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The “Holdout” Juror: Condemnable, Laudable or Neither?

A Dialogue Between Joel Cohen and Harvey Fishbein

The nation, particularly the citizenry of Plymouth Massachusetts, watched closely as Lindsay Clancy stood trial for the unthinkable scenario of having strangled her three extremely young children to death.

At the denouement of a dramatic trial, the public became absolutely transfixed after jury deliberations approached some 35 hours. This, particularly when it learned of a note to the judge from the jury foreperson informing the judge that the jury was becoming hopelessly deadlocked. The reason given for the deadlock was one juror. That juror had actually expressed doubts about Clancy’s guilt – yet was nonetheless refusing to follow the law’s dictates regarding reasonable doubt. Accordingly, the defense, in the person of Kevin Reddington who had become somewhat of a folk hero in Plymouth for his aggressive defense of Clancy, *knew* that a lone holdout repeatedly voted to convict Lindsay in the sanctuary of the jury room, resulting, frustratingly, in 11 to 1 votes to acquit.

Even though a hung jury is typically considered a victory for the defense, Reddington made uncommonly vituperative demands that the judge outright remove the holdout, expecting that such a maneuver would result in Clancy’s total acquittal. The trial judge denied the motion and ultimately declared a mistrial.

Reddington promptly used his bully pulpit outside the courthouse to openly condemn the holdout who had become an obstacle to Clancy’s acquittal for having held out. Reddington went so far as to say that the juror “robbed” Clancy of the acquittal that she richly deserved. As they say, *the jury’s still out* over whether the prosecutor will bring Clancy to trial again.

The type of intense, nationwide fixation on a jury as we have just seen in *Clancy* also occurred in 2015 in New York County when Pedro Hernandez first stood trial for the kidnapping/murder of Etan Patz. The *Hernandez* jury deliberated for 18 days. The respective lawyers in *Hernandez*, however, were unaware of the breakdown of votes in that jury room – including neither the vote split nor whether the votes were progressing in one direction or another.

Following the defense lawyer’s playbook, Hernandez’s counsel repeatedly, but unsuccessfully, moved for a mistrial -- recognizing that obtaining a hung jury in a case in which the defendant had repeatedly confessed the murder to the authorities would be a tremendous victory. But to no avail.

Not until 18 days into the process in the Hernandez case did the judge finally agree that a mistrial was the only way to go. Only then did the attorneys for both sides, along with the world, finally learn that one single juror, Adam Sirois, had held out – in this case for acquittal – against 11 other New York County jurors.

As pretty much everyone agreed, that mistrial was indeed a defense victory! The Manhattan District Attorney's office, which lost that case, didn't condemn Sirois for declining to go along with his fellow jurors or for not giving sufficient attention to what they had to say. Instead, the office simply chose to proceed to trial once again, after which it finally obtained a conviction. Even then, there was no public criticism of Sirois when his lone voice had stood against what had risen to a combined 23 votes to convict following a painful and costly second trial.

To address the issue of the "holdout" juror, Hernandez's extremely well-regarded defense attorney, Harvey Fishbein, has agreed to discuss it. (Incidentally, the U.S. Supreme Court just recently denied Hernandez's effort to vacate his conviction based on a clearly questionable unMirandized confession). Our conversation follows here:

Joel Cohen: Every criminal lawyer who has ever lost a case (including myself) is unhappy with the result. This particularly with the juror who defense counsel perceives as having been a "ringleader" in persuading the other jurors to convict. Still, what do you think of a defense lawyer outright calling a holdout juror a "liar" in court for, allegedly, falsely swearing that he could follow the judge's instructions, and outside court publicly condemning that juror as having "robbed" his client, as blatantly occurred in *Clancy*? Not to mention the questionable tactic of announcing to the jury pool what they themselves, might face if they had the temerity to vote to convict the next time around.

Harvey Fishbein: Although the word "liar" is very strong and we have not heard from the juror, if the lawyer's information is correct as to why the juror held out, then the juror violated the oath they took to base their verdict on the evidence and to follow the law. In doing so, the juror sabotaged the process and unlawfully denied the defendant her right to a fair trial and deserves to be publicly condemned. However, if the lawyer's purpose is to influence the verdict of a second trial, then the lawyer is wrong.

JC: It seems that the eleven jurors who voted to convict Pedro Hernandez in his first trial were undoubtedly displeased with the holdout juror, Sirois. They wanted a unanimous guilty verdict given their lengthy commitment to that difficult trial. How should the public react to a holdout – either in *Clancy* or *Hernandez* -- when the public might tend to have agreed with the majority, and believes that the holdout is simply a contrarian? Maybe even ego-driven in refusing to fall in line with the others?

