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SYMPOSIUM:
THE 50TH ANNIVERSARY OF *12 ANGRY MEN*

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The year 2007 marks the fiftieth anniversary of the movie *12 Angry Men*. This movie offers a portrayal of jury deliberations that is rare in the history of American filmmaking. One interpretation of the movie is that it portrays the jury as a group of twelve ordinary men who learn in the course of their deliberations what it means to be a jury. The jurors, led by the persevering Juror #8, played by Henry Fonda, eventually learn to put aside indifference, prejudice, and personal enmity to piece together the evidence with a critical eye, and to deliver a verdict of not guilty based on their reasonable doubt. However, that is only one interpretation. The movie continues to raise questions, spark debate, and invite multiple interpretations fifty years after it was released. This Symposium draws from a diverse group of contributors—academics, judges, and a former juror—and invites their views. They offer creative, and at times conflicting, interpretations of a movie that has endured for fifty years, and that will likely endure for another fifty years.

I. THE AMERICAN JURY

DELIBERATION AND DISSENT: *12 ANGRY MEN* VERSUS THE EMPIRICAL REALITY OF JURIES — *Valerie P. Hans* — *579*

This article contrasts the cinematic portrayal of jury deliberation in *12 Angry Men* with an empirical portrait of real world juries derived from fifty years of jury research. The messages of this iconic movie converge with the findings of research studies in some surprising ways. During the course of the movie's deliberation, the different perspectives of the movie's jurors emerge as important contributors to the jury's fact finding, reinforcing the empirical finding that diversity among jurors produces robust deliberation and superior decision making. *12 Angry Men* also illustrates both the importance of majority opinions and the power of dissenters under a unanimous decision rule.

ANGER AT ANGRY JURORS *Jeffrey Abramson* *591*

12 Angry Men portrayed the lone holdout juror as essential to the jury's protection of the individual against injustice. But recently a number of empirical and normative questions have been raised about the holdout juror. Some studies go so far as to suggest that most holdout jurors are motivated by unreasonable doubts or are engaged in unlawful acts of jury nullification. The result, according to such studies, is that hung juries are on the rise. After reviewing these studies, this article concludes that there is no reliable evidence establishing a national trend toward a rise in hung juries, although some jurisdictions are experiencing a noticeable spike. This article also concludes that data is also lacking to establish a rise in instances of jury nullification and that the independence of juries is threatened by treating holdout jurors as if they were engaged in misconduct.

12 ANGRY MEN (AND WOMEN) IN FEDERAL COURT *Judge Nancy Gertner* *613*

The movie *12 Angry Men* reflected everything that is extraordinary and troubling about the American jury system. It portrayed twelve lay people, struggling with questions of guilt or innocence, bias and fairness, or racism and rationality. But the movie was troubling in equal measure. These important struggles about guilt or innocence were played out in an all-white, all-male jury, while the defendant was a minority. Jury trials in federal court reflect the same extraordinary and troubling pattern, particularly as street crime is "federalized." Constitutional remedies—as they are currently construed—are inadequate to the task. The Jury Selection and Service Act has likewise been narrowed. Yet the fundamental unfairness remains.

WHY EVERY CHIEF JUDGE SHOULD SEE *12 ANGRY MEN* *Judith S. Kaye* *627*

In this article, the Chief Judge of the State of New York, Judith S. Kaye, writes about several aspects of *12 Angry Men* that raise concerns for all of today's chief judges. She connects scenes in the film to the modern challenges of maintaining adequate jury facilities, assuring juror diversity, providing effective legal representation to those who cannot afford counsel, and incorporating twenty-first-century technology. Although much has changed in jury service since 1957, Judge Kaye concludes that the essence of the film has not: the quest for justice is timeless.

DELIBERATION IN *12 ANGRY MEN* *Barbara Allen Babcock and Ticien Marie Sassoubre* *633*

The authors explore the ways *12 Angry Men* remains a relevant and teachable portrayal of the mysterious process of jury deliberation. Even though few juries today would look like the jury in the film, its performance reveals the continuing value of the institution.

A JURY BETWEEN FACT AND NORM *Robert P. Burns* *643*

With a great cast, *12 Angry Men* remains perhaps the most compelling portrayal of an American jury in action. I begin by noting eight details in the film which are so obvious that their significance may be difficult to discern. I then discuss the significance of the film being a *drama*, indeed, a drama about a drama. I discuss the kind of truth that a dramatic portrayal of the jury can aspire to and what it can add to social scientific accounts. Finally, I identify the six dramatic tensions that define the film's meaning.

