GOOD FILM, BAD JURY

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INTRODUCTION

12 Angry Men[1] is a terrific film. Henry Fonda portrays Juror #8, the lone holdout. He manages to turn around eleven other jurors who have already made up their minds to convict the defendant in a capital murder case. Fonda gives a powerful performance. The American Film Institute rates Fonda's Juror #8 as fifteenth on its list of the greatest fifty movie heroes of all time.[2] During his fabled career, Fonda played other legends, including the young Abraham Lincoln, Tom Joad, the President of the United States (twice), Admiral Chester Nimitz (twice), "Mr. Roberts," and two celebrated Clarences of the law—Clarence Darrow and Clarence Earl Gideon.[3] Who can resist Fonda as still another heroic figure, doggedly pursuing the truth? The late actor radiated honesty and integrity. His face was an affidavit.

I'm pleased to participate in this commemoration of the fiftieth anniversary of *12 Angry Men*. It is a wonderful movie with a remarkable ensemble cast, featuring a riveting actor with an unassuming sense of justice. Director Sidney Lumet and writer Reginald Rose produced and shot a tightly-written, suspenseful drama. Let us cheer their accomplishments. But we should celebrate *12 Angry Men* for what it is—great and engaging theatre. Let us not claim that the movie stands for something more. It should not be our ideal of an American jury.

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1. 12 ANGRY MEN (Orion-Nova Productions 1957). Citations to specific portions of the film are to the script. *See infra* note 5.

2. AFI's 100 Years . . . 100 Heroes & Villains, http://www.afi.com/tvevents/100years/handv.aspx (last visited May 29, 2007).

3. The films and TV programs in which Henry Fonda portrayed these roles are: *Young Mr. Lincoln* (1939), *Grapes of Wrath* (1940), *Fail-Safe* (1964), *Meteor* (1979), *In Harm's Way* (1965), *Midway* (1976), *Mister Roberts* (1955), *Clarence Darrow* (1974) and *Gideon's Trumpet* (1980), respectively. IMDB listing for Henry Fonda, http://www.imdb.com/name/nm0000020/ (last visited Mar. 24, 2007).

The jurors in *12 Angry Men* seem to display some of the qualities we expect of jurors in criminal cases: they (eventually) examine the evidence critically and they hold the State of New York to the constitutional standard of proof beyond a reasonable doubt. Give them props for that. Yet if we probe deeper we see a disturbing picture. The jury is dysfunctional. They have caustic arguments, not careful discussions. Worse, they reach a verdict based upon evidence that was neither introduced nor discussed in court. The film presents a veritable buffet of juror misconduct.

In Part I, below, I address some troubling juror dynamics. Part II, the heart of this essay, explains how the jurors committed misconduct. In the last section of the piece, I explore why a film with such unacceptable jury behavior has come to be so admired.

I. WHY ARE THEY ANGRY?

There is a disconnect between the way in which the jurors approach their deliberations and the manner in which their service has been idealized. The title of the film is, of course, *12 Angry Men*. But just what are they angry about? They do not seem angry about the murder. They are not angry about the quality of the lawyering. They are not angry about being handed the awesome responsibility of sitting in judgment in a capital case. They seem most angry about being asked to deliberate past an initial (and somewhat premature) ballot and being asked to discuss the evidence. How are we to think about their anger?

Let's get the obvious out of the way first: the jury is all-male and not racially diverse, which we can only hope is an artifact of its time.[4] The accused is a young man of Puerto Rican descent who resides in a poor neighborhood in New York City. No persons of color or women are on the jury. Perhaps those with the most diverse life experiences are Juror #11, a

4. The Fourteenth Amendment's Equal Protection Clause has long been held to prohibit intentional exclusion of African Americans from the jury. Strauder v. West Virginia, 100 U.S. 303, 310 (1879). But equal protection challenges are difficult to prove. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 205–06 (1965) (substantial underrepresentation in venire does not itself show purposeful discrimination). The equal protection analysis of jury composition was not applied to a group other than African Americans until 1977. *See* Castaneda v. Partida, 430 U.S. 482, 495–99 (1977) (underrepresentation of Mexican Americans in grand jury venires). The Sixth Amendment's "representative cross-section" requirement was also not incorporated and applied to the states until long after this movie was made; the same case also prohibited the systematic exclusion of women from jury service. *See* Taylor v. Louisiana, 419 U.S. 522, 528–33 (1975). And it was not until 1986 that the Supreme Court meaningfully prohibited the exercise of peremptory challenges on the basis of race. *See* Batson v. Kentucky, 476 U.S. 79, 97–98 (1986). In her *amicus curiae* brief in *Batson*, the District Attorney of Kings County (Brooklyn), New York, reported that race discrimination in jury selection occurred frequently and openly. Brief for Elizabeth Holtzman as Amicus Curiae, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263), 1985 U.S. S. Ct. Briefs LEXIS 2, *12–*24.

refugee from Europe, and Juror #5, who grew up in an impoverished neighborhood. The movie's hero, Juror #8 (Fonda), is described as an architect who constantly seeks the truth.[5] The extreme end of the spectrum is represented by Juror #10, who is overtly racist and whose opinions about the evidence eventually unravel.

