "every word" of the testimony because she thought *she could* "tell whether someone is telling the truth by looking at the way he moves his eyebrows," and another juror who refused to convict on a murder charge because "[s]omeone that good-looking could not commit such a crime." JUDGE HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 197–99 (1996).

Finally, defense attorney Robert Duncan related the story of a man he defended in the 1970s on a charge of murder. The defense argued that the defendant had acted in self-defense, but the jury reported after several hours that it was "hopelessly deadlocked" at eleven-to-one. After further deliberations, the jury returned a verdict of not guilty. In the elevator, the foreman told Mr. Duncan that the holdout had been a "young hippie girl," and the jury reached the final verdict by simply not counting her vote. Duncan concluded: "To my knowledge, this is the only 11 to 1 unanimous acquittal ever returned in the Circuit Court of Jackson County, Missouri." SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 199 (1988).

16. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 462–63 (Midway reprint ed., Univ. of Chi. Press 1986).

deadlock.[17] Further, there is no particular set of demographic characteristics that differentiate holdout jurors from any other jurors.[18] Even more importantly, however, holdout jurors behave and contribute to the deliberation process in the same fashion as other members of the jury.[19] In at least one study, holdouts were just as effective as their majority counterparts in their ability to recall legal definitions or evidence presented through testimony.[20] As a result, "[h]oldouts differ from other jurors chiefly in their perceptions of the quality of deliberation and agreement on the proper verdict."[21]

Legal scholarship that addresses jury decision-making and, in particular, that makes assumptions about the nature and motivations of holdouts, has not accounted for the voluminous contribution of contemporary psychology to this area until recently. In part, this is because "[l]egal scholars, many of whom care about community values in the law, traditionally lack training in empirical methods."[22] In the last five years, legal scholars have begun to change their approach, having recognized the need to incorporate social and cognitive psychology into the legal analysis of human behavior. Especially in the area of jury dynamics, empirical research "has revealed a number of specific limitations in the way individuals process information and make choices among alternatives under conditions of uncertainty—deficiencies that ... may compromise the workings of our legal system."[23]

To adequately assess and analyze the thought processes of the holdout juror and, in particular, to determine the extent to which the legal system should protect the anonymity and interests of the holdout in the jury deliberation process, the lessons learned from

17. *Id.* at 462. In the study conducted by Kalven and Zeisel, the hung jury rate in such cases was 0%. *Id. See generally* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 690–707 (2001) (reviewing empirical research results on jury decision-making published between 1955 and 1999).

18. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 149 (1983).

19. *Id.* (noting that "holdouts spoke as much as other jurors, and there were no significant differences between holdouts and nonholdouts [sic] in content of discussion.").

20. *Id.*

21. *Id.* at 150.

22. Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How "Legal Priming" Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059, 1070 (2005). Other authors have noted that "the judgment and decisionmaking tradition in psychology has provoked ... much interest and controversy in legal circles." Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1087 (2003).

23. Ross & Shestowsky, *supra* note 22, at 1081. This tradition of cognitive psychology is distinct from the contemporary movement of law and economics as an approach to legal scholarship. *See infra* Part III.

research in cognitive psychology are essential.[24] This Article represents a step towards bridging the gap between legal scholarship and cognitive psychology with respect to the assessment and analysis of the thought processes of holdout jurors in felony criminal trials and the opposition they confront.

Part I outlines the historical development of the negative perception of holdout jurors, particularly in light of the near-universal unanimity requirement in felony criminal trials. The Part further discusses the phenomenon and overall frequency of hung juries in order to define the scope and nature of the issue. Through an analysis of a sample of federal and state case law, Part II illustrates how trial and appellate courts have addressed the potential removal of holdout jurors for various reasons, from outright juror misconduct to a simple refusal to deliberate further. This review of cases demonstrates the wide range of current practices, heuristics, and assumptions that courts employ to address issues related to obstinate holdouts, and traces these practices from the most egregious intrusions into jury deliberations to the more cautious approaches.

Part III incorporates basic principles of cognitive psychology into an analysis of the thought processes of the holdout juror. It begins with a prescriptive model of decision-making, and then moves through a discussion of the biases that influence individual jurors. It ends with an extended discussion of psychological research into conformity pressures, the majority's rejection and isolation of the deviate, and independence in the face of overwhelming opposition as applied to the context of jury decision-making. Part IV builds on this empirical foundation by addressing two judicial approaches to navigating the balance between preventing juror misconduct and protecting the secrecy of jury deliberations. Ultimately, this Part concludes that to protect the interests of the holdout juror and the integrity of the deliberation process, the higher value must be placed on preserving the secrecy of deliberations at the expense of tolerating some level of potential misconduct. The Part proposes alternatives to judicial intervention into the deliberation process, and suggests methods for improving the protection of the holdout juror from being the subject of coercive practices. Finally, this Article concludes by emphasizing the

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24. *Id.* at 1083. ("Knowledge about the determinants of human judgment and behavior can be relevant to legal theory and practice in various ways. In particular, such knowledge is relevant to our understanding of factors that . . . compromise the inferences and judgments made by triers of fact who must process, remember, and integrate the information with which they are presented.").

developing nexus between psychology and legal scholarship, and proposes several areas for further study that will enhance the future examination and analysis of jury decision-making, particularly in the context of the lone holdout who stands opposed to the conclusions of the overwhelming majority.

I. UNANIMITY AND THE HUNG JURY

"Boy, oh boy—There's always one."

—Juror #3 in 12 Angry Men[25]

The rule that a jury must return a unanimous verdict, either guilty or not guilty, in felony criminal trials is nothing new in the American system of criminal justice. In fact, only two states, Oregon and Louisiana, allow less than unanimous verdicts for both convictions and acquittals.[26] To understand the dynamics involved in jury decision-making, it is helpful to review briefly the origins of the unanimity requirement and the occasional debate over its efficacy.

A. The Historical Rule of Decision

1. Origins of the Unanimity Requirement

There is little historical certainty as to the origins of the unanimity requirement, but there are a number of theories and historical accounts.[27] The first recorded instance of a unanimous jury verdict occurred in 1367.[28] By the end of the fourteenth century, "unanimous verdicts were required in all criminal trials," and were woven into the fabric of the English common-law jury by the eighteenth century.[29] "The jury was to pronounce the truth, and there was only

25. 12 ANGRY MEN, *supra* note 1.

26. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, 278–81 (2000). *See also* LA. CODE CRIM. PROC. ANN. art. 782 (2006); OR. REV. STAT. § 136.450 (2005).

27. One author has advanced four possible theories for its development: 1) Compurgation, the practice of adding jurors until twelve of them agreed; 2) As compensation to the defendant for the lack of sufficient guarantees of a fair trial; 3) To punish jurors who did not vote with the majority, and who usually had prior "personal knowledge of the facts of a case"; and 4) From "the medieval concept of consent," which implied unanimity. Glasser, *supra* note 11, at 663–64.

28. Osher, *supra* note 12, at 1326 (citing JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 179 (1994)).

29. *Id.* at 1326–27.

one truth. If all jurors did not agree to a verdict, then a truth was not being declared."[30]

The United States neither immediately, nor universally, adopted the English model of unanimity.[31] The authors of the Constitution, while expressly providing for the right to a trial by jury, were silent on the issue of unanimity or, for that matter, any rule of decision.[32] Nevertheless, "as Americans became more familiar with the details of English common law and adopted these details in their own colonial legal systems, unanimity became the accepted rule in the United States during the eighteenth century."[33] In criminal trials, the principle of unanimity became a core value: because a jury's decision is singular and unanimous, the result appears to be legitimate, and the parties and the general public are more likely to respect the outcome.[34]

In twentieth-century America, on the federal level, jury unanimity in criminal trials has consistently been the rule, having been declared one of the fundamental requirements of a federal jury trial.[35] The Supreme Court, in holding that jury unanimity is a constitutional requirement in federal criminal trials, relied heavily on common-law tradition and the "historical acceptance" of the unanimity rule.[36]

The same rule, however, has not been imposed on the states.[37] To date, only two states, Oregon and Louisiana, allow for non-unanimous verdicts in felony criminal jury trials. In 1934, Oregon voters, concerned about the frequency of hung juries, amended the state constitution to permit verdicts of 10–2 for conviction or acquittal.[38] In 1928, Louisiana voters passed legislation allowing

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30. RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 94 (2003).

31. Glasser, *supra* note 11, at 664. During the seventeenth century, four states rejected the unanimity requirement and instead included provisions in their state constitutions allowing for a jury to return a majority verdict. *Id.* These states were North Carolina, South Carolina, Connecticut, and Pennsylvania. *Id.* at 664 n.59. *See also* Morehead, *supra* note 10, at 938 (discussing the history of the unanimity requirement).

32. U.S. CONST. amends. VI, VII.

33. Glasser, *supra* note 11, at 664.

34. JONAKAIT, *supra* note 30, at 95.

35. *See* Johnson v. Louisiana, 406 U.S. 356, 369 (1972) (Powell, J., concurring).

36. Osher, *supra* note 12, at 1330. *See also* Patton v. United States, 281 U.S. 276, 288 (1930) (holding that the unanimity rule is one of the "essential elements" of a jury trial).

37. *See, e.g.,* Jordan v. Massachusetts, 225 U.S. 167 (1912); Maxwell v. Dow, 176 U.S. 581 (1900).

38. *See* Kachmar, *supra* note 14, at 278. *See also* OR. CONST. art. I, § 11, *codified at* OR. REV. STAT. § 136.450 (2005).

votes of 9–3 to convict or acquit in felony criminal trials.[39] These two aberrant systems remained in place until a set of constitutional challenges in federal court resulted in two landmark cases decided by the U.S. Supreme Court on the same day: *Apodaca v. Oregon*,[40] and *Johnson v. Louisiana*.[41]

2. *Apodaca* and *Johnson*: Studies in Psychological Assumptions

The two cases were fairly straightforward. In *Apodaca*, two of the defendants were convicted on 11–1 verdicts, while the third defendant was convicted on a 10–2 vote.[42] In *Johnson*, the defendant was convicted on a 9–3 vote.[43] In both cases, the Supreme Court held, in 5–4 decisions with Justice Powell concurring in the judgment of the Court, that both jury trial decision rules were constitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[44] As a result, to this day, Oregon and Louisiana remain the only two states that allow juries to convict or acquit a defendant with less than a unanimous verdict in a wide array of criminal trials.[45]

What is remarkable about the *Apodaca* and *Johnson* decisions is not so much the outcome of the constitutional questions, but rather, the extent to which the Justices relied on sweeping assumptions about the psychology of jury decision-making in both the majority and dissenting opinions. As one psychologist generously noted: "[E]mpirical evidence lacking, the Justices [were] forced to rely on their own judgment as to how people will behave and on the probable consequences of their rulings."[46] Other psychologists have not been so kind: "Just as we are not constitutional lawyers, it is clear that the justices of the high court are not social psychologists."[47]

39. Kachmar, *supra* note 14, at 278. *See also* LA. CONST. art. VII, § 41. This statute has since been amended to allow for 10–2 verdicts in certain felony criminal cases. *See* LA. CODE CRIM. PROC. ANN. art. 782 (2006).

40. Apodaca v. Oregon, 406 U.S. 404 (1972).

41. Johnson v. Louisiana, 406 U.S. 356 (1972).

42. *Apodaca*, 406 U.S. at 406.

43. *Johnson*, 406 U.S. at 358.

44. *See Apodaca*, 406 U.S. at 411–14; *Johnson*, 406 U.S. at 362–65.

45. William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts*, 25 INT'L REV. L. & ECON. 1, 2 (2005).

46. Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. APPLIED SOC. PSYCHOL. 38, 38 (1977).

47. KASSIN & WRIGHTSMAN, *supra* note 15, at 200.

Instead of relying on empirical psychological evidence of how jurors behave, the Court "speculated freely about social influence processes within the jury room, interactions between majority and minority factions, and the like."[48] The sections of the opinions where wild speculation was most prevalent occurred in the discussions of the need for, and degree of appropriate protection for, jurors who were holding out for acquittal. For the majority, Justice White offered the following theory of jury deliberations:

> We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purposes—when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position.[49]

The Supreme Court majority, dismissing the defendants' fears that minority factions would be ignored, placed its trust in the majority jurors to consider fully and reject the minority's views before overriding their position.

In dissent, Justice Douglas was no better at relying on intuition, proposing an alternative theory:

> [N]onunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required either by Oregon or by Louisiana even though the dissident jurors might, if given the chance, be able to convince the majority. . . . It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches us that polite and

48. *Id. See also* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1265 (2000) (noting that the opinions were based "largely on intuition").

49. *Johnson v. Louisiana*, 406 U.S. at 356, 361 (1972).

academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity.[50]

The unfortunate result of these opinions is not so much the debate over which view of human nature is correct, but that the tendency to speculate without any foundation in the empirical literature of cognitive psychology has carried over to legal scholarship, particularly in the realm of jury decision-making and the efficacy of the unanimity requirement.

In the years following *Apodaca* and *Johnson*, from time to time, there has been a flurry of publication activity addressing the continued desirability of the unanimity requirement, with advocates on both sides making spurious and sweeping conclusions about how people behave and make decisions as jurors.[51] One scholar, for example, citing only his own experience on a six-person jury, boldly asserted that the extent of a particular juror's participation in deliberations is dictated by "[i]ndividual personality traits" and that "a majority-rule scheme would encourage [dissenting jurors] to speak up more than a unanimity-rule scheme because they would need to persuade fewer jurors to change the verdict."[52] Another scholar, promoting the expansion of decision rules requiring less than unanimity, has argued that unanimity no longer works as well as in the past because "[e]ccentric jurors are undoubtedly not so easily persuaded today to accept the majority view."[53]

50. *Johnson*, 406 U.S. at 388–89 (Douglas, J., dissenting).

51. *See, e.g.*, Glasser, *supra* note 11; Kachmar, *supra* note 14; Morehead, *supra* note 10; Osher, *supra* note 12. *See also* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995) (advocating majority juries); Barbara A. Babcock, *A Unanimous Jury is Fundamental to Our Democracy*, 20 HARV. J.L. & PUB. POL'Y 469 (1997); Richard H. Menard, Jr., *Ten Reasonable Men*, 38 AM. CRIM. L. REV. 179 (2001); Richard A. Primus, *When Democracy is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417 (1997); Edward P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775 (1992) (utilizing the assumptions of law and economics, but citing one psychological study only to the extent of tracking rates for the occurrence of hung juries); Eugene R. Sullivan & Akhil R. Amar, *Jury Reform in America—A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141 (1996) (debating a 10–2 decision rule).

