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JURY REFORM AT THE END OF THE CENTURY: REAL AGREEMENT, REAL CHANGES†

Phoebe C. Ellsworth*

The University of Michigan Journal of Law Reform *recently sponsored a jury reform symposium dealing with the numerous current proposals for improvement of the jury system. Professor Phoebe Ellsworth prepared the following article as an overview of the* Journal's *published symposium presentations. Her references to particular papers are generally understandable without the full publication at hand, but interested readers may obtain copies of the symposium issue from the address listed below.*

Complaints about the jury system and calls for its reform are nothing new—they have probably existed as long as the jury system itself. Warren Burger called for the reform of the civil jury in 1971;[1] in 1905 William Howard Taft decried the contemporary tendency "to exalt the jury's power beyond anything which is wise or prudent . . . ."[2] Judges complain to judges, lawyers complain to lawyers, legal academics write articles about the jury for other legal academics, social scientists report their research on juries to other social scientists, and the jurors themselves go home and express their exasperation to their families. Any of them may try to tell their stories to the public, and journalists fan the flames of discontent.

The *University of Michigan Journal of Law Reform* Symposium, "Jury Reform: Making Juries Work," was unusual and particularly valuable in that it brought together these disparate students and critics—judges, lawyers, legal academics, social scientists, and even an experienced and thoughtful juror—to share their knowledge and concerns, thus managing to achieve that diversity of perspectives that many believe is one of the major advantages of the jury itself.

A second unusual and valuable feature of the Symposium was a shift in emphasis from a concern with documenting, analyzing, and bewailing the failures of the American jury to a concern with devising, implementing, and testing solutions. More remarkable yet, there was a heartening convergence in the views

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[1] *See generally* Warren E. Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A.J. 855 (1971).

[2] William H. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 14 (1905).

of participants whose intellectual backgrounds and practical experience were very different. Although there was some disagreement about the particular nature of the problems in the jury system and their seriousness, similar suggestions for reform were proposed by judges, lawyers, scholars, and jurors. And many of the reforms were not merely empty wishes; the Symposium also included preliminary reports of attempts to implement these suggestions.

I. THE RECENT RISE IN INTEREST IN JURY REFORM

Before 1970, social science exploration of the jury consisted of a scattering of small isolated studies and one monumental research initiative which culminated in 1966 with the publication of Kalven and Zeisel's *The American Jury*.[3] This study recruited more than 500 judges who reported on jury verdicts in more than 3500 trials from all regions of the United States. The authors found that the jury verdicts matched the verdicts the judge would have given 78% of the time (for both civil and criminal cases) and, in a ringing endorsement of the American jury system, concluded that there was no substantial evidence that juries were incompetent to perform their task.[4] In 1968, in the case of *Duncan v. Louisiana*,[5] the Supreme Court extended to the states the right to jury trial in criminal cases.[6] This decision paved the way for a series of decisions about what the right to a jury trial actually implied, including decisions regarding which common characteristics of juries—representativeness, unanimity, twelve members—were essential to the definition of a jury, and which were not.

Although there was hardly any research on jury decision making at the time, and none that addressed the particular questions raised in the cases before the Court, the Supreme Court based its decisions in part on empirical assumptions about the relation of these characteristics to the quality of the jury's decision making. For example, in *Williams v. Florida*,[7] the first of these cases, the Court considered the issue of the constitutionality of reducing the number of jurors from twelve to six. In deciding that six-member juries were constitutional, the Court made the empirical claim that "the reliability of the jury as a factfinder hardly seems likely to be a function of its size."[8]

Social scientists were appalled that the Court could draw such far-reaching conclusions about jury behavior without any evidence whatsoever, and thus

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[3] *See generally* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).
[4] *See id.*
[5] 391 U.S. 145 (1968).
[6] *See id.* at 157-58.
[7] 399 U.S. 78 (1970).
[8] *Id.* at 100-01.

the *Duncan* decision, and its progeny also, ushered in a period of intense activity by social scientists who felt that the Court's empirical claims should be tested empirically. Research on juries, initially inspired by dissatisfaction with the Court's decisions on jury size and unanimity,[9] took on a life of its own and became a flourishing field, slowly building up a body of reliable knowledge about how juries function, what they do well and what they do badly, how they respond to evidence and to extra-evidentiary information, and how certain procedural variations impair or enhance their ability to perform their task.[10] From Kalven and Zeisel's original research[11] to the present, most social scientists have agreed that juries are competent fact-finders, and that jury deliberations tend to identify and correct *errors of fact* and to result in an *understanding of the facts* that is more complete and more accurate than that of any individual member.[12] Whether this competence extends to very complex technical evidence is still an open question.

Over the same period of time, study after study found that jurors are far less competent at *understanding the law* as presented to them in the judges' instructions, and that the deliberation process is not particularly effective in correcting *legal mistakes* or producing an accurate understanding of the law.[13] Jurors' understanding of the law can be considerably improved, however, by rewriting the turgid, technical pattern instructions in clearer language[14] and by providing the jurors with at least some instructions before the very end of the trial.[15]

Social scientists have made numerous suggestions for reform, beginning in the mid-1970s and continuing up to the present.[16] Until very recently, however, these suggestions were largely ignored. In 1991, Alexander Tanford reviewed the impact of two of the most commonly proposed reforms—preinstructing the jury on substantive law and giving jurors written copies of the

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[9] *See generally* Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca, Cooper & Madden v. Oregon, 406 U.S. 404 (1972).
[10] *See generally* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986).
[11] *See generally* KALVEN & ZEISEL, *supra* note 3.
[12] *See* REID HASTIE ET AL., INSIDE THE JURY 230 (1983); Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, *in* JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al. eds., 1997); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL., PUB. POL., & L. 589 (1997); *see also* HANS & VIDMAR, *supra* note 10, at 118-20.
[13] *See* HANS & VIDMAR, *supra* note 10, at 120-27; HASTIE ET AL., *supra* note 12, at 231; *see also* Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 L. & CONTEMP. PROBS. 205, 218-23 (1989). For an excellent review of these studies, *see generally* Lieberman & Sales, *supra* note 12.
[14] *See generally* Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or In Light of It*, 1 L. & HUM. BEHAV. 163 (1977).
[15] *See generally* Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. APP. PSYCHOL. 220 (1991).
[16] *See generally* Lieberman & Sales, *supra* note 12.

instructions to use during their deliberations—on state courts, legislatures, and rule-making commissions. Tanford found no evidence whatsoever for a trend toward greater use of these procedures.[17] He concluded that lawmakers were unlikely to be persuaded of a need for reform on the basis of social science research. It appears not that the calls of the social scientists were considered and rejected, but rather that they were simply ignored.

Intense media coverage of a series of dramatic trials has accomplished what decades of social science research, high on responsibility but low on human interest, could not. In this Symposium issue, Professor Marder argues,[18] as do Hans, Hannaford, and Munsterman,[19] that public concern about juries and their shortcomings has been galvanized by a string of high publicity cases: The Menendez brothers, Lorena Bobbitt, Rodney King, O. J. Simpson, and a host of minor characters in the Simpson drama became names that evoked instant recognition and often considerable passion in many if not most Americans. The public became disturbed and often outraged about the failure of the jury system, and, as Marder documents,[20] calls for reform became increasingly common and increasingly urgent.

It would be a mistake, however, to conclude that the public and the media, once awakened to the need for reform, called for consideration of the social science research that had been accumulating quietly over the years. The public's view of the problems within the jury system was not the same as the social scientists' view, and the reforms they called for bore little resemblance to the recommendations of the social scientists.