The jurors' lack of diversity may explain some of their perspectives. It certainly adds to the drama. It is difficult, however, to see it as a full explanation for the jurors' anger.

Juror #7, who firmly believes the defendant guilty (but is not portrayed as racially biased against the defendant in the same way as Juror #10), is constantly dismayed by the prospect of prolonged deliberations. Early on, Juror #7 wants to decide this death penalty case quickly so he can go to a baseball game.[6] After the first ballot, which reveals Juror #8 as the lone "not guilty" vote, Juror #7 asks "what's there to talk about?" and says that "[y]ou couldn't change my mind if you talked for a hundred years."[7] He is argumentative throughout, and even gets upset when another juror tries to explain the concept of reasonable doubt.[8] Juror #3, who rivals Juror #10 as caustic and combative, says before the first ballot in this death penalty trial, "let's get this thing over with. We've probably all got things to do."[9] Later, he almost gets into a fistfight with Juror #8 (Fonda) over a game of tic-tac-toe.[10] At another point, he lunges at Juror #8, and threatens to kill him.[11] Other jurors flash anger and frustration. Juror #6 says "[w]e shoulda been done already."[12] Elderly and mild-mannered Juror #9 wishes he was younger so that he could fight Juror #10.[13] Along with their anger, several jurors are closed-minded and unwilling to consider each others' views. Surely this is not the way we want our juries to deliberate, especially in a capital case.

But of course this is theatre. The conflicts between the jurors provide the drama. *12 Angry Men* is a great movie. A screenplay titled *Twelve Calm Jurors Rationally Discuss the Evidence* would not make it to the big screen. And if it did, few would pay to watch.

5. Reginald Rose, *Twelve Angry Men*, *in* FILM SCRIPTS TWO 156, 159–60 (George P. Garrett, O. B. Hardison & Jane R. Gelfman eds. Irvington Publishers 1989) (1972) (screenplay version of the film 12 ANGRY MEN (Orion-Nova Productions 1957)).

6. *Id.* at 170.

7. *Id.* at 177–78.

8. *See id.* at 290.

9. *Id.* at 167.

10. *Id.* at 234.

11. *Id.* at 274.

12. *Id.* at 224.

13. *Id.* at 282.

Some might think this critique is too harsh. Perhaps we should instead cheer the jurors' final vote. We could take *12 Angry Men* as an uplifting example of a divided jury reaching a consensus despite (1) jurors' prejudices; (2) strong early commitments to fixed positions; and (3) hostile deliberations. After all, the jury does eventually get around to discussing the evidence. Juror #8 (Fonda) dissects the testimony and undermines the accuracy of witnesses' recollections. After a series of ballots, the eleven jurors who initially voted to convict manage to find a reasonable doubt and change their votes to not guilty. Isn't this what we want juries to do? Didn't this jury work together in the end? Isn't this cause for celebration?

Psychologists Saul Kassin and Lawrence Wrightsman pretty much take this view. They contrast *12 Angry Men* with the deliberations of the 1974 jury that acquitted former Attorney General John Mitchell and Maurice Stans in a Watergate-related prosecution. One juror (a wealthy supporter of the defendants' former boss, Richard Nixon) eventually converted others to his position. As it turned out, the juror managed to acquire undue influence over the other panelists, and they deferred to him. Kassin and Wrightsman note that we respond favorably to *12 Angry Men* but not to reports of the Mitchell-Stans jury.[14] They write that "[w]hat most distinguishes Fonda and [the Mitchell-Stans juror] is the extent to which their methods of influence comport with our vision of an ideal deliberation."[15] Juror #8 was just one man among twelve. He proved influential through his reasoning, say Kassin and Wrightsman. There was no *undue* or *improper* influence. Fonda "managed to convert his peers through a series of rational and persuasive arguments concerning the quality of the state's evidence."[16]

Were it but true. Even if we can overlook the jurors' hostile deliberations, what destroys this romanticized view of *12 Angry Men* is the misconduct of Juror #8 and others. Fonda may have made rational and persuasive arguments about the evidence, but it was not confined to the evidence introduced at trial.