It is interesting to note that of the ten articles cited here addressing reform of the unanimity requirement, seven of them were published between 1996 and 1998—not coincidentally in the aftermath of the O.J. Simpson criminal trial, whose verdict was announced in October 1995. The irony is that the O.J. Simpson jury, rightly or wrongly, was unanimous in its verdict. Taylor-Thompson, *supra* note 48, at 1265–66, n.21 (noting how critics of the unanimity rule seize "on moments of public outrage" to call for its elimination).

52. Glasser, *supra* note 11, at 674.

53. Morehead, *supra* note 10, at 944. Morehead concludes that "[e]liminating the requirement of unanimity . . . will do much to restore public confidence in our system of justice." *Id.* at 945. This statement is without support or citation.

Much of this debate has centered on the troublemaker status of the holdout juror: the perception that one irrational juror (or more) can prevent a unanimous verdict.[54] This trend in legal scholarship in this area does little to advance the understanding of the dynamics of the jury decision-making process, let alone provide a basis for normative conclusions. Significant steps in legal scholarship are required to bridge the widening gap between legal theory and the social sciences, particularly by reference to the growing body of relevant evidence and theories produced in the field of cognitive psychology.[55]

3. Psychological Evidence Supporting the Unanimity Decision Rule

Although it is not the purpose of this Article to discuss at length the efficacy or reasonableness of the unanimity decision rule in felony jury trials, it is worth a brief exploration of the literature in order to demonstrate the dangers, as evident in *Apodaca* and *Johnson*, in relying too heavily on "common" assumptions about human behavior. Although most psychological studies are based on laboratory conditions using mock juries, because of the high value placed on the secrecy of jury deliberations, there is no other practical way to acquire reliable data in a controlled environment.[56] Comparing empirical evidence to controlled studies of human behavior, in the form of mock juries in particular, and interviews of actual jurors post-verdict, provides the most complete picture of juror behavior possible, while preserving the inherent secrecy of jury deliberations.

The psychological evidence, in short, overwhelmingly lends more credence to Justice Douglas's view of juror behavior than Justice White's view.[57] The differences between the deliberation processes of unanimous juries as compared to majority juries (of

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54. Neilson & Winter, *supra* note 45, at 3. *See also* JONAKAIT, *supra* note 30, at 98 (noting that some scholars have expressed concern that deadlocked juries are increasingly caused by an irrational juror who refuses to follow the law).

55. A notable and laudable exception to this trend is Kim Taylor-Thompson's article defending the unanimity requirement as a means to respect the rights of jurors who are female and/or racial minorities. Taylor-Thompson, *supra* note 48.

56. One scholar has commented that "although mock-jury studies may invite criticism, it is difficult to imagine alternative, more accurate methodologies by which to assess jury dynamics." *Id.* at 1272 n.67.

57. *See* Nemeth, *supra* note 46, at 55.

varying acceptable ratios of decision) are "substantial."[58] Juries operating under a system with less than a rule of unanimity took less time to reach a verdict, were less satisfied with the quality of the deliberations, were less certain of the accuracy of their verdicts, and were less influenced by the discussion during deliberations.[59] In general, jurors deliberating under either eight of twelve or ten of twelve decision rules "viewed deliberation as less thorough and less serious," and regardless of whether there was any dissent, such jury members "were less apt to agree on the verdict and on the issues underlying the verdict."[60] Such jurors tended to "discuss both the law and evidence less," "recall less evidence," and were less likely to correct their own mistakes about the evidence or the jury instructions.[61] The minority faction members in juries operating on a less-than-unanimity rule, in particular, "were especially likely to believe that they had not had opportunity to express all their arguments concerning the case."[62]

Not only do unanimous juries take longer to reach a decision, but, not surprisingly, they take more polls before reaching a verdict.[63] Jurors in the minority "participate with greater frequency and are perceived as more influential in unanimous as compared to majority rule juries."[64] In at least two studies, jurors operating under unanimity requirements shared more instances of agreement and disagreement, and offered "more opinions and information."[65] Jurors working towards unanimity "were more ef-

58. KASSIN & WRIGHTSMAN, *supra* note 15, at 201.

59. *Id.* at 202. In addition, and critically, "[a]fter reaching their required quorum these groups usually rejected the holdouts, terminated discussion, and returned a verdict within just a few minutes." *Id. See also* HASTIE, PENROD & PENNINGTON, *supra* note 18, at 229 ("[J]urors from both majority and holdout factions have lower respect for their fellow jurors' open-mindedness and persuasiveness under the nonunanimous decision rules."); Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules, in* IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM 235, 252 (Lawrence S. Wrightman et al. eds., 1987) (concluding that majority juries "do not reach consensus; they are less effective in convincing all members of the appropriateness of the verdict; they do not deliberate as long or as 'robust'; and they leave members with the feeling that justice has not been administered").

60. HASTIE, PENROD & PENNINGTON, *supra* note 18, at 82. Jurors, in general, held a negative view of other jurors' "open-mindedness and persuasiveness" during deliberations. *Id.* This lack of confidence in the verdict extends to members of the majority as well as the minority. JONAKAIT, *supra* note 30, at 103.

61. JONAKAIT, *supra* note 30, at 103.

62. HASTIE, PENROD & PENNINGTON, *supra* note 18, at 29. These scholars further note that "[d]issenting viewpoints ... are at a relative disadvantage in non-unanimous juries as compared to unanimous juries," thus affecting the "counterbalancing of viewpoints during deliberation." *Id.* at 28.

63. *Id.* at 32.

64. *Id.*

65. Nemeth, *supra* note 46, at 53.

fective in actually persuading their members that the final verdict was the appropriate one," engaged in "more robust argument and less polite conversation," and "tended to take longer to reach a point where the verdict could be predicted."[66] They engage in a more "thorough review of the evidence and generate authority and finality for verdicts."[67] Finally, and perhaps most importantly, two economists have demonstrated that "when eventual verdicts are considered, a unanimous jury rule tends to lead to more accurate verdicts when compared to nonunanimous rules."[68]

Preeminent psychologists, who have extensively studied juries, have concluded that "the unanimous rule appears preferable to majority rules because of the importance of deliberation thoroughness, expression of individual viewpoints, and protection against sampling variability effects of initial verdict preference."[69] Two psychologists put it more starkly: "[T]he nonunanimous jury is unacceptable. It weakens and inhibits jurors who are in the voting minority; it breeds closed-mindedness; it impairs the quality of discussion; and it leaves many jurors unsatisfied with the final verdict."[70] The fact that the federal criminal system and forty-eight of the fifty states have retained the unanimity requirement for felony jury trials is a testament to this psychological evidence and, perhaps, to tradition. Of course, the existence of the unanimous decision rule that has become so ingrained in American society has also produced another phenomenon: the holdout juror.

B. The Hung Jury

Juries required to deliberate to a unanimous verdict "do in fact reach verbal consensus on a verdict"[71] most of the time, but there are times when one or more dissenters refuse to vote with the majority. This results in a hung jury. Psychologists have found that a hung jury usually only occurs "when a substantial minority faction

66. *Id.* at 55. This might be true, in part, because "a large proportion of discussion occurs during the interval between the largest faction reaching ten and the [unanimous] verdict being rendered. This discussion usually includes several error corrections and references to the standard of proof." HASTIE, PENROD & PENNINGTON, *supra* note 18, at 229.

67. JONAKAIT, *supra* note 30, at 96.

68. Neilson & Winter, *supra* note 45, at 3. This is true for both convictions and acquittals. *Id.* at 6. They further note that "it is misleading to argue that nonunanimous verdicts reduce the hung jury rate." *Id.* at 3.

69. HASTIE, PENROD & PENNINGTON, *supra* note 18, at 229.

70. KASSIN & WRIGHTSMAN, *supra* note 15, at 215.

71. *See* Nemeth, *supra* note 46, at 53.

existed at the start of deliberation, even though a minority of one might hang the jury at the end of deliberation."[72] In one analysis of hung juries, scholars found that three features of felony jury trials affect the likelihood of a hung jury: "1) the evidentiary characteristics of the case; 2) the interpersonal dynamics of deliberations; and 3) jurors' opinions about the fairness of the law as applied during the trial."[73]

Despite the various reasons why a jury might become deadlocked, the rate of occurrence of hung juries has, over time, remained remarkably low and stable. Over thirty years ago, a survey of over 3,500 state trials requiring unanimity found that the rate of deadlock was 5.6%, with higher rates reported in major metropolitan areas.[74] A 1999 study found that between 1980 and 1997 federal criminal hung jury rates were consistently between two percent and three percent, while the average rate of hung juries in the state courts of numerous large, urban areas was approximately six percent.[75] The widely accepted statistical average for the number of criminal trial juries in the United States unable to reach unanimous verdicts is just over five percent, approximately the same as it was over three decades ago.[76]

While the hung jury rate itself is not a cause for alarm, an analysis of the empirical literature reveals significant reasons to be concerned about protecting jurors who choose to dissent from the majority in jury deliberations. Studies have shown that cases that are considered to be relatively balanced are more likely to result in hung juries, sometimes at a rate of up to ten percent.[77] In one of the only major studies of hung juries, twenty-four percent of them were found to have deadlocked on votes of 11–1, with all of them

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72. *Id.* at 27. Interestingly, in this particular study, a full twenty-five percent of the hung juries studied were deadlocked with a lone dissenter at the end of deliberations. *Id.*

73. 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, 1265–66 (2003).

74. KALVEN & ZEISEL, *supra* note 16, at 461, 508. The rate of hung juries in New York City was seven percent and in Los Angeles fifteen percent. *Id.* at 508.

75. Neilson & Winter, *supra* note 45, at 2. *See also* Hannaford-Agor & Hans, *supra* note 73, at 1252 (noting that some urban areas report deadlock rates in excess of ten percent). It appears that California tends to experience a higher-than-average rate of hung juries, varying widely by county, with the federal hung jury rate, in particular, running twice the national average. *See* Kachmar, *supra* note 14, at 295–96.

76. *See* Menard, *supra* note 51, at 179. Of course, the hung jury rate drops precipitously if one considers that ninety-five percent of criminal cases are resolved by plea bargain. *See* Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 145 (2005); Taylor-Thompson, *supra* note 48, at 1318–19.

77. JONAKAIT, *supra* note 30, at 100.

breaking in favor of conviction.[78] These holdouts are not simply "idiosyncratic" or irrational; the same research and subsequent studies have indicated that deadlocks caused by holdouts usually involved "a much larger number of dissenters at the outset of deliberations" and that these cases often reflect "genuine disagreement over the weight of the evidence."[79]

Although the occurrence of deadlocked juries has been called "a practical failure of the jury," there are many psychologists and legal scholars who believe that "the presence of some hung juries is a desirable property of the jury institution."[80] Over forty years ago, one federal judge advanced a succinct defense of the deadlocked jury: "[A] mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise."[81] Prominent jury researchers have concluded that the hung jury, which they call "the jury system's most interesting phenomenon," is "a valued assurance of integrity, since it can serve to protect the dissent of a minority."[82] There is virtually universal acceptance of the unanimity rule of decision for felony criminal jury trials and our society places a historical and cultural value on its preservation. This, coupled with the relatively significant occurrence of a minority of one among the population of hung juries is persuasive evidence that the criminal justice system should make a particular effort to address, with sensitivity, the issues that arise during trial when a holdout juror has been identified during deliberations. As the next Part will illustrate, however, trial and appellate courts on both the state and federal levels are far from perfect in their efforts to preserve the integrity of jury deliberations when the rights and interests of a holdout juror are at stake.

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78. KALVEN & ZEISEL, *supra* note 16, at 460. The authors noted that in general, juries break two-to-one for conviction every time. *Id.*

79. Taylor-Thompson, *supra* note 48, at 1317. One study in Los Angeles found that over a three-year period, cases that were re-tried after a hung jury split eleven-to-one for conviction resulted in a second deadlocked jury twenty-three percent of the time. JONAKAIT, *supra* note 30, at 101–02.

80. HASTIE, PENROD & PENNINGTON, *supra* note 18, at 232.

81. Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting) (rejecting the majority's holding that the trial court's delivery of an *Allen* charge was appropriate).

82. KALVEN & ZEISEL, *supra* note 16, at 453.

II. THE FAILURE TO PROTECT THE HOLDOUT JUROR

"Everyone has a breaking point."

—Juror in 12 Angry Men[83]

The jury deliberation room is often no place for the faint of heart. It can be a brutalizing environment in which strangers say things to each other that they would never dream of saying to someone they know on more than a transitory basis.[84] In most cases, however, the identification of a holdout juror is accompanied by allegations of misconduct, refusals to deliberate, or other behavior opposed by the overwhelming majority of the jury.[85]

Before proceeding to an analysis of the psychology of the holdout juror, this Part examines a sample of cases, reviewed by federal and state appellate courts, where trial judges addressed issues during jury deliberations surrounding the existence of a dissenting juror. These examples, far from unusual, demonstrate that trial courts vary widely in the extent to which they delve into the deliberation process, ranging from a practice of protecting the sanctity of the jury to instances that can only be interpreted as overt coercion.[86] In many of these cases, the holdout juror is further isolated,

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83. 12 ANGRY MEN, *supra* note 1.

84. *See* Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133, 151 n.68 (1996) (detailing several anecdotes of high emotions during jury deliberations). During one Las Vegas murder trial, in which the foreman accused the lone holdout of, among other things, glaring at him, the defense attorney replied: "Hell, in jury deliberation they do more than glare. They yell, scream, [and] shout.... It's none of your business or my business." Peter O'Connell, *Rudin juror, foreman at odds*, LAS VEGAS REV.-J. ONLINE EDITION, May 2, 2001, http://www.reviewjournal.com/lvrj_home/2001/May-02-Wed-2001/news/16003473.html (last visited on Nov. 11, 2006) (on file with the University of Michigan Journal of Law Reform). The judge left the holdout on the jury, and the jury returned a guilty verdict the next day. Peter O'Connell, *Rudin Verdict: Guilty of Murder*, LAS VEGAS REV.-J. ONLINE EDITION, May 3, 2001, http://www.reviewjournal.com/lvrj_home/2001/May-03-Thu-2001/news/16013338.html (last visited Nov. 11, 2006) (on file with the University of Michigan Journal of Law Reform).