II. THE AMERICAN CRIMINAL JUSTICE SYSTEM

THE MYTH OF FACTUAL INNOCENCE *Morris B. Hoffman* *663*

The movie *12 Angry Men* is part of a larger American myth about the frequency of wrongful criminal convictions. This essay examines the broader contours of that myth, including its most recent incarnation in the form of innocence projects, suggests more realistic upper and lower bounds for the real wrongful conviction rate, and argues that exaggerations about the frequency of wrongful convictions threaten to become self-fulfilling.

WAS HE GUILTY AS CHARGED? AN ALTERNATIVE NARRATIVE BASED ON THE CIRCUMSTANTIAL EVIDENCE FROM *12 ANGRY MEN*
Neil Vidmar, Sara Sun Beale, Erwin Chemerinsky, James E. Coleman, Jr. *691*

This essay argues that while *12 Angry Men* is typically viewed as a vindication of innocence, careful consideration of the evidence suggests that the jury probably reached the wrong verdict: the circumstantial evidence pointed to guilt! The authors use this insight to discuss the potential impact of circumstantial versus direct evidence on real juries and perhaps the ways that cases are litigated. The essay suggests a number of questions requiring empirical research.

12 ANGRY MEN: A REVISIONIST VIEW *Michael Asimow* *711*

12 Angry Men is the definitive film about the jury and has influenced generations of viewers to regard the jury system as fundamental to American justice. This article suggests a revisionist view of the film. It argues that the film should instead generate reservations about whether the jury system is likely to produce just results. Empirical studies indicate that it is quite unlikely that one holdout juror can persuade the other eleven to switch positions, so that the racist and classist views of the majority of the jurors would normally prevail. More important, the jury in *12 Angry* M*en* got it wrong. The unchallenged circumstantial evidence against the defendant pointed overwhelmingly to his guilt, well beyond a reasonable doubt. Although Juror #8 successfully casts doubt on the eye-witness testimony against the defendant, these doubts do not reduce the overwhelming probability of guilt generated by the circumstantial evidence.

GOOD FILM, BAD JURY *Charles D. Weisselberg* *717*

12 Angry Men is a wonderful movie. Acting in one of the most acclaimed film roles of all time, Henry Fonda, as Juror #8, turns around a jury bent on conviction. Fonda begins as the lone holdout and one by one the other jurors change their views. Over the last half century, the jury in *12 Angry Men* has come to symbolize an independent and vital American institution, the petit jury. But, as the Article explains, Fonda and his fellow jurors commit clear misconduct, eventually deciding to acquit the accused using evidence that was not introduced at trial. We cannot excuse the jurors' misconduct, even though they tried to fill gaps in the evidence and make up for defense counsel's failings. We may admire *12 Angry Men* as a movie. It is terrific theatre. But we should not praise the jury in the film. The jurors in *12 Angry Men* do not have the qualities we want for those who sit in judgment in our criminal justice system.

III. *12 ANGRY MEN* IN POPULAR CULTURES

12 ANGRY MEN IS NOT AN ARCHETYPE: REFLECTIONS ON THE JURY IN CONTEMPORARY POPULAR CULTURE — *David Ray Papke* — *735*

While *12 Angry Men* remains an important cinematic and political work, the film provides an atypical pop cultural portrayal of the jury. Most portrayals are limited and even degrading, a pattern suggesting both a failure to appreciate the jury as an embodiment of popular sovereignty *and* our society's apolitical self-disenfranchisement.

MAD ABOUT *12 ANGRY MEN* — *Stephan Landsman* — *749*

12 Angry Men is the product of a world that has vanished. This article presents twelve reasons why we might consider placing *12 Angry Men* on the refuse heap of history along with the Ford Edsel, hula hoop, and Soviet Union—things that a changing world rendered outmoded. Despite all this, the article concludes that *12 Angry Men* should not be discarded but cherished because it makes dramatically real the invaluable service to society performed by jury deliberations in validating the workings of our justice system and spreading the rule of law.