II. THE MISCONDUCT BUFFET

A. Jury Misconduct Law

Let's start with a statement of general principles.

14. *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 169–72 (1988). They rely on *New York Times* reporter Martin Arnold for accounts of the Mitchell-Stans jury.

15. *Id.* at 171–72.

16. *Id.* at 172.

In the late Middle Ages, when defendants in England were allowed to opt for trial by jury instead of by ordeal, jurors were generally chosen because they already had knowledge of the parties or the facts.[17] But we no longer want jurors with knowledge of the facts; indeed, for centuries the practice has been quite the opposite.[18] A modern trial with all the trimmings means one in which lawyers present evidence in open court and witnesses are cross-examined. As a matter of due process, jurors must decide the case solely on the basis of the evidence presented in court,[19] and they take oaths to do so.[20]

From these fundamental precepts comes the law of juror misconduct. Jurors must decide cases based upon the evidence presented in court, and therefore cannot conduct their own investigations or consider extraneous evidence. This is sometimes a difficult issue for courts to address because jurors may not "impeach" their own verdicts. In post-conviction proceedings, for example, courts are generally precluded from hearing challenges to the content and quality of the jury's deliberations, particularly when such challenges are based on testimony of the jurors themselves.[21] One may argue that this prohibition is necessary, as a general matter, if we wish to respect the jury's verdict and its independent role, and to facilitate open and honest deliberations.[22] Yet even this strict limitation has been held to yield when it is alleged that jurors have considered extraneous evidence or have

17. *See* 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 317–19 (3d ed. 1922); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 26 (1986).

18. For a description of juries in the Old Bailey in the late seventeenth and early eighteenth centuries, see John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 272–77 (1978). Langbein reports that juries heard many cases, sometimes in batches. *Id*. While this shows the jury system still evolving, it indicates that jurors were not selected for their knowledge of the facts or parties.

19. Said the Supreme Court in Irvin v. Dowd, 366 U.S. 717, 722 (1961):

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial.

See also Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) ("[T]he jury's verdict [must] be based on evidence received in open court, not from outside sources.").

20. For some sample juror oaths, see FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 225 (4th ed. 1996, rev. 2000), *available at* http://www.fjc.gov/library/fjc_catalog.nsf ("Do each of you solemnly swear [*or* affirm] that you will well and truly try, and true deliverance make, in the case now on trial and render a true verdict according to the law and the evidence, so help you God?"); CAL. CIV. PROC. CODE § 232(b) ("Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?").

21. *See, e.g.*, Tanner v. United States, 483 U.S. 107, 116–27 (1987); FED. R. EVID. 606(b).

22. *See, e.g.*, McDonald v. Pless, 238 U.S. 264, 266–69 (1915).

conducted experiments that do not appropriately reflect the evidence introduced at trial.[23]

As a result, courts have found misconduct where jurors have visited the crime scene,[24] brought into the deliberations new information about the defendant or aspects of the case,[25] and conducted experiments with items not introduced at trial.[26] On occasion, courts have even found experiments in the jury room with *admitted evidence* to be improper if the experiments are not based on trial testimony, or if they do not fairly represent the conditions under which the crime took place.[27]

The next part of this essay explains that under these principles, the jury in *12 Angry Men* went pretty far off the rails.[28]

23. For a thorough discussion, see Judge Friendly's opinion in United States *ex rel*. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970).

24. *See, e.g.*, Hill v. United States, 622 A.2d 680, 682–86 (App. D.C. 1993) (conviction reversed where juror went to crime scene to see lighting conditions); Bobo v. State, 327 S.E.2d 208, 209–11 (Ga. 1985) (murder conviction reversed where two jurors visited crime scene to assess whether officer could have seen and identified defendant); People v. DeLucia, 20 N.Y.2d 275, 279–80 (1967) (remand for a hearing where it was alleged that jurors visited crime scene and reenacted the crime).

25. *See, e.g.*, *Owen*, 435 F.2d at 815, 821 (affirming grant of habeas corpus relief where jurors reported extraneous information about the defendant's character and prior acts); Russ v. State, 95 So. 2d 594, 600–01 (Fla. 1957) (defendant would be entitled to a new trial if juror told others new facts about the defendant's bad character that were within juror's personal knowledge); McDonald v. S. Pac. Transp. Co., 71 Cal. App. 4th 256, 263–65 (1999) (misconduct in personal injury case for juror, who was a transportation consultant, to give his expert opinion as to why gates could not be installed at railroad crossing); Snook v. Firestone Tire & Rubber Co., 485 So. 2d 496, 497–99 (Fla. Dist. Ct. App. 1986) (remand for further investigation in civil case where it was alleged that a juror investigated tire mounting procedures, and shop personnel told her that the accident could not have occurred as plaintiff claimed).