85. *See* O'Connell *supra* note 84. *See also infra* Part II.A.

86. In at least one case, a holdout juror was held in criminal contempt for not disclosing in the jury selection process an eleven-year-old conviction for possession of LSD. *See* People v. Kriho, 996 P.2d 158 (Colo. Ct. App. 1999) (reversing for a new trial on the criminal contempt charge because evidence of jury deliberations was improperly admitted); National Drug Strategy Network, *Holdout Juror in Drug Case, Laura Kriho, Found in Contempt of Court, Fined $1200*, Mar.–Apr. 1997, http://www.ndsn.org/marapr97/kriho.html (last visited Nov. 11, 2006) (on file with the University of Michigan Journal of Law Reform). The District Attorney, after the reversal, dismissed the case. State's Mot. & Order to Dismiss the Case, People v. Kriho, No. 96 CR 91 (Colo. Dist. Ct. Aug. 4, 2000), *available at* http://www.levellers.org/jrp/acquit.image.htm.

castigated, or even removed altogether from the deliberation process.[87]

A. The Worst of the Worst

In 2001, the California Supreme Court developed a standard for addressing the conditions under which a juror could be removed from deliberations. In *People v. Cleveland*,[88] during the second day of deliberations, the jury in a robbery case returned a note to the trial court requesting that one juror be replaced because that juror "[did] not agree with the charge and [did] not show a willingness to apply the law."[89] The trial court decided to interview the foreperson extensively, and then called the entire jury into the courtroom, asking it whether anyone felt "that any other juror or jurors . . . [were] not deliberating, [or were] not considering others' opinions, [and had] foreclosed discussion."[90] After ten jurors responded affirmatively, the trial court decided to interview each juror individually, without the presence of the other jurors.[91] The court interviewed the allegedly offending juror last, who stated that he was engaging in the deliberation process and that he had "no problem with the law. [He] only [had] problems with the facts as [he] perceive[d] them."[92] The trial court, concluding that the juror was not adequately deliberating with his fellow jurors, dismissed him and seated an alternate juror.[93] The jury returned a guilty verdict two hours later.[94]

Recognizing that "not every incident involving a juror's conduct requires or warrants further investigation,"[95] the California Supreme Court reversed the conviction, holding that a trial court may remove a juror from deliberations if "it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate."[96]

87. It is important to note at the outset of this survey of cases that the only cases that are appealed in this context are those that result in conviction. The prosecution cannot appeal a verdict resulting in acquittal. United States v. Whittaker, 268 F.3d 185, 192 (3d Cir. 2001). Therefore, the holdout juror or jurors in these cases were, in every case, holding out for acquittal.

88. People v. Cleveland, 21 P.3d 1225 (Cal. 2001).

89. *Id.* at 1227–28.

90. *Id.* at 1228.

91. *Id.*

92. *Id.* at 1229.

93. *Id.* at 1229–30.

94. *Id.* at 1230.

95. *Id.* at 1233.

96. *Id.* at 1237 (citations omitted).

In this case, the court held that the interviews of the jurors did not reveal the holdout's refusal to deliberate to a "demonstrable reality," particularly since there had been at least a day of deliberations without complaint.[97] Nevertheless, the court did not explain further what constitutes a "demonstrable reality" or the justification for removing a holdout juror who had stopped deliberating because the dissenter's arguments no longer had any persuasive force on the majority.[98] Further, the court did not address in any meaningful way the inherently coercive effect that interviewing the entire panel of jurors individually would have had on the course of deliberations had the trial court decided *not* to remove the dissenter from the panel.

These unanswered questions would appear again in the California courts later the same year in *People v. Hightower*,[99] a case addressed by the California Court of Appeal after *Cleveland*. In *Hightower*, during the third day of the jury's deliberations, the trial court in a murder case received two notes from the jury reporting that one juror was refusing to follow the court's instructions by basing discussions on "feelings, suppositions, and *unreasonable* interpretations of the evidence."[100] The court questioned the foreperson with counsel present. The foreperson identified the holdout, describing the juror as "Vietnamese."[101] The court then questioned the holdout juror, who reported that he was deliberating, following the court's instructions, and subject to "a lot of pressure" and "a lot of personal attack" in deliberations.[102] After interviewing each of the other ten jurors individually, the trial court removed the holdout juror for misconduct and seated an alternate on the jury, which then returned a guilty verdict two hours later.[103]

The California Court of Appeal, noting that it could not "say that the trial court conducted an unnecessarily intrusive inquiry," held that there was "no violation by the trial court of the principles announced and reaffirmed in *Cleveland*."[104] This opinion, however,

97. *See id.* at 1238.

98. *Id.*; *see also* Gina Duwe, *Jury Convicts Man in Agent's Killing*, MILWAUKEE J. SENTINEL ONLINE, July 26, 2005, http://www.jsonline.com/story/index.aspx?id=344006 (on file with the University of Michigan Journal of Law Reform) (reporting that trial court in murder case removed holdout juror who sent a note "declining to deliberate further" following pressure from other jurors to the extent that she became ill).

99. People v. Hightower, 114 Cal. Rptr. 2d 680 (Ct. App. 2001).

100. *Id.* at 683.

101. *Id.* at 684.

102. *Id.* at 686.

103. *Id.* at 687–88, 699 (Kay, J., dissenting).

104. *Id.* at 692–93.

was issued over a strong dissent which noted that, as in *Cleveland*, this jury reported no difficulty with the holdout juror except "after a substantial period of deliberation, when [the holdout] was, as he put it under pressure."[105] The dissent, albeit without referring to any empirical psychological evidence, insightfully noted that:

> Someone in [the holdout's] position, who feels that he cannot articulate his views as well as the other jurors and is being told by other jurors that he does not belong on the jury might be expected to begin agreeing with them, and might even go so far as to claim that he did not know what he was getting into when he originally said he could be fair and impartial. He should not be disqualified for making such statements because they are reflective of duress, not bias, under the circumstances.[106]

Finding no substantive difference between the holdout juror in this case and the one in *Cleveland*, the dissent would have reversed the conviction "because the interrogation of the entire jury during deliberations effectively coerced the verdicts."[107] The dissent concluded that while "there are no bright-line rules dictating when an investigation must cease, . . . it was prejudicial error to continue to relentlessly question every juror in this case about what was wrong with the lone holdout for an acquittal."[108] As this Article later argues,[109] this is precisely the type of case where there *should* be a bright-line rule preventing such an intrusive inquiry when a juror holding out against an overwhelming majority has been identified.

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105. *Id.* at 696 (Kay, J., dissenting) (footnote omitted).

106. *Id.*

107. *Id.* at 698 (Kay, J., dissenting).

108. *Id.*

Unfortunately, the decision in *Cleveland* has remained the law in California. In *People v. Metters*, No. A074986, 2002 WL 31106404 (Cal. Ct. App. Sept. 23, 2002), the California Court of Appeal affirmed a robbery conviction in a case where the trial court removed the holdout juror after the juror refused to deliberate further, telling the court that "I have come to a conclusion which is different from my fellow jurors." *Id.* at *6.

The dissent, noting that there were several alternatives available to the trial court, would have reversed because the court "undertook an egregiously intrusive inquiry into the substance of the jury's deliberations and the thought processes of individual jurors." *Id.* at *17 (Kline, P.J., dissenting). Following the holdout's removal, the jury returned a guilty verdict in fifteen minutes. *Id.* The dissent concluded that the other jurors must have noticed that the removal of the holdout "was rooted in her unwillingness to submit to the other jurors' view of the case." *Id.* at *31 (Kline, P.J., dissenting). This insight correctly identifies not only the effect on the holdout juror by an intrusive inquiry by the trial court, but also the effect on the rest of the jury upon the resumption of deliberations.

109. *See infra* Part IV.

These cases are not confined to California. In *West v. State*,[110] a Georgia trial court in a cocaine possession case received three notes from the jury during deliberations, one of which stated that one juror thought an undercover police officer who lied on duty was committing entrapment.[111] The trial court delivered a supplemental instruction explaining that the entirety of the law and the facts had been previously given to the jury, and declined to give a further instruction on entrapment.[112] The next day, however, after returning to the courtroom, the foreperson reported to the court that there was a holdout juror who refused to vote to convict or "listen to the evidence" because "he was bothered by [the officer's] denial that he was a police officer and believed that all cops were liars."[113] In the presence of the entire jury, the trial court then identified the holdout juror and questioned that juror at length.[114] The juror replied that "he simply did not think that the state had proven its case," after which other jurors commented on the holdout juror and the duties of an undercover officer.[115]

Following what was, in effect, the jury deliberating in front of the court and counsel, the court instructed the jury that entrapment was "not applicable to this case," and the jury returned a guilty verdict fifteen minutes later.[116] Without addressing the obviously coercive nature of the trial court's intrusion into the deliberations of the jury, the Georgia Court of Appeals affirmed the conviction, finding "no error as [the trial court] did not intimate an opinion as to [the defendant's] guilt or innocence or improperly comment on the evidence."[117]

110. West v. State, 606 S.E.2d 100 (Ga. Ct. App. 2004).

111. *Id.* at 102.

112. *Id.*

113. *Id.* at 103.

114. *Id.*

115. *Id.*

116. *Id.* at 103.

117. *Id.* at 104. This is not the only case of this type from the Georgia state courts. *See, e.g.*, Thompson v. State, 581 S.E.2d 596 (Ga. Ct. App. 2003) (affirming the trial court's removal of the holdout juror who had been seen talking with an alternative juror who had previous contact with a known convicted drug felon, despite the holdout juror's claims that they had only discussed travel arrangements to court); Mason v. State, 535 S.E.2d 497 (Ga. Ct. App. 2000) (reversing conviction on charges of rape and child molestation where trial court received a note from the holdout juror after three days of deliberations and the delivery of an *Allen* charge asking that deliberations be ended, because the trial court questioned the holdout in front of the entire jury, refused to declare a mistrial after the holdout stated that she did not believe her opinion about the case would change, and had not disclosed to defense counsel an initial note from the foreperson requesting that the holdout be replaced). *See also* United States v. Kemp, No. CRIM. A. 04-370-02, 2005 WL 1006348 (E.D. Pa. April 28, 2005) (involving the removal of a holdout juror, after substantial inquiry by the trial court, who expressed a view that she was unlikely to believe FBI agents' testimony, despite the holdout's

In *Braxton v. United States,*[118] a juror sent a note to the trial court several hours into deliberations indicating that another juror had made a statement during deliberations that "most police are liars."[119] The trial court, after instructing the jury at length about the "jurors' duty to follow the law" and the court's instructions, effectively targeted the holdout juror by instructing the foreperson in front of the entire jury to "let [the judge] know in writing whether any juror is refusing to follow the court's instructions."[120] The next day, the court received three notes from three different jurors, identifying a juror who they believed held some preconceived beliefs against the police.[121] The court decided to question the foreperson in the presence of counsel, who stated that the holdout juror had "[e]xperiences outside of the courtroom" that affected the juror's "assessment of the evidence."[122] However, he also acknowledged that it was difficult to explain how the juror was refusing to follow the court's instructions. Referring to the holdout as the "offending juror," the trial court declined to interview him and dismissed him, after instructing the foreperson to walk into the jury room with the courtroom clerk and, in the presence of the other jurors, "point out" the holdout.[123] Not surprisingly, "almost immediately" after he was removed, the jury returned a guilty verdict.[124]

The D.C. Court of Appeals recognized that it was "readily apparent" that the dismissed juror was a holdout, but nevertheless affirmed the conviction.[125] The court noted that "any error in not interviewing [the holdout juror] was invited" because the defendant's attorney consistently objected to any judicial inquiry of any of the jurors once it had been identified that there was a holdout.[126] Noting that the only pieces of evidence before it were the uncontradicted notes from the disgruntled jurors, and that "the evidence of juror misconduct was less than overwhelming," the appeals court determined that it was nevertheless "constrained to sustain

denial of such bias); *United States v. Kemp*, 379 F. Supp. 2d 690 (E.D. Pa. 2005) (denying defense motion for judgment of acquittal).

118. Braxton v. United States, 852 A.2d 941 (D.C. 2004).

119. *Id.* at 943–44.

120. *Id.* at 944.

121. *Id.* at 944–45.

122. *Id.* at 945.

123. *Id.* at 946.

124. *Id.*

125. *Id.* at 947.

126. *Id.* at 948.

the judge's decision to dismiss this juror."[127] In a footnote, the appeals court suggested that the proper course of action by the trial court should have been to declare a mistrial, but it refused to address that issue in the opinion because "counsel ha[d] not raised on appeal the issue."[128]

Despite the general understanding that jury deliberations can be unpleasant places where equally unpleasant speech is occasionally used, at least one court has removed a juror for using such speech. In *Arnold v. State*,[129] the trial court received a series of notes indicating that the jury was deadlocked at 10–2, one of which stated: "Any juror[,] especially the foreman[,] who tells another juror to go to hell should be removed!"[130] The court interviewed the foreperson, who did not specifically recall making the statement, but noted that there had been a "heated argument" during deliberations.[131] The foreperson gave the impression that he was one of the two holdout jurors for acquittal.[132] Calling the situation "unsalvageable," the trial court questioned the foreperson in front of the entire jury panel about the state of the deadlock.[133] During the inquiry, another juror interjected, asking the court whether a juror could be dismissed for "using curse words" and calling jurors "monkeys."[134] The trial court responded that such conduct was "totally inappropriate" and that "some action could possibly be taken in that regard."[135] The trial court then excused the jury, and dismissed the foreperson from the jury "based *solely* on his use of vulgar and disparaging language."[136] Sixteen minutes later, after the complaining juror became the new foreperson, the jury returned a guilty verdict.[137]

The Georgia Court of Appeals reversed the conviction, holding that "the trial court abused its discretion in removing the jury foreman based solely on his use of offensive language during heated jury deliberations."[138] While the court likely reached the right result in this case, it missed a much larger point about the trial court's method of inquiry. After learning that the vote was

127. *Id.* at 948–49.

128. *Id.* at 949 n.10.

129. Arnold v. State, 617 S.E.2d 169 (Ga. Ct. App. 2005).

130. *Id.* at 172. It is unclear from the record how the trial court learned the deadlock was 10–2. *Id.* at n.1

131. *Id.* at 173.

132. *Id.*

133. *Id.* at 173–74.