II. WHAT IS THE PROBLEM? TWO PERSPECTIVES ON THE JURY SYSTEM

In America today, public outrage is most reliably aroused by people getting better than they deserve—sometimes literally "getting away with murder," sometimes "getting something for nothing." Juries are reviled as incompetent or biased when they acquit "obviously guilty" defendants or when they award astronomical damages for "obviously trivial" injuries.[21] Although the development of DNA analysis exonerated over fifty people who had been wrong-

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[17] *See generally* J. Alexander Tanford, *Law Reforms by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 L. & SOC. REV. 155 (1991).
[18] *See* Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285 (1999).
[19] *See* Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM 349 (1999).
[20] Marder, *supra* note 18.
[21] *See generally* Phoebe C. Ellsworth & A. Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, PSYCHOL., PUB. POL. & L. (forthcoming 1999).

fully convicted (and who were lucky enough that testable material from the crime still existed), and although over the last twenty years more than seventy-five people have been released from death row due to serious doubts about their guilt, these stories do not seem to provoke the same crusading passion as decisions that are regarded as too lenient.[22] The juries that wrongfully convicted them are not singled out for the sort of scrutiny and criticism that were levelled at the juries in the cases of the Menendez brothers, Stacey Koon and his associates, and O. J. Simpson. Likewise, cases in which plaintiffs receive no damages at all do not seem to provoke much indignation.

A. Civil Juries

On the civil side, the public is aware of a "litigation explosion" in which irresponsible or unscrupulous people either exaggerate the seriousness of their injuries or try to pin the blame on somebody (preferably somebody rich), in an attempt to acquire as much money as possible. Lawsuits proliferate, and more and more often these undeserving people are winning huge awards from gullible juries. That, at least, is a common public perception of the problem.

Before analyzing the causes of a problem and proposing solutions, it is always important to step back and ask whether there really is a problem at all. In this Symposium issue, Chappelear argues cogently that the media have exaggerated the scope of the jury problem, if there is one, by focusing on unusual cases with fabulous awards.[23] He approaches the question more systematically, examining every case to be tried in a single Ohio courthouse over a twelve-year period.[24] The results of this careful scrutiny mesh nicely with what other researchers, using different methods, have found: Most cases settle, most trials take less than a week, and most damage awards are modest.[25] Plaintiffs do not seem to be winning more often now than they used to. Punitive damages are very rare. On the whole, there is little evidence of a new and pressing need for sweeping reforms.

On the other hand, the fact that some media stories have led to exaggerated perceptions of the severity of the problem should not be taken as evidence that there is no problem at all. The fact that the decisions of civil juries are not

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[22] *See generally* Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, L. & CONTEMP. PROBS. (forthcoming 1999) (addressing in depth the problem of erroneous convictions in capital cases).
[23] *See* Stephen E. Chappelear, *Jury Trials in the Heartland*, 32 U. MICH. J.L. REFORM 241 (1999).
[24] *See id.*
[25] *See generally* Samuel R. Gross & Kent Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. REV. 1 (1996); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan ed., 1993); Special Issue, *The Future of Punitive Damages*, 1998 WIS. L. REV. 1.

recklessly fanatic should not reassure us that they are perfect, that there is no room for improvement. Professor Hastie's article, in this issue, suggests, for example, that in setting punitive damages, most jurors consider some of the criteria that are laid out in the judge's instructions, but very few consider all of them.[26]

Research on civil juries began somewhat more recently than research on criminal juries, and much more needs to be done before we will be in a position to make confident statements about the steps in the decision making process that jurors handle effectively and those that cause them difficulties, or to propose promising remedies in the areas where civil juries seem to have most trouble. Complex technical and statistical evidence, long multi-party trials, the influence of damage severity on judgments of liability, and the setting of compensatory and punitive damages have all been suggested as areas of possible difficulty for juries.[27] There is some evidence to support these suggestions, but so far it is far from conclusive. For example, there is hardly any research that actually compares judges' and juries' responses to the same trial materials; thus we do not know which of the jury's shortcomings are also characteristic of judges. If juries are susceptible to errors of reasoning on some aspects of their task, and judges are not, the focus of reform efforts should be specifically aimed at the jury; but if judges are susceptible to the same errors as jurors, obviously a different kind of reform is needed.

B. Criminal Juries: Unreasonable Acquittals and "Nullifications"

On the criminal side, the concern is with the perceived leniency of juries, especially with their failure to convict "obviously guilty" defendants. Sometimes this leniency is seen as gullibility. In the first trial of Lyle Menendez, the jury was hung, with the six men favoring a verdict of murder, and the six women a verdict of manslaughter. The women were portrayed by the media as emotional creatures, moved to sympathy by irrelevant evidence.[28] More recently, as Marder persuasively argues in this Symposium issue, active bias has replaced gullibility as the key element in media and popular explanations of jury leniency: The issue is defined as one of jury nullification.[29]

As Marder argues, most of what is labeled "nullification" is not really nullification at all.[30] True nullification occurs when the jurors understand the law

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[26] *See* Reid Hastie, *The Role of "Stories" in Civil Jury Judgments*, 32 U. MICH. J.L. REFORM 227 (1999).
[27] *See generally* Larry Heuer & Steven D. Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 L. & HUM. BEHAV. 29 (1994); MacCoun, *supra* note 25.
[28] Apparently the male jurors shared this view. *See* HAZEL THORNTON, HUNG JURY: THE DIARY OF A MENENDEZ JUROR 91 (1995).
[29] *See* Marder, *supra* note 18.
[30] *See id*.

they are supposed to follow, and consciously decide to disregard it. Sometimes they make this decision because they feel that the law itself is unjust; sometimes because they feel that the punishment is unjust; and sometimes because they feel that although the law and the punishment are appropriate for the general case, strict adherence to the law would be a miscarriage of justice in the particular case before them.[31] This is the nullification of the juries who refused to enforce the Fugitive Slave law, and it is the nullification of white juries who refused to convict whites of crimes against blacks because they believed that blacks were not fully human; for good or ill, it is an intentional, and often principled decision.

Current outcries against jury nullification define the term more loosely, if they define it at all. They attribute to the jurors what Green calls a "dishonest partisanship"—favoring one's own group without careful consideration of the law at all.[32] Sometimes it is seen as embodying the morality of a stubborn and insular subculture (usually a minority subculture, nowadays, but sometimes, as in the Rodney King case, the white racist subculture), and sometimes it is the idiosyncratic bias of an individual holdout. It is further described as an emotional resistance to the outcome that would be inevitable under rational analysis. Principled nullification has often been viewed as a sign that the system is working well, that "natural law" prevails over black-letter law, that juries reflect community standards of justice when the law itself does not. The nullification decried by the media and the public, however, is viewed as a sign that the system is falling apart, that self-interest and bias prevail over any law.

As with the "litigation crisis," before we rush in with reforms designed to deal with the "nullification crisis," we should first explore whether there *is* a problem of crisis proportions, and what the nature of the problem is. The bizarre cases of O. J. Simpson and Stacey Koon and his colleagues can hardly be taken as evidence for a general trend, and in fact there is little evidence that jury acquittals are rising dramatically.[33] Vidmar and his colleagues examined rates of conviction in the federal courts and five state courts (LA, FL, NC, NY, and TX) over periods ranging from ten to fifty years and found that conviction rates have been stable over the last ten years in state courts, while conviction rates have actually *increased* in federal courts over both the last ten years and the last fifty years.[34] The scare stories about the rising tide of nullification usually rely on a handful of apparently egregious cases. Sometimes

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[31] *See generally* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 (1985).
[32] *See id.* at 28.
[33] *See* Roger Parloff, *Race and Juries: If It Ain't Broke*, AM. LAW., June 1997, at 5-7, 72-74.
[34] *See generally* Neil Vidmar et al., *Should We Rush to Reform the Criminal Jury?*, 80 JUDICATURE 286 (1997).

these stories are supplemented by the statements of a couple of individual prosecutors or judges who assert that there is a nullification problem; occasionally, a highly selective set of statistics is presented as though they were representative.[35] In an excellent exposé, Parloff[36] demonstrated that all of this so-called statistical evidence could be traced to a single *Wall Street Journal* article published the day after the O. J. Simpson verdict.[37] For this and other reasons, Parloff suggested that the evidence for the "nullification crisis" is largely propaganda.