A DIFFERENT STORY LINE FOR *12 ANGRY MEN*: VERDICTS REACHED BY MAJORITY RULE—THE SPANISH PERSPECTIVE — *Mar Jimeno-Bulnes* — 759

The film *12 Angry Men* is well known in Spain, not only to picture-goers but also to researchers examining the pros and cons of trial by jury. Had its plot faithfully reflected Spanish legislation on jury proceedings, the film would undoubtedly have ended very differently. Under the Spanish Jury Law of 1995, a verdict may be reached by a simple majority of the jurors, rather than by the unanimous decision that is depicted in the film. However, it is not the need for a unanimous verdict or otherwise, but for a "reasoned" verdict that has caused considerable controversy in Spain. The deliberations of a jury constitute the main theme of *12 Angry Men*; however, the film also touches upon other issues (such as jurors acting as *ex officio* defense lawyers and the death penalty). The purpose of this paper is to discuss certain elements of that much-acclaimed film and examine the way in which Spanish juries reach their verdicts.

THE GERMAN RESPONSE TO *12 ANGRY MEN* — *Stefan Machura* — *777*

12 Angry Men was well received by the German audience. It would be hard to find a German equivalent, since Germany is not a jury country. However, writer Bodo Kirchhoff and director Niki Stein created a film along the lines of *12 Angry Men*. The TV film *Die Konferenz* (2004) depicts the deliberation of a teachers' conference on the fate of a young man accused of raping a fellow student. Like *12 Angry Men*, *Die Konferenz* addresses key social problems of its time. The main topic is gender relations. Tellingly, *Die Konferenz* has no dominant hero like Henry Fonda's Juror #8. The film also refrains from giving a comforting ending.

THE GOOD, THE BAD, OR THE INDIFFERENT: *12 ANGRY MEN* IN RUSSIA — *Stephen C. Thaman* — *791*

12 Angry Men made a great impact in Russia when first screened in 1961. Jury trials were featured in classic novels of Dostoevsky and Tolstoy in the nineteenth century and, after having been reintroduced in Russia in the 1990s are again becoming part of its culture. The article will explore this history and discuss the continued importance of *12 Angry Men* today on Russia's stages and in the new remake by filmmaker Nikita Mikhalkov.

IV. UNIVERSAL THEMES

CHARADES: RELIGIOUS ALLEGORY IN *12 ANGRY MEN* — *Bruce L. Hay* — *811*

This article argues that *12 Angry Men* is a complex, elaborate biblical allegory. The first half of the article is devoted to showing that the film quietly reenacts a series of stories from the Hebrew Bible and the New Testament: primarily the story of Christ, but also (among others) the stories of the great flood, the sacrifice of Isaac, the exile in the desert, and the lamentations of Jeremiah. The second half of the article investigates the relation between the film's biblical subtext and its attack on McCarthyism and other pathologies of 1950s American political culture. The article suggests that the film's unspoken portrayal of Henry Fonda's character as a latter-day prophet and savior might be thought of as a sort of subliminal advertisement for the values of legal liberalism (respect for civil liberties, tolerance of dissent, the rule of law, and so on). The article emphasizes some of the tensions and paradoxes in the film's use of allegory, which includes unmistakable ethnic and gender stereotypes deriving from biblical sources.

FATHERS IN LAW: VIOLENCE AND REASON IN *12 ANGRY MEN* — *Austin Sarat* — *863*

In this article I argue that *12 Angry Men* is as much a film about fatherhood and law as about juries and civic virtue. It is a powerful presentation of sons subject to paternal brutality, of fathers tormented by their sons, and of the very real possibility of sons murdering their brutal fathers. This film thus deploys complex images of fatherhood as a site and source of violence and anger. By presenting those images it reminds us of law’s own complex relationship to reason and violence.

THE BANALITY OF EVIL: A PORTRAYAL IN *12 ANGRY MEN* — *Nancy S. Marder* — *887*

Popular culture thrives on a portrayal of evil as murder, mayhem, and violence, rather than as a result of small actions taken by ordinary citizens. The movie *12 Angry Men* explores the evil of indifference that is far more pervasive and powerful than the evil of monsters common in film, but rare in life. With the exception of Juror #8, played by Henry Fonda, the jurors summoned to decide a boy's fate are willing to sentence him to death in their indifference to their role as jurors and in their haste to complete their jury service. Fonda, through his lone vote of not guilty, manages to slow down the proceedings so that the jurors must deliberate. The process of deliberating leads the jurors to reexamine the evidence, contribute their insights, and reach a new understanding of the case that they had not had as individuals, particularly when blinded by haste, bias, and the disinterest of key actors such as the judge and defense attorney. The process of deliberation transforms these individuals from indifferent men willing to commit evil in the name of the state to responsible citizens willing to take seriously their roles as jurors.