134. *Id.* at 174.

135. *Id.* at 174 n.4.

136. *Id.* at 174 (internal quotation marks omitted).

137. *Id.*

138. *Id.* at 175.

split 10–2 in favor of conviction and that the foreperson was one of the holdouts, the trial court questioned the foreperson in the presence of the entire jury panel, which of course included the *other* holdout. After the complaining juror spoke up out of turn, the court excused the jury and dismissed the foreperson, leaving the other dissenter alone against the overwhelming remaining majority. It is not at all surprising that it took a mere sixteen minutes and the ascension of the complaining juror to the status of foreperson for the remaining holdout to accede to the will of the majority. The appeals court failed to address the effect that this obviously coercive process had on the remaining holdout juror who, it is clear, quickly capitulated.[139]

B. Cases Moving Towards a Middle Ground

Although many of the cases described in the preceding Part illustrate examples of trial court judges engaging in arguably coercive behavior in order to obtain a unanimous verdict, the situation today is certainly not as bad as history would suggest. Some courts have taken steps to develop a middle ground that recognizes the inherently coercive impact of excessive investigation by the trial court when allegations of juror misbehavior arise. Unfortunately the practice of making grand assumptions about the nature of jury deliberations persists, and such assumptions do not fully account for the complexity of the problem.

In *People v. Foreman*,[140] an Illinois trial court received a note from the jury after several hours of deliberation indicating that one juror

139. There are a number of cases where appeals courts have reversed convictions after trial courts have obviously improperly influenced or, in some cases, coerced the jury into reaching a verdict. *See, e.g.*, United States v. Hernandez, 862 F.2d 17 (2d Cir. 1988) (reversing conviction after the trial court removed the holdout for acquittal after four days of deliberations, when the holdout admitted to throwing water at another juror, because the trial court excessively questioned the holdout juror individually, removed the juror after praising the entire jury panel for their efforts to persuade the holdout to vote to convict, and stated that thousands of dollars would be wasted by a mistrial); People v. Branch, 462 N.E.2d 868, 872–74 (Ill. App. Ct. 1984) (reversing a murder conviction where the trial court received a note from the jury identifying one holdout for acquittal who had stated that no one should go to jail, because the trial court subsequently told the jury that the holdout "should not have received jury service" and it would arrange overnight accommodations within the hour, resulting in a unanimous guilty verdict ten minutes later); State v. Johnson, 105 P.3d 85 (Wash. Ct. App. 2005) (reversing a murder conviction after the trial court removed the holdout for acquittal after four days of deliberations, following a determination that the foreperson was credible in testifying that the holdout was excessively emotional, impeding deliberations, and had often retreated to a corner of the jury room).

140. People v. Foreman, 836 N.E.2d 750 (Ill. Ct. App. 2005).

refused to agree to a guilty verdict "even if she believed that [the] defendant was guilty."[141] After the trial court directed the jury to continue deliberations, the jury sent another note thirty minutes later indicating that the holdout juror "objected to returning a verdict under any circumstances because of religious beliefs."[142] The court then instructed the entire jury that "no one . . . [was] being asked to pass judgment upon anyone," concluding that "if anybody [thought] that they [were] being asked to judge someone they [were] mistaken."[143] About an hour after the instruction, the jury delivered a guilty verdict.[144] The Illinois Court of Appeals affirmed the conviction, holding that the trial court's supplemental instruction was not coercive, but rather "clarified and instructed the holdout juror on her duties and responsibilities as a juror."[145]

141. *Id.* at 764.

142. *Id.*

143. *Id.* at 764–65.

144. *Id.* at 765.

145. *Id.* For an example of a trial court that engaged in extensive inquiry into the deliberation process, but ultimately correctly declared a mistrial, see *United States v. McIntosh*, 380 F.3d 548 (1st Cir. 2004). In *McIntosh*, the district court learned during deliberations that there was a holdout for acquittal who declared his mind made up and who refused to deviate from his position. *Id.* at 551. The court, reluctantly and only at the suggestion of the jury, interviewed the holdout juror, who claimed that his verdict was based on the evidence and that he made up his mind only after deliberations had begun. *Id.* at 551–52. Following a later note from the jury indicating another deadlock, the prosecutor informed the court that a criminal background check of the holdout juror revealed a number of arrests during the preceding ten years, suggesting that the juror had not been truthful during jury selection. *Id.* at 552. The court again questioned the juror and determined that because none of the arrests had resulted in a felony conviction, the juror was not ineligible to serve on the jury. *Id.* The court then declared a mistrial due to a hung jury. *Id.* The appeals court affirmed, finding "ample evidence in the record to support the district court's decision not to jettison [the holdout juror]." *Id.* at 556. The trial court should never permit the target of a juror's complaint to also become the target of a zealous prosecutor who decides to further investigate the background of a dissenting juror during jury deliberations. On occasion, the prosecutor's subsequent investigation of a suspected dissenting juror has created additional issues often not relevant to the subject of the jury's note at all. *See, e.g.*, Sanders v. Lamarque, 357 F.3d 943, 944 (9th Cir. 2004) (holding that the trial court improperly removed the lone holdout juror based on, among other things, information discovered by the prosecutor during deliberations, noting that "[r]emoval of a holdout juror is the ultimate form of coercion"); People v. Gallano, 821 N.E.2d 1214, 1221 (Ill. App. Ct. 2004) (addressing information revealed by a prosecutor's background check of a juror after the juror sent out a note during deliberations that he could not sign a guilty verdict "because [he felt] some reasonable doubt"). A prosecutor who investigates the criminal or other background of a juror after deliberations have begun is simply not doing her job. The time to conduct criminal history checks of prospective jurors is at the beginning of the trial during jury selection, not at the end of the trial. Such a background check during deliberations reveals the prosecutor's obvious motive to convince the court to remove a juror who has turned out to be unfavorable to the prosecution's case. This late-acquired information should never be used to dismiss a juror who has been identified as a dissenter.

In *United States v. Geffrard*,[146] the district court received a letter from one of the jurors during deliberations "identify[ing] herself as a person having religious beliefs based on the teachings of Emanuel Swedenborg."[147] The letter explained that the juror could not "live with a verdict of guilty for any of the defendants on any of the charges because of her beliefs deep within her heart and soul."[148] Among other things, the juror explained that she believed the facts indicated entrapment even though the jury had been instructed previously that entrapment was not a defense in the case. She also stated that she viewed the rest of the jury "with intellectual contempt as being unable to understand the teachings of Swedenborg."[149] The court of appeals affirmed the district court's decision to remove the juror on its own motion without further judicial inquiry,[150] noting that "the judge declined with good reason to get into a likely unproductive discussion with a juror about that juror's deeply held religious beliefs at odds with criminal procedure."[151] A mistrial could have created issues involving double jeopardy and the replacement of the excused juror by an alternate was disfavored after deliberations had begun. As such, the court of appeals concluded that the district court exercised sound discretion in declining to engage in a discourse with the holdout juror when the contents of the juror's letter clearly indicated her intent.[152] This case, better than most, demonstrates a careful trial court that balanced the necessity of removing a juror who could not deliberate properly with the interest in protecting the integrity of the deliberative process without judicial interference.

The U.S. Court of Appeals for the Ninth Circuit is one of the most protective courts when it comes to the treatment of holdout jurors by trial courts. In the groundbreaking case of *United States v. Symington*,[153] the jury had deliberated for seven days on twenty-one criminal counts before the trial court received a note indicating that there was a lone holdout.[154] Four days later, the jury sent

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146. United States v. Geffrard, 87 F.3d 448 (11th Cir. 1996).

147. *Id.* at 451.

148. *Id.* A transcript of the entire letter is contained at the end of the appellate court's opinion. *See id.* at 453–54.

149. *Id.* at 451–52.

150. The jury returned a unanimous verdict from its eleven remaining members, a procedure permissible under federal criminal procedure. *See id.*; *see also* FED. R. CRIM. P. 23(b).

151. *Geffrard*, 87 F.3d at 452.

152. *Id.*

153. United States v. Symington, 195 F.3d 1080 (9th Cir. 1999).

154. *Id.* at 1083. The note alleged that the juror had made a final decision before reviewing all of the counts. *Id.*

another note stating that the holdout, an elderly woman, refused to continue discussing the case, citing various examples of her refusal to participate.[155] The trial court then conducted individual interviews with each jury member to assess the problem, with each of the majority jurors suggesting that the holdout be dismissed, though some of them expressed the view that "their frustration ... may have derived more from their disagreement with her on the merits of the case."[156]

After all of the majority jurors had been interviewed individually, the trial court interviewed the holdout, who claimed that she was willing to continue deliberating, but complained about pressure she was feeling from the other jurors: "I found myself backed up against the wall for a vote every time [there was] an objection to my vote on a specific count or an element of the count .... I realized that I was the one isolated."[157] She professed a willingness "to discuss the elements of the case with the other jurors," but told the court that "she became intimidated when everyone talked at once and demanded that she justify her views as soon as she stated them."[158] After the interview was completed, the trial court dismissed the holdout juror "for just cause for being either unwilling or unable to participate in the deliberative process in accordance with the instructions of the Court."[159]

The Ninth Circuit reversed the conviction, holding that

> if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial.[160]

Although this rule is among the most protective of the interests of holdout jurors, it created a situation where the integrity of the

155. *Id.*

156. *Id.* at 1083–84.

157. *Id.* at 1084. This inquiry generated 101 pages of transcript. *Id.* at 1097 (Fitzgerald, J., concurring in part and dissenting in part).

158. *Id.* at 1084.

159. *Id.* Several days later, the jury, reconstituted with an alternate juror, returned a guilty verdict on seven counts, acquitted on three counts, and hung on the remaining counts. *Id.*

160. *Id.* at 1087 (emphasis in original). *See also* Sanders v. Lamarque, 357 F.3d 943, 948 (9th Cir. 2004) (holding that, after the state trial court extensively inquired into the jury's deliberation process, "the trial court committed constitutional error when, after learning that the juror was unpersuaded by the government's case, it dismissed the lone holdout juror").

jury's deliberations is easily compromised. By framing the question before the court as "what evidentiary standard the district court ought to employ" to determine whether a holdout juror should be removed,[161] the court revealed a major flaw in its reasoning. A higher standard—one which the court ultimately adopted—leads to trial courts committing a greater intrusion into the jury's deliberation process in order to find adequate evidence to support a decision on removal.

In *Symington*, for example, the trial court conducted an extensive examination of each individual juror to determine the scope and nature of the deliberation problem. Viewed from the perspective of the holdout, however, the entire jury sat in the jury room while the holdout juror watched as her colleagues were individually questioned outside of her presence about her conduct in deliberations. Knowing that eleven members of a majority opposed to her views had just told the judge everything that she had been doing wrong, by the time it was her turn to be interviewed, it mattered very little what she actually said. There was no conceivable way the trial court could leave that juror on the panel without the specter of coercion having been imposed by the very nature of the judicial inquiry.

The *Symington* court recognized this dilemma, and acknowledged the important fact that a trial judge "must not compromise the secrecy of jury deliberations."[162] The court further noted, however, that the value placed on secrecy means that "a trial judge may not be able to determine conclusively whether or not a juror's alleged inability or unwillingness to deliberate is simply a reflection of the juror's opinion on the merits of the case, an opinion that may be at odds with those of her fellow jurors."[163] Finally, the court recognized the tension created in its standard by noting that "prohibit[ing] juror dismissal unless there is no possibility at all that the juror was dismissed because of her position on the merits may be to prohibit dismissal in all cases."[164] The court did not acknowledge that having a standard for dismissal in this context in the first place necessitates judicial inquiry into the deliberation process. It is precisely for this reason that, as will be explained further below, *any* judicial inquiry into the course of deliberations, once they have started and once a holdout juror has emerged, necessarily imposes a taint on the integrity of both the jury and the deliberation process.

161. *Symington*, 195 F.3d at 1086.
162. *Id.* at 1086.
163. *Id.*
164. *Id.* at 1087 n.5.

This detrimentally affects the holdout juror, regardless of the reasons for dissent.

III. THE PSYCHOLOGY OF THE HOLDOUT JUROR

This Part will discuss the thought processes of the holdout juror and how they are different from jurors who enjoy membership in the majority. To accomplish this goal, it is necessary to bridge the considerable gulf that exists between legal scholarship and empirical psychology by articulating a psychological context within which the question of the protection of the holdout status can be analyzed. This journey through the annals of cognitive psychology does not attempt to align itself with the valuable contributions previously made to legal scholarship by the law and economics paradigm. The legal terrain describing the intersection between legal theory and economic principles is well worn. Instead of describing the psychology of the holdout juror exclusively in the context of a normative or prescriptive framework, this Part will discuss the limits of the prescriptive model of decision-making in this context, and then offer a descriptive model of juror decision-making that emphasizes the uniqueness of the holdout's position relative to other jurors and the particular psychological forces at work on a holdout juror.

One article recently asked: "Why has the law and economics tradition been so influential, and mainstream social and cognitive psychology relatively ignored, in modern legal scholarship?"[165] One answer might be that in legal scholarship, there is a heavy emphasis on prescriptive solutions to problems of decision while cognitive psychology provides a more descriptive model for how people actually behave. Indeed, law and economics addresses "decision making by constructing axiomatic models that describe the market forces at work in particular circumstances and that prescribe appropriate actions in light of the assumptions underlying the models."[166] The emphasis is "on prescribing what should be done rather than on describing what decision makers actually do and certainly not on diagnosis or implementation."[167] For law and economics scholars, the individual's behavior is "evaluated in light of

165. Ross & Shestowsky, *supra* note 22, at 1081.

166. LEE ROY BEACH, THE PSYCHOLOGY OF DECISION MAKING: PEOPLE IN ORGANIZATIONS 5 (1997).

167. *Id.*

how well it conform[s] to the prescriptive models rather than the other way around."[168]

Students of cognitive psychology and organizational behavior approach the analysis of decision-making in a different manner. The psychological approach is much more "interested in the interplay of group and institutional dynamics and their effects on the decisions made within and on the behalf of organizations;" in other words, *how* decision-makers use information to arrive at decisions.[169] It is important in this analysis, therefore, to acknowledge the "important truism of social psychology . . . that people respond not to some objective reality but to their own subjective interpretations or definitions of that reality."[170] As other authors have recognized, this truism generates two relevant insights to legal analysis: 1) "[D]ifferences in judgment may reflect differences in the way a given issue or object of judgment is being perceived and construed rather than a difference in the perceivers' values or personality traits," and 2) "[S]uccessful persuasion," particularly of a holdout juror, "involves a change not in people's underlying values or beliefs about the just response to a given set of facts and circumstances but rather a change in the way they interpret those facts and circumstances and assimilate that information to their own pre-existing beliefs and life experiences."[171] As will be seen below, these insights have tremendous value to the analysis of the holdout juror. To begin the analysis, however, a brief side trip into a well-known prescriptive model of decision-making will provide the foundation for the descriptive analysis that follows.