Like critics of the jury in every era, writers who are alarmed by these twin crises tend to ascribe the weaknesses of the jury system to the irrationality or prejudice of the people chosen for jury duty: Too many unsuitable people are allowed on juries; too many well-qualified people are excused. At the beginning of the century William Howard Taft railed against a system that made it possible, even perhaps inevitable, "to eliminate from all panels every man of force and character and standing in the community, and to assemble a collection in the jury box of nondescripts of no character, weak and amenable to every breeze of emotion, however maudlin or irrelevant to the issue."[38] At the end of the century, in an exhibition staged by a judge and a law professor, the idea that the problem with the jury system is the undesirable influence of *bad jurors* was reiterated by Judge James Rant, who bewailed the subversive influence of "the obstinate loner, the obsessive individual, the morally-challenged individual."[39]

Who are these obstinate, morally-challenged nondescripts whom Taft and Rant rail about and whom an abundance of commentators on the O. J. Simpson case have in mind?[40] Well, they are not middle-class white people. After the Simpson case, people felt more free to say what they did not quite want to say before: that black jurors are reluctant to convict blacks, so they nullify.[41] The nullification crisis, and the litigation crisis too, are partly about race. Current publications emphasize black bias, not white bias, although there is no evidence that one race is more scrupulous in following the law in interracial cases than the other.

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[35] *See* Michael Meyers, *The Racial Divide: Color-Blinded Juries*, *in* RACE AND THE CRIMINAL JUSTICE SYSTEM 41-45 (G. A. Reynolds ed., 1996); *see generally* Abigail Thernstorm & Henry D. Fetter, *From Scottsboro to Simpson*, 122 PUB. INTEREST 17 (1996).
[36] *See* Parloff, *supra* note 33.
[37] *See* Benjamin A. Holden et al., *Color-blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1.
[38] Taft, *supra* note 2, at 13.
[39] Eugene R. Sullivan & Akhil R. Amar, *Jury Reform in America: A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141, 1154 (1996) (quoting debate speech given by Rant).
[40] *See* Marder, *supra* note 18.
[41] *See generally* Thernstrom & Fetter, *supra* note 35; Michael D. Weiss & Karl Zinsmeister, *When Race Trumps Truth in the Courtroom*, 7 AM. ENTERPRISE 54 (1996); D. Levine, *Race Over Reason in the Jury Box*, 148 READER'S DIGEST 385 (1996); Jeffrey Rosen, *One Angry Woman*, THE NEW YORKER, Feb. 24, 1997, at 54.

As Cohn and Sherwood point out, black jurors are underrepresented in jury pools, particularly in jurisdictions where most defendants are black.[42] There is no public outcry about this unfairness that approaches the outcry against nullification and juror incompetence; for many people, I suspect, the underrepresentation of blacks is seen as one more sign of their unfitness. If they cannot be recruited proportionally from voter registration lists, if they do not settle down at one address and stay there, if they do not eagerly respond to a summons from the courthouse, they probably aren't people "of force and character and standing in the community" anyway.[43] So Cohn and Sherwood's efforts to achieve representativeness by oversampling blacks failed.[44] Perhaps in the future their efforts will succeed—if they sweeten the pill by referring to "neighborhood" rather than "race," or if they emphasize the virtues of the new system they propose, which does not "subtract" but merely "recycles" the white jurors. Race is not the whole story behind the alarmist attacks on bad jurors, but it is certainly a part of it.

But, as with the "litigation crisis," the fact that there is no nullification epidemic does not mean that there is no problem. An honest mistake is still a mistake, and erroneous verdicts are a cause for concern even if they have nothing to do with nullification.[45] Social science research provides ample evidence that the greatest weakness of juries is their lack of understanding of the law.[46] Most surprising jury decisions are not the result of a careful analysis of the law and a principled—or even an unprincipled—decision to ignore it, but of an inability to figure out what the instructions mean in the first place. Jurors work hard to understand the instructions, spending twenty percent or more of their deliberations discussing the law,[47] feel frustrated, and sometimes ask for help but rarely get it. They finally muddle through with what seems like a plausible interpretation, an interpretation that is often incorrect. This is a cause for concern.

The research, however, provides no support for the public's perception that this failure is due to the inclusion of jurors who are biased or unfit. For decades, social scientists have tried to find characteristics of individual jurors that would predict their verdicts and their behavior in the jury room, and they have generally come up empty-handed.[48] Race, gender, income, education, occupation, and personality have all been examined and have all turned out to

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[42] *See* Avern Cohn & David R. Sherwood, *The Rise and Fall of Affirmative Action in Jury Selection*, 32 U. MICH. J.L. REFORM 323 (1999).
[43] Taft, *supra* note 2, at 13.
[44] *See* Cohn & Sherwood, *supra* note 42.
[45] *See* Marder, *supra* note 18.
[46] *See* Ellsworth, *supra* note 13; HASTIE ET AL., *supra* note 13; *see generally* Elwork et al, *supra* note 14; Liebermann & Sales, *supra* note 12; Smith, *supra* note 12.
[47] *See* Ellsworth, *supra* note 13, at 218; HASTIE ET AL., *supra* note 13, at 85.
[48] *See* HANS & VIDMAR, *supra* note 10, at 131-48.

be practically useless in predicting how a person will behave when called as a juror in a particular case. There is little support for the popular notion that bad jury decisions are caused by bad jurors.

Social scientists therefore reject the "Bad Juror" theory as a general explanation for questionable verdicts, and prefer a "Bad System" theory, arguing that the decision making task is presented to the jury in ways that make it unnecessarily difficult to reach a well-informed, accurate decision. Some critics have argued that the experience of jurors in the courtroom is structured to frustrate understanding at every step.[49] The legal jargon of pattern instructions is obscure and unfamiliar; instructions are often communicated to the jurors solely by being read out loud by the judge; the legal framework which should help the jurors to organize the evidence appropriately is withheld from them until after they have already heard all the evidence; the evidence itself is presented in a disorganized fashion; jurors are treated like blank slates, with no preconceptions about the law; they are given little encouragement to ask questions when they are uncertain about their task or the law; and, in general, they are reduced to passive non-participants throughout the trial. None of these features of the jury's task is conducive to high-quality decision making. Before deciding that jurors are governed by their hearts, we should consider the possibility that the system does very little to encourage the intelligent use of their minds.

III. REFORMS

One of the most exciting revelations of the Symposium, reflected in several of the articles in this issue, was the astonishing agreement among lawyers, social scientists, judges, and jurors about how to improve the jury system. None of the members of these constituencies subscribed to the "bad juror" theory of jury incompetence or recommended solutions geared toward weeding out inadequate jurors in favor of their better-endowed peers. Rather, they all shared the view, long advocated by social scientists, that the deficiencies in the performance of jurors reflect deficiencies in the system, and that reform efforts should involve changes in the task presented to jurors rather than changes in the people chosen to serve. Judge Dann of Arizona[50] and Judge Mize of the Washington D.C. Council for Court Excellence[51] described the comprehensive reforms they have initiated. Judge Dann, in his 1993 arti-

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[49] *See generally* B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993).
[50] *See id.*
[51] *See generally* COUNCIL FOR COURT EXCELLENCE DISTRICT OF COLUMBIA JURY PROJECT, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN WASHINGTON, D.C. (1998).

cle and at the *University of Michigan Journal of Law Reform* Symposium, ridiculed the defects of the traditional legal model, which treats jurors as passive observers without preexisting ideas or frames of reference, recording a one-way stream of information like tape-recorders, and waiting until all the evidence is in and the legal categories have finally been revealed before reaching a judgment. He contrasted this model with the "behavioral-educational" model. According to this model, jurors approach the evidence and law with their own frames of reference, which they use to actively organize and evaluate the information they receive, and reforms should take advantage of these cognitive strategies by encouraging active involvement and providing jurors with more tools to help them accomplish their task. In contrast, the passivity of their role in the current system frustrates jurors; the instructions baffle them. The whole process creates obstacles to attention, understanding, and accurate application of the law.

As illustrated by the contributions of Longhofer[52] and Phillips[53] to this volume, many of the proposed reforms are designed to transform jurors from passive sponges to active participants: allowing them to take notes and to ask questions, and providing them with the information they need, *when they need it*, to make the right decision. The goals are to increase attention and a sense of continuous engagement, and to reduce confusion.[54] They range from relatively uncontroversial suggestions, such as providing jurors with written copies of the instructions, to more radical reforms, such as allowing jurors to question witnesses or to discuss the case among themselves before the trial is over.