26. *See, e.g.*, Doan v. Brigano, 237 F.3d 722, 731–36 (6th Cir. 2001) (misconduct for juror to conduct home experiment with lipstick to test whether defendant could have seen a bruise in the dark; "what triggers concerns of a constitutional dimension, is the fact that Juror A conducted an out-of-court experiment and reported her findings to the jury in the manner of an expert witness"); State v. Pichay, 823 P.2d 152, 152–53 (Haw. 1992) (granting new trial where jurors brought dolls, which were not evidence, and a calculator into jury room); People v. Castro, 184 Cal. App. 3d 849, 852–57 (Cal. Ct. App. 1986) (conviction reversed where juror conducted home experiment with binoculars to see if officer could have observed and identified defendant). *But see* Urena v. Phillips, 2006 U.S. Dist. LEXIS 220, at *21 (E.D.N.Y. 2006) (jury experiment with gun was not improper; it was an "examination of an item already in evidence, whose functioning had been demonstrated by the prosecution's expert witness while under oath, and which did not seek to inject evidence or facts not part of the record at trial into the jury deliberations").

27. *See, e.g.*, United States v. Beach, 296 F.2d 153, 158–60 (4th Cir. 1961) (remand to determine if jury experimented with adding machines, which were in evidence, under conditions unlike those in defendant's home); *Ex parte* Thomas, 666 So. 2d 855, 858 (Ala. 1995) (conviction reversed where juror put on an exhibit (the defendant's pants) to see if it was possible to reach into the front pockets while handcuffed; although a rope used to bind the hands during the experiment had not been introduced into evidence, more importantly, "the jury had heard no evidence of the defendant's reach while handcuffed and it had heard no evidence as to how loosely or tightly the handcuffs held his hands").

28. I recognize that the film was released in 1957, and many of the cases just cited were decided long after. Nevertheless, I think it fair to assess the film by these principles. First, many of the basic concepts of juror misconduct were set before the movie was made. Second, to the extent that we think

B. Misconduct in the Movie

There are at least five instances of serious juror misconduct in the film.

The clearest act of misconduct is also the most dramatic. Early in the deliberations, when Juror #8 (Fonda) is the lone holdout, the jurors are discussing the murder weapon, a switchblade knife. Juror #8 asks to see the knife, which was admitted into evidence.[29] It has a very unusual carved handle. Juror #4 recounts the testimony of the storekeeper who sold the knife (or one just like it) to the defendant. According to the storekeeper, it was the only knife of its kind he ever had in stock. Juror #4 flicks open the knife and jams it into the table for all to see.[30] Juror #8 argues that it is possible for another person to have done the killing with a knife similar to the one bought by the accused. When Juror #3, a bully, shouts back that it's not possible, Fonda reaches into his pocket, draws a knife, flicks it open and stabs it into the table right next to the murder weapon. The two knives are twins; they are exactly alike.[31] As Juror #8 (Fonda) explains, he walked through the defendant's neighborhood the previous night. He bought the knife for two dollars at a pawnshop three blocks from the accused's house.[32] Soon thereafter, a juror switches his vote to not guilty.[33]

This is fabulous theatre but incontrovertible misconduct. Juror #8 has conducted an investigation in the accused's neighborhood. He has given unsworn, untested testimony that an identical knife could be purchased near the defendant's home. And he has exhibited extraneous physical evidence, the second knife, in the jury room to great effect.

Later the jurors discuss the testimony of two key trial witnesses. One witness had testified that she saw the killing through the windows of the last two cars of a moving elevated ("el") train; the other, the defendant's downstairs neighbor, had testified that he heard the accused threaten to kill his father right before a body hit the floor. Juror #8 asks how long it takes a six-car elevated train to pass a given point. There has apparently been no trial testimony on this fact, so the various jurors hazard guesses and agree that it takes ten seconds.[34] He then asks if anyone has lived next to the el

about the film as setting forth a vision for how a jury *should* behave, it is appropriate to judge this jury by contemporary legal norms.

