

## **Juries: Opportunity or Peril**

### **What Happens Next - 02.25.23**

Larry Bernstein:

Welcome to What Happens Next. My name is Larry Bernstein. What Happens Next is a podcast which covers economics, finance, politics, and sports.

The today's topic is Juries: Opportunity or Peril

Our first guest will be Sonali Chakravarti who is a Professor of Political Theory at Wesleyan University who focuses on the importance of juries to democracy. She is the author of the book *Radical Enfranchisement in the Jury Room and Public Life* and Sonali will discuss how to expand jury nullification.

Our second guest will be Retired Federal District Court Judge Gary Feinerman who left the bench two months ago to be a litigation partner at Latham and Watkins. Gary presided over 48 jury trials, and I want to learn from Gary about what he learned watching juries from his vantage point as a judge.

Our third guest is David Stelling a law partner at Lief Cabraser Heimann & Bernstein. David is one of the top class action lawyers in the country and represented the class in the famous VW Diesel Case, David will discuss the challenges working with a jury in complex civil litigation.

Our final speaker will be the What Happens Next film critic Darren Schwartz who will review the classic 1957 film *12 Angry Men* and its continuing relevance to understanding the innerworkings of jury deliberation.

There is much to cover so buckle up.

I make this podcast to learn, and I offer it free of charge. If you enjoy today's podcast, please subscribe from our website for weekly emails so that you can continue to enjoy this content.

Let's begin with Sonali.

Sonali Chakravarti:

Hi, my name is Sonali Chakravarti. I'm professor of Political Theory at Wesleyan University. My focus is on the relationship between law and politics, and my research is on juries in the American criminal system. When we think of the term enfranchisement, oftentimes we think of voting. But I'm actually interested in being a juror. Being a juror is the most demanding civic obligation that we have. It requires us to talk with our neighbors to persuade, to engage, to listen to make a decision of incredible importance to someone else's life.

When Alexis de Tocqueville came to the United States in the 19th century, he observed juries, and he found them to be one of the most inspiring and ennobling parts of democratic life. He

thought that that the courtrooms were a type of schoolhouse for democracy, where ordinary people could be the authors of the law as is called for in a democratic society.

Juries are the only place in legal and political life where ordinary people have final decision-making power in their hands.

The messiness and mistakes of the jury system are the mistakes and shortcomings of democracy itself. Juries point us to what we need to work on in democratic life.

One of the key provisions in the sixth amendment of the Constitution, which ensures the right to a jury trial is that the jury be impartial. And when you ask people what impartiality means, they're often quick to say it's fairness or treating both sides in an argument equally. But this definition is not always the best way to think about legal impartiality. It doesn't make sense for jurors to treat both sides equally because the state is supposed to prove their case beyond a reasonable doubt. The state has a burden that the defense does not have.

One of the biggest problems we face with the jury system is racial discrimination and the fact that jurors of color are not well represented. When black jurors speak very candidly about either their negative experiences with law enforcement or their concerns about systemic racism or patterns of police violence against black people this could be used as a basis for their dismissal. And these strikes don't need to be based on any particular reason. Both sides have a certain number that they can use and we've seen is that black jurors are removed at a higher rate than other jurors.

One case that I've studied is the trial of Derek Chauvin for the killing of George Floyd. The judge in that case knew that people had strong feelings about the video they had seen even before being called to a jury service. But what I respected and appreciated was that the judge allowed people to be candid about how what they knew about the case how they felt about it about how it connected to other cases of police violence in the past. But he also made sure that Derek Chauvin was going to get a fair trial and that Chauvin had all the protections that he was entitled to. If a juror could not see Chauvin being acquitted, they should not be on this case.

There are two things that contribute to the power and independence of jury decisions. One is that the decision a jury makes cannot be overridden by a judge or other office of the court. And the second is the secrecy that juries are entitled to during their deliberation process. There's no transcript of what happened. There's no officer of the court that is recording it. It is very frustrating for scholars of juries because we never get access to what happens inside a deliberation room. Of course, some jurors write memoirs or talk to the press.

One of the things that emerges from these core ideas of the independence of the jury is the power of jury nullification. Nullification refers to the power to render a not guilty verdict apart from the evidence. And this can happen for a variety of reasons. The jury can think that that a law itself is unjust. The jury could also think that the application of the law doesn't make sense in this case. So, despite there being ample evidence that might lead to conviction, the jury does not want to reward the prosecution for the way it conducted itself in this case.

The last reason for nullification is that the jury wants to show some type of mercy or compassion to the defendant. It is subtle in the sense that while a jury can render a not guilty verdict based on something other than the evidence, jurors can never render a guilty verdict based on something other than the evidence.

In my work, I argue that we should have more discussion and more education around nullification. It is both an opportunity for the jury to express something important about a law but it can also be misused. One example of its misuse was that there were juries in the Jim Crow South that nullified people who were put on trial for lynching that there was ample evidence. The jury decided in these cases to render a not guilty verdict. On the other hand, I've written about how in 1850, the Fugitive Slave Act asked for harsher punishments of those who helped slaves escape. Juries in the North repeatedly refused to punish people for that.

Larry Bernstein:

Let's start with Tocqueville.

He traveled to the US with his brother to observe our prison system. And on this historic visit, he was introduced to the American jury system that he found to be beneficial. France does not have juries. And the role of the judge is different. In France judges have a duty to ascertain the facts and they cross-examine witnesses, but in the US, judges are limited to interpreting the law and deciding the verdict and sentencing.

Tell us about the differences between the Anglo-Saxon and Continental Europe legal systems about the use of juries.

Sonali Chakravarti:

One thing that striking about Tocqueville's observation about juries is that it's coming from a person who is afraid of mob rule. He had seen how the French Revolution treated royalty. He was also just skeptical and nervous about giving people too much power.

You didn't have a cognitive requirement, and you were choosing people randomly and you were giving them final decision-making power on a very important topic. I think that's what really stood out that there was a way to harness democratic power in a way that made sense.

Tocqueville called judges the closest thing we have in America to an aristocracy. But I have argued in my work that jurors should realize they are different from judges in a good way. They are not tied to the minutiae of the law as judges are, they do not see defendants every day, the things that strike them as new or shocking or unusual should be given greater concern.

I go back to the founders who really cared about juries. Because we are moving from a monarchy to a democracy, we're still afraid of the tyranny of the state. We need a government that has a significant amount of power, but they can misuse that power.

One of the worst ways you can misuse power is by taking away liberties from someone who doesn't deserve to have their liberties taken away. We would rather have a system that has strong checks on the abuse of power.

Larry Bernstein:

There is that concept that better 10 guilty persons go free than one innocent suffer.

Sonali Chakravarti:

It's called Blackstone's Ratio.

Larry Bernstein:

What do you think about that ratio for risk of jury error?

Sonali Chakravarti:

This is an issue on which reasonable people disagree. It's a strength of our democracy that we are comfortable with the tradeoff.

We do not feel like we must let too many people go such that our quality of life is affected. I'm thinking of cases of sexual assault since the Me-Too movement where the ratio was letting too many people go. In general, it speaks to how much we want to protect liberty in democratic life. And we live with the cost of that. The closer you are to crime as a victim the harder it is to accept that ratio.

Larry Bernstein:

Sometimes juries do what you want them to do and sometimes they do not. If you expand jury nullification, you are going to get haphazard implementation. Some jury decisions you will agree with like letting violators of the Fugitive Slave Act go free, while you will disagree with not imprisoning the lynchers.

Some would argue that jury nullification is problematic because it undermines the democratic process of making laws that apply to everyone. And that if you have nullification, then it will be decided locally by 12 individuals that can run counter to the wishes of the democratic majority. If you want to change the law, why not make the legislature do it.

Sonali Chakravarti:

With driven nullification, we're letting 12 people decide on a specific case. If there is a nullification, a jury refuses to enforce the anti-lynching act, it doesn't change the act itself, right? Another case can be brought. It's a one-off decision. I've argued that we should pay more attention to jury decisions as a way of getting information about where people are at in regard to different laws.

Some scholars have argued that the relaxation of marijuana possession laws in many states was partially the result of juries nullifying those cases. There should be a dialogue between what juries are doing and what legislatures are doing. But to your point, do we want to empower individual people to act on their conscience when it's in opposition to the law that was decided democratically?