A. *A Prescriptive Model of the Holdout Juror*

"It's always difficult to keep personal prejudice out of a thing like this."

—Henry Fonda in 12 Angry Men[172]

The analysis of the holdout juror as a rational actor requires a number of assumptions. The first and most important assumption

168. *See id.* at 6. "Behavior that conformed to the models was judged to be rational, and behavior that did not conform to the models was judged to be irrational." *Id.*

169. *Id.*

170. Ross & Shestowsky, *supra* note 22, at 1088.

171. *Id.*

172. 12 ANGRY MEN, *supra* note 1.

is that the holdout juror is, in fact, a rational individual, meaning, in the classic normative decision theory context, that the holdout juror will seek to do "what is best."[173] In basic terms, this means choosing the option that offers the biggest payoff, whatever that means in context, and can include minimizing loss.[174] It is further assumed that a jury operates as a single-play game.[175] In other words, it can be assumed for this hypothetical construct that a jury of twelve people will not be composed in precisely the same way at any time in the future and asked to decide another case. While it is certainly true that a person could serve on a jury a number of times during his or her life, it is highly unlikely that the juror would ever again see the same eleven faces in the jury room during deliberations. As a result, hurt feelings simply do not matter as much—to the holdout juror or, for that matter, to the members of the majority.

Once the assumptions are established, the illustration of the "game," as game theorists put it, can occur. Depending on the nature of the decision, a payoff matrix is constructed in the context of either a single decision or a double-dependent decision. One scholar, for example, in analyzing juror decision-making where the focal point was the decision of one member of the jury panel, depicted a double decision: first, the defendant decides whether or not to commit the crime, and then the juror subsequently decides whether or not to convict.[176] In an alternative model of a decision, another scholar has used a single-player matrix to examine the difficult decision of Shakespeare's Hamlet of whether or not to believe the ghost of his father and kill the king.[177] Hamlet first has to decide whether or not to believe his father's ghost, the former king, who claims he was murdered by his uncle, the current king.[178] If he believes the ghost, he must kill the king to fulfill his duty as the former

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173. *See* BEACH, *supra* note 166, at 66.

174. *Id.*

175. *See* Primus, *supra* note 51, at 1423 n.21 (describing juries as "one-shotters" as opposed to administrative bodies which experience repeated interaction and opportunities for decision).

176. Ehud Kalai, *A Rational Game Theory Framework for the Analysis of Legal and Criminal Decision Making*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 235, 235–37 (Reid Hastie ed., 1993). This matrix is unusual because it targets the decision of the person that occurs second in the sequence of decisions. Kalai acknowledges that this is a critical weakness in the analysis. *Id.* at 239. Under traditional game theory analysis, the decision-maker chooses a course of action leading to some uncertain outcome. In this case, the act to be judged has already occurred and the decision will lead to a certain outcome: conviction or acquittal. *Id.*

177. John Orbell, *Hamlet and the Psychology of Rational Choice Under Uncertainty*, 5 RATIONALITY & SOCIETY 127, 130 (1993).

178. *Id.* at 129.

king's son; if he does not believe the ghost, he must not kill the current king.[179] Whether or not the ghost is telling the truth provides the other variable in the decision matrix and leads to the range of consequences for being correct or incorrect in his decision.[180]

To illustrate the payoff matrix and decision faced by the holdout juror, the single-player matrix of Hamlet's example is the better fit.[181] In order to achieve the status of a holdout juror, the juror must be a member of a jury panel that has reached an 11–1 decision, either to convict or to acquit. For this rational-actor analysis, it will be assumed that the jury is split in favor of conviction, although the analysis is the same in either direction. The holdout for acquittal has two choices, one of which must be taken: vote to convict, thereby cooperating with the majority; or vote to acquit, thereby causing a hung jury.[182] Like the ghost in Hamlet, there are then two possible states of affairs: either the majority is correct and the defendant is actually guilty, or the majority is incorrect and the defendant is actually innocent.[183] The problem for the holdout juror is thus illustrated in Figure 1.

FIGURE 1
THE CHOICES OF THE HOLDOUT JUROR
AND THEIR CONSEQUENCES

	MAJORITY CORRECT D ACTUALLY GUILTY	MAJORITY INCORRECT D ACTUALLY INNOCENT
Vote To Convict	CONVICTION GUILTY PUNISHED A	CONVICTION INNOCENT PUNISHED B
Vote To Acquit	HUNG JURY CRIMINAL GOES FREE C	HUNG JURY INNOCENT GOES FREE D

179. *Id.*

180. *Id.* at 129–30.

181. The analysis could proceed, as in the game theory analysis of juror decision-making, with two participants: the defendant and the juror. However, because this Article seeks to isolate the decision-making process of the holdout, as opposed to the entire jury, the defendant is not a player in the holdout's game. Likewise, it matters little what the majority of the jury does; all power over the outcome at the point the jury is divided 11–1 is assumed to be in the hands of the holdout juror.

182. For this analysis, it will be assumed that a case that results in a hung jury will not be later re-tried. The defendant in such cases will go free.

183. This analysis necessarily puts aside for the moment the fine legal distinction between "innocent" and "not guilty."

"We have nothing to gain or lose by our verdict."

—Henry Fonda in 12 Angry Men[184]

After the decision options are clearly defined and the consequences are identified, the next step is to determine the relative preferences of the holdout juror for each of the possible outcomes. The most preferred outcome in this context is that the innocent defendant avoids being wrongly convicted and, as a result, goes free. By contrast, the worst outcome is for the innocent defendant to be wrongly convicted and punished.[185] The other two outcomes, convicting the guilty defendant and letting the guilty defendant go free, fall somewhere in the middle of these two spectrums, but it would be a mistake to simply place them on a footing as equally desirable outcomes.[186] Convicting the guilty defendant comports with a general sense of justice, whereas letting the guilty defendant go is unjust. However, to a certain extent, such an outcome is acceptable in society as a check on the criminal justice system: "Better that ten guilty persons escape, than that one innocent suffer."[187] As a result, the outcome of conviction for a guilty defendant is valued higher than the outcome that frees the guilty defendant.[188] For the sake of this analysis at the moment, the fol-

184. 12 ANGRY MEN, *supra* note 1. As Fonda's character points out, the usual forces of self-interest, it can be assumed, do not exist in the jury context. *See also* Primus, *supra* note 51, at 1442. At any rate, for the purposes of this Part, the theory of an "offensive veto," whereby a self-interested juror threatens a veto in order to improve a bargaining position, if such a circumstance actually exists at all, will be acknowledged, but set aside. *See id.* at 1443.

185. *See* Kalai, *supra* note 176, at 237.

186. *But see id.* at 237 (equating these two outcomes in order to simplify the analysis, claiming that such an analysis eliminates a "vengeance motive" by the juror). It is not clear why assigning different values to the two outcomes necessarily implicates a vengeance motive. It is certainly just as reasonable to assume that a juror will experience no satisfaction in convicting a guilty defendant beyond that associated with correctly and faithfully following the court's instructions.

187. 4 WILLIAM BLACKSTONE, COMMENTARIES 352, *quoted in* Alexander Volokh, n *Guilty Men*, 146 U. Pa. L. Rev. 173, 174 (1997). This principle is also a tenet of Islam. *Id.* at 179 n.41.

188. Of course, this ordering of preferences requires a number of assumptions about how jurors view their duty as judges of the facts and what value society might place on the possible outcomes. These assumptions are not without support in the scholarly literature. *See, e.g.*, Ellsworth, *supra* note 13, at 1406 (arguing that the movie *12 Angry Men* "stands for the idea that convicting the innocent is a far greater miscarriage of justice than acquitting the guilty"); Kalai, *supra* note 176, at 239 (noting the assumption that the mistake of convicting an innocent defendant "is very costly to the juror"); Primus, *supra* note 51, at 1436–38 ("False conviction is a terrible result, and a decision rule for juries should strive to minimize its occurrence, even if doing so raises the incidence of false acquittal.... On a weighted preference model, requiring unanimity for conviction makes sense only if false conviction is much worse than false acquittal.").

lowing relative values will be assigned to each of the four outcomes: Box A = 7, Box B = 1, Box C = 4, Box D = 10.[189]

In assigning probabilities to the two essential considerations by the holdout juror (that the majority is correct or incorrect), a critical question must be answered: Is the holdout juror's decision one that is made under conditions of *uncertainty* or *risk*? A decision made under uncertainty is one in which the decision-maker has little or no information on which to base a determination of the odds that one of the triggering conditions is correct.[190] A decision-maker confronts risk, however, "when he or she can attach probabilities to alternative states of the world with confidence."[191] Of course, for the holdout juror—or any juror, for that matter—the decision to vote guilty or not guilty is not made in a vacuum. If it were, the probabilities would be equal and the juror might as well flip a coin, something which jurors are usually expressly forbidden from doing in reaching a verdict.[192] Instead, the holdout juror has the benefit of hearing the evidence of witnesses and the arguments of counsel, as well as the discussion by the holdout's fellow jurors. While it is rarely the case that a holdout juror has all of the desired information to make a decision, it does not follow that the decision to vote to convict or acquit is made in a state of absolute uncertainty. Therefore, the decision is one made under risk.[193]

Assigning probabilities to the relevant triggering conditions can become a bit complicated. It is possible to construct a mathematical model to assist in determining the relative probabilities as a distribution of evidence of guilt or innocence for a guilty person

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189. As one scholar has noted, this calculus in normative decision theory "requires two guesses: a guess about what the payoffs (i.e. the consequences or results) will be if the option in question is chosen and a guess about how valuable those payoffs will be when they actually accrue to the decision maker." BEACH, *supra* note 166, at 66–67.

190. *See* Orbell, *supra* note 177, at 130.

191. *Id.*

192. *See, e.g.*, IDAHO CRIMINAL JURY INSTRUCTION 207 (2005) ("Your verdict in this case cannot be arrived at by chance, by lot, or by compromise."). After all, tossing a coin "is only a means of coming to *some* decision. It is not a means of avoiding horrible error . . . ." Orbell, *supra* note 177, at 131.

193. Of course, this situation is better than the one Hamlet found himself in after he initially heard the ghost's accusation. At that time, he had very little information, if any, to rely on in making a decision about killing the king. *See* Orbell, *supra* note 177, at 131. Hamlet was able to devise a "play within a play" to gather more information and turn his decision into one of risk, rather than one of uncertainty. *Id.* at 135. Jurors, on the other hand, are expressly prohibited from engaging in such activity. *See, e.g.*, IDAHO CRIMINAL JURY INSTRUCTION 108 (2005) ("[D]uring this trial do not make any investigation of this case or inquiry outside of the courtroom on your own. Do not go to any place mentioned in the testimony without an explicit order from me to do so."); NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTION 1.9 (2005).

and an innocent person respectively.[194] For the purpose of simplifying matters in order to demonstrate a relatively simple point, it is not necessary to become quite so complex, particularly when it is clear that probabilities of guilt or innocence are difficult, at best, to coordinate with some objective view of evidence in a particular case. In order to demonstrate the general trend of the decision payoff calculus, it might be most helpful to survey three different probabilities. First, let it be assumed that, as is presumed by the current felony jury system, "Twelve heads are better than one." In other words, since the holdout is faced with a vote of eleven jurors in favor of conviction, the first assignment of probabilities will be 11/12 (.916) in favor of a correct majority and 1/12 (.083) in favor of an incorrect majority.[195]

Under this assumption, the prescriptive economic model indicates that the holdout juror should vote to convict with the overwhelming majority, albeit the calculation is close. The calculation of payoffs is accomplished by multiplying the probabilities by the values assigned to the various outcomes, and adding the results for each decision. Thus, under this first assumption of probabilities, the calculation appears as follows: Vote to Convict = .916(7) + .083(1) = 6.495; Vote to Acquit = .916(4) + .083(10) = 4.494.

Because the probabilities assigned in the first probability distribution are dependent entirely on the number of votes to convict that exist against the holdout, consider a second probability distribution for a relatively close case on the evidence: 51% to 49% in favor of conviction. In this case, the holdout juror's decision is clear: vote to acquit and break with the majority. The payoffs are not even close.[196] Even assuming that the relative values assigned to the various outcomes are incorrect, and that holdout jurors in particular—or jurors in general—place a much lower value on the conviction of an innocent person (say, negative 10), the gap only grows wider, leading the rational holdout juror to vote not guilty.

This is not only true for close cases, however. Consider the third and final probability distribution of a less close, but not overwhelming, case in favor of the guilt of the defendant: 66% to 34% in favor of conviction. Even in a case where the evidence appears to line up in favor of the conviction of the defendant, given the relative values placed on the various possible outcomes, it is not close for the holdout juror: vote to acquit and frustrate the major-

194. *See* Kalai, *supra* note 176, at 237–38.

195. *See* BEACH, *supra* note 166, at 70–74 (explaining decision matrices and the calculation of expected values based on alternative decision options).

196. Under the second probability distribution, the calculation appears as follows: Vote to Convict = .51(7) + .49(1) = 4.06; Vote to Acquit = .51(4) + .49(10) = 6.94.

ity.[197] In fact, given these relative outcome values, the "tipping point" where the holdout juror is stymied with two options carrying equal expected values is 75% in favor of the accuracy of the majority in conviction and 25% in favor of an incorrect majority.[198] If it is assumed that the value placed on the outcome of convicting an innocent person is "-10" rather than "+10," the tipping point is even more extreme: 87% in favor of the majority correctly convicting the defendant and 13% in favor of the majority reaching the incorrect conclusion.[199] Therefore, it appears that in almost every case, assuming the consequences of the outcomes are valued correctly (or at least close), the holdout juror should vote to acquit and thwart the will of the overwhelming majority.