29. *See* Rose, *supra* note 5, at 200.
30. *Id.* at 201, 203.
31. *Id.* at 204.
32. *Id.* at 205.
33. *Id.* at 215.
34. *Id.* at 234–36.

tracks. Juror #6 says he had worked in an apartment next to the tracks and it was noisy. Juror #8 says that he once lived next to the tracks and it was unbearably noisy. Putting the two bits of unsworn testimony together, Juror #8 argues that it would not have been possible for the witness to have heard the defendant's threat because the train had roared past the window for a full ten seconds before the body hit the floor.[35]

One might suggest that the jurors are simply interpreting the facts in light of their own common experiences, as they are permitted to do. But estimating how long it takes a train to pass, especially without any trial testimony as to the train's speed (or the train's usual speed on that section of track), is hardly within jurors' common experiences. Neither is knowing whether sound could readily travel between the upstairs and downstairs apartments, even when a train is passing by outside. Nor are the jurors bringing in their own experiences merely to raise a reasonable doubt about the witness' testimony. Juror #8 puts it this way: "I think we've proved that the old man couldn't have heard the boy say, 'I'm going to kill you . . . . '"[36]

Not content with supplying missing expert testimony, the jurors then conduct an experiment. The downstairs neighbor had also testified that after the body hit the floor, he went from his bedroom to the apartment door and saw the defendant run down the stairs. He said that it took him fifteen seconds to get to the door. But the witness had had a stroke and dragged his leg when he walked in court, which the jurors had observed.[37] The jurors note that defense counsel failed to cross-examine the witness about his ability to get to the door in fifteen seconds, which Juror #8 (Fonda) attributes to the lawyer not wanting to bully an old man.[38] The evidence showed that the witness would have had to walk fifty-five feet to get to the door. Lacking a ruler or measuring tape, Juror #8 paces off what he believes is the distance. Having heard no testimony about how quickly the man walked on the night of the killing, Fonda guesses. The jurors time the experiment. Fonda reaches the finish line after thirty-three seconds.[39]

There's more. The father was stabbed with the knife at a downward angle.[40] Juror #8 (Fonda) takes on the role of defense counsel. Prompted by Fonda, Juror #5 (who grew up in a crime-ridden neighborhood) tells the others that he has seen knife fights. "Switch-knives," he says, "came with

35. *Id.* at 236–38.
36. *Id.* at 244.
37. *Id.* at 260–65.
38. *Id.* at 267.
39. *Id.* at 268–71.
40. *Id.* at 300.

the neighborhood where I lived." You use the knife "underhanded." "Anyone who's ever used a switch-knife'd never handle it any other way."[41] Juror #8 continues with the direct examination of Juror #5, his unsworn knife expert: "Do you think he could have made the kind of wound that killed his father?" "Not with the experience he'd had all his life with these things," testifies the expert.[42]

We might compare these instances of misconduct with a portion of the deliberations that takes place late in the film. There the jurors confront a lack of evidence on a key point, but they appropriately treat it as relevant to the existence of reasonable doubt.

In this part of the movie, the jurors are again discussing the testimony of the woman who saw the killing through the windows of a passing el train. According to her testimony, she had gone to bed but was unable to fall asleep. At about ten minutes after midnight, she looked out the window and saw the murder.[43]

Juror #9 notices another juror rubbing the bridge of his nose where his eyeglasses had made deep marks. This reminds Juror #9 that the witness had those marks as well, and similarly rubbed her nose. The witness was not wearing glasses in court and there was apparently no testimony at trial as to whether or why she wore glasses. The jurors decide that the marks could only be made by eyeglasses,[44] which appears to be a fair inference based upon common (not expert) knowledge. The jurors note that the witness' eyesight was not addressed by the lawyers in court, and that they do not know what kind of glasses she wore. But it does seem clear that if she needed glasses, she would not have worn them to bed.[45] The issue proves decisive; her eyesight is "in question now." As Juror #2 puts it, "You can't send someone off to die on evidence like that."[46]

Of course, that the jurors acted properly in questioning the reliability of this witness' observation does not mean that the witness' eyesight was so bad that she was in fact unable to see the murder. We don't know either way, for the record is undeveloped. There was no cross-examination on this factual issue, which could have been a wise strategic choice by defense counsel or an inept omission. (One would hope that the decision not to cross-examine was deliberate, and was informed by a full defense investi-

41. *Id.* at 306.
42. *Id.* at 307.
43. *Id.* at 318.
44. *Id.* at 322–28.
45. *Id.* at 329–31.
46. *Id.* at 331.

gation). Either way, the lack of cross-examination worked here to the accused's benefit.