I think it should be taught alongside civil disobedience, which is a principled stand against a policy.

Larry Bernstein:

Norman Rockwell has series of paintings entitled the four freedoms. One painting is entitled the freedom of speech. Rockwell's illustration shows a man speaking at a local town hall, and I think the idea is that everyone has a right to speak and more importantly can make a contribution to the democratic conversation.

I think your argument is that the jury is another form of that conversation albeit behind closed doors.

Sonali Chakravarti:

It is funny you mentioned Norman Rockwell, because behind me, I have a print of a Norman Rockwell painting, and it's called the Jury Room. What we see is a group of jurors around a table trying to convince, gesticulating with their hands. You can see some intensity in the faces of the other jurors. And the one juror who seems to be the holdout is the only woman on the jury, and she seems to be quite committed to holding her own position.

Larry Bernstein:

Litigation is complicated. Civil matters require an understanding of how the world works, and criminal proceedings have gotten more complex with innovations in forensics. What makes a good juror?

Sonali Chakravarti:

So, one thing that comes to mind is that being a good juror should be the goal of K-12 education. Creating citizens in democracy is one of the reasons why we have public education in the United States. It's to have the science skills, economic skills, reading skills, psychology skills to be a good juror. I feel like that is what high school is for.

Larry Bernstein:

I enjoyed watching the TV show Law and Order. The show without commercials lasts 45 minutes, and it is split between the police investigation and the prosecution and trial. In real life, the trials are not action packed and the trial last for more than 22 minutes. It's boring. The questions sometimes seem pointless. Jurors fall asleep. I am not attacking the jurors. It is likely that the lawyers are doing a poor job, and that the underlying trial method is flawed and too time consuming. What do you make of the tedious nature of civil and criminal procedures for the jurors?

Sonali Chakravarti:

I'm optimistic that the legal system takes this problem seriously. Shorter trials is one way to do it. Your point about attention is also really key, we know that our attentional faculties are being affected by how we gather information, having things at our fingertips through the internet,

through social media. When you're a juror and you're told not to be on your phone, it also makes it harder to pay attention in those contexts.

I think we have less patience and even less like attentional ability. Studies have found that people who serve on juries end up feeling more positive about the legal system than when they came in. They're more likely to follow the news, they're more likely to vote in the next election. So, we see spillover civic effects from serving on a jury.

Larry Bernstein:

One of the most famous books in legal sociology was written in the 1960s and entitled *American Juries* by Kalven and Zeisel. The authors sent questionnaires to judges to see if they agreed with the jury's verdicts. What I thought was interesting is that the judges thought that the juries were more lenient than they were.

Sonali Chakravarti:

If I recall correctly in about 80% of the cases the jury's verdict was the same as what the judge would have decided. I think it shows that like juries on the whole get it right. They can understand complex evidence like you brought up.

To the point about more leniency that is what we would hope to see. The reason we have a jury is in part to have people who can more easily relate to the defendant's position than they can to anybody else in the courtroom.

We often see that with celebrities, they think that maybe their celebrity will help them with a jury in a way that a judge won't be as starstruck with a celebrity defendant.

Larry Bernstein:

When the jury gets a verdict wrong, there is a cost. A criminal could be let go or an innocent person can be imprisoned. There is also a problem when society believes that the criminal justice system does not work. I am looking at you OJ.

Sonali Chakravarti:

The cost of a wrong verdict is very high. The importance of the jury as the cornerstone of the legal system as the basis for integrity of the legal system reaches far beyond the number of cases that actually go to jury trial. The importance of the jury is one that crosses political divides, Republican judges as well as Democratic appointed judges all want to uphold the jury system.

If we keep seeing bad decisions, or if we keep feeling that the process is failing, that leads to a crisis of legal legitimacy. When these high-profile verdicts seem to be out of sync with justice, that is a big problem.

Larry Bernstein:

What do you think is the optimal size of a jury?

Sonali Chakravarti:

I think 12 is a good number. There are states that have six on their state juries. You might have less of a chance of polluter, but I think you have less of a chance of a dissenting opinion as well.

What we know about hung juries is oftentimes, as opposed to this Norman Rockwell painting, where one person looks like they're going to be the holdout. We know that when juries really are hung, it's usually more than one person. For the quality of debate to be high, I think 12 is a good number.

Larry Bernstein:

What are you optimistic about our legal system?

Sonali Chakravarti:

I am optimistic that Americans can hold two seemingly contradictory truths about the legal system. The legal system is a bit corrupted but that the adversarial trial is a good way to adjudicate difficult issues in democratic life. And we need to find humane ways of making decisions when people break the law. I believe that Americans can be honest about the past and hopeful about legal judgments in the future.

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Gary Feinerman:

Thank you Larry. It's a pleasure to join you again on your podcast, and I'm very happy to talk about one of my favorite subjects which is juries. Just a brief outline of juries in the United States. The Sixth Amendment to the Constitution gives criminal felony defendants the right to a trial by jury. And the Supreme Court has incorporated the Sixth Amendment through the 14th. And what that means in layperson's terms is that the Sixth Amendment applies not only in federal court but in state courts as well. So, in any felony trial in the United States state or federal that case will be tried to a jury unless that right is waived, in which case it's a bench trial, meaning that the judge decides whether the defendant is guilty or not guilty rather than a jury.

Nearly every state provides a jury trial in civil cases. So United States courts make far more use of juries than virtually any other country in the world.

And that reflects a desire by the framers to repose power as much as possible in the hands of citizens rather than in the hands of government officials. The jury trial right is of bulwark against government oppression. My law partner, Sean Berkowitz discussed an example of that a few months ago on your show Larry in connection with the Michael Sussman trial that took place in Federal court in DC last summer.

So how does a jury get selected? Because litigants are entitled to a fair and impartial jury, and the process is called voir dire. So, what happens is the court's jury department sends out jury summons to citizens because only citizens can serve on a jury.

The list can be drawn from voter rolls, driver's license records or other public records. The jury department then selects a group of prospective jurors, and that group is called a venire.

In my former court where I sat on the Northern District of Illinois, our venire for criminal cases was between about 40 and 50 people on average and in a civil case it was about 25.

In my courtroom, the prospective jurors filled out a written questionnaire that asked questions about their background and their views of subjects.

And each questionnaire was customized for each case. So, for example, I had a jury trial involving a false advertising case brought by Dyson against Shark Ninja. It involved vacuum cleaners. We had a screen out for people who were employed by either Dyson or Shark Ninja. People who had negative experiences or positive experiences with either company and or people who were in a business where they had been either subject to or had brought a false advertising suit. Because while they might be great jurors in any other case, Dyson versus Sharp Ninja probably was not the case for them because they would carry some baggage with them that would make it hard for them to be impartial. And then I would ask each prospective juror questions in open court directed towards answers they had given on their written questionnaire that appeared problematic.

Then outside the jury's presence each side can move to strike for cause any prospective juror that couldn't be fair. I would rule on those motions, and then of the remaining prospective jurors, each side could exercise preemptory challenges, meaning that they could strike those prospective jurors from the case without giving any reason at all. And in federal court each side in a civil case gets three preemptory challenges. While in a criminal case, the government gets six and the defendant gets 10. So there have to be 12 jurors in a criminal case, and there are at least two alternates in case a juror drops out in the middle of the trial. And there could be anywhere from six to 12 jurors in a civil case and the relative size of criminal and civil juries, along with the greater number of preemptory challenges in a criminal case.

The fact that there are more successful strikes for causing a criminal case than in a civil case is why the criminal venire is much larger than a civil venire.

Juries, they've been subject to criticism, but I think overall it's a force for good in our society. Now, make no mistake, juries have gotten things wrong and sometimes gravely wrong, whether intentionally, and you could think about criminal trials that took place in the South where there might have been a black defendant back in the twenties or the thirties. And there are other instances as well, where there was an intentional miscarriage of justice by a jury or innocently. The jury sincerely thought that one thing had happened when in fact it hadn't. But in my experience, juries generally get it right.

I presided over several dozen jury trials when I was a judge over my 12 years in Federal Court here in Chicago. And I can recall only one or two instances where I thought the jury had definitely made a mistake. Another benefit is that having a collective decision making body composed of ordinary citizens, I believe gives the parties greater confidence in the integrity of the verdicts that are produced. The verdict when there is a jury, the verdict isn't the product of the judge's bias, proclivities or inattention. It is a group of people that get together and debate what the results should be. I think that that leads to more confidence and more accuracy. Finally, I

found that the jury system restores or cements the faith that the jurors themselves have in our system of government.