This does not, however, end the inquiry. The psychology of the holdout juror is indeed more complicated than the normative decision model and payoff matrix would lead one to believe. This leads the inquiry back to behavioral decision theory in order "to study how people *actually* make decisions rather than how they *ought* to make them."[200] The first problem is that when the probabilities are not known with certainty—in this case regarding the correctness of the majority view—the decision-maker must rely in part on guesses about the actual probabilities. This is called the person's "subjective probability" of deciding correctly.[201] Because jurors operate under conditions of incomplete information—always without the evidence they wished they had or questions they wished they could ask—they make decisions within a variation of a model of subjective expected values in the payoff matrix.[202] In most behavioral decision analysis, this results in a gamble of sorts; the decision-maker bets on the most likely choice and waits to see what happens as a result.[203] For jurors, it is more like a reverse gamble: the holdout juror (in this case) makes the final decision to convict or hold out for acquittal, and then hopes that the right decision

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197. Under this final probability distribution, the calculation appears as follows: Vote to Convict = .66(7) + .34(1) = 4.96; Vote to Acquit = .66(4) + .34(10) = 6.04.

198. Letting x equal the probability the majority is correct, the equation is as follows: 7x + 1(1-x) = 4x + 10(1-x).

199. Following the same principle, this equation is as follows: 7x - 10(1-x) = 4x + 10(1-x).

200. BEACH, *supra* note 166, at 79.

201. *Id.*

202. *Id.* at 79–80. *See also* Osher, *supra* note 12, at 1348–49 ("[M]ost courts forbid jurors to ask questions, take notes, or see transcripts of prior testimony."). There is no logical rationale for prohibiting jurors from taking notes or receiving copies of the jury instructions, particularly in a lengthy criminal trial. Limiting such information only skews the probabilities.

203. BEACH, *supra* note 166, at 81.

was made. The unique position of the juror is that it may never be known with certainty whether the decision was correct or not.[204]

Beyond behavioral decision theory is another theory of decision-making called "naturalistic decision theory" that also focuses almost exclusively on the way decision-makers make their decisions.[205] This theory is "very much influenced by the need for practical knowledge about real-world decision making,"[206] and can provide an insight into the psychology of the holdout juror that prescriptive decision theory cannot. This theory is characterized by the observation of "bounded rationality," which is described as follows:

> Because decision makers' cognitive capacity is rather limited, they must reduce information processing demands by simplifying the problems they encounter. To do so, ... they construct "small worlds" that are limited representations of the problem at hand. The representation contains only the most salient information, and the decision maker proceeds to make his or her decision based solely on that "bounded" representation. The decision may in fact be "rational" in that it conforms to the prescriptions of the appropriate prescriptive theory, but the decision maker uses only the information contained in the bounded representation.[207]

This describes rather well the experience of the juror and can be particularly applied to the holdout juror in light of the unanimity decision rule. The system encourages bounded rationality through the court's closing instructions to the jury: "Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions."[208]

The holdout juror is also faced with issues of "framing" and "priming" merely by participation as a member of the jury panel.[209]

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204. This assumes that the defendant continues to profess innocence regardless of the outcome of the case. This unsatisfactory outcome for the holdout juror might implicate the ultimate weakness of the prescriptive decision model in this context: i.e., that the proposed payoffs may not ever be realized at all.

205. BEACH, *supra* note 166, at 9.

206. *Id.*

207. *Id.* at 10.

208. NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTION 7.2 (2005); *See also* 1A FEDERAL JURY PRACTICE AND INSTRUCTION § 12.01 (5th ed. 2005); EIGHTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTION 3.02 (2000).

209. Psychologists generally agree that decision frames are partly controlled by the formulation of the problem, and partly controlled by the norms, habits, and characteristics of the decision-maker. *See* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981). Priming "refers to the incidental activation of

As one scholar has noted, "[s]imply placing citizens on a jury systematically alters the way that they perceive situations and make decisions."[210] Jurors take with them to the panel their preconceived notions and beliefs about how jurors can and should behave. This can lead to the jury system invoking "a legal cultural power that challenges and competes with jurors' other cultural influences,"[211] all of which can affect and alter decision-making. This tension has been called "legal priming" and occurs "when folk theories about the law are triggered in societal members."[212] Social psychologists describe this in general terms as the effect of "an environmental event on subsequent thoughts, feelings, and behavior," noting that once the prime has been "activated," "it exerts a passive effect on the person that frequently cannot be controlled."[213]

Priming presents a particular complication for the psychological analysis of the holdout juror. Not only is there the prime that accompanies the mere placement on the jury panel at the beginning of the trial, but there is the additional prime that becomes activated once an individual juror has been identified by the majority as the lone holdout who is preventing a unanimous verdict. The "holdout juror prime" is naturally influenced (and usually suddenly triggered) by the individual's preconceived notions about the role of the holdout juror in society, and can be shaped by the media, attorneys, anecdotes from friends, and, not to be overlooked, the individual's culture.

In fact, cultural considerations in an increasingly diverse society provide an additional layer of analysis to the holdout juror's unique prime. One concern is that a legal prime that alters an individual's role as a juror "endangers the role of cultural diversity in decision-making" because "jurors invoke shared constructs about the law that are filled with biased information, including stereotypes."[214] Cultural diversity, however, can be valuable to a jury's deliberations in a number of ways, not the least of which is to assist the jury's interpretation of a witness's words or experiences in ways that might be missed by a more homogenous group.[215] One study has even found that "jury ethnicity influenced perceptions of the

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knowledge structures . . . by the current situational context." John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996).

210. Levinson, *supra* note 22, at 1060.

211. *Id.*

212. *Id.* at 1066.

213. *Id.* at 1068.

214. *Id.* at 1071–72.

215. *See* Taylor-Thompson, *supra* note 48, at 1285.

defendant's honesty and guilt."[216] The danger is that the legal prime applicable to the holdout juror "could trigger 'majority' thinking patterns in underrepresented communities, such that minority members conceivably could unconsciously discriminate against members of their own community."[217]

What the normative or prescriptive theories fail to take into account is that humans are inherently and "solidly anchored in a social context" unique to the individual.[218] The individual's social context is made up of a number of social influences, including, among many other things, culture, gender, race, ethics, morals, and life experiences. This presents a much more complex picture of the psychological process of the holdout juror who, through the lens of the perception of how a holdout juror should behave and think when faced with an overwhelming majority on the other side, must decide whether to vote with the majority or continue the deadlock and ultimately cause a mistrial. Against this intricate and multi-faceted approach to the psychology of the holdout juror, the next Part will examine how individuals who find themselves in the unenviable position of standing alone against a roomful of strangers actually behave.

B. The Pressure to Conform

"It's not easy to stand alone against the ridicule of others."

—Juror #9 in 12 Angry Men[219]

A lone holdout juror preventing a unanimous verdict is certainly subject to pressure, both internal and external, to vote with the majority. In the jury deliberation context, "[s]ome degree of social pressure is inevitable and perhaps even desirable."[220] What is less certain is how a particular individual juror will behave under such circumstances. One theory of dissent points to two choices presented the dissenter in the political context: "act moderately or speak radically."[221] In the case of juries, however, as will be seen below, there are other options for the holdout, including withdrawal.

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216. *Id.* at 1293.

217. Levinson, *supra* note 22, at 1073–74.

218. *See* BEACH, *supra* note 166, at 160 (describing the deontological theory of decision-making).

219. 12 ANGRY MEN, *supra* note 1.

220. KASSIN & WRIGHTSMAN, *supra* note 15, at 185.

221. Gerken, *supra* note 2, at 1746.

It would be a mistake to assume that an individual's personality is the dominant factor in determining whether the holdout will give in to the pressure or continue to dissent. Indeed, "the tendency for people to overemphasize the influence of personality on behavior and to underestimate the influence of the situation" has been called by psychologists the "fundamental attribution error."[222] What is clear from the empirical psychological literature is that the jury's first vote on guilt is an excellent predictor of the final verdict, and that a jury divided 11–1 in favor of guilt is "virtually certain to convict."[223] Under what circumstances, therefore, does a holdout juror continue to persist to a true deadlock? And what pressure comes to bear on the holdout in an attempt to influence his or her vote? The following will explore these questions in more detail.

1. The Conformity/Independence Studies of Solomon Asch

In the 1950s the psychologist Solomon Asch conducted studies to investigate "the conditions of independence and lack of independence in the face of group pressure."[224] These studies were constructed to generate a disagreement between a single person (the subject of the experiment) and a group of varying size (whose members were collaborators with Asch and his colleagues) concerning a "simple and clear matter of *fact* in the immediate environment."[225] Even worse for the experiment's subject, however, was that the group that disagreed with the individual was universally *incorrect* in its judgment of the fact in question, which in this case, was the match of "the length of a given line—the standard—with one of three other lines."[226] After each member of the group examined the lines in front of them, each one was asked to publicly vote, in the order they were seated, on which of the three lines was the match for the standard line.[227]

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222. Orbell, *supra* note 177, at 139.

223. Ellsworth, *supra* note 13, at 1396.

224. Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS 1 (1956) [hereinafter Asch, *Studies of Independence and Conformity*]; *see also* SOLOMON E. ASCH, SOCIAL PSYCHOLOGY 465–79 (1952) (discussing initial methodologies and findings of these studies).

225. Asch, *Studies of Independence and Conformity*, *supra* note 224, at 1.

226. *Id.* at 1–3.

227. *Id.* at 3. The subjects of the experiment were white, male, college students between seventeen and twenty-five years of age. *Id.* at 5. In this way, in addition to holding constant the variables of race, gender, and age (to a degree), the study was able to focus on "the effect of a group of *peers* upon a minority of one." *Id.* at 5 (emphasis added).

The subject was manipulated by a prearranged seating arrangement so that he consistently sat one position from the last member of the group. As such, he would have an opportunity to hear the votes of most of the other members of the group before his vote.[228] The study placed the single individual "in the position of a *minority of one* against a *wrong and unanimous* majority. Perhaps for the first time this person found a massed majority contradicting the clear evidence of his senses."[229] The members of the erroneous majority were specifically instructed not to argue with the subject's vote or perception, making them "far from militant or aggressive; rather [they] tended to the side of impersonality."[230] The goal of the study was "to observe the impact of these conditions when the question at issue was that of resisting or bowing to a prevailing group direction."[231]

The results of the study were, at the time, truly astounding. Asch found that most subjects voted with the erroneous majority at least some of the time, defying their own senses.[232] There were individuals on the extremes, either voting consistently with the majority or expressing staunch (and accurate) independence, but most subjects fell somewhere in the middle.[233] In general, however, Asch concluded that some subjects "were able to retain independence for a number of trials but weakened with further exposure to the majority, a change that might be accounted for in terms of mounting pressure."[234] Reaction from the subjects in a post-study interview process ranged from initial self-doubt and denial to acquiescence and suspicion of the majority, with many subjects expressing "an oppressive sense of loneliness which increased in prominence as subjects contrasted their situation with the apparent assurance and solidity of the majority."[235] As the study noted,

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228. *Id.* at 4. The votes occurred after each examination period, resulting in a number of rounds of voting with different sets of lines for each subject. *Id.* at 21.

229. *Id.* at 3.

230. *Id.* at 4. This prevented the insertion into the study of any overt pressure other than, of course, the mere fact that every member of the group was voting a particular way.

231. *Id.* at 2.

232. *Id.* at 21. This should not really be all that surprising since, as a general matter, "[e]ighty years of experimental evidence strongly shows that individuals are influenced by the actions and expectations of others." Bibb Latané, *The Psychology of Social Impact*, 36 AM. PSYCHOL. 343, 344–45 (1981).

233. Asch, *Studies of Independence and Conformity*, *supra* note 224, at 20.

234. *Id.* at 23.

235. *Id.* at 27–32. This loneliness persisted despite the fact that the "pressure" imposed by the majority went completely unexpressed vocally. *Id.* Other studies have confirmed "that the greater an individual's dependence upon another individual or group, the more he will conform to that individual's position or to the group's norms." Bibb Latané & Sharon Wolf, *The Social Impact of Majorities and Minorities*, 88 PSYCHOL. REV. 438, 439 (1981).

"the most compelling reason for yielding was the intolerableness of appearing different from the group when to do so had the meaning of exposing oneself to suspicion of defect and disapproval."[236]

Equally important as the conclusion that individuals succumb to this perceived pressure due to an overwhelming sense of isolation and desire to conform is Asch's further conclusion regarding those subjects that maintained independence: "It is . . . unduly narrowing to emphasize submission, to the neglect of the not inconsiderable powers persons demonstrate on occasion for acting according to conviction and rising above group passion."[237] Asch observed that "independence requires the capacity to accept the fact of opposition without a lowered sense of personal worth."[238] In a later article, Asch further described the independent subjects as falling into one of three categories: 1) "Independence based on confidence in one's perception and experience;" 2) "[S]ubjects who are independent and withdrawn;" and 3) "Subjects who expressed inner doubt, but "felt necessity to deal adequately with the [assigned] task."[239]

This corollary conclusion about independent subjects is most relevant to the analysis of the psychology of the holdout juror.[240] Those subjects in the Asch studies who maintained their independence throughout cannot be labeled as "eccentrics" or "irrational" holdouts; they were merely relying on their senses and perceptions, drawing *correct* conclusions about the facts in question. They persisted in their independence in the face of consistent

236. Asch, *Studies of Independence and Conformity*, *supra* note 224, at 32. Lest the reader conclude that the study is irreparably flawed by the exclusivity of the young, white, male subjects, this study has been recreated with similar findings in at least one other culture. *See* Felix Neto, *Conformity and Independence Revisited*, 23 SOC. BEHAV. & PERSONALITY 217–22 (1995) (examining the Asch findings in light of the ability to replicate the results in different cultures and finding that in a similar study of female psychology students in Portugal, the subjects expressed "considerable distress under group pressure").

237. Asch, *Studies of Independence and Conformity*, *supra* note 224, at 3. *See also* Ronald Friend, Yvonne Rafferty & Dana Bramel, *A Puzzling Misinterpretation of the Asch 'Conformity' Study*, 20 EUR. J. SOC. PSYCHOL. 29 (1990) (arguing that between 1953 and 1984, scholars increasingly accentuated the role of the conformity aspect of the study and underestimated the significance of the findings on independence).

238. Asch, *Studies of Independence and Conformity*, *supra* note 224, at 51. He further noted, however, that there were also subjects who remained independent even though they became convinced that the majority was correct. *Id.* at 70.