KENNETH M. PIPER LECTURE

THE CHANGING FACE OF COLLECTIVE REPRESENTATION: THE FUTURE OF COLLECTIVE BARGAINING — *Kenneth G. Dau-Schmidt* — *903*

Although the obstacles to employee organization appear daunting, this is an exciting time to be involved in the American labor movement. Just as the movement had to adapt as industrial methods of production were adopted around the dawn of the twentieth century, so too must it now adapt to the changed circumstances of the working people under the new information technology in a global economy. Employee interest in some form of representation or mutual aid and support remains high, as workers confront issues of increased risk, lower job security, and pervasive downward pressure on wages and benefits.

In this essay, Professor Dau-Schmidt examines how the American labor movement is responding to the challenges of the new economic environment in new and creative ways. He argues that, as employers become "boundaryless" using the new information technology in the global economy, unions will have to become

"boundaryless" and organize on multi-employer, sectoral, occupational, professional, national, or international bases. He also asserts that we are likely to see worker organizational objectives that transcend the objectives of higher wages and benefits from a particular employer sought through traditional bread-and-butter collective bargaining. Higher wages and better working conditions will of course remain one of the primary objectives of worker organizations, but they may be achieved within the context of larger area standards contracts, corporate codes of conduct, local and state laws, national laws, or international treaties. Finally, Professor Dau-Schmidt argues that we are likely to see more employee collective action that surmounts the traditional strategies of withholding labor or boycotting goods to achieve higher wages and benefits for the employees of a particular employer. Strikes and boycotts will continue to be important weapons in labor's arsenal, but workers also will use other weapons—supporting and organizing worker efforts to enforce their legal rights outside of the collective bargaining relationship and using the political process to achieve successes that cannot be won at the bargaining table.

STUDENT NOTES

RECONSIDERING *IN RE TECHNOLOGY LICENSING CORPORATION* AND THE RIGHT TO JURY TRIAL IN PATENT INVALIDITY SUITS — *Andrew W. Bateman* — *933*

Over the past decade, the Federal Circuit and the Supreme Court have lessened the role of the jury in patent cases, both by classifying patent issues as questions of law for the judge, and by limiting the situations in which jury trial is available as of right. Recently, in *In re Technology Licensing Corporation*, the Federal Circuit held that there is no right to a jury trial in a declaratory judgment action seeking a declaration of patent invalidity, where the defendant counterclaims with alleged infringement and seeks an injunction as the sole remedy. In line with Supreme Court precedent, the *Technology Licensing* majority applied a two-pronged "historical analog" test: (1) compare the statutory action to eighteenth-century actions from England, as they existed prior to the merger of the courts of law and equity; and (2) determine whether the remedy sought is legal or equitable in nature. Under the first prong, the Federal Circuit majority determined that the closest historical analog to the declaratory judgment action for patent invalidity was the inverted form of the action: a patent infringement suit where the defendant alleges patent invalidity. A review of eighteenth-century English patent law, however, in combination with a closer look at the nature of the present-day patent invalidity action, suggests that the writ of *scire facias*—a legal action—is a more appropriate historical analog to the declaratory judgment action for patent invalidity, and that the right to jury trial should therefore attach. At a minimum, the uncertainty as to what the appropriate analog might be suggests that the Federal Circuit should have followed the Supreme Court's approach in *Markman v. Westview Instruments*. In *Markman*, the Court had recognized that there was no clear historical analog to patent claim construction, and therefore looked instead to functional considerations and policy concerns. Under that approach, the highly fact-intensive nature of patent invalidity issues dictates that the right to jury trial should be preserved.