Very few people <laugh> show up for jury service wanting to be picked for the jury. When I read the names of the jurors who were going to be seated, there invariably were some long faces among those who were selected. But I would watch the jury during each trial. Whether it is questioning of witnesses or argument of lawyers, and most jurors were very obviously paying very close attention to the proceedings. And then after each trial, I would speak to the jury in a private setting after they had returned their verdict. And they invariably and unanimously would tell me what an enlightening and inspiring experience it had been for them and jury service at least for the 12 in a criminal case, or the six through 12 in a civil case. It showed them that government can work well and reach a just and fair result.

Larry Bernstein:

Who wants to be on a jury? Many people can't get away from work and this can be a real sacrifice.

Gary Feinerman:

Most people don't want to be on the jury because it takes up a lot of time. It is an imposition on ordinary citizens to kind of be plucked off the street, placed in a courtroom and then selected. You are basically conscripted. The way that most of my colleagues in Chicago Federal Court dealt with that is to ask the jurors, will serving on this jury be a substantial hardship on you?

We would tell them how long the case was going to take, and then some people would give compelling answers. Like, I'm the sole caretaker for a small child and I can't get coverage this week. Or I have a business trip planned this week that cannot be rescheduled. Or I have a long-awaited vacation and I already bought my airline tickets and booked my hotel, or I have surgery scheduled. And in those cases, we would excuse those jurors and we would call it a hardship excuse. But for people who just would rather all things being equal not be on the jury, those excuses did not get far in my former courtroom.

On the other side of the coin, there are people who want to be on the jury very much. And that could be for either good reasons or bad reasons. The good reasons are a person wants to fulfill a duty of citizenship, which is sitting on a jury, thinks it would be interesting and worthwhile and that is great. Then there are people who want to be on the jury for not so good reasons. And that is usually because they have an axe to grind, whether it's in a criminal law case. Either they are inclined to return a guilty verdict or a not guilty verdict. People who have a particular view of the civil justice system, whether they are anti-corporation or pro-corporation and think that there are too many civil lawsuits. And the questionnaire that I had all the prospective jurors fill out was designed to sort out those people. have done so.

Larry Bernstein:

When juries were first used hundreds of years ago, we lived in small villages, and everyone knew each other and did business together. Does the application of the impartiality doctrine mean something different now?

Gary Feinerman:

The Dyson - Shark Ninja case, just because somebody had a vacuum cleaner made by one or the other, would not have been a reason to strike them for cause. It's that if they had a real problem with one of them and had held a grudge against one. Same thing with having a General Motors car or flying on United Airlines, or using Facebook, <laugh>, some products are ubiquitous and all of us use one brand or the other. It's only if you have a strongly positive or negative experience is that a ground for striking for cause. In terms of people, yeah, you're right.

Back in the day, the jury pool was exceedingly small, and before automobile transportation, members of the jury pool, all of them may have known either the criminal defendant or both in a civil case. I like our system now because it is hard to be a fair and impartial juror because you're going to have had experiences with that person that are either positive or negative. And even if you try to put those experiences aside, it cannot help but call your judgment as to what happened. So that is the principal screen.

First, I have both sides introduce themselves, the lawyers, and the parties. I have everybody stand up and state their name. Then I ask all the prospective jurors, do any of you know anybody at either counsel table? If the answer is yes that is an automatic strike because the presumption is that they can't exercise fair and impartial judgment in the case because they personally know one of the players, whether it's a lawyer or a party. And I think that leads to more fair results because then the juror's personal experience is going to impinge on their judgment.

Larry Bernstein:

What do you think about jury size of 12 people, and do you think the collective is better at evaluating evidence than a smaller group?

Gary Feinerman:

Having a sufficient number on the jury where you're going to get some diversity of perspective and thought is so valuable because one person, one juror, may see things in a different way than the other person. The collective decision-making process, when you get a bunch of people around the table and they talk about their perspectives, it could reveal blind spots in your own thinking about a case that you probably would not have been aware of had you just been thinking about the case on your own as opposed with a group of 11 others. I think that that size improves accuracy and fairness of the ultimate result.

Larry Bernstein:

The film 12 Angry Men gives a fictional depiction of a jury deliberation. What do you make of that fictitious jury as compared to what you saw in practice?

Gary Feinerman:

Well, it's <laugh>, it's 12 Angry Men. And that is your first tip off, that it does not reflect contemporary practice because you're not going to have an all-male jury in contemporary times. If memory served that was not a very well-functioning jury because part of the drama of the case was that certain members of the jury brought their biases and prejudices into the jury room.

The jurors may not have been of like mind, but they were of like background. That jury didn't work as well as contemporary juries where you have people from all walks of life, across geographic region from which the jury is drawn. You're going to have a diversity of experience and a diversity of perspective that wasn't present with those 12 Angry Men.

Larry Bernstein:

I participated in voir dire in a NYC court and many of the prospective jurors did not seem qualified for the task. The jury pool included people from all walks of life. I remember one line of questioning that lasted five minutes with one guy before the attorney realized that he could not speak English.

Gary Feinerman:

The example you just gave is a reason to strike somebody from the jury because our proceedings here in the United States are conducted in English, and if you can't understand English you really shouldn't be on the jury. So that's an easy one, but that's the beauty of the jury system. You are going to get lawyers, bankers, doctors, cab drivers, teachers, postal workers, custodial workers, short order cooks, unemployed people, and retired people. You are going to get people from rural areas, from suburban areas, from urban areas, and they are all thrown together.

And that is what I meant by diversity. And a part of diversity is racial diversity and ethnic diversity. You're going to have gender diversity that's easy to do. If it's done right, you're going to have people from all walks of life, socioeconomic diversity, professional diversity, different ethnic and racial groups as well, particularly where I live. Cook County is a big metropolitan county. And the Northern District of Illinois, my former court has Cook County and many of the collar counties.

Larry Bernstein:

One benefit of a diversity in experience is that potentially one juror can bring relevant knowledge to the jury deliberation.

Gary Feinerman:

I do not know if you were a Happy Days fan back in the seventies. Do you remember the episode where the Fonz was picked for a jury?

Larry Bernstein:

No.

Gary Feinerman:

It was a criminal case, the defendant was riding a motorcycle. And of course, the Fonz rode a motorcycle, and he knew a lot about motorcycles. And in the deliberations, he said this particular defendant's motorcycle, the accelerator is on the left handlebar rather than the right handle bar. So, it would've been impossible for this defendant to have committed the crime, given the kind of motorcycle that that defendant drove. And you have the Fonz on the jury bringing his perspective and his knowledge of how this particular motorcycle worked.

Larry Bernstein:

When does it make sense for a defendant to choose a bench trial with a judge instead of a jury?

Gary Feinerman:

If it's a case that turns on a very technical issue of the law, I think you're probably better off with the judge than with the jury. Otherwise, you are probably better off with the jury. I'll give one example. So, I had a case when I was a judge. It was a drug case, and there were a couple counts that charged distribution of fentanyl. Then there was one count, and it's a separate crime that charged distribution of fentanyl that resulted in serious bodily injury to the person who used the fentanyl.

The defendant pleaded guilty to distribution but went to trial on the serious bodily injury charge, which was a separate crime, and that defendant chose a bench trial. And that was a good move because if you present that case to the jury where you say I admit that I'm a fentanyl distributor, and I want you to decide that this person who suffered very, very adverse physical reaction after taking fentanyl, that it wasn't my fentanyl that that caused that adverse reaction. It was somebody else's fentanyl that did. I could see that that would be a tough sell for a jury. Because the jury's not going to do that person any favors.

That person chose a bench trial, and it was the right decision, because I ended up acquitting the defendant of that more serious charge. I was in the business of being a judge and you learn to compartmentalize facts into different buckets. I was better able probably to put aside the fact that this person was a Fentanyl dealer and focused solely on did the government prove beyond a reasonable doubt that the physical distress suffered by the person was caused by that defendant's fentanyl as opposed to other fentanyl that that person had taken from another supplier.