239. Solomon E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, *in* READINGS IN SOC. PSYCHOL. 174, 178 (Eleanor E. Maccoby et al. eds., 3d ed. 1958).

240. Indeed, it can only be speculated how many jurors have voted with the majority despite holding doubts, some of which might even have been "reasonable," because they could not stomach the thought of standing alone in the face of the potential derision from the majority.

and repeated unanimous opposition to the conclusions they drew from their perception of the evidence. This was true, even though there were reports that these independent subjects experienced increased isolation and loneliness during the course of the study. The silent pressure placed on the outcast in this context pales in comparison to the pressure experienced by the holdout juror against a unanimous majority of jurors who have been ordered to stay in a room until they reach a unanimous verdict through deliberation.

The psychological literature examining this dynamic reveals that a holdout is isolated, punished, and eventually rejected by the majority altogether.

> [T]he greater the number of people advocating a position, the greater are their resources for rewarding those who conform to that position and punishing those who deviate.... When influence pressure is generated by a unanimous majority, all of the social forces acting on an individual target will pull him in the same direction.[241]

Moreover, "[a]s the proportionate size of the deviate's subgroup decreases, rejection of the deviate increases" to the point that the majority views the deviate as less threatening because of a decreased likelihood that the deviate will "change the group opinions or influence member's beliefs about the correctness of their opinions."[242]

As the holdout juror becomes more and more isolated, his participation in the deliberation process decreases in direct proportion. In the case where "a lone holdout opposed a majority of eleven ... the holdout was strongly isolated from all deliberation processes."[243] Research has shown that although juries tend to vote in secret towards the beginning of deliberation, they begin using more public voting methods when they encounter difficulty reaching agreement and one or more holdouts have been identified.[244] At the point

241. Latané & Wolf, *supra* note 235, at 439, 441. The authors call this "social impact theory." *Id.*

242. Jasmine Tata et al., *Proportionate Group Size and Rejection of the Deviate: A Meta-Analytic Integration*, 11 J. SOC. BEHAV. & PERSONALITY 739, 749 (1996). This "rejection of the deviate" can include the expression of blatant hostility, as group members perceive it to be "safer to attack the deviates as the number of deviates decreases." *Id.* at 741, 743.

243. HASTIE, PENROD & PENNINGTON, *supra* note 18, at 166. In that particular jury, the holdout did not speak at all until two hours into the deliberation process, and when the juror did finally attempt to speak, the majority cut off the discussion, causing the holdout to withdraw from further discussion with the jury. *Id.*

244. KASSIN & WRIGHTSMAN, *supra* note 15, at 203.

where the majority numbers ten, its members "reject, ridicule, and punish individuals who frustrate a common goal by adhering to a deviant position."[245] Even when the holdout juror attempts to express his or her position to the fellow members of the jury, "hostile reactions send him back into his protective shroud of silence."[246] These findings concerning the holdout juror as the deviate in the group, which detail the pressures of isolation, rejection, and punishment that ultimately lead to an effective withdrawal from the active deliberation process, should sound familiar after a review of the case law described in Part II. Yet the common reaction of trial courts in concluding that the holdout juror is not deliberating with his or her fellow jurors is to impose the ultimate sign of rejection: the court's expulsion of the holdout juror from the jury altogether instead of the declaration of a mistrial.

2. More Stress for Holdouts: Order Bias, Stubbornness, and the Power of Two

In another study by Solomon Asch, subjects were asked to read a list of personality traits that characterized a hypothetical person and then speculate on how much they would like that person. "Half of the subjects read that the individual was: intelligent, industrious, impulsive, critical, stubborn, and envious. The other half read the same list, but in the reverse order."[247] Rather than finding that subjects indicated that they felt the same way about the hypothetical person regardless of the order of the characteristics, the study concluded that subjects who read the first list formed more favorable impressions than subjects whose list began with the negative traits.[248] Asch called this the "primacy effect"—that the first bits of information received heavily determine a person's overall impression—while other psychologists have referred to this as an "order bias."[249]

Even though jurors are instructed at the beginning of a trial not to form any opinions about the case until they have heard all of the

245. *Id.* at 175.

246. HASTIE, PENROD & PENNINGTON, *supra* note 18, at 232.

247. KASSIN & WRIGHTSMAN, *supra* note 15, at 133 (citing Solomon E. Asch, *Forming Impressions of Personality*, 41 J. OF ABNORMAL & SOC. PSYCHOL. 258–90 (1946)).

248. *Id.*

249. *Id. See also* BEACH, *supra* note 166, at 137 (citing a study that found that "when charges against a defendant were considered in decreasing order of seriousness juries were more inclined to convict on a serious charge than when the charges were considered in an ascending order").

evidence, social psychologists have found "that once people form an opinion or develop a theory, even if based on the limited early returns, they are unlikely to change their minds when confronted with subsequent contradictory information."[250] There are four reasons this occurs: 1) "[O]nce a person has formed a belief, he or she may unwittingly adopt a biased *search* for information and, in doing so, procure false support for that belief;" 2) "[P]eople make snap judgments ... and then *assimilate* subsequent information into that first impression;" 3) "[O]nce people form an impression, they *discount* or reject facts that challenge their views;" and 4) "[W]hen it comes time to make a decision, they will *misremember* the evidence as having been more supportive than it actually was."[251]

Because so many cases decide in the direction of the initial majority, it can be extremely difficult for a minority faction, let alone a minority of one, to persuade the majority to change its decision.[252] If any member of the jury shifts his vote from the initial position taken during deliberations, that shift, regardless of whether it is for conviction or acquittal, correctly predicts the final verdict ninety-six percent of the time.[253] Therefore, while jurors tend to be stubborn in their initial assessment of the case, once a single member of the jury shifts course, the others tend to follow.

Some empirical evidence has demonstrated that jurors process information by creating a story in the context of a particular case that "enables comprehension and organization of the evidence so that evidence can be meaningfully evaluated."[254] As a result, jurors who come to different conclusions about the verdict have simply developed different stories to fit the evidence.[255] Of course, differences occur because the story created by a particular juror "was

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250. KASSIN & WRIGHTSMAN, *supra* note 15, at 133.

251. *Id.* at 133–35 (noting that some scholars have described these distorted perceptions as "naïve realism"); Ross & Shestowsky, *supra* note 22, at 1090–91.

252. HASTIE, PENROD & PENNINGTON, *supra* note 18, at 27.

253. KASSIN & WRIGHTSMAN, *supra* note 15, at 203; *see also* JONAKAIT, *supra* note 30, at 103 & n.22 (noting that the minority faction rarely prevails in the verdict); Latané & Wolf, *supra* note 235, at 451 (noting that the influence of the shift "actually derives from the pervasive influence of the majority"); Nemeth, *supra* note 46, at 54 (observing that the minority only demonstrates a tendency to prevail when it expresses a desire to acquit).

254. Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 192 (1992); *see also* Taylor-Thompson, *supra* note 48, at 1278 ("[T]he individual juror constructs stories in an effort to interpret evidence and to explain events in a trial.").

255. Pennington & Hastie, *supra* note 254, at 192. It is interesting to note, however, that the movie *12 Angry Men* does not follow this theory. Instead of constructing an alternate story, the holdout systematically disputes each piece of significant evidence until reasonable doubt has been created. 12 ANGRY MEN, *supra* note 1.

heavily dependent on the juror's implicit theory of human behavior—and not everybody had the same implicit theory."[256]

It is certainly possible to have conflicting stories based on the evidence without being labeled "aberrant" or "eccentric." What most critics of the holdout juror fail to realize is that the empirical literature clearly demonstrates that it is extremely rare for a jury split 11–1 early in the deliberations to not reach a unanimous verdict. In almost every case where a lone holdout remains after a period of deliberations, that person had at least some "companionship at the beginning of deliberations."[257] This minority might have been "whittled away" during the course of deliberations, but for one holdout to remain unconvinced after that process is a persuasive indication "that the case itself must be the primary cause of a hung jury."[258]

It is also clear from the empirical evidence that where the lone holdout has at least one *other* member of the jury voting the same way, either before becoming a lone holdout or after having convinced someone to join him, the strength of the faction increases significantly.[259] In fact, studies have shown that "the presence in the field of *one other* individual . . . was sufficient to deplete the power of the majority, and in some cases to destroy it."[260] As one legal scholar simply put it: "A minority of two is many times stronger than a minority of one."[261]

If a lone holdout emerges in the jury room after some period of deliberations and is faced with the wide array of social and internal pressures described here, then *any* influence from the trial court, even if objectively viewed as innocent, can lead him to give up the dissenting position and vote with the majority. The empirical findings described in this Part support the conclusion that the trial court should do everything possible to protect the status of a holdout juror or holdout faction. This is true regardless of whether the minority consists of a split of 11–1 or 10–2. As the analysis of the case law above illustrates, the problem of external judicial pressure on the holdout is not automatically eliminated by the existence of a partner in deliberations. If the holdout faction consists of two jurors, and the trial court, regardless of whether there is any investigation,

256. BEACH, *supra* note 166, at 149.

257. KALVEN & ZEISEL, *supra* note 16, at 463.

258. *Id.*; *see also* JONAKAIT, *supra* note 30, at 102.

259. *See* KALVEN & ZEISEL, *supra* note 16, at 463.

260. Asch, *Studies of Independence and Conformity*, *supra* note 224, at 180.

261. Ellsworth, *supra* note 13, at 1397. *See also* Rita M. James, *Status and Competence of Jurors*, 64 AM. J. SOC. 563, 568 (1959) (discussing the power of the larger minority of jurors).

removes *one* of the minority's members for perceived misconduct, abusive language, or "refusing to deliberate" with the majority, the remaining holdout is placed in an impossible situation, making it unreasonable to persist in a posture of dissent.

The distinction in the holdout's vote appears in the difference between two types of social influence. "Through *information* social influence, people conform because they want to be correct in their judgments and expect that when others agree with each other, they must be right.... Through *normative* social influence, however, people conform because they fear the negative consequences of appearing deviant."[262] While some of what enters into a holdout's thought process may include concerns about appearing to be unreasonably stubborn in an untenable position, "[n]ormative influence exceeds an acceptable level whenever it leads people to vote against their true beliefs."[263] Nowhere is the trial court's undue influence in this regard more evident than in the delivery of an *Allen* charge, also known as a "dynamite charge," that is delivered after deliberations have begun when there is an indication that a deadlock exists in the jury.[264] An equally daunting experience for the holdout juror can be a trial court's inquiry process into the conduct and deliberations of the jury. This occurs through individual interviews, and culminates in the holdout being placed on the spot after a member of the majority lodges some complaint against his behavior that is certain to draw the court's attention.[265] Such inherently coercive interference by the trial court at best makes it difficult for the holdout juror to continue in a position of dissent. At worst, it arguably undermines the right to a fair trial guaranteed by the Sixth Amendment.[266]

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262. KASSIN & WRIGHTSMAN, *supra* note 15, at 175.

263. *Id.* at 185.

264. *See* Allen v. United States, 164 U.S. 492 (1896). Psychologists have expressed concern that such a charge encourages jurors to compromise their viewpoints and gives the impression that the trial judge agrees with the majority of the jury, causing the holdout juror to capitulate. KALVEN & ZEISEL, *supra* note 16, at 454. Because of these concerns, a trial court should never deliver an *Allen* charge to a deadlocked jury where it has discovered that the jury is divided eleven-to-one. A private *Allen* charge, in particular, that is delivered to the holdout juror by the trial court is greatly offensive to the integrity of the jury's deliberations and the holdout juror's opinion of the evidence. *See, e.g.*, United States v. Zabriskie, 415 F.3d 1139 (10th Cir. 2005) (reversing conviction where trial court delivered private *Allen* charge to holdout juror).

265. *See supra* Part II.

266. In 1977, one of the most in-depth analyses of a particular jury and its deliberations was published following the conviction of Juan Corona for twenty-five counts of murder in California. Based on thorough interviews of all twelve jurors, the work recreates the eight days of deliberations that occurred in January 1973, and reflects a jury dynamic consistent with the psychological literature discussed in this Article, including heated deliberations,

IV. SAFEGUARDING THE INTEGRITY OF JURY DELIBERATIONS

"No jury can declare a man guilty without being sure."

—Henry Fonda in 12 Angry Men[267]

The jury deliberation process will never—and should never—be a place free from heated discussion, spirited debate, and the use of myriad techniques to persuade. Decisions like these, after all, are not made in a vacuum. Nevertheless, improvements to the process can occur in order to ensure that the integrity of deliberations is better protected to prevent outside parties from directly or indirectly becoming additional participants in the jury's deliberations. This Part outlines some of ways that the jury trial system can be fine-tuned to respect the position of the holdout juror and, as a result, improve the conditions for deliberations for the entire jury.

A. *Insightful Courts: Steps in the Right Direction*

Not all courts are unmindful of the difficult questions presented by the appearance of a holdout juror accompanied by allegations of misconduct during deliberations. Sensitive to the psychological issues involved and the inherent coercion present in any form of judicial intervention, some courts have even attempted to craft standards of review to better balance the competing interests of the holdout juror and the prevention of juror misconduct.

In *State v. Elmore*,[268] the Washington Supreme Court affirmed the reversal of a defendant's murder conviction by the Washington Court of Appeals, holding that the trial court improperly removed the lone holdout juror after an investigation into allegations that the juror was refusing to deliberate further with the majority. The court crafted a new standard for juror removal, holding that "a deliberating juror must not be dismissed where there is *any reasonable possibility* that the impetus for dismissal is the juror's views of the sufficiency of the evidence."[269] In reaching this conclusion, the justices were sensitive to the tension, noting that the "[d]ismissal of a holdout juror . . . risks violating the Sixth Amendment to an impartial

memory distortion, and the extensive efforts to convince a final holdout to vote with the majority. *See* VICTOR VILLASEÑOR, JURY: THE PEOPLE VS. JUAN CORONA (1977).

267. 12 ANGRY MEN, *supra* note 1.