Many of these reforms were proposed by social scientists, and some of these proposals have been around for twenty years.[55] They went largely unnoticed, however, until the high-publicity trials of the late 1980s and 1990s focused public and media attention on the jury. Despite the immediate calls for reforms based on the "bad juror" model, including provisions for nonunanimous juries in criminal cases, the consensus among judges, jurors, social scientists, and to some extent attorneys, is solidly in favor of reforming the *system* and achieving collaboration among all four groups in designing and evaluating reforms.

Perhaps most remarkable of all, several of the proposals for reform include provisions for empirical research designed to evaluate the consequences of

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[52] *See* Ronald S. Longhofer, *Jury Trial Techniques in Complex Civil Litigation*, 32 U. MICH. J. L. REFORM 335 (1999).
[53] *See* Annie King Phillips, *Creating a Seamless Transition from Jury Box to Jury Room: Proposals for More Effective Decision Making*, 32 U. MICH. J.L. REFORM 279 (1999).
[54] *See* Ellsworth & Reifman, *supra* note 21.
[55] *See, e.g.*, Elwork et al., *supra* note 14.

the reforms. For example, one of Annie King Phillips's suggestions is that jurors be allowed to discuss the case with each other before the trial is over.[56] This innovation is being tried in Arizona, and the Arizona Supreme Court has authorized a random-assignment experiment to test its effects. In this issue, Professor Hans and her colleagues report the first preliminary results of that experiment.[57] Among all the proposed innovations, the importance of this commitment to well-designed empirical research to discover the consequences of these changes should not be underestimated. It is an exciting time for juries, with an explosion of interest, a lively collaboration of scholars and practitioners, comprehensive proposals for change, actual implementation of some of these proposals, and high-quality scientific study of their effects.

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[56] *See* Phillips, *supra* note 53.
[57] *See* Hans et al., *supra* note 19.

A DEFENSE OF TRIAL BY JURY†

Douglas W. Hillman*

The theme this year for Law Day, which we celebrate on May 1, is "Celebrate Your Freedom." Individual freedom, as we know it today, means more than freedom from physical restraint. It consists of all rights necessary to ensure true human freedom. Under our Constitution and Bill of Rights, individual liberty encompasses such fundamental rights as representative democracy, the right of personal security, freedom of action, freedom of conscience, due process, equal protection, the impartial administration of civil justice, and, of course, the right of trial by jury.

The subject today is particularly appropriate for us living in Western Michigan in light of the uproar over the recent jury-ordered acquittal of a prominent and distinguished former congressman. The trial was exhaustively monitored by the media. It was reported in the [Grand Rapids] *Press* that damaging blood alcohol evidence allegedly demonstrating defendant's intoxication was excluded on legal grounds by the trial judge. This inadmissible evidence, although never presented to the jury, was described in great detail by the local media. Following defendant's acquittal, letters have poured in to the *Press* lambasting the defendant, the jury system, and even accusing the defense counsel of chicanery. Some angry letter writers questioned whether the entire jury system shouldn't be chucked!

And these are not the only voices being raised. With increasing urgency, many U.S. manufacturers, insurers, doctors, and municipal officials are trying to overhaul the nation's tort system by limiting the role of the jury. Typical legislative proposals include arbitrary limitations on the amount of damages recoverable by victims of institutional negligence, irrespective of the extent of their injuries or the gravity of defendant's gross indifference to human safety. Other proposals often put forth include a requirement of mandatory arbitration. The claimed justification for these arbitrary infringements on individual liberty is that of economic necessity. It is claimed our jury system, whether civil or criminal, is incompetent, irresponsible, and out of control. Even my friend John Douglas, the *Press* columnist, has written that two standards of justice exist in this country: one for the rich and prominent and another for the rest of us!

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† A 1999 Law Day essay, published originally in the *Grand Rapids [Michigan] Press*.

* Senior Judge, United States District Court, Western District of Michigan; Judicial Fellow and Past President, International Society of Barristers.

I submit that nothing could be further from the truth. It has been my experience, first thirty years as a trial lawyer and almost twenty years on the bench, that jurors are conscientious, attentive, and fully aware of their responsibilities to the parties and the public. It is my personal observation that jurors make every good faith effort to arrive at verdicts which are fair, just, and in accordance with the evidence and the law. I might add that the close advisors to President Nixon who went to jail for the obstruction of justice would be amused at the comments of John Douglas.

Obviously, no system made up of human beings is perfect. We are not talking about a perfect institution. But where does a perfect institution exist? On occasion a jury verdict may surprise or even shock some observers. But it must be remembered that the reports of court proceedings from the news media to the public may be quite different from the actual evidence submitted to the jury. Likewise, the public may not understand that under our law the jury in a criminal case must acquit a defendant unless it finds the state has proved him or her guilty "beyond a reasonable doubt."

In the many cases over which I have presided, I can count on one hand the jury verdicts with which I disagreed. And, of course, in those few cases it may well be that the jury's assessment of the evidence was more reliable than mine.

The right to a jury trial is guaranteed in the seventh amendment to the United States Constitution. It is a basic and fundamental right that dates back almost 800 years. On the English plain at Runnymede a resolute band of rebel barons gathered on the banks of the Thames and extracted from King John his assent to the concept of constitutional government. This, of course, was the signing of the Magna Carta, which is credited with the establishment of the "twin pillars of democracy": representative government and trial by jury. The centerpiece of the Magna Carta was the 39th Clause, which provided:

> No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed, nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.

This event became the rallying cry of individual liberty in England during the 17th century and so influenced the founding fathers of our country that the seal of the Magna Carta was emblazoned on the cover of the Journal of the Proceedings of the First Continental Congress, held in Philadelphia on September 5, 1774, where our forefathers laid the foundation stone of individual liberty in the United States.

Trial by jury is an essential ingredient of our fundamental right to the impartial administration of civil justice. Not only is it our constitutional right,

guaranteed by the seventh amendment and by comparable provisions of our state constitutions, but it is the only way an individual citizen can ensure that his or her other fundamental rights are protected.

Some years ago, former President George Bush, in speaking of our Constitution, said:

> Two hundred years after its ratification, this extraordinary document is recognized around the world as the great charter of American liberty and democracy. Indeed, as James Madison predicted, the principles enshrined in our Bill of Rights have become for all peoples, "fundamental maxims of free government."

It is easy to forget now, more than 200 years removed from the events, that the right of trial by jury was held in very high esteem by the colonists. Its denial to the colonists at the hands of the English king and his appointed colonial judges was one of the important grievances leading to the break with England. Our founding fathers considered the right of trial by jury an important bulwark against tyranny and corruption and an important safeguard too precious to be left to the whim of the sovereign. The overwhelming concern for trial by jury was a key factor which led to the adoption of the Declaration of Independence and to the seventh amendment, now an integral part of the U.S. Constitution. It was believed then, and is equally valid today, that juries represent the laymen's common sense and thus keep the administration of law in accord with the wishes and feelings of the community.

M.D.A. Freeman, a scholar who has written extensively on the judicial system, wrote that the jury is a mechanism by which the court's output of justice may be balanced with community sentiment. He stated:

> Juries are part of our inherited political culture. The jury mediates between the law and the people. The importance of the jury lies in the fact that lawyers and judges know that their arguments must be pitched on a level that the man [or woman] in the street can understand. The jury rests on a notion of justice "in which law must be made to seem rational and even humane" to a layman.

Consequently, I submit, an attack on the jury system is really an attack upon the foundation of our political system. Without the jury we would not be the society we are now.

What confronts the court in any case before it is a multitude of conflicting claims. What the jury does is to compare what it hears with its own experiences. It by no means follows that it will pick one side's story or the other. It is quite possible for it to take segments of the competing versions put in by different participants and to weld them into a composite picture. It has been

my experience that the jury uses its own best judgment and common sense, much as its members do in the everyday world.

