At the beginning of my "Reflections," I stated the different causes of the failure of justice in the present time. Circumstances obliged me to write that pamphlet in great haste, in which I forgot to enumerate among these causes the non-agreement of jurors. It would be a useful piece of information, and an important addition to the statistics of the times, if the Convention could ascertain, through our able statistician, the percentage of failures of trials resulting from the non-agreement of jurors in civil, in criminal, and especially in capital cases. This failure of agreement has begun to show itself in England likewise since the coarse means of forcing the jury to agree, by the strange logic of hunger, cold, and darkness, has been given up.

In Scotland no unanimity of the jury is required in penal trials; nor in France, Italy, Germany, nor in any country whatever, except England and the United States; and in the English law it has only come to be gradually established in the course of legal changes, and by no means according to a principle clearly established from the beginning. The unanimity principle has led to strange results. Not only were jurors formerly forced by physicial means to agree in a moral and intellectual point of view, but in the earlier times it happened that a verdict was taken from eleven jurors, if they agreed, and "the refractory juror" was committed to prison! (Guide to English juries, 1682. I take the quotation from Forsyth, History of Trial by Jury, 1855.)

Under Henry II. it was established that twelve jurors should agree in order to determine a question, but the "afforcement" of the jury meant that as long as twelve jurors did not agree, others were added to the panel, until twelve out of this number, no matter how large, should agree one way or the other. This was changed occasionally. Under Edward III. it was "decided" that the verdict of less than twelve was a nullity. At present, in England, a verdict from less than twelve is sometimes taken by consent of both parties. There is nothing, either in the logic of the subject, or the strict conception of right, or in the historic development of the rule, that demands the unanimity of twelve men, and the only twelve men set apart to try a cause or case.

At first the jurors were the judges themselves, but in the course of time the jury, as judges of the fact, came to be separated from the bench as judges of the law, in the gradual developement of our *accusatorial* trial, as contradistinguished from the *inquisitorial* trial. It was a fortunate separation, which in no other country has been so clearly perfected. The English trial by jury is one of the great acquisitions in the developement of our race, but everything belonging to this species of trial as it exists at present, is by no means perfect: nor does the trial by jury form the only exception to the rule that all institutions needs must change or be modified in the course of time if they are intended to last and outlive centuries, or if they shall not become hindrances and causes of ailments instead of living portions of a healthy organism.

The French and German rule, and, I believe, the Italian also, is, that if seven jurors are against five, the judges retire, and if the bench decides with the five against the seven, the verdict is on the side of the five. If eight jurors agree against four, it is a verdict, in capital as well as in common criminal cases. There is no civil jury in France, Germany, Italy, Belgium, or any country on the continent of Europe.

This seems to me artificial and not in harmony with our conception of the judge, who stands between the parties, especially so when the State, the Crown, or the People, is one of the two parties; nor in harmony with the important idea (although we Americans have unfortunately given it up in many cases) that the judges of the fact and those of the law must be distinctly separated. The judge, in the French trial, takes part in the trying, frequently offensively so. He is the chief interogator; he intimates, and not unfrequently insinuates. This would be wholly repugnant to our conceptions and feelings, and, may the judge for ever keep with the American and the English people his independent, high position *between* and *above* the parties!

On the other hand, what is unanimity worth when it is enforced; or when the jury is "out" any length of time, which proves that the formal unanimity, the outward agreement, is merely *accomodative* unanimity, if I may make a word? Such a verdict is not an intrinsically truthful one; the unanimity is a real "afforcement" or artificial. Again, the unanimity principle puts it in the power of any refractory juror, possibly sympathizing more with crime than with society and right, to defeat the ends of justice by "holding out." Every one remembers cases of the plainest and of well-proved atrocity going unpunished because of one or two jurors resisting the others, either from positively wicked motives or some mawkish reasons, which ought to have prevented them from going into the jury-box altogether.

I ask, then, why not adopt this rule: *Each jury shall consist of twelve jurors, the agreement of two-thirds of whom shall be sufficient for a verdict, in all cases, both civil and penal, except in capital cases, when three-fourths must agree to make a verdict valid. But the foreman, in rendering the verdict, shall state how many jurors have agreed.*

I have never heard, nor seen in print, any objection to the passage above alluded to, in which I have suggested the abandoning of unanimity, other than this that people, the criminal included, would not be satisfied with a verdict, if they knew that some jurors did not agree. As to the criminal, let us leave him alone. I can assure all persons who have investigated this subject less than I have, that