I said this on the record, when I delivered the verdict, I thought it was probably more likely than not that the user's physical distress was caused by the defendant's fentanyl. But I couldn't get all the way up to beyond a reasonable doubt. So, I acquitted the defendant, and that defendant might have gotten the same result from a jury. But I think in that situation where it is a technical question where the trier of fact has to put aside uncomfortable facts about the defendant, probably better off with the judge.

Larry Bernstein:

The previous speaker Sonali Chakravarti discussed the benefits of jury nullification and her desire to expand its use. Where do you stand on the issue of jury nullification?

Gary Feinerman:

I think that is a horrible idea, and it would be an absolute disaster. It would end up probably hurting more criminal defendants than it would help. And here is why the jury takes an oath to follow the law. They stand up and the courtroom deputy, the Marshall, or the bailiff reads an oath, and the jurors say, I do. So, they would be violating their sworn oath as jurors if they were to not faithfully apply the law to the facts and render a verdict that is based on their fair evaluation of the evidence.

I tried when I was a judge, an immigration case where the charge was illegal reentry, and it's probably the easiest charge for the government to prove the crime is reentering the United States without permission after you had already been deported.

So, all the government must do is show that the person was here. They show that the person had previously been deported, and then they say, voila. During venire some of the people on their questionnaire indicated a discomfort with the immigration laws. And so, I would question those prospective jurors, and one of them said I do not agree with the country's immigration laws. I am going to acquit no matter what. And I said I understand. But that's not your job as a juror.

Your job as a juror is to figure out what the facts are, apply to the law, and render a verdict based on your determination of the facts. He said, I understand that, but I just will not convict. And I said, I completely respect what you're saying, and I really appreciate your honesty. And that juror got stricken. And she would have wanted that juror on the case. Right.

Larry Bernstein:

Sonali's best example for jury nullification is the Fugitive Slave Act, where northern juries refused to convict those who protected slaves who escaped and didn't assist the return of the slaves to the South. And she said that those juries felt that that law was illegitimate and therefore did not to enforce it. And she said, that is the beauty of the jury system. And I guess what you would say is if, when some potential juror said, I view that law to be unethical, you tossed the guy. She thinks that's a problem.

Gary Feinerman:

Yeah. So now I talked myself into being in favor of the Fugitive Slave Act, <laugh>.

Larry Bernstein:

You are not saying that you favor all the laws. You are saying that it is the job of the legislature to make the laws and the jurors to ascertain facts.

Gary Feinerman:

You just gave the best counter argument to what my position is. And to have a jury enforce a hideous Fugitive Slave Act is probably the best argument for jury nullification. Sitting here, I can't really argue against that. What I would say is this, it can go in the other direction for sure because jurors commit to follow the law. And sometimes a faithful analysis of the facts must lead to an acquittal. And you want your jurors to feel bound by that obligation to return an acquittal,

even if they think the defendant, is an awful person. Sometimes awful people go to trial, and it just so happens that they did not commit the crime for which they were charged.

And you do not want a jury to say, well, I'm going to nullify the reasonable doubt standard and find this person guilty because I'm sure this person did something wrong. That warrant's punishment that they aren't necessarily being charged with in this case. And whether they did what they were charged with in this case or not, well, I do not really know, but this person deserves to be in prison, and therefore we are going to return a guilty verdict. That is another form of jury nullification and that would be just awful. And I think that the proponents of jury nullification are missing that extreme danger that their theory could possibly result in it.

Larry Bernstein:

What do you think of jury consultants and the escalation in a more refined voir dire and tailoring arguments for the specific jury?

Gary Feinerman:

I'm not sure I would call it escalation. I would just call it a more refined voir dire. And whether it's a jury consultant that's doing that, or whether it's an attorney on the team that's focused solely on keeping tabs on, on whether the jury is paying attention and how they're reacting to certain things, it really doesn't matter. And so now what jury consultants do is that they bring more refined tools to the table to make the same judgments that lawyers have been trying to make for however long peremptory challenges have been in place. It's kind of like scouting in professional sports. In the fifties, sixties, and seventies, it was just based on gut and feel and then analytics started coming in and nobody would say that that's unfair. It's just that the scouts are doing the same thing that they were always doing which is trying to find the best people for their team. They're just bringing different tools to the table, and they're not illegitimate tools at all.

Larry Bernstein:

Moving to civil litigation. Some trials are complicated. They don't call it complex litigation for nothing. Jurors need to be capable of understanding technical materials and I am not sure all jurors are up to the task.

Gary Feinerman:

It's a legitimate concern. This probably manifest itself most regularly in patent cases that involved very complex technology. And it may be hard for the juror to understand the technology that is involved and whether there's infringement. It's really, really difficult. But what a good lawyer will do, is to present those complicated concepts in a manner that the jury can understand. It is their role to figure it out. I guess the presumption of your question is that a judge would better understand the technology in the patent case.

And that may be true in some instances, but it would not be true in other instances. So, I think the problem is we ask the justice system to call balls and strikes and to render judgements in situations where the factual matter being considered is very, very difficult and complex as to

whether a jury is better at that than a judge, I'm not sure. And if the parties are both concerned, they can go to arbitration and get some experts to handle it.

Larry Bernstein:

Mock juries are a great way for lawyers to find out how lay people will respond to arguments. You are a retired judge. Do you think that you have specialized knowledge for how you expect a judge will respond to a motion or an interpretation of a law in a specific case?

Gary Feinerman:

Hopefully, I could bring a lot, <laugh>. I guess we will see. When you are a judge, you just have so many reps, whether it's deciding motions or conducting hearings or presiding over trials that you can't help but get a more refined sense of how a particular argument or a motion or issue is going to play out in front of the judge in a pretrial setting. Or how a particular piece of evidence or approach to a witness or trial strategy will play out in either a bench trial or a jury trial. I have had 12 years as a federal district judge. I have that perspective and hopefully that will allow me to provide representation to the clients that they might not otherwise get from lawyers without that perspective.

Larry Bernstein:

Judge Richard Posner wrote a book *How Judges Think*. And in the book, Posner said that lawyers should concede arguments that they are going to lose. Better to admit the bad arguments and explain why they don't matter. Do you agree with Judge Posner?

Gary Feinerman:

That is a great insight, Larry. And it's very important to make strategic concessions because there are some arguments on whose hill you don't want to die because you will die there if you keep pressing an argument that is a loser. It's going to hurt your credibility in front of either the judge or the jury. Second, and this is one of the perspectives I bring from 12 years on the bench, it's going to make the judge think that in order for you to win, you have to prevail on that particular issue. And if that issue is a clear loser, it signals to the judge that your bottom line is going to fail. If you have a way around the strategic concession, which is X may be true, but I still win. The case still should be dismissed.

Summary judgment still should be granted. Class certification still should be denied. That is the way to go. It shows confidence in your bottom line to make strategic concessions because you are saying, "yes, the other side has this good point, but it doesn't matter because of these other arguments." It's a very important thing to understand, and not many lawyers understand that you don't have to win every battle in a case. You just have to win the important battles. And winning the important battles often turns on having the judge believe you on the important battles. And that in turn depends on showing the judge that you recognize the weak areas of the case, and you have a way of dealing with them, because That is the thought process that the judge is going through.

Larry Bernstein:

You retired from the Federal Bench at the end of 2022, and you are now a partner with the law firm Latham and Watkins. Why did you make that change and what do you think that you bring from your judicial experience to your new job?

Gary Feinerman:

Being a federal district judge was the honor of my professional lifetime. It was a wonderful job. I loved my coworkers, my law clerks, and the staff. But I had been a judge for 12 years, and what I realized towards the end, I missed getting in the ring, making arguments on behalf of a client and being an advocate and all that entails. Second, being a federal district judge is a lonely professional existence. I had my colleagues, but you decide cases on your own. It is solitary.

I have gotten back into the ring representing clients in contested matters and bringing to bear the perspective that I obtained over the last 12 years as a district judge.

Whether it's as a full-fledged member of a trial or a litigation team. Lawyers always ask themselves, "what's the judge going to think of this? What's the jury going to think of that?" And I'm well positioned to answer that question, whether it's a motion or a contested hearing or whatever critical junction there is in a case.

Larry Bernstein:

What are you optimistic about as it relates to juries?