268. State v. Elmore, 123 P.3d 72 (Wash. 2005).

269. *Id.* at 73 (emphasis added).

jury."[270] When initially faced with an allegation of misconduct of the holdout juror, therefore, "the trial court should first attempt to resolve the problem by reinstructing the jury."[271] If that fails to resolve the problem, however, the court should conduct a limited inquiry that reflects "an attempt to gain a balanced picture of the situation; it may be necessary to question the complaining juror or jurors, the accused juror, *and* all or some of the other members of the jury."[272] The court concluded that "the heightened standard requires the trial court to err on the side of allowing the juror to continue to deliberate if there is any reasonable possibility that the juror's views are based on the sufficiency of the evidence."[273]

Faced with a similar situation, the Second Circuit Court of Appeals developed its own standard in *United States v. Thomas*,[274] holding that "a juror [can] be dismissed for a refusal to apply the law as instructed only where the record is *clear beyond doubt* that the juror is not, in fact, simply unpersuaded by the prosecution's case."[275] The court recognized that "[o]nce a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important—safeguarding the secrecy of jury deliberations."[276] Noting that "the very act of judicial investigation can at times be expected to foment discord among jurors,"[277] the court observed that a trial judge "faced with anything but *unambiguous evidence* that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged [misconduct]; in such circumstances, the juror is not subject to dismissal on the basis of his alleged refusal to follow the court's instructions."[278] Therefore, the court explained that when the requirement that the jury not disregard the law conflicts with the inherent secrecy of jury deliberations, courts are "compelled" to protect "the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity."[279]

While both of these standards were developed with the interests of the holdout juror and the protection of the secrecy of delibera-

270. *Id.* at 79.
271. *Id.* at 80.
272. *Id.*
273. *Id.* at 83.
274. United States v. Thomas, 116 F.3d 606 (2d Cir. 1997).
275. *Id.* at 608 (emphasis added).
276. *Id.* at 618.
277. *Id.* at 620.
278. *Id.* at 622 (emphasis added).
279. *Id.* at 623. The court defended this balance because "[t]o open the door to the deliberation room any more widely . . . would, in our view, destroy the jury system itself." *Id.*

tions in mind, they both suffer from the same defect: there is no clear limit on the extent of a court's investigation into allegations of misconduct. In order to meet the "any possibility" standard of the Washington Supreme Court, a trial court could continue the inquiry into allegations of a refusal to deliberate or other misconduct until such evidence was found. Surely at least one of the majority jurors, and obviously the holdout juror, would express a view that the holdout had questions about the sufficiency of the evidence. The standard, although based in sound and insightful principles of psychology, is really no standard at all; it depends entirely on the trial court's interest in seeking out some indication that the juror at issue has at least some disagreement with the majority's view of the evidence.

The *Thomas* court's "clear beyond doubt" standard is no better. Although the court recognizes that some level of jury misconduct is an acceptable tradeoff for the protection of the secrecy of deliberations, the standard itself leaves the trial court with the incentive to conduct an extensive inquiry into the conduct of jurors during deliberations in order to be convinced "beyond doubt" that the juror is not properly considering the evidence in the case. The court's reasoning would have led the reader to believe that the standard being developed was one opposed to any form of judicial inquiry after deliberations had begun. Instead, it turned out to sanction, perhaps unintentionally, an extensive inquiry process by the trial court faced with an allegation of juror misconduct.[280]

B. The Value of Secrecy of Deliberations

The inherent problem underlying the entire process is that it is impossible for a trial judge to meet any of these standards crafted by the appellate courts without delving too deeply into the jury's deliberations. Ultimately, this leads to the judge making credibility determinations among various juror-witnesses. This tension is enhanced by the presence of a holdout juror standing alone against the majority. In a competition between jury secrecy, the existence of a holdout, and the potential for the technical existence of some

280. *See generally* Hannaford-Agor & Hans, *supra* note 73, at 1259 (discussing the *Thomas* decision and noting that "it is often difficult to differentiate between a juror who intentionally disregards the law and a juror who genuinely has doubts about the evidentiary value of trial testimony"); Frank A. Bacelli, Note, *United States v. Thomas: When the Preservation of Juror Secrecy During Deliberations Outweighs the Ability to Dismiss a Juror for Nullification*, 48 CATH. U. L. REV. 125 (1998) (discussing the *Thomas* decision).

form of juror misconduct, the holdout's interests and the secrecy of the deliberations must win every time. As the *Thomas* court pointed out: "The jury as we know it is supposed to reach its decisions in the mystery and security of secrecy; objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself."[281]

The proper conclusion that follows from this reasoning is not that a protective standard must be developed that allows the trial court to conduct a limited inquiry into deliberations in order to determine the existence or absence of misconduct by the dissenting juror. Rather, in this situation, the dangers inherent in any intrusion into the deliberation process *at all* after deliberations have begun are sufficiently great to justify the prevention of all forms of judicial inquiry other than to inquire as to the presence of a deadlock.[282] Consider the various possible courses of action a trial judge can take when confronted with a note from one or more jurors stating that a single juror is refusing to deliberate, ignoring the law, not listening to fellow jurors, or engaging in some other similar form of misconduct. The court could question each and

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281. *Thomas*, 116 F.3d at 619. *See also* Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886 (1983) (discussing the dangers of post-trial interviews of jurors regarding the substance of deliberations).

282. In order to guard against improper judicial influence of individual jurors and to maintain the appropriate distance between the trial court and jury once deliberations have begun, courts should answer all juror questions in writing. An added benefit of this practice is to preserve the record for a potential appeal and avoid the risk that a court answering a juror's question or comment might engage in an ad-libbed dialogue with the jury. It is not uncommon for the court to receive an inquiry from one or more members of the jury indicating a potential deadlock or impasse, and requesting further instruction. When faced with such a request, the trial court should only ask two questions of the jury: 1) "Are you deadlocked?," and 2) "Would further deliberation be useful?" There is no need to ask these questions in open court when a simple written supplemental instruction will do. The author is grateful to Hon. Joel D. Horton, District Court Judge, Idaho Fourth Judicial District, for providing this fine example:

> As I previously instructed you, you are to consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. However, none of you should surrender your honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant because the majority of the jury feels otherwise or for the purpose of returning a unanimous verdict.
>
> If you conclude that you are hopelessly deadlocked and that further deliberations will not be fruitful, the presiding juror should indicate on the face of the verdict form for each count as to which there is deadlock the fact that the jury is deadlocked, without revealing the numerical division of the jury panel, and should sign that verdict form.

A written response by the trial court in this situation will maintain and preserve the secrecy of the jury's deliberations and will not unduly influence the substance or conduct of the deliberation process.

every juror about the potential misconduct, but this would require an extensive discussion of the course of deliberations and would serve to isolate the target juror, requiring the juror to explain and defend her conduct to the court. As one scholar has noted: "[A] juror who makes such a stand is forced to return to the jury room to continue deliberation face-to-face with that same (now hostile) majority. This is not exactly a tempting alternative."[283]

The equally poor alternative is for the trial court to question only the disgruntled and the target juror(s). This option does not better prevent the isolation, nor the implied intimidation and coercion, which is inherent in such a judicial inquiry. Instead, it requires the court to make credibility determinations when faced with conflicting evidence. Any inquiry of this sort, whether it involves only the jurors at issue or the entire group, and whether it consists of an interview of the panel as a whole or a series of interviews of individual jurors while the rest of the panel waits in the jury room, irreparably harms the course of the jury's deliberations.

Suppose, for example, that after an inquiry by the court, it decides to remove the holdout juror. As the cases above illustrate, the result is a speedy verdict, involving little additional deliberation. If, however, the court decides to retain the holdout juror after an inquiry into the juror's alleged misconduct, the target juror returns to the deliberation room completely isolated and ostracized from the group. At this point, the holdout juror would experience an enormous—and likely irresistible—pressure to conform to the majority's view. The Supreme Court's reasoning in its holding that a trial court's inquiry into the numerical division of the jury is reversible error is applicable to this type of judicial inquiry as well:

> We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal. . . . Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a

283. Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133, 152 (1996).

practice, which is never useful and is generally harmful, is not to be sanctioned.[284]

If such reasoning applies to a judicial inquiry into the numerical division of the jury, then surely it applies even more significantly to a judicial inquiry into the alleged misbehavior of a single juror, particularly a holdout, against the majority after deliberations have begun. Jury secrecy in deliberations and the protection of the holdout juror against coercion are so sacrosanct that any judicial inquiry into the type of misconduct described in this Article is likewise not to be sanctioned.

The implications of such a bright-line rule respecting the secrecy of deliberations quickly become evident. A certain amount of juror misconduct will be tolerated in order to protect the integrity of deliberations in this context.[285] It does not mean, however, that jurors can never be removed for the type of misconduct described in this Article after deliberations have begun. If, for example, the court received a note from the holdout juror clearly stating an intention not to follow the law or the court's instructions, the court can, and should, immediately remove that juror without any inquiry at all.[286] When the trial court is able to determine that a juror is refusing to deliberate or follow the court's instructions based solely on the material provided it by that juror's note or letter, then the removal of the offending juror does not interfere with the in-

284. Brasfield v. United States, 272 U.S. 448, 450 (1926).

285. What constitutes juror misconduct in many cases can become a difficult question after deliberations have begun. As a general rule, in order to protect the holdout juror, a trial court should never remove a juror from the panel after deliberations have begun based on an allegation from one or more members of the majority that he has simply refused to deliberate further. Such behavior should never be viewed as juror misconduct requiring the offender's removal from the jury.

On the issue of misconduct, it is ironic that the movie *12 Angry Men*, a film that has been quoted throughout this Article and described by scholars as depicting an ideal jury and "our ideal juror" in Henry Fonda, also contains one of the most blatant examples of juror misconduct. *See* Ellsworth, *supra* note 13, at 1399 n.44. Relatively early in the deliberation process in the movie, the jurors discuss the testimony of the shopkeeper who sold the young defendant a knife with an intricate, unique handle the same day that a knife with the same handle was found stuck in the body of the deceased victim. 12 ANGRY MEN, *supra* note 1. Henry Fonda, in a moment of high drama, pulls out a knife with the same handle and thrusts it into the wooden deliberation table, proudly proclaiming that he bought it during a break in the trial in a shop around the corner from the defendant's house. *Id.* Although an excellent example of juror misconduct that would have required his removal had the court discovered it, few viewers would have approved of such a result.

286. *See, e.g.*, United States v. Geffrard, 87 F.3d 448 (11th Cir. 1996). As soon as the trial court received the lengthy letter from the juror who identified herself as a follower of the teaching of Emanuel Swedenborg and what that entailed, it became instantly clear that the juror was unable to fulfill her duties as a juror and should have been immediately removed. *See id.* (including a copy of the entire letter).

tegrity of deliberations or implicate issues of coercion or intimidation.[287]

CONCLUSION

"There are a lot of questions I would've liked to ask."

—Henry Fonda, 12 Angry Men[288]

Bridging the gap between empirical psychological research (and other social sciences) and the law is worth further pursuit. There is much that can be learned by applying well-researched principles of psychology to the development and implementation of legal systems, particularly in the context of jury trials. Jurors are complex, and especially in the case of holdout jurors in a criminal justice system in which the near-universal decision rule is that a verdict be unanimous, the lessons of psychology can help shape and explain the law so that the interests of holdout jurors are protected. In the long run, this protects a defendant's right to a fair trial.

In this endeavor, it is important to recognize that all jurors have different life experiences, perspectives, and even biases—few are blessed (or cursed) with a sterile 'impartiality'—and that the counterbalancing and juxtaposition of these different points of view results in a jury that is far more thorough, more accurate, and more fair than a jury of twelve impartial clones could ever hope to be.[289]

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287. Although this Article does not attempt to resolve or extensively discuss the normative debate concerning juror nullification, it is entirely possible that a prohibition against judicial investigation in this context will mean that a holdout juror could, if so inclined, create a deadlock based on a nullification motive. As one scholar has pointed out, "[w]hen we speak of nullification today, we mean holdout jurors: one or two jurors, convinced either that the criminal sanction with which the defendant is threatened is unjust or that the defendant himself does not deserve to be punished, foil the ten or eleven who would render a guilty verdict." Menard, *supra* note 51, at 188. While there exists a potential that an individual juror could essentially nullify the deliberation process by dissenting, the likelihood of this occurring is mitigated by the limitation previously discussed that such judicial inquiry into this type of alleged misconduct should be prohibited only after some period of deliberation has already occurred. If there is a nullifier lurking among the jury panel, that person is likely to be quickly identified at the very beginning of deliberations and, if brought to the attention of the court, can be swiftly removed before the deliberation process has reached the substantial merits of the evidence. This lessens the concerns over improper intrusion by the court into the deliberation process.

288. 12 ANGRY MEN, *supra* note 1.

289. Ellsworth, *supra* note 13, at 1407.

Indeed, more research is needed from a deontological approach to analyze the influence that forces such as "moral obligation and commitment" have on human behavior in the jury deliberation process.[290] As one scholar put it, "[i]t is high time that theory and research acknowledge the powerful impact of decision makers' beliefs, values, morals, ethics, obligations, and duties."[291] Although speaking more to the psychologist than the lawyer, this statement rings even more true in the context of an ever-growing heterogeneous jury pool from which decision-makers in criminal trials are drawn.

More research is also needed to examine the "story model" of jury decision-making, the effect of *Allen* charges on the actual decisions of the jury (including its dissenters),[292] and the emerging field of "cultural psychology" to help explain how juries make decisions relative to life experience and how culture impacts thought.[293] Finally, a variation on Asch's ground-breaking research should explore the reverse problem with respect to the holdout juror; that is, the insertion into an unwitting group of a lone dissenter who makes observations that are clearly contrary to the senses of the unified majority. Without allowing verbal discussion, a strict examination of the nonverbal reactions of the majority would be instructive to gain a more complete understanding of the pressure to conform faced by a lone holdout juror.

The holdout juror standing alone against an overwhelming majority is an object of both praise and derision in American society. Few juries take the course of *12 Angry Men*, but more than a few contain lone dissenters who refuse, for whatever reasons, to vote with the majority. Before dismissing such individuals as eccentric or irrational, the legal community should look to other disciplines, including cognitive psychology, to understand better the circumstances under which there exists a holdout juror at all. In a system of unanimity requirements and increasing evidence complexity, a lone dissenter who has an honest disagreement with the rest of the jury regarding the existence or absence of reasonable doubt deserves as much respect and deference as any member of the overwhelming majority. The preservation of a fair trial and notions of justice require no less.

290. *See* BEACH, *supra* note 166, at 159–61 (explaining the deontological paradigm).

291. *Id.* at 194.

292. *See* KASSIN & WRIGHTSMAN, *supra* note 15, at 194 (noting that there is no empirical evidence examining why *Allen* charges are so successful at producing verdicts).

293. *See* Levinson, *supra* note 22, at 1064.