HF: While the public might have a general view what the verdict should be in a given case, it is the jury that is in court every day listening to the witnesses and viewing the evidence. If a holdout, whether it be for conviction or acquittal, bases their decision on the evidence presented at trial and not on a personal hidden agenda, then the juror is following their oath and acting in the true American tradition of freedom of thought and speech, and should be commended rather than criticized. In the *Hernandez* case, Adam Sirois has publicly described the reasons he had a reasonable doubt, that he discussed these reasons with his fellow jurors, listened to their opinions and responded to their concerns. In the end he was not persuaded that he was wrong while other jurors who at first agreed with him slowly withered over the 18 days of deliberation and ultimately agreed to side with the majority. To me, Adam Sirois is a juror who has followed his

oath and the law. He did not acquiesce to peer pressure. It was not ego. It was a commitment to his oath and values.

JC: If a jury can't vote unanimously and is hung at 11-1 (or even 10-2) to convict or acquit, what should that typically mean to the prosecution office or defense counsel? Of course, it would be reasonable to conclude that it might be extremely hard to obtain unanimity at a retrial. But might it also represent something altogether different?

HF: If a trial, in which the evidence and judicial decisions went as expected, ends with an 11-1 or 10-2 hung jury, both sides have an opportunity to reevaluate their respective positions. If the hung jury was tilted to an acquittal, then a prosecutor needs to seriously consider if a retrial is in the interests of justice. For a defendant, pursuing a plea agreement to a lesser charge is an option. However, it is different for an accused who has steadfastly maintained their innocence. Regardless of which way the jury was leaning, their options are more limited as to whether a second trial occurs. But it does offer them an opportunity to reevaluate their approach to the prosecution's witnesses and evidence, as well as to reconsider how to present, or not, the defenses. Of course, if a jury cannot reach a unanimous decision, shouldn't that by itself mean as a matter of law that reasonable doubt exists?

JC: I suspect that you still believe that your client, Hernandez, was actually innocent – that the DA's office simply got "the wrong guy" even though he confessed to the murder multiple times. Does that mean, despite your gifted abilities, that the system can't be relied upon to work given that only one juror out of 24 – a truly iconic holdout – could be persuaded to vote to acquit? And what, in your view, might it say about such a lone juror?

HF: I firmly believe that Pedro Hernandez is innocent, and your question contains exactly why he was convicted. The word "confession" is a powerful and damaging word. It would take much more time and space to go through the myriad reasons he "confessed" and why each so-called confession was unreliable. But I also think that understandable human emotions played a role in the jury verdict and the combination of the two were impossible to overcome given some of the evidentiary rulings in the case. And that is why I view the lone holdout juror as someone who should be commended. He didn't refuse to deliberate. He explained why, based on the evidence, he believed there was reasonable doubt and what that meant. He didn't refuse to listen to the arguments of his fellow jurors and then refused to change his position despite the obvious pressures of an 18 day deliberation. To me, he is a juror who followed his oath and his conscience and that is exactly what he was instructed by the judge to do.

JC: And might it also mean that, indeed, the "holdout juror" might simply be a personality who just tends to go against the grain -- and doing so in a very public trial rather than in a run of the mill case is simply an opportunity to occupy that role writ large *with the public watching*?

HF: Jury selection is designed to weed out that juror. But if a juror has a hidden agenda and is willing to lie, it makes it very difficult. That is why I think it is critical and invaluable for empanelling a fair and impartial jury that will follow the law for the courts to involve attorneys in questioning the potential jurors during voir dire. While it is time consuming, in the end it may very well save time.

JC: So, I suspect, your answer to the question posed by the title above is: “It depends.”

HF: Exactly!

JC: Undoubtedly, we will soon enough hear from more than some of the jurors in *Clancy* -- maybe even the “holdout” who might seek to defend himself against defense counsel Reddington’s wrath.

Thank you so much, Harvey, for your valuable insights.

Joel Cohen practices white collar criminal defense law at Ruskin Moscou Faltischek PC and co-teaches a new seminar with David Lat at Cardozo Law School called “*Ripped from the Headlines.*” **Harvey Fishbein**, a veteran criminal defense lawyer in New York, has served two terms as President of New York Criminal Bar Association, and is a Fellow of the American College of Trial Lawyers. Incidentally, he (along with *Hernandez* juror Adam Sirois) were the first guest presenters at the Cardozo class.