Gary Feinerman:

I am optimistic about juries because I saw firsthand how they operate. They take their job very, very seriously. It's important when you do have a chance to be part of the government. When you are a juror, you become part of the judicial branch on a temporary basis. You want to get it right and you want justice. In my experience, my juries understood the need to pay awfully close attention and to render a fair verdict. And they did so. I am optimistic they are going to continue to do so.

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Larry Bernstein:

David, what is your job?

David Stellings:

I am a plaintiff's class action lawyer.

Larry Bernstein:

What are the typical class action lawsuits that you will work on?

David Stellings:

My firm and I work on lots of different types of cases. For example, we're part of the leadership structure in the litigation against the opioids industry. We also do product liability, employment discrimination, and antitrust cases.

Larry Bernstein:

You led the VW diesel class action.

David Stellings:

Yes. That's a product liability case.

Larry Bernstein:

Do these class action cases usually end up in front of a jury?

David Stellings:

Yes. For the vast majority of the time when the cases go to trial, they the jury as the fact finder.

Larry Bernstein:

Do you view having a jury as an opportunity?

David Stellings:

Absolutely.

Larry Bernstein:

The corporate community believes that a jury trial is like owning a lottery ticket in your favor. Do you view it the same way?

David Stellings:

Jury trials are really risky for everyone, both sides. Everyone has experienced the surprise of winning a jury trial that you expected to lose and losing a jury trial that you expected to win. It's really a roll of the dice and there's a whole industry that exists specifically to help litigants' lawyers choose jurors for juries.

Larry Bernstein:

What percentage of your civil trials use juries?

David Stellings:

Probably 75, 80% of my cases would go to a jury instead of to a bench trial or judge trial.

Larry Bernstein:

Is that your choice?

David Stellings:

It's always the plaintiff's choice at the beginning of a case to request a jury trial. There are certain types of claims that as a matter of law are only triable to a judge.

Larry Bernstein:

Do you look at the jury as an opportunity or peril?

David Stellings:

Yes.

Larry Bernstein:

<Laugh>. Why?

David Stellings:

It's an opportunity because jurors are people with their own experiences, their own viewpoints, and if you have the right jury, you can craft a narrative that is tailored to your particular jurors that will hopefully appeal to them both on an intellectual level and also an emotional and psychological level.

Generally speaking, when you have a bench trial and you're trying your case to the judge, the judge is the one who's deciding everything. Judges are obviously very experienced in presiding over cases.

Larry Bernstein:

I am sure you don't lose many jury trials, so when you reflect on the losses, why did you lose?

David Stellings:

I lost the cases well before we got to trial. There are many times during the life of a class action in which a plaintiff's claim can be extinguished. The cases that I can think of, I lost on summary judgment. So, after the evidence had all been collected the defendant said to the judge, there's not enough here to support plaintiff's claims. And the judge agreed.

Larry Bernstein:

Why do you choose a jury over a judge?

David Stellings:

I don't always ask for jury trials. It depends on who my judge is. Some judges are viewed, whether rightly or wrongly, as more open-minded to certain types of claims from plaintiffs. Some judges are viewed as more open to class action. Some judges are known as more skeptical to class action cases. And so, sometimes we tailor our requests to our audience, which is what every persuasive arguer should do.

Larry Bernstein:

Tell me about your strategy for opening remarks before a jury.

David Stellings:

Generally, we're trying to make the jury feel that our client has been wronged, that there's a fundamental unfairness involved, and that it would be unfair to allow the corporate defendant to get away with this type of bad behavior.

Larry Bernstein:

What do the corporation's lawyers do in their opening remarks?

David Stellings:

It varies from case to case. Most of the time, corporations focus on the warts of the plaintiffs themselves in class action trials. So, they'll try to make the jurors or the judge dislike the plaintiff. They'll point to maybe the plaintiff is a huge complainer. Maybe the plaintiff has sued 10 different times. Of course, we would never go to trial with a plaintiff like that. But those are the types of things that defendants are looking to do to make the plaintiff as unsympathetic as possible. They also talk about what good their corporate defendant does in the community, in the United States, how valuable their products are to the people who buy them, things like that.

Larry Bernstein:

The jury is an Anglo-Saxon creation, and you do not see juries in continental Europe. Why have jury trials survived and do you think the institution works?

David Stellings:

I think that there's something appealing to Americans about the idea that any one of us can be the decider of whether conduct was right or wrong. People like the idea of participating in those types of decisions. In Europe, those decisions are all made by the judges and by the regulatory state, which is a different way of approaching responsibility.

Larry Bernstein:

In French trials, the judge is not an independent actor but instead is also responsible for fact finding. What do you make of that?

David Stellings:

I think that the French judges would tell you that they view themselves as both a fact finder and an independent party. They're not on one side or the other. The American judges are not the fact finders. Their job is to decide what the law is, to allow the jury to decide which set of facts are more persuasive to them, and then to apply those facts to the elements of the law.

In the Volkswagen Clean Diesel case, maybe a French judge would say, "I don't think that Volkswagen did anything wrong when they designed the software to fool the regulators, because the regulators should have caught it." In the United States, an American judge would have no role in that determination at all. It doesn't matter whether the judge thinks that Volkswagen

cheated or didn't cheat. All that judge is doing is giving the jury the opportunity to decide based on what was presented at the trial which set of facts is more persuasive. Then the judge is bound factually by what the jury determines.

Larry Bernstein:

Are there any legal limitations on the size of damage awards?

David Stellings:

You're talking about punitive damages. The Supreme Court hasn't put a definitive ceiling on the multiplier that that a jury can apply to compensatory damages to determine punitive damages. I believe there's a BMW case from years ago where the Supreme Court said that the punitive damages shouldn't be more than 10. The size of the punitive award also is dependent upon the relative size of the compensatory award. Part of punitive damages is to act create a deterrent for future bad conduct. So, if you if you have a punitive damage finding of \$10,000 for a company like 3M or Proctor and Gamble, that's not a deterrent. So punitive damages to be able to serve their deterrence function must be very large.

Larry Bernstein:

Why is tort reform partisan?

David Stellings:

Very broadly speaking, the Chamber of Commerce, which represents a very large percentage of the biggest corporations in the United States, takes positions on tort reform and on judicial issues that are favorable to its corporate clients. The Chamber and its constituents generally try to make it more difficult for us to be able to certify class actions. They try to make it more difficult for us to get punitive damage awards. They try to make punitive damage awards smaller; they try to create more obstacles for plaintiffs in civil litigation against big companies. They're very goal oriented. It's much harder now to certify classes than it was 20 years ago, largely because of restrictions that were imposed because of corporations and the chamber. Courts have obviously accepted them, but a lot of those restrictions are not beneficial to consumers or to people who are ripped off by these companies.

One example, the Chamber was a big supporter of is the idea that arbitration is better than litigation. In 2012, the United States Supreme Court said it was okay for a corporation to force consumers to arbitrate their claims for the corporation's bad behavior, rather than allow them to go to trial. That type of forced arbitration has resulted in many corporations effectively getting immunity for bad behavior, because it takes a lot of resources for a consumer to pursue a large company for ripping them off. And most people won't do that.

Larry Bernstein:

So you are no longer in a class, and you are now arbitrating individually.

David Stellings):

Exactly. You're forced to arbitrate individually because not only are there forced arbitration provisions, there also are related class action prohibitions in the consumer contracts.

When you signed up with us, it says very clearly that all complaints must go through mandatory arbitration, and there can't be a class action. Many courts will in fact, compel all of those claims into arbitration. Most people are not willing to hire lawyers and spend their time to pursue \$50 or a few hundred dollars. And very few lawyers are willing to spend their time to pursue that amount of money. So those claims just go away. Judge Posner of the Seventh Circuit said something to the effect of, only a fool or a mad man will sue for \$40 <laugh>. The fiction that companies like AT&T maintain is that arbitration is better for consumers because it's so easy and so much quicker. But the fact is that almost none of them are willing to spend their time and money to do it.

Larry Bernstein:

Is there a legislative solution to that problem?

David Stelling:

Yeah, absolutely. There's been a bill that has been sitting around for several years, I believe that's called the Arbitration Fairness Act. But with this somewhat dysfunctional congress that we have is highly unlikely to pass. But it would legislate no forced arbitration or class action waivers in civil litigation.

Larry Bernstein:

How do you use mock jurors in your trial preparation?