A cinematic demonstration of this point is provided by the more recent movie, *My Cousin Vinny*.[47] Two young men are on trial for murder. A witness claims that he looked out of his window and saw the defendants flee the "Sac-O-Suds," a store where the killing took place. One of the defense lawyers asks:

> Mr. Gibbons [defense counsel]: Mr. Tipton, I see you wear eyeglasses.
>
> Mr. Tipton [witness]: Sometimes.
>
> Mr. Gibbons: Well, would you care to show those eyeglasses to the jury, please? Thank you. Now Mr. Tipton, were you wearing them that day?
>
> Mr. Tipton: No.
>
> Mr. Gibbons: Ha! You see, you were 50 feet away. You made a positive eyewitness identification and . . . yet . . . you were not wearing your necessary prescription eyeglasses.
>
> Mr. Tipton: They're reading glasses.[48]

From a defense lawyer's perspective, less is often more.

In sum, I believe that there are at least five instances of juror misconduct in *12 Angry Men*: (1) Juror #8's oral account of purchasing a knife identical to the murder weapon three blocks from the accused's home; (2) Juror #8's dramatic display of new physical evidence (the identical knife) in the jury room; (3) the jurors' speculative calculations of train speed and noise; (4) the experiment, not based on trial testimony, of whether a witness could have reached his apartment door in fifteen seconds; and (5) Juror #5's expert testimony about the use of switchblade knives.

C. Assessing the Jurors' Behavior

Some might argue that these are not truly serious instances of misconduct, that they would not be treated as such by a reviewing court and, in any event, that this conduct should be condoned, especially in a capital case. To consider these points, it may help to explore a hypothetical. What would we think of the jury's behavior if the same misconduct led to conviction rather than acquittal? This is in fact the only posture in which these claims of misconduct could be decided by a criminal court. Under the Double Jeopardy Clause, the prosecution cannot appeal an acquittal.[49] Thus, *12*

47. MY COUSIN VINNY (Twentieth Century Fox 1992).

48. *Id.*

49. *See* Green v. United States, 355 U.S. 184, 188 (1957) ("[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy . . . . Thus it is one of

Angry Men might be remade, as it was (badly) in 1997.[50] But we would not see a sequel in which the verdict of acquittal is overturned due to the jury's misconduct, and the State of New York tries the defendant for a second time.

In our hypothetical, let us assume that the defense was that another person had done the killing with a unique knife. As part of the defense case, counsel for the accused argued that no one could purchase such a unique knife in the defendant's neighborhood. Assume further that the elderly downstairs neighbor had testified at trial that he recognized a different person's voice when he heard the threat to the decedent, and that after hurrying to the apartment door he saw someone else run out. Moreover, assume that the knife wounds were level (not downward) and the defendant had argued that he could not have made them because he was taller than his father, and a natural angle for the knife and the wounds would have been downwards.

In this hypothetical, the misconduct would have destroyed the defense. Juror #8 would have established that a similar knife could be purchased nearby. The misconduct about the train and the experiment about movement within the apartment would refute the testimony of the elderly neighbor. Juror #5's expert knife testimony would undermine the defendant's argument about the angle of the wound. Let us assume that the accused is convicted of murder.

I suspect that few of us would be comfortable with this outcome. All of this new evidence would have been discussed by the jury without ever affording the defendant an opportunity for rebuttal or cross-examination. He could not, for example, address Juror #5's critical assumption that the accused was so experienced with switchblade knives that he would have held one underhanded. He would not have had the chance to ask the downstairs neighbor to demonstrate that he really could move fast on occasion, as he did the night of the murder, and thus that he really did see another person leave the building. The defense would not have been able to cross-examine the pawnshop owner who sold Juror #8 the knife.

Let's take our hypothetical one step further. Assume that the convicted defendant brings a new trial motion or a post-conviction petition to challenge the verdict based upon juror misconduct. This of course presupposes that the defense is fortunate enough to learn about the jury's behavior and that at least some jurors are willing to come forward and admit what took

the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.").

50. 12 ANGRY MEN (MGM Television 1997).

place. In truth, these contingencies pose significant practical barriers to post-conviction challenges, as jurors are generally told that they are not required to talk with lawyers or investigators after the trial.[51] As a result, many do not.

How would a court address the claims of misconduct in our hypothetical? I think that most courts would at least *hear* the allegations with respect to the new physical evidence (the knife) and Juror #8's visit to the defendant's neighborhood. These claims would generally be understood as involving extraneous evidence, and courts regularly resolve such post-conviction challenges.[52] The other contentions would encounter more significant obstacles. Many courts would, I believe, characterize the other claims as assaults on the quality of the jurors' deliberations and summarily reject them, either due to restrictive evidentiary rules or longstanding principles of respect for the jury's deliberative process. A number of other judges would, fortunately in my view, understand the allegations differently. When jurors claim special knowledge and act as experts (such as on train speed and the correct way to hold a switchblade knife), they are indeed placing extrinsic evidence before the jury. When jurors conduct experiments in the jury room that are not under conditions described in the trial testimony, they are also functionally considering extraneous and untested evidence.