Charles S. May, one of the most brilliant lawyers and eloquent orators in Michigan, was described by *The Chicago Times* as perhaps the most able, independent thinker of his time. As far back as 1875, Mr. May told the graduating class of the University of Michigan Law School that trial by jury was an indispensable armament of a civil liberty against tyranny and oppression, and warned: "Rome, Sparta, and Carthage fell because they did not know it. Let not England and America fall because they threw it away."

Mr. May's tribute to judicial democracy is supported by historian Edward Gibbons' observations on legislative democracy in his *Decline and Fall of the Roman Empire*:

> If such an institution, which gives the people an interest in their own government, had been universally established . . . the seeds of public wisdom and virtue might have been cherished and propagated in the empire of Rome . . . . Under the mild and generous influence of liberty, the Roman empire might have remained invincible and immortal.

The United States, which for all practical purposes is the refuge of the civil jury, stands today as the final hope for the survival of true democracy in a world which today seems devoted to economic progress at the expense of personal liberty.

And finally I submit that as our birthright and as the very essence of our democratic republic, the right of trial by jury is a crucial and priceless right of every American citizen. As we are reminded by the American Jury Trial Foundation, trial by jury does not belong to Congress, to our state legislators, or to our courts. It belongs to us. Trial by jury is our last chance for the preservation of individual independence and the future of American freedom.

WHAT REALLY MATTERS†

James R. Becherer*

I am grateful to be here sharing this great resort, the good talks, and the wonderful fellowship with you, and I would like to take this opportunity to urge you to reflect for a few moments on what matters to you. I know that's a very open question, so I will suggest some answers that I consider rather universal and common to most of us. I hope that you will laugh and cry and be inspired, and that you will leave here glad to be alive. As you all know, in our daily lives we can get wrapped up in this or that—things that don't really matter—so it's good to take time to refresh ourselves on what does really matter.

HUMOR

Because the best way to start any speech is with some humor, I always say that the first thing that matters is humor. And then I add, are you fun to live with? I was a marriage counselor for twenty-one years, and I have to say that I hope the answer is yes. Imagine spending your life—easily sixty years now—with someone who isn't any fun. Isn't that prison?

You do know, I suppose, that risibility, which is the ability to laugh, is a product of the mind; the more intelligent you are, the more likely you are to be witty and to see the humor of life. It all fits—the good, the bad, and the ugly—and we laugh. I have never known really intellectual people who did not laugh easily and have a sense of humor.

In referring to having a sense of humor, I mean perceiving the humor in daily life. I don't mean telling jokes. Anybody can do that. There is one Irish joke I'd like to share with you, though. A guy went into a bar and saw only one other patron, who was sitting on a stool. The newcomer went over to the seated patron and said, "You know, you look Irish." The guy sitting there said, "Well, I am. In fact, I was born there." The first guy said, "So was I. What county?" "County Mayo." "What town?" "Castlebar." "So was I! What street?" "Brendan Lane." "So was I!" Just then another guy came into the bar and shouted to the bartender, "Anything going on around here?" The bartender said, "No, not really. The O'Leary twins are drunk again."

Years ago some nurses who were planning a convention called to ask me to give a talk on humor in medicine. I said I would like to do that, so I got seri-

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Hualalai, Kailua-Kona, Hawaii, March 5, 1999.

* Priest, marriage counselor, writer, and lecturer, Cleveland, Ohio.

ous about talking about humor and how therapeutic it is. You probably know about Norman Cousins, one of the great minds of this century. His book *Anatomy of an Illness* described the treatment he devised for himself when he was stricken with a crippling illness. He watched funny movies and read jokes, in order to experiment with the importance of laughter, and he proved that laughter really is quite healing. It reduces stress, it eases pain, it hastens recovery, it brightens your outlook. More recently, we had Robin Williams in "Patch Adams," which depicts the therapeutic value of laughter. (I can't believe how often Robin Williams comes into my talks, and into my mind in my own pursuit of joy or happiness, because he has contributed so much.)

I want to highlight in another way the importance of humor. I came from a rather austere home, a so-called good home. My father was German, and I lived in fear. All we did was pray and work and work and pray. But my mother was Irish, and occasionally we had the privilege of going to her town, which was about 150 miles from where I lived. We would go to see my Great Aunt Nell. And even though this was in the 1930s, I remember it better than what I did last night, because Aunt Nell was a wonderful Irish woman with a sense of humor. To me, she was beautiful, with her wavy, white hair and her dress—always blue with white polka dots. At her feet was the dog Blackie. Blackie smelled, or at least one of them did, and I always thought it was the dog. Our senses take it all in; we have sense memory.

My father turned into somebody else when we got to Aunt Nell's because she was so much fun. She would tell one story after another, which I didn't understand because a seven-year-old child doesn't really understand adult humor, but I was happy because they were happy. I would walk around looking at my parents and wondering who they were—they weren't the people I knew at home—but it was soothing and enjoyable, and it made me feel secure. And even though Aunt Nell had buried a son in the War and had been widowed and had been crippled all her life, she was laughing.

What memories do you give your children and your grandchildren whom you love so much? You can be fun, you can be joyful. It is just a matter of collecting the right ingredients. I believe in that. I saw it work with my father. So surround yourself with joy and fun and your own Aunt Nells. Laughter sort of has a bad reputation: If you laugh a lot, then you're not really serious and you can't be taken seriously. Our churches are full of somber, forbidding types. I believe that's wrong. We need to laugh. Joy is the inviolable sign of the presence of God.

LIFE

Another thing that matters to me is just life itself. Am I truly enjoying this

life? Am I waiting for it to come to me, or am I reaching out to it? Do I see it, smell it, taste it, touch it, appreciate it right here and now while I am living it?

There is a wonderful scene in the classic play *Our Town*, which came out during the Great Depression. Emily is the young mother who has died, and, talking to the other "spirits" in the cemetery, she raises this wonderful question: "Do any human beings ever realize life while they live it—every, every minute?" You really have to live life to love life, and you really have to love life to live life.

God says, "Behold, I put before you life and death. Choose life." It's a daily choice. We are born each morning, and we spend a few hours working or playing or exploring, then we go back into the fetal position and die each night. And then we're born again the next morning. So I hope you bring enthusiasm to each day. Are you truly alive?

Not everyone is equally alive. One evening I was watching the news on television, and we were to see a man in New York City being told that he had just won $6,000,000 in the lottery. They went up to him with the microphone and said, "Sir, you just won $6,000,000." He said, "So? Won't bring back my wife." Well, I think I know why she died. This man was what we call a "thud" on the "Emotional Quotient" scale. (We've always been concerned about our intelligence quotients, but do you realize that your EQ is far more effective and valuable than your IQ? And there are so many professions—the clergy included—who kill off your EQ.) Another night I was watching television and saw an interview of an eighty-nine-year-old man who was just starting college. "Sir, why are you starting college when you're eighty-nine years old?" He said, "What?" He couldn't hear. The interviewer repeated, more loudly: "Why are you starting college when you're eighty-nine years old?" He said, "Well, I thought it was the thing to do now that I finished high school." That man was alive. Are you a "thud"? Ask your wife. I am going to keep on living until I die, so life matters.

CHILDREN

Don't you just love children? In the last ten years I have experienced the enthusiasm, the thrill that people of my generation get from grandchildren. Children are so beautiful, so innocent—sort of what we were like when God first put us here. But you know life is tough, so we need to be with children. And we need to be with the children within ourselves. You may have noticed that the people we delight in are usually those who are not all that serious about themselves; they can make mistakes and laugh at themselves.

I'll tell you one story about a child that really moves me. A three-year-old boy was playing in the back of a truck when someone got in the truck and

drove off. The little boy slid back and almost fell out but managed to hold on. Finally the driver saw the boy in the rearview mirror and stopped and grabbed him. As his family hugged and talked to him, the boy said, "An angel helped me." His family didn't pay much attention to that. Several months later they were showing the little boy pictures of his family, and they pointed to his grandfather, who was dead, and said "That's your grandfather." He said, "No, that's the angel." I believe things like that.