David Stelling:

It's always surprising what the mock jurors are focusing on. That's why mock juries are such a valuable pretrial tool, and you don't do just one. You do multiples to try with different people. If you have a good jury consultant, they have ways of sectionalizing exactly. One of the incredibly valuable aspects of doing mock juries is that they crystallize what your story should be. They tell you; this is what we care about. This is what we don't care about. This is what we liked. This is what we don't like. This is the lawyer that we really love. This is the lawyer that we hate.

It's also critical to have a good jury consultant to help you draw mock juries that are somewhat like the type of jury you're likely to have in the forum where you're trying a case. If our jury consultant just pulls random people off the street of Manhattan, but we're trying our case in West Texas, that's not going to be helpful. So, you must really have a group as representative as possible.

Larry Bernstein:

When you do your mock trial, someone has to represent the corporation on your staff. And then when you go to the real trial, how similar are the arguments made by the mock corporation versus yours?

David Stellings:

The cases that get to trial have been going on for five years. It's not a secret, it's not litigation by surprise. All the arguments that the corporation is making against us, they have repeatedly made against us throughout the course of the litigation trying to kill the case. They hadn't been successful. But over time, we learn, these are their three strongest arguments.

Larry Bernstein:

When I watch a civil trial, they can be very boring. How do you keep the jurors awake?

David Stelling:

A lot of civil trials are boring, especially the ones where you must go into the detailed engineering specifications involved. Jurors fall asleep during trials all the time. Sometimes judges fall asleep. Sometimes lawyers who are involved in the trial fall asleep. The trials can last for months. When you have a judge who's experienced trying cases, very often they will impose strict deadlines, strict time limits on both sides to try to keep the trial moving along.

The very best trial lawyers are the ones who condense detailed information into soundbites that are easily absorbed by the jurors. You don't want to be the lawyer who's up there droning on for six hours during your opening. That's generally not an effective way to win.

Larry Bernstein:

Can jurors ask questions during the trial?

David Stellings:

This really varies hugely state by state and court by court, and sometimes even judge by judge. Some judges will allow jurors to ask questions during the trial. Some judges will not allow jurors to ask questions during the course of the trial, but will allow them to ask questions after all the evidence is in. Some judges won't allow jurors to ask any questions at all. It's all over the place.

Sometimes jurors give their questions to the judge before, and then the judge reads them, or the judge modifies them to make them more neutral. You don't want to have jurors cross-examining witnesses at the same time as the lawyers.

Larry Bernstein:

Do some jurors listen to what interests them and then tune out the rest?

David Stellings:

Most of us, probably not you, but most of us only absorb part of what we're hearing at any given time. We're biased. We focus on the things that are most interesting to us, and let our minds wander when people are talking about things that are less important to us. That's true of juries as well. You're never going to have a group of jurors who all listen attentively a hundred percent of the time to all of the witnesses and all of the arguments through a four-week trial, let alone a four-month trial.

Larry Bernstein:

Who would be willing to give up four months to be a juror for a trial?

David Stellings:

There have been many TV shows that are focused on jury trials. And people think it's exciting to be in that situation, to be the decider. I think a lot of people do take jury duty seriously. The idea that they can decide whether someone is guilty of murder or not, or whether a company has to pay a billion dollars or not. But it's a very significant time investment especially in these big civil class action cases where you frequently have trials that go on for months.

Larry Bernstein:

What is the role of jury consultants?

David Stellings:

Jury consultants are involved not only in creating mock juries, but they're also involved in the process where we choose a jury for trial. They say, B and C are hanging on every word. D, E, F and G don't give a shit what you're saying. E and F seem to really like this argument that the defendant's making. They pay very close attention to how they're reacting. And then we modify accordingly if it seems like after our opening that the jury is not interested, we tried to change the narrative a little bit to make it more exciting to get their attention.

Larry Bernstein:

With so much money on the line, do lawyers break the law to win the case?

David Stellings:

People will go to jail in that situation.

It is very unusual to encounter a lawyer who even would be willing to lie in court, let alone try to influence jurors. Ethics are a critical part of the legal practice in this country.

Larry Bernstein:

There are so many documents involved in trial preparation. How do you go through them all?  
Does AI help?

David Stellings:

There are a giant number of documents involved in all of our cases. It's common to get literally millions of documents. Sometimes tens of millions of documents. I think in opioids there was something like 40 million documents that were produced. There are tools that we must help us review those documents. It's not realistically possible for human eyes to read every single word in every single one of 40 million documents.

Some of the tools are more effective than others. Even with those tools, frequently in big cases, you have literally hundreds of lawyers who are reviewing documents around the clock for

months at a time. On the plaintiff's side, we use what's called technology assisted review. It's a system where you train a computer program to recognize what constitutes a hot document.

The system knows this document A is considered hot and it has all of these words, and this document B is considered not relevant, and it has these other words or these other characteristics. You test the system; you give it an additional set of documents and it gets graded based on its accuracy. And then you go through another iteration of the training, and you keep going through that a similar process until you're happy with the results.

There's a tendency to wanting junior people to be dealing with the documents in these cases. But very frequently partners or even senior partners need to get involved early in that process to make sure that the interesting documents that are being fed into the TAR system are hot or irrelevant documents. The system is totally reliant on the training given to it by the lawyers.

Larry Bernstein:

I met you at a parent's reception for my daughter Hannah's kindergarten class.

David Stellings:

That's right. And our daughter of Veronica was in her class,

Larry Bernstein:

I noticed right away that you were very entrepreneurial.

David Stellings:

The plaintiff's class action business is a very risky one. We only get paid if our cases are successful, we spend millions of dollars per case, and we have hundreds of cases going at any given time. So, if we choose our cases poorly or do a bad job litigating, or we take dumb positions, or we're overly aggressive or not aggressive enough, then we could end up closing. Many plaintiffs' firms don't stay open very long because they bet big on the few cases and don't win. We all have a lot riding on the results of our cases. It incentivizes us to get the best possible result for our clients.

Larry Bernstein:

Why do these cases cost so much money?

David Stellings:

Money is spent in a variety of ways. Having a law firm with offices is expensive. Lawyer time is expensive. And when cases go through the U.S. civil justice system, they take years, so we're investing a lot of human labor and time into it. We also have expert costs, which are enormous.

You could spend millions of dollars on experts pouring through the code and figuring out what evidence there is. It's just a lot of work over a really long period of time. And the companies that are on the other side hire very good lawyers who spend a lot of time and a lot of the company's money defending against the claims. One of the things that I'm proud of at my firm is how we

are on the other side of literally the best defense firms in the entire country, if not the world, daily. And we stand our ground, and we very often win.

Larry Bernstein:

When you hire and evaluate new lawyers, what traits do you look for in future partners?

David Stellings:

We hire smart people from good schools, and they are technically good lawyers, but what we're looking for people to stand out, for them to be proactive in their cases. It's very easy as a first- or second-year associate to sit at your desk and wait to receive an assignment. The most successful people are those who look at the case from 30,000 feet and figure out what our case is about. They plan accordingly to make sure that we're doing everything we can to maximize our position.

Larry Bernstein:

During the pandemic, you had to work with zoom instead of face-to-face meetings. Did zoom undermine trust between the parties?

David Stellings:

During the heart of the pandemic everything was virtual, and the cases that I work on, there are very large stakes for both sides. You need to establish a relationship of trust with the lawyers on the other side. It's not to say that you're ever going to agree on all the issues in the case, that's virtually never going to happen. But to be in a position where you're negotiating hundreds of millions of dollars or billions of dollars you must trust that the other side is going to act in good faith, and they have to have that same trust in you. That just doesn't happen when you're only seeing them by zoom. You have to be in person. There's also a huge amount of communication information that gets lost in Zoom. It's hard to know sometimes when it's okay to speak in a group setting.

That's true for hearings as well. You want to see how the judge is reacting in person.

Larry Bernstein:

What are you optimistic about?

David Stellings:

I'm optimistic about the ability of the civil justice system to effect big changes in this country. The opioids litigation is an example. The regulators over many years were not able to curb this bad behavior that resulted in so many people suffering and dying. Our litigation has succeeded where the regulators struggled to do so.

Larry Bernstein:

What are you optimistic about related to juries?