Of course, there is a world of difference between preventing a judge from inquiring into a claim of juror misconduct and holding up that conduct as a model of proper juror behavior. It may well be that many courts

51. As an example, California's current pattern criminal jury instructions provide the following model language as part of a final instruction:

> Now that the case is over, you may choose whether or not to discuss the case and your deliberations with anyone. . . . Let me tell you about some rules the law puts in place for your convenience and protection. The lawyers in this case, the defendant[s], or their representatives may now talk to you about the case, including your deliberations or verdict. Those discussions must occur at a reasonable time and place and with your consent. Please immediately report to the court any unreasonable contact, made without your consent, by the lawyers in this case, their representatives, or the defendant[s]. A lawyer, representative, or defendant who violates these rules violates a court order and may be fined.

JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS (2006) ("3590. Final Instruction on Discharge of Jury"), *available at* http://www.courtinfo.ca.gov/jury/criminaljuryinstructions/calcrim_juryins.pdf.

52. Nancy Marder, who admires the jury in the movie, acknowledges that Juror #8 "may have gone too far in introducing a switchblade knife that he had bought at a pawn shop in the defendant's neighborhood." Nancy S. Marder, *Why* 12 Angry Men? *(1957): The Transformative Power of Jury Deliberations*, *in* SCREENING JUSTICE—THE CINEMA OF LAW 157, 168 n.7 (Rennard S. Strickland, Teree E. Foster & Taunya Lovell Banks eds., 2006). She notes that Fonda's actions would at least have given an argument for a mistrial had the defendant been convicted. *Id*. I think that Juror #8's actions are much more serious than Professor Marder may suggest, and I believe that his acts—combined with the other instances of misconduct—so taint the deliberations that we should not continue to praise the work of this jury.

would declare themselves unwilling to intrude into the jury's deliberative process and, thus be unable to adjudicate allegations that the defendant was convicted on the basis of untested expert evidence supplied by jurors. That does not mean that courts affirmatively approve of the jurors' actions. We should label their behavior misconduct, even if it is misconduct that may not be remedied under our current laws and evidentiary rules.

Finally, we must ask whether it matters that the misconduct in *12 Angry Men* is in aid of acquittal rather than conviction. Should we tolerate juror investigations and testimony when defense counsel has not done an adequate job or there are gaps in the evidence? What about the fact that this is a capital case? In my view, the jurors committed misconduct even though it led to a not guilty verdict.

Let me be clear about what I am arguing and what I am not. I believe in the constitutional principle of proof beyond a reasonable doubt. And while all juries should deliberate with care, I believe that juries in death penalty cases have a special obligation to be thorough, careful and deliberate, and to make their judgments based upon the evidence. Moreover, I am *not* arguing that the defendant in *12 Angry Men* should have been convicted, nor would I be comfortable with his execution. The gaps in the evidence suggest that defense counsel may have been inexperienced, or that he failed to conduct a full investigation. Or it could be that exculpatory information may not have been provided to the defense. But I think that the remedy is to fix these failings and facilitate a full and fair trial. I would not empower the jury to conduct its own investigations or allow jurors with special expertise to expound on their views, insulated from any scrutiny by parties.[53]

A danger of holding this jury up as a model is revealed by our earlier hypothetical. Sauce for goose and gander go together. There is no practical way to cabin a jury's out-of-court adventures solely to instances where the evidence favors the accused. One cannot, for example, instruct a jury that it is free to conduct its own investigation but that it may consider only new exculpatory evidence and must disregard any newly-found inculpatory evidence. The same is true for expert opinions held by jurors. Once we establish a mode of decision making for jurors, that path will be followed in considering all evidence, whether the path eventually leads to guilt or innocence.

53. I acknowledge the line-drawing problem. It is difficult in many instances to distinguish between juror opinions that are (improperly) based upon claims of special expertise and those that are (properly) the product of reason and common experience. In this essay, I have suggested examples of conduct that fall on each side of the line.