Once when I was on my way to give a talk, I stopped at a gas station to fill up my car. I was wearing my Roman collar, so I was identifiable. A little kid, wearing a baseball cap off to the side, approached me. He had papers under his arm, papers that he was selling. Do you know what he did? He didn't try to sell me a paper—he thrust a dime in my face. He said, "Here ya are, preacher, for your church." That's a child. (Of course, my friends ask me if I kept the dime. I honestly don't remember, but I know I should have because he needed to know that he could give.)

Long ago I learned a little poem that I want you to think about:

Across the fields of yesterday
He sometimes comes to me,
A little lad just back from play—
The lad I used to be.

And then he looks so wistfully
Once he's crept within,
I wonder if he hopes to see
The man I might have been.

I think it's good to go back over your life and think about whether you have become what you thought you would be, or perhaps more. And I think it's essential that we keep pictures of ourselves when we were kids, so that we don't get too far removed from the child within or too heavy over life.

LOVE

Love matters. I talked to you about love, mainly love in marriage, the last time I spoke to you,[1] but I want to emphasize this time that love is not confined to marriage. Would you say you have love in your heart? Are you a loving person? Are you able to love and be loved? There is no song that is more right than the one sung by Nat King Cole a long time ago called "Nature Boy": "The greatest thing you'll ever learn is just to love, and be loved in re-

[1] Becherer, *Love, Life, and Marriage*, 31 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 326 (1996).

turn." I will put it a different way. All the laws of the prophets reduce to love—love God, love neighbor, love self. Be a lover above all. And when it's all over, that's all you will be asked: Did you love? Did you love life?

I do hope you preserve the love in your marriage. I might have told you this story the last time, but it bears repeating. At my urging, a couple I knew went on one of my retreats for couples; they had ten children and were reluctant to go away for the weekend. By Saturday morning they were holding hands, and you could see that they were enjoying themselves. I tiptoed up behind them and said, "You two look happy." They said, "Oh, we are. We're so glad we came on this retreat. Did you know this is the first time in twenty-one years we've been away from our children for a whole weekend? And are we having a good time!" I said, "Can you imagine what a good time your kids are having? They want you to have a life of your own. They want you to have a life so that they don't have to worry about you. They want you to have a love life so they can believe in love. They want to know that you're okay and they can spend their energies in a new direction."

I was in New York recently, and I saw *Les Miserables* again. This wonderful, wonderful line struck me as it always does: "To love another person is to see the face of God." Love is of God, isn't it? "He who abides in love abides in God and God in him." I hope all of your marriages are trinities—husband, wife, and the love between them—because then you have experienced divinity in humanity and trinity in unity, and you've got what we truly call love. From you, it spreads out to your children and your clients and the people you work with and all you meet.

FRIENDSHIP

Not far behind love in importance is friendship. In the society we have built, everybody is moving about and they need to come together with somebody they can trust, someone with whom they can talk honestly, openly, and confidentially. In order to have a friend, you have to be a friend. Friendships are democratic; they have to be equal. If you're not equal, you really can't be friends. (That's why some marriages are better than ever: because a lot of marriages have become democratic now that women have education and jobs and income. A couple of years ago an ecstatic woman told me she had found the right anniversary card, which said, "To my husband, my very best friend.")

Men find it hard to have real friends. They have golf buddies, beer buddies, fishing buddies. But you really need friends, and they seem harder to find even though the world is twice as populated as it was when I was born. "People who need people are the luckiest people in the world." That's why you

find great nourishment in this group, with all its firm and warm friendships.

I still have about three buddies left from World War II, and I went to California recently to see one of them. We had spent a year in France together, and he was a sort of mentor, but I hadn't seen him in fifty years. I got to his place an hour early, and I thought, "I know what I'll do—I'll get a loaf of French bread and a jug of wine because that will bring it all back." When I returned, I was nervous and I thought I'd better put the bread and wine down so I could hug him—something we never did fifty years ago, but we do now, thank God. I knocked at the door. A little old man with a cane came to the door, my friend of fifty years. . . . Well, that's life, and that's friendship.

LOVE OF SELF

The one great thing I would like to give everybody is a love for himself or herself, the feeling that it's good to be me. Why do so many want to smell like Elizabeth Taylor or dress like the skinny people walking the runway? That's so frustrating and so useless because you are who you are.

Remember the movie *It's a Wonderful Life* about George Bailey played by Jimmy Stewart? He had troubles not of his own making, and he couldn't pay the bills. He was so frustrated that he was going to take his own life until an angel, Clarence, came to him. The genius of the movie is that Clarence made George Bailey realize how wonderful life is and how wonderful his life had been by walking George through his life and showing him all the people that he had helped, all the people that he had loved, and all the people that loved him. In the end George returned home so excited because life really is wonderful.

To focus for a few minutes on your wonderful lives, I want to reflect on a remark Ed Nevin made the other day about your job being a vocation.[2] I loved that. I was always aware that I had a vocation, a calling, and Ed made clear that you too are called, not just thrown out here like a bunch of seed. You have a reason to be here, and you are equipped with whatever you need to make your contribution to life. If you approach your work as I approach mine, it's not just a mercenary experience but a way we can make a better world or a better person and as a result become better ourselves. We're all tempted to do things for lesser motives, and that's all right sometimes, as long as we keep our integrity and we act for the best reasons or at least we incorporate them now and then. The world needs law and order and justice, and I thank you for contributing to that.

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[2] Nevin, *The Search for Atticus Finch*, 34 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 331 (1999).

Spiritual Life

The last thing I want to discuss that matters is your God, your spiritual life. I realize that not everybody has the gift of faith or strong faith, and I don't want to step on any religious toes, but I have to say that God is really not unreachable. Indeed, God is unavoidable.

There is a Buddhist story about a man who went to the guru and said, "The more I seek God, the more distance I find between us." The guru said, "Well, stop trying, stop looking. There really is no distance between you and God. Stop the search and enjoy the experience." The man said, "You mean, God and I are one?" The guru responded, "No, not one, but not two either." "Can you explain that?" "It's like the sun and the rays—not one, not two. It's like the ocean and the waves—not one, not two. It's like the singer and the song—not one, not two." So I hope God is in your face and in your heart. Don't try too hard. Just relax and let him discover you.

Last spring I was at a Wake Forest graduation, and the speaker quoted Bishop Tutu. According to her, Bishop Tutu said, "God can't love you any more than He does, and God can't love you any less than He does, no matter what you do." I like that. It eliminates all the religious foolishness about a conditional God and a judging God. To know that you are loved just the way you are, forever and unconditionally, is the best source of life and what probably matters the most. And when we die, and we will, I don't think God is going to ask about all the little stuff that we have been told he would: "Did you miss Mass? Did you have a bad thought?" No, I think God is going to say, "Well, how'd you like it? Did you love life? Did you really love it?" And I'm going to say, "Yes I did! I loved life!! In fact, I would have stayed."

I AM PROUD TO BE A LAWYER, AND YOU SHOULD BE, TOO†

Walter Herbert Rice*

After listening to Dave Greer's wonderful talk this morning on "The Way We Were," you probably are wondering "Where We Went and Why"—what has happened to that wonderfully congenial, service-related profession with which we began this now tired century; what has transformed a true profession, laden with civility and ethical rules and standards, into one which is more like a business, where its members, at least more and more of them, hate to get out of bed in the morning, knowing that they will be spending eight to ten hours that very day interacting with disagreeable people who will make them feel and act disagreeable as well.

We lawyers, particularly those of us over forty, are prone to gather together and bemoan the loss of the profession as it used to be. We like to harken back to a golden age, now gone with the wind, a gentler time, an era in which professionalism and civility abounded and in which all lawyers adhered to a rigid code, a Marquis of Queensberry set of rules in which civility and professionalism, consideration toward one's opponents, were the order of the day. In short, we long for the profession the way it was.