CODIFYING A COMMONS: COPYRIGHT, COPYLEFT, AND THE CREATIVE COMMONS PROJECT — *Adrienne K. Goss* — *963*

In response to problems of overprotection perceived in America's copyright scheme, the founders of the Creative Commons project have sought to create modular licenses allowing authors and artists to declaim some of the default protections associated with their copyright in order to grant public permission for use of their work in contexts such as nonprofit media or derivative works. This article reviews criticisms of the Creative Commons project and analyzes the project from the standpoint of copyright's overall policy goals, both domestically and internationally. Because copyright policy seeks to enhance the public supply of information and knowledge, the article concludes that Creative Commons comports with underlying rationale for copyright protections. However, because of the private nature of the initiative, significant problems arise with questions of enforcement of the Creative Commons licenses as well as with Congressional goals of uniformity. The article suggests that many of the problems posed could be alleviated by codifying a means for copyright owners to opt for a more limited form of copyright within federal copyright law.

EXPANDING NLRA PROTECTION OF EMPLOYEE ORGANIZATIONAL BLOGS: NON-DISCRIMINATORY ACCESS AND THE FORUM-BASED DISLOYALTY EXCEPTION — *Andrew F. Hettinga* — *997*

As they fight for better working conditions both in the union and non-union context, employees increasingly use online web logs or "blogs" to better organize themselves. For organizational purposes, these blogs present numerous advantages over more traditional speech forms. This article adds to the growing voices calling for explicit protection of employee blogs under Section 7 of the National Labor Relations Act ("NLRA"), which protects "concerted" employee action taken "for mutual aid and protection" from employer retaliation, provided that such blogs otherwise comply with NLRA requirements. Furthermore, by analogizing to past NLRA jurisprudence concerning traditional organizational speech, this article argues that a "non-discriminatory access" rule should govern employee internet use; for example, if an employer allows employees to use the internet on their lunch breaks for non-work related reasons, that employer must also allow employees to access their organizational blogs. However, the NLRB has fashioned an important exception to NLRA protection that allows employers to punish otherwise-protected speech because it is openly disloyal. In order to properly protect employee organizational blogging, this article next discusses the uneven and subjective manner in which courts have applied this "disloyalty exception" to traditional organizational speech, and what impact this uneven application might have on blogs specifically. The article then isolates different factors courts consider when applying the exception, attempts to logically categorize traditional organizational speech into different forum categories (public, employee-sponsored, and employer-sponsored), and considers what differences or patterns in the exception's application, if any, may be found when employee speech occurs in different fora. The article concludes by suggesting a means for courts and the NLRB to more equitably apply the disloyalty exception and ensure proper protection for employee blogs. Since blogs quite easily lend themselves to the forum categorizations described above, courts should first consider what forum category the organizational speech appears in; courts should then apply the exception's "factors" with varying strength depending on that categorization.

KELO COMPENSATION: THE FUTURE OF ECONOMIC DEVELOPMENT TAKINGS — *Benjamin A. Householder* — *1029*

The recent Supreme Court decision in *Kelo v. City of New London* has dramatically expanded takings jurisprudence, granting municipalities the power to take from one private owner for the economic benefit of both private developers and communities at large. Although the expansion has great potential to create necessary benefits for various municipalities, the victims of the takings, private owners who are stripped of their property, are now cast in a brighter light. This article argues that there is no longer the same balance there once was with takings, namely property being taken for a purely public use in exchange for fair market value or "just" compensation. In this new era where private developers team up with municipalities to create economic growth, fair market value is no longer "just." Where private developers also reap benefits from the taking, not just the public at large, fair market value becomes an archaic excuse to keep profits up. Therefore, a new method of valuing taken property that more closely conforms to the "just" standard set forth by the founding fathers is necessary to preserve faith in the government and eminent domain.

THE USE AND ABUSE OF THE TORT BENEFIT RULE IN WRONGFUL PARENTAGE CASES — *Kathryn C. Vikingstad* — *1063*

Recovery of child-rearing damages in wrongful parentage cases has deeply divided courts across the United States. Depending on the state in which parents find themselves, they may be able to recover no, some, or all child-rearing damages. Despite the great divide in recovery schemes, all states, with the exception of the few that allow parents the opportunity to fully prove and recover all child-rearing damages, have one thing in common: they severely abuse and misuse the tort benefit rule. This article examines the manner in which the benefit rule has been misused in wrongful parentage cases and illustrates how this misuse represents courts' misunderstanding of the injury suffered by the plaintiffs. This article concludes that a proper application of the tort benefit rule and a proper

understanding of the injury in wrongful parentage cases require courts to allow plaintiffs the opportunity to fully prove and recover all child-rearing damages.