III. AMERICAN IDOL

There is one final question to address. If the deliberations in *12 Angry Men* are so flawed and the jury so dysfunctional, why has the film's image of the jury resonated so well with the public for so many years? I will briefly explore three possible explanations, apart from the pure appeal of Henry Fonda: (1) people do not know much else about the jury; (2) citizens think of the jury as an autonomous decision maker; and (3) our system uncritically fosters the belief that the jury is best-equipped to find facts, and that its verdict is generally reliable. Let me address each point in turn.

Other than Vice President Dick Cheney's National Energy Policy Development Group,[54] the jury may be our most secretive democratic public institution. We go to great lengths to preserve the confidentiality of jury discussions. No outsiders observe the jury. The trial may be a grand open affair, but guilt or innocence is decided in a small locked room, protected from prying eyes. Jury deliberations are not taped, even in those jurisdictions that permit cameras in the courtroom. As I have noted, restrictive rules of evidence prohibit jurors from testifying about most aspects of their deliberations. It is said that nature abhors a vacuum. Without images of real juries deliberating, cinematic representations easily become the public's perception of how the jury should operate. And the images in *12 Angry Men* are powerful.

Moreover, the principle of jury autonomy is older than the Republic. Historians commonly point to *Bushell's Case*[55] as establishing in 1670 that jurors render their own verdicts, free from coercion from the court.[56] In

54. *See* Cheney v. United States Dist. Ct., 542 U.S. 367 (2004).

55. 124 Eng. Rep. 1006 (C.P. 1670).

56. *See, e.g.*, THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 200–49 (1985); *see also* Langbein, *supra* note 18, at 285, 298 (suggesting that *Bushell's Case* did not become a landmark until about a century after it was decided); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 134 (Little, Brown and Co. 5th ed. 1956) (1929).

Edward Bushell was the foreman of the jury at the 1670 trial of Quakers William Penn and William Mead. Penn and Mead were tried at the Old Bailey on charges of unlawful and tumultuous assembly. The jury declared Penn guilty only of "speaking in Gracechurch Street" and acquitted Mead. After being sent back out, the jury eventually returned with definitive acquittals of both men. Penn and Mead's Case, 6 Howell's State Trials 951 (1670), *reprinted in* DON C. SEITZ, THE TRYAL OF WILLIAM PENN & WILLIAM MEAD FOR CAUSING A TUMULT 21, 33 (University Press 1919) (1719). During a fractious courtroom debate, William Penn uttered the immortal words: "If Not guilty be not a Verdict, then you make of the Jury and *Magna Charta* but a meer Nose of Wax." *Id.* at 28. (Take note, Hollywood—that's *real* drama.)

The court thought the verdict was contrary to instructions, and the jurors were fined and imprisoned for contempt. Bushell and several fellow jurors were eventually released on a habeas corpus petition, which established the ability of jurors to render their own verdict according to the law and the facts. *Bushell's Case*, 124 Eng. Rep. at 1012.

1735, a colonial jury acquitted publisher John Peter Zenger of seditious libel following a politically-motivated prosecution.[57] The conception of the jury as an independent body that checks executive power is deeply rooted in our history and culture. With this common understanding of the jury's role, the public may perhaps be forgiven for assuming that jurors are unconstrained in how they may consider the evidence.

My third point is that our justice system fosters (and is unable to question seriously) the gospel that juries return reliable verdicts. Our system depends on selling this concept. If we want citizens to accept and respect jury verdicts, which is of paramount importance, people must believe in the jury as a reliable trier of fact. It is no overstatement to say that in the criminal justice system, the jury is an American idol. And we truly have a faith-based system, for we permit neither serious inquiry into jury decisions nor empirical study of jury deliberations. Unless there is misconduct in the courtroom itself or the use of extraneous evidence, we accept verdicts as final even when there are disturbing indications that deliberations have gone seriously awry.[58] We protect the gospel by walling off verdicts from substantive challenges. With this faith in the jury to make the right decisions, and without any tradition of analyzing the jury's verdict, it is perhaps also easy to comprehend why the public would uncritically accept the actions of the jurors in *12 Angry Men*.

CONCLUSION

So let us celebrate *12 Angry Men*. It is a wonderful drama. Three cheers for Henry Fonda in yet another heroic role. But let's cheer neither the film nor Fonda as a model for how we want juries or jurors to behave.

57. For an account of the proceeding, see JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz ed., Belknap Press 1963) (1736).

58. *See, e.g.*, United States v. Hernandez-Escarsega, 886 F.2d 1560, 1579 (9th Cir. 1989) (no evidentiary hearing permitted into allegation that one juror prayed that another would change his vote to guilty, and it would be a sign from God that her prayer had been heard if the wavering juror wore his blue blazer to court).