David Stellings:

I think juries will continue to be able to exert near total control over the decision making of most civil and criminal trials in this country. I don't think anyone any politician from either side is going to be willing to seriously curtail the privileges the juries enjoy in this country.

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Larry Bernstein:

I would like to welcome back the What Happens Next movie critic Darren Schwartz whose previous career was in building sales teams for companies like Groupon.

Darren, welcome back to the show.

Darren Schwartz:

Thank you, Larry. Happy to be here.

Larry Bernstein:

This week's podcast is about juries, and I thought what could be better than a discussion with Darren regarding the classic film 12 Angry Men? Darren, I hope you did your homework. Please open with a brief synopsis of the plot as many in our audience have not seen the film or haven't seen it in years?

Darren Schwartz:

I watched it twice. I did a little research, and the quick summary, 12 Angry Men is a 1957 film directed by Sidney Lumet in his first movie feature, and the film centers on a murder case where the evidence seems to overwhelmingly point towards a guilty verdict. But one man did not believe that that was the case. The 12 jurors' debate and in doing so, the film highlights one of the cornerstones of our democracy, which is that everyone is innocent until proven guilty, and that guilt must be beyond a reasonable doubt.

Henry Fonda is alongside Jack Klugman, Martin Balsam, E.G Marshall, and a powerhouse performance by Lee J. Cobb. The Film received Academy Award nominations for best picture, best actor, best adaptive screenplay, however, it did not win any of them. And the film was also consistently ranked as Henry Fonda's best performance.

Larry Bernstein:

This is a felony murder case where a boy is accused of murdering his father with a knife. A similar knife was acquired by the boy earlier that day, a neighbor witnesses the killing and an old man who lived in the apartment below saw the boy running out of the apartment building immediately after the body hit the floor. It seems like a slam dunk case until Henry Fonda starts making mincemeat of the prosecution's evidence.

Tell us about what happened in the jury room.

Darren Schwartz:

They all walk in, and they think this kid is guilty. They're in a rush to convict this kid. The first thing they do is say, "Hey, customary, let's just take a vote right now." And they go around all guilty. Not guilty? And Henry Fonda raised his hand and okay, wait a second. This is not going to be as easy as we thought.

Larry Bernstein:

Retired Federal Appellate Judge Richard Posner wrote a book entitled Law and Literature. In the book he highlights the benefit of fiction to understand the complexity of the law and its nuances. Here this film allows us to get into the innerworkings of the jury deliberation process. What do you make of Henry Fonda as Juror #8's decision to vote not guilty?

Darren Schwartz:

Well, I think it was courageous and standing up for what is right. These were 12 angry men but none of them were as strong as Henry Fonda who was willing to take that initial stand. Sometimes it just takes one person, and that courage is important.

Larry Bernstein:

The jury deliberations take a turn during the discussion about the murder weapon. Tell us about the knife.

Darren Schwartz:

This was said to be a unique switch knife. They called it a switch knife, which I thought it was a switchblade, but in 1957, I guess it was a switch knife and it had a decorative handle. And the shop owner where it was sold it to the defendant said this is a one of a kind. I have never seen this before. And they brought that knife in and one of the other jurors took it and put it into the table right in front of Henry Fonda, which was very dramatic and just stuck upright in the table.

And after some conversation and after the other jurors were committed to this is a one-of-a-kind switch knife, Henry Fonda opened his pocket, picked out the same exact switch knife, slammed it into the wood sticking up, right next to the other one.

He said after court, the day prior, he had walked around at a local shop near where the defendant lived, was able to buy the same exact one.

Henry Fonda at that point, which I thought was also extremely strategic, said, I want to take a secret ballot now and vote. And he got the one other not guilty. And he began gaining momentum.

Larry Bernstein:

Being a juror is burdensome. The jurors did not want to deliberate, they wanted to go home, get back to work, or go to the Yankees game. Most of the jurors were convinced the boy was guilty and did not want to indulge Henry Fonda juror #8 with a lengthy discussion.

Darren Schwartz:

The cultural background of the defendant. He was from a slum. Juror 10 Ed Begley was just a straight up racist. And no matter what was said, he went in there thinking, I do not like this kind of person.

The other challenge is that justice comes at a price, which is time and effort and consideration. And the realization is that you must give back. You must participate fully in this process because one day it might be you on the stand. And most those people did not have that perspective. And it took Henry Fonda as jury number eight to say, wait a second, we need to really consider the facts. And eventually people were saying, a man's life here is at stake. We need to do the right thing. But to begin with, it was just one guy.

Larry Bernstein:

The movie takes place in 1950s NYC, and Manhattan at that time was predominantly white. That said, the jurors did not consider themselves from the same ethnic group. They differed by class, educational attainment, occupation, and ethnicity. Some of the jurors were born in the US but there were a few immigrants who were treated as outsiders.

I am not sure that I would label this as racism because everyone in the story was white. Maybe we should call it bigotry. Yet, there were members of the jury who would not tolerate bigotry.

The bill of rights guarantees you a right to a jury trial, and that allows the defendant to be judged by his peers. Jack Klugman plays a juror who grew up in the slums who provided valuable insights to the case.

Darren Schwartz:

It was amazing the way that they did that. The Jack Klugman part where he's the one that grew up in the slum and he knew how to use a switch knife was also kind of funny because I only know Jack Klugman as Oscar from the Odd Couple.

Larry Bernstein:

I loved him in Quincy.

Darren Schwartz:

He was saying, yeah, I grew up and I would see people having a knife fight? And it was like so cavalier, like does not a knife fight end horribly with blood and stitches <laugh>. It was like not a big deal.

Henry Fonda was so good at breaking down each piece of evidence and figuring out what was important. He was one man to start, but as he went along, each juror brought different perspectives which was critical.

Larry Bernstein:

I was called for jury duty in 1995 when I lived in NYC and I joined the jury pool in the Centre Street Court House, which is the same court building in the film 12 Angry Men. What I found fascinating was that the jury pool was a cross section of NYC in every dimension: race, class, education, immigrants, everything imaginable. It was like being at the DMV.

In my professional career working at Salomon Brothers and proprietary trading companies I worked with various people with different upbringings from around the world, but they were generally very well educated. Darren, you worked in sales and had to deal with all kinds of people. How do you influence people to do things who are quite different from you?

Darren Schwartz:

Well, first of all, I appreciate you categorizing salespeople as people that you'd see at the DMV, which in itself is outrageous <laugh> and proves that you have interacted with a very limited group of people, so this is probably more about you.

Darren Schwartz:

I am a little more comfortable with the every man. And I think it relates to building a sales team. It does not matter where you come from, your racial background, your social economic background, your age.

What matters is if you can learn about people, explain value, find out what people need, and ultimately manage your emotions. And to a large extent, sales is to be creative and nimble on your feet. And that is one of the things that Henry Fonda did in this movie, he was able to jump around, address the individual needs of the jurors as he got people to believe that there was reasonable doubt.

Larry Bernstein:

Do you think the jury would have benefitted from having some younger people on it?

Darren Schwartz:

I do not know. I just cannot wrap my head around what a 21-year-old was like back then. Young people were a little more polite, more respectful of seniority.

When I was growing up, I called my friend's parents, Mr. And Mrs. And all my kids' friends call me Darren. I was okay with that. Do your kids' friends call you Mr. Bernstein or Larry?

Larry Bernstein:

You are right. Most kids call me Larry or LB. I cannot imagine calling you Mr. Schwartz, Darren, I just can't, I can't do it.

Darren Schwartz:

I do not think that my kids call any of their friends' parents, Mr. or Mrs. I think they call them by their first name. Maybe just because we want to be cool with our kids, who knows. But I'm going

to actually try to institutionalize from now on being called Sir. And I will let you know how that goes. <laugh> by everybody including you.

Larry Bernstein:

Sir, as a follow-up.

Darren Schwartz:

Yes.

Larry Bernstein:

In my family there is a reticence to watch black and white movies. My wife refuses outright. I have had no success with my son. When he was 11 years old, I wanted to watch with him the movie First Blood starring Sylvester Stallone as Rambo. My son said, dad, is this movie in black and white? I said, no, it's not, it's color. You sure? Yeah, I'm sure it's a recent film. How recent? Early eighties. Early eighties. They didn't have black and white back then? No, it was color.