Well, let me tell you something, ladies and gentlemen—it never *was* the way it was! When I began the practice, some attorneys were just plain mean and nasty to opposing counsel and parties. They are gone now, all of them, and the only thing that has kept these lawyers from getting kicked out of heaven . . . is the fact that they never got there in the first place. Once a week, I think of them, and I look down and say, "Rest well, you miserable so-and-sos." So, while professionalism is an issue today, its lack has always been with us, although probably not as widespread, as commonplace, as endemic as it is now. Much like domestic violence, lack of professionalism, lack of civility, always existed; it was simply never talked about in polite circles.

We have not, I submit, lost our sense of direction. What we have lost is our sense of pride in our profession. That's right, pride, P-R-I-D-E. That's right, pride, good old-fashioned pride in our profession. Pride begets professionalism. If you have pride in your profession and what it has accomplished, then, I submit, you will be more civil toward your colleagues and act more as a professional while, at the same time, be able to vigorously, ethically, compe-

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† Address at Dayton (Ohio) Bench/Bar Conference, November 19, 1999.

* Chief Judge, United States District Court, Southern District of Ohio.

tently, and successfully represent your client. And you should—we all should be so very proud of this wonderful profession of ours.

Speaking personally, after one-third of a century as a member of our profession, I cannot think of anything I would rather have done than to have become a lawyer and to have been involved, for all these years, with a profession that has accomplished so much for so many people throughout our country. I am still, to this very day, *proud* to be a lawyer.

However, I am increasingly infuriated with being the butt of bad jokes and cheap shots from every bush-league comedian and malcontent among us. I am fed up with opportunistic politicians blaming our profession for everything from the cost of a loaf of bread to the decline of western civilization. I am just plain tired of being bashed, pilloried, and ridiculed by persons whose collective ethics, civic-mindedness, social consciousness, and intelligence is not the equal of the worst of us.

I am proud to be a lawyer, and you should be, too. I want to share with you some thoughts as to why this is so, to arm you with answers and responses for the never-ending questioning of your choice of careers and, not least of all, to help you act and to carry yourselves as professionals in all that you do in your daily lives as lawyers.

I am proud to be a lawyer, and you should be, too, because lawyers, members of *our* profession, through fearless and zealous representation of clients, regardless of a client's circumstances or the unpopularity of the cause or viewpoint which he championed, have guaranteed and preserved our individual freedoms and liberties against the tyranny of the majority that would squelch or repress those causes, viewpoints, or liberties. In doing so, lawyers, members of *our* profession, have breathed life into and made real the promises contained in our Constitution and its Bill of Rights. Lawyers did this; society, if left to its own devices, would not have done so.

I am proud to be a lawyer, and you should be, too, because lawyers, members of *our* profession, have worked to achieve victory in the civil rights revolution and to achieve, at least in law, a color- and gender-blind society that protects members of our community from discrimination on the basis of age, race, ethnicity, and gender. Sixty years ago, at the dawn of World War II, legal or at least de facto segregation of public facilities, schools, and universities was a way of life. Thanks to lawyers, members of *our* profession, the infamous *Plessey v. Ferguson* decision, with its sanctioning of the separate but equal doctrine, a doctrine which legitimized segregation on the basis of race, is no longer the law of the land, and equal justice, under the law, has taken its place. Lawyers did this; society, if left to its own devices, would not have done so.

I am proud to be a lawyer, and you should be, too, because in the area of criminal law, lawyers, members of *our* profession, have worked hard to make certain that the guarantees of the Bill of Rights, the best set of individual freedoms and liberties against a strong central government ever devised, apply to *all* levels of government, state and local as well as federal, and thus protect all of our citizens. By making a reality of the guarantees or promises set forth in the Bill of Rights, lawyers have removed, to the extent humanly possible, the disparity between rich and poor in our system of justice and have dispelled the myth that justice is only for the rich. They have accomplished this by pushing cases and legislation that resulted in court-appointed counsel for all who could not afford them, for bail reform, and the like. Lawyers did all of this; society, if left to its own devices, would not have done so.

I am proud to be a lawyer, and you should be, too, because lawyers, members of *our* profession, serving as prosecutors on the local, state, and federal levels act not as enforcers or rubber stamps for the executive branch of our government, but seek to do justice in the individual case, to make certain that all procedural and substantive safeguards are provided to the accused and that our Constitution's Bill of Rights will live on, as it has for more than two centuries, as a real set of protections for both individual liberties and society as a whole, rather than as a set of empty promises as constitutional guarantees are, sad to relate, in so many of the countries of this world. Lawyers did all of this; society, if left to its own devices, would not have done so.

I am proud to be a lawyer, and you should be, too, because in the areas of antitrust and securities law, thanks to the efforts of attorneys, members of *our* profession, these laws do not exclusively protect the wealthy and the powerful, but rather serve to create and perpetuate free markets that protect both the small and the powerless as well as the wealthiest among us. Lawyers have accomplished all of this; society, if left to its own devices, would not have done so.

I am proud to be a lawyer, and you should be, too, because in the area of products liability and environmental law, thanks to the efforts of lawyers, members of *our* profession, the consumer in this country enjoys a greater level of product safety and reliability for the products he buys than any consumer anywhere else in the world. Thanks to the efforts of lawyers, the water we drink and the air we breathe is cleaner and fresher than at any time since the dawn of the Industrial Revolution, two centuries ago. As a result, we will succeed in leaving an inhabitable world to those that follow. Lawyers have accomplished all of this; society, if left to its own devices, would not have done so.

I am proud to be a lawyer, and you should be, too, because in the field of labor law and allied fields, without the efforts of lawyers, members of *our* profession, millions of our citizens would still be working in unsafe factories and sweatshops for pennies per hour, with no workers' compensation or un-

employment compensation to help safeguard themselves and their families should bad times come to pass. Lawyers have accomplished all of this; society, if left to its own devices, would not have done so.

I am proud to be a lawyer, and you should be, too, because in the area of rights for prisoners and mental health patients, thanks to the efforts of lawyers, members of *our* profession, the least powerful among us, in many cases society's rejects, are treated humanely and with some degree of understanding of the need both to protect them and to prepare them for life outside of confinement. If it is true that one judges the civility of a society by the manner in which that society protects its least fortunate, then we stand high on the list. Lawyers have accomplished all of this; society, if left to its own devices, would not have done so.

By now, some of you may be thinking that I am proud only of plaintiffs' attorneys in civil cases and criminal defense attorneys. Not true, dear listener, not true. *All* law, be it commercial, criminal, personal injury, medical malpractice, matrimonial, or what have you—all law, without exception, deals with the need to balance individual rights against the rights of society. Defense attorneys in civil cases, prosecutors in criminal matters, and lawyers who never, ever enter a courtroom all guarantee, through their vigorous and effective representation of their clients, that this delicate balance will be kept and that the rule of law will always prevail.

I am proud to be a lawyer, and you should be, too, because lawyers have been in the forefront of all non-judicial levels of government—the legislative and executive branches—making our system of government—local, state, or national—with all its problems, the most responsive government to the citizens it serves in the history of the world.

I am proud to be a lawyer, and you should be, too, because lawyers have always been and continue to be in the forefront of every worthwhile community activity and endeavor, serving as community leaders in both the private and the public sectors and, thus, improving the quality of the lives of all of us.

I am proud to be a lawyer, and you should be, too, because lawyers have an ethical code, second to none, which—even in the increasingly competitive and cut-throat atmosphere of society in general—is adhered to by ninety-nine and nine tenths percent of us, thus distinguishing us from all other professions.

I am proud to be a lawyer, and you should be, too, because above all of the previously male dominated professions, we lawyers have welcomed women into our midst to the point where women play a major role in all levels of our profession and are today equal partners in the American system of justice and in the rule of law. The result is, and will continue to be, a tremendously improved profession in every way.

I am proud to be a lawyer, and you should be, too, because our profession has recognized the need, somewhat belatedly, to bring more minorities into

our profession at all levels . . . not because this is the politically correct thing to do, but because it is right, because it is generations overdue, and because success in this effort will dramatically improve our profession and its ability to deliver its services to *all* of our citizens.