I had to negotiate. He agreed to watch the first five minutes and then he would reevaluate watching the balance. When we finished the movie, I asked my son what he thought of it and he said, all Rambo wanted was a sandwich. If they had just given it to him a lot of lives would have been saved.”

Darren, how do you explain the reluctance to watch classic black and white movies?

Darren Schwartz:

I think people like what's new. This movie, in particular, is a slow burn. And I do not think that that fits in today's attention span. I am reluctant to watch a black and white movie because it's going to be dated. I think it's fair to have that stigma, but at the same time, if you watch the right movie, it can be really delightful. This is clearly my favorite black and white movie now, and it is one of my top 10 favorites of all time.

Larry Bernstein:

Going back to the plot of 12 Angry Men, I thought it was interesting that when the jury adjourned to deliberate that there were no rules or guidelines on how the jury would reach its verdict. There were guardrails like what questions they could ask the judge, or what evidence they could examine, but choosing the foreman, who gets to speak, whether there will be secret ballots that was up to the jury.

How do people work together to interact in an environment without formal rules?

Darren Schwartz:

Well, I would not say that there are no rules. It is not a micromanaged process. You are not getting a step-by-step playbook. A jury, you get instructions from the judge. You hear all the evidence, you go into the jury room, and they lock you in and you figure it out. I think that is

that. So, to me, there are rules. They are just high-level rules. I think the lesson to me is sometimes when you micromanage, you are not going to get the right results.

You are going to get resentment and you are going to get people who are not thinking about the end in mind. And that is a hundred percent true for sales teams. When you do not give the ability to experiment and interact in a way that they want to feel natural, then you are not going to get the right results. And throw them into this big kettle, they hopefully can figure it out. And that is what our justice system is counting on.

I just got a called for jury duty in May. I am going to need a note from you to excuse me, hopefully. By the way, I am actually excited to do it based on this experience.

Larry Bernstein:

Watching 12 Angry Men, did it give you more confidence in the jury system?

Darren Schwartz:

I think that it gave me more of an education as to what goes on in jury room. Cuz I've had jury duty before, and I was not selected. Very disappointing. I'm not sure what happened there. Hoping for a better result in May.

Larry Bernstein:

This movie is 65 years old. Isn't that unbelievable?

Darren Schwartz:

There were some funny lines that were said. The advertising guy goes, "let's throw it down to the stoop and see if the cat licks it up." I do not even know what that means. But I am committed to using that today with somebody <laugh>. "Let's run it up the flagpole and see if anyone salutes it." "It's as plain as the nose on your face." One of my favorites is "I'm getting tired of all this yackety-yak," which I think that stands the test of time no matter where you are. Oh, and the other thing is one point Jack Warden, jury seven, they opened the window. How hot was that room? Everybody was pouring sweat except for juror four. He takes out a piece of gun and throws it in his mouth and he takes the wrapper, throws it out the window,

Larry Bernstein:

You can't do that.

Darren Schwartz:

You are canceled immediately. Now you litter, it is over.

And then he was talking to Henry Fonda, and he said, "I made 27 grand last year selling Marmalade, which is pretty good.

So, I looked it up. How much you think 27 grand in 1957 is worth today?

\$290,000, which is a lot for Marmalade you know.

Larry Bernstein:

Sales is not that bad, huh?

Darren Schwartz:

Right. <laugh>.

Larry Bernstein:

I thought it was interesting that the jurors got so angry that it looked like somebody was going to throw a punch or worse. A juror who was working-class did not like the way Lee Cobb was speaking to an old man on the jury, and he physically threatened him.

Darren Schwartz:

Oh, that was great. I thought it was also another line that was anachronistic. If you do that again, I am going to lay you out, <laugh>.

Larry Bernstein:

You called it one of the 10 best films you have ever seen, but it does not even best picture. How is that possible, Darren?

Darren Schwartz:

Well, I'm not going to be subject to other people's opinion.

Larry Bernstein:

The whole movie is filmed in one little jury room with a bare bone set: a table, a dozen chairs, a couple of windows, a fan, and a light. That is it. The focus is on the words. It is a talkie film. There's little action except when the guys get hot about analyzing the evidence.

This is Sidney Lumet's directorial film debut. He becomes one of the biggest directors in Hollywood. He made tons of films including Network, Serpico, and Dog Day Afternoon. He wrote a book entitled Making Movies, which describes how to direct films.

Lumet explains that in the production of 12 Angry Men that in the first third of the film, the camera is used at the same level as the characters. In the second third, the camera is filmed from above pointing down at the characters that gives an uneasy feeling that the jury room is collapsing in on them. And then in the final third, the camera is filmed from below that makes it seem that things are looking up. What did you think about the camera positioning in the film direction?

Darren Schwartz:

I thought it was brilliant and I noticed it as I was watching it. The close-up you saw the beads of sweat on their faces and their shirts drenched. I thought it was impactful. Being in one room, this claustrophobic feeling, all the tension building up.

There are a few movies that I remember that were set in one room. When I first saw *Breakfast Club*, I was 14. I did not like it because it was in just one room and it's just the characters to carry the movie.

Larry Bernstein:

How about *Misery* with James Caan and Kathy Bates that was set in a single room that was upsetting.

Darren Schwartz:

*Rear Window*. It was a couple years before this.

Larry Bernstein:

Should our podcast listeners go to Netflix and watch *12 Angry Men* for the first time or rewatch it?

Darren Schwartz:

If you're interested in the justice system. Technology changes and culturally things changed. But the justice system is largely unchanged. It is the cornerstone of our democracy. It's a very interesting commentary on us as a country and our legal system.

Larry Bernstein:

Next topic is persuading an audience. Henry Fonda does the soft sell.

Darren Schwartz:

Yeah.

Larry Bernstein:

Tell me about that.

Darren Schwartz:

Well, he knew that he was up against 11 other jurors who were more than happy to find the kid guilty.

At no time did he ever proclaim that he knew the kid was innocent. That was a big distinction. You do not have to be found innocent. You must be found guilty beyond a reasonable doubt. So, he fought not by trying to convince everyone with a big sweeping presentation but by breaking down each critical point in the case and going over it in meticulous detail. And as he did that, he was able to pick off a few jurors at a time that there was reasonable doubt.

Larry Bernstein:

Darren, what are you optimistic about as juries?

Darren Schwartz:

I have got jury duty in May. I now know that Martin Balsam would be an excellent candidate to be a foreman. I'm going to do my best to learn from Henry Fonda and to go into this jury duty and make it clear to the judge, "your honor, I'm the guy, pick me" and see where it goes.

Larry Bernstein:

How do you like being a movie critic on this podcast What Happens Next?

And are you taking this responsibility seriously.

Darren Schwartz:

Larry. I mean, I watched the movie at least two and a half times. I found the original 1957 review. I'm at worst in no way qualified to do this. And at best, <laugh> maybe qualified to do it until someone better comes along. I am a position holder at this point. I'm shocked that you're going to allow me to do this, but I also think that it's good for you to be able to experience this time with me.

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Larry Bernstein:

Thanks so much Sonali, Gary, David, and Darren for joining us today.

If you missed last week's show, check it out. The topic was Prince Harry - the Spare.

Our speaker was Tina Brown who discussed her new book *The Palace Papers: Inside the House of Windsor – The Truth and the Turmoil*. Tina is the former editor of *The New Yorker* and *Vanity Fair*.

Tina explained why the public is so fascinated with the Royal Family and the continuing deterioration of Prince Harry's relationship with his brother William. Why Harry decided to give up his royal responsibilities, and why she believes that the monarchy will survive and prosper.

I would now like to make a plug for next week's show on how diversity, equity and inclusion is under attack. The first speaker will be Jay Greene from the Heritage Foundation who will discuss Florida Governor's challenge to the DEI bureaucracy in Florida's public universities.

Our second speaker will be Dr, Stanley Goldfarb who runs a new think tank names Do No Harm. Stanley is the former Associate Dean at the UPenn Medical School and the author of *Take 2 Aspirin and Call me by my Pronouns: Why Turning Doctors into Social Justice Warriors is Destroying American Medicine*. Stanley will discuss how DEI is impacting medical schools, medical residencies, medical research, and medical care.

You can find our previous episodes and transcripts on our website [whathappensnextin6minutes.com](http://whathappensnextin6minutes.com).

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I would like to thank our audience for your continued engagement with these important issues,  
good-bye.