I am proud to be a lawyer, and you should be, too, because, unlike other professions where the cost of services has begun to price that service out of the middle-class market, where those practitioners respond by placing their heads in the sand, we lawyers adapt and develop alternatives to our traditional dispute resolution mechanisms to guarantee continued access to our system of justice—cost effective, efficient means of providing legal services and resolving disputes, with no decrease in the quality of those services. These include alternative dispute resolution mechanisms of all types: mediation, summary jury trials, arbitration, small claims courts, and the like—all of which serve the purpose of making certain that each and every one of our citizens, regardless of his or her lot in life, will always have access to our legal system.

I am proud to be a lawyer, and you should be, too, because we serve the least fortunate members of our society. Members of *our* profession, not content to bemoan the lessened funding for legal services to the poor, have done something to increase our services to our less fortunate citizens. In every community, groups of lawyers have banded together to support legal aid societies and to provide hundreds of hours of donated legal services to guarantee that the rule of law will apply to all and that all will have access to our system of justice.

I am proud to be a lawyer, and you should be, too, because in the area of criminal law, lawyers, members of *our* profession, prosecutors and defense attorneys, and lawyers generally, have resisted the current, popular trend of attempting to deal with the crime problem by building more and more prisons and locking up more and more people and throwing away the key. Lawyers, members of *our* profession, are lone voices in the wilderness, increasingly effective though, in advocating a return to a criminal justice system that works, one which both punishes and protects on the one hand and rehabilitates on the other, a criminal justice system that believes in fitting the punishment to the crime of the offender and to the interests of the community, a criminal justice system that believes in dealing with the causes of crime (poverty, ignorance, drug addiction, alcoholism, lack of education, and the like) as the best means of curbing the spiraling crime rate.

I am proud to be a lawyer, and you should be, too, because lawyers, members of *our* profession, protect the Constitution and fight the tendency and the willingness, so prevalent in today's society, to give up our liberties in order to fight the epidemic of crime. Lawyers, members of *our* profession, recognize that the price of freedom is, in truth, eternal vigilance, that one who trades freedom for security will have neither, that the war on crime must never be a

war on the Constitution, and that if the Constitution no longer can protect the worst of us, it can never hope to protect the best of us.

I am proud to be a lawyer, and you should be, too, because lawyers, members of *our* profession, guarantee that in a time of tremendous social and economic dislocation, necessary changes will be made by means of the rule of law, and not by means of violent revolution.

I could go on and on—but I see no need to do so. Hopefully, you get the idea.

Let us be *proud* to be attorneys and let us pledge to defend our profession with all our hearts and with all our souls. Let us stop apologizing for being lawyers. We *are* a productive and contributing component of our American society and of our respective communities.

The next time someone questions you as to your choice of career or casts aspersions on our profession, get face-to-face with that person and say:

> Sir (or Madam), let me tell you a little bit about our profession and about those of us who are members of that profession.
>
> What we are about, sir, in everything we do, every day of our lives, is to make our system of justice work—the American system of justice, the best system of justice ever devised for resolving disputes between individuals and between individuals and their government. What we are about is preserving and protecting and improving that system of justice. What we are about is the protection of individual freedoms and liberties against the ever-present danger that those freedoms and liberties will be compromised in the name of expediency or some ephemeral, short-term goal. What we are about is guaranteeing that our system, when we pass it on to those who come after us, will be as good as, if not better than that which we inherited from those who came before us.
>
> How much more productive, how much more contributing, and how much more worthwhile, sir, can any life's work be?

AIMING AT NOTHING AND SELDOM MISSING†

Alan G. Greer*

One of the primary reasons people have such a low respect for and opinion of attorneys is that they don't know what we stand for as a profession or as individuals.

So, why don't they know, you may ask? Because *we* don't know. Too many of us aim at nothing and seldom miss. As a result, we are unhappy in our professional as well as our personal lives. We entered the profession of law to do good, but too many of us have ended up doing only money. Money is obviously important up to a point, but good and right are far more important.

Some time ago, I read an article in a major national publication premised on a lawyer's statement that he "was paid to be rude." I haven't been able to get that quotation out of my mind. That attorney's sole focus—the only thing he is really aiming for—is getting paid. That's all he stands for and the public knows it.

But he has got everything totally backwards. Our purpose as lawyers should not be just to get paid, with the understanding that we will do anything to achieve that end. Instead, it should be to practice ethical law for which we earn a just compensation. We cannot let ourselves be pushed into becoming deformed human beings who are not only despised by the public but despised by ourselves as well.

In fact, the basic reason for the public's negative view of lawyers is the perception that the only thing we, as a profession, are actually interested in is their money. In their eyes, the problems they bring to us are only excuses for lawyers to pile up dough. We foster that view by demanding higher and higher fees from our clients and more and more billable hours out of our lawyers.

In response, too many of us plead that our firms' cultures force us to focus primarily on hours and money. If being rude or cutting ethical corners increases the money we bring in or the hours billed, then that's the way it will have to be. Besides, we add, we aren't as bad as a lot of other attorneys we know.

That is like the story of the minister at a funeral who is looking for someone in the congregation to say something good about the deceased, but no one

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will speak up. Finally one old member stands and grudgingly declares, "Well, he wasn't as bad as his brothers and sisters." That may be the standard we lawyers want to apply to ourselves, but if it is the best we can do, we deserve the public's distrust.

If our clients or our firms pushed us to commit murder, would we do it? Of course not. So, where do we draw the line? Just because something is "legal" and someone will pay us to do it doesn't mean we can abandon our judgments of true right and wrong for legalistic formulas based on technical acceptability. We need to return to a test of "would my mother be ashamed if she read in the morning paper that I had acted that way." Often, the best thing we can do for a client or our firm is to say the word "No." When our peers or our firms pressure us to act otherwise, we have to find the courage to resist. That may create tensions in our practices, but so what?

The practice of law involves the constant, never-ending dealing with huge, unresolved tensions between clients, adversaries, courts, and, not least, within our firms. Firms seek to impose order and system upon our individual chaos, to shape us into the firm's version of a successful lawyer. And that is necessary to the firm's success.

However, as our firms seek to cut off our rough, uneven edges, it is just as necessary for us, as individual lawyers, to push back against that tension and maintain our individuality and self-respect. The trick is when and how to push. If you blindly accept everything your firm dishes out, you will become just another of the unhappy cookie cutter lawyers who are a dime a dozen. If, on the other hand, you fight everything, no matter how minor, you are branded as a hopeless malcontent with no future.

But if you pick your battles based on true merit, right and wrong, you will become a recognized and valued individual by your clients and within your firm—not to mention much happier to boot.

That's the good news. The bad news is that, if you want to be a truly good lawyer, the tensions never go away, nor are they completely resolved. At best, new ones only replace the old ones. In the words of a lawyer I really respect, "You just get to dive off higher and higher platforms into smaller and smaller tanks, but that's fun."

Pick your own priorities. Don't let them be imposed on you. But be prepared to pay the price for your choices and know there will be a price.

In my opinion, among these priorities should be respect for others and ethics in our day-to-day practices. These are not things to be skirted or games to be played in order to see how close to the edge we can get without falling over. Instead, they should be the "polestars" by which we guide our practices as lawyers and human beings.

And don't forget your dreams; don't let them turn into nightmares. Be-

cause, be they dreams or nightmares, in the end they will have defined you. So don't fall into the trap of forfeiting what you wanted when you dreamed of becoming a lawyer, and of accepting what you get, money, as the only thing that makes our profession worthwhile. Instead, keep in mind what an old Buddhist woman said when she asked author Sandy Johnson why people in the rich West weren't happy and then suggested, "Maybe your riches have taken more away from you than they have given."

We want to be proud of our profession and ourselves. We spend a lifetime searching for respect and are devastated when the strangers who make up "the public" tell lawyer jokes and rate us below used car salesmen. We seem to forget that you cannot have public respect without first having self-respect. And it is our own self-respect that we chip away at hour by hour when we "do anything to win," trash each other, and finagle our ethics to keep a client happy.

So, let's aim for something truly worthwhile—simple self-respect. If we are honest with ourselves and do what it takes to earn that self-respect, the respect of others will follow.

But it begins with you!

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