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D. Nolan Kaiser

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JURIES, BLINDNESS, AND THE JUROR FUNCTION

D. NOLAN KAISER*

Come now, with all your powers discern how each thing manifests itself, trusting no more to sight than to hearing, and no more to the echoing ear than to the tongue's taste: rejecting none of the body's parts that might be a means to knowledge, but attending to each particular manifestation.

—Empedocles of Agrigentum (484-424 B.C.)

Jury service is a duty for most, but privilege for a few. This fact escapes lawyer and laity alike, for they conceive it as a duty; the language of street and statute confirms this fact, as it is universally spoken of as "jury duty." Yet, there are those who because they are denied the opportunity to discharge this civic duty perceive it as a privilege.

In this paper I critically examine the confused legal practice of excluding blind persons from jury service. Historically, blind persons do not appear among any set of "twelve good men of the neighborhood called to jury," nor, are they considered "peers" within the meaning of that term as contained in the prevailing interpretation of the sixth amendment jury guarantee. Since I accept as a given the moral and legal validity of using lay persons to find the facts of a case, I seek to provide criteria for the concept "peer" which will include blind persons. Proposing blindness as a quality exempting jury service, I contend that a blind person should be able to claim or waive this right at choice. He can assess the credibility of testimony without seeing facial expressions, gestures, and other body language signs. He can receive and reasonably weigh material evidence including documents, signatures, photographs, and maps. The perfectly autonomous juror who receives all the admitted evidence, rationally weighs it according to instructions and arrives at verdict is not just mythic, he is not even an ideal which our system of justice prizes. Many of the standard powers and functions of the judge plainly show juror and metajuror features. When these features are conjoined with bench trial, and are seen against the sociological reality that some judges, like some lawyers, are blind, the continued legal practice of disqualifying blind persons from jury service is logically inconsistent.

* Professor of Philosophy, Central Michigan University. Professor Kaiser is blind, and was recently excluded from jury service for "cause" due to his blindness. This article was written after that exclusion. Recently, in March, 1984, Professor Kaiser was finally allowed to sit on a jury.

I here provide a number of epistemic, legal, and moral considerations designed to encourage the legal community to rethink its uncritical acceptance of the practice of disqualifying blind persons for jury service.

I. PARTIALITY, IMPARTIALITY, AND JURIES

The symbol of justice through law is known to all: it is the statute of a woman in flowing robes with her eyes bound by a cloth and holding aloft an hypothecary's scale. The message is clear. Justice is blind. She impartially applies the law, favoring neither one side nor the other; the mighty and the lowly, the wealthy and the poor are all equal before her seat of judgment.

It is the judge who occupies this seat of judgment and is an exemplar of legal knowledge. The causes brought in pleadings before the bench are issues of conflict that breach the orderly operation of society. Laws are the standard of social order. They may enshrine and protect the dignity of persons. They may display a nice appreciation of political democracy and the public interest. On the other hand, laws may mis-distribute human rights, creating class distinctions. They may cloak despotism in the robes of authority. In either case, the judge is charged with managing the pleadings. He impartially applies and interprets relevant points of law.

The jural setting, by custom and by design, creates the impression in the citizen of austere and sober reflections. It elicits feelings of veneration, and judges are perceived as larger than life size. Consonant with this picture of solemn impartiality the judge is called upon to meet standards of disinterested fairness not required by other institutions in the social frame. He is expected to "step down" or "to remove himself from the case" where he can be shown to have a special interest. "The interest in the subject matter of the litigation which disqualifies a judge is a direct pecuniary or property interest, or one which involves some individual right or privilege, whereby a liability or pecuniary gain must occur to the judge on the event of suit."¹

If we turn from bench to bar to consider the role of litigants, we find that the stylized search after justice encourages partiality. The litigants, or more precisely, counsel for litigants, are special pleaders. Consider a criminal trial. The prosecution and defense are advocates. The prosecutor who surmises the defendant not guilty will vigorously

1. 48 C.J.S. *International Law* 79 (1947).

advocate the reasonableness of the belief that he is. Defense counsel who suspects, but does not know, that his client is guilty will vigorously advocate the reasonableness of the belief that he is not. It is left for a jury to render a verdict on the evidence and arguments.

Jurors are required to meet a set of qualifications initially formulated in custom but generally given statutory status. A juror may be disqualified for reason of prejudice, physical disability, relationship to a party, expression of an opinion, conscientious scruples against a given law, and so on. The selection process begins by a blind or random selection of names from among a pool of citizens meeting certain competencies. Such competencies include citizenship, residency, age, and language. From among the veniremen so selected there is a blind or random drawing of names for prospective jurors. It is from among these prospective jurors that any actual petit jury is seated.

Justice requires that the judge and juror be impartial while expecting litigants to be special pleaders. These seemingly incompatible threads in the fabric of justice are given play in the permissible challenges against seating prospective jurors.

A challenge for cause is a vote against seating a prospective juror for a reason which the court hears and weighs. The paradigm instances precipitating such challenges are prejudice, disability, and relationship. A second variety is the peremptory challenge. Unlike the preceding, peremptory challenges are limited in number. Each side has the same number of such challenges, thus once again the system seeks justice through impartiality of treatment.

The distinguishing feature of the peremptory challenge is that no reason must be given which the court hears. Of course a challenge for "no reason which the court hears" is not a challenge for no reason *simpliciter*. These covert reasons may be as rational or irrational as the mind of man can conceive. The motive is to advantage one side at the expense of the other. While there are permissible reasons buttressing challenges for cause which are *prima facie* rational and morally defensible, it is also plausible that at least some of the reasons prompting peremptory challenges are irrational and morally indefensible.

The theoretic basis of "challenge for cause" immediately rests upon impartiality as a requirement of justice and mediately upon a set of policy considerations collectively aiming at willingness, ability, and good character. The theoretic basis of the peremptory challenge rests upon a requirement of justice which declares that two sides given equal opportunity to act on their own behalf will cancel one another's partial-

ity. In this way it is believed that a jury so empaneled will likely be neutral and offer no clear advantage to one side or the other.

The criminal defendant has the right to trial by jury of his peers. This very feature of "trial by peers" suggests a mistrust of a professional cadre who is expert in the law and experienced at fitting fact to law. Since defendants ordinarily come from the people, it is the system's preference for the people to render judgment on one of their own.² In the past, the intimacy of communities made it impossible to discover persons who did not know the defendant or the facts of the case. Hence virtue was made of necessity, and jurors were expected to know the person and character of the defendant and facts of the case.³ This built-in partiality was moderated by a selection of good men whose steadfastness as citizens could be presumed to preserve as much objectivity as their first-hand knowledge would permit. In a word, the system's aim was to procure good character and credible witness. By the reign of Henry VI (1422-1471) the much prized petit jury replaced the earlier modes of trial; petit jurors began to receive testimony from witnesses though they continued to supply evidence of their own knowledge.⁴ This development at law was powerfully reinforced by political and social forces already afoot in the land.

In the late 13th Century the movement toward enclosure of land was given statutory recognition. From these beginnings it gained legislative and social momentum, culminating in the Great Enclosure Act of 1801. Whole populations were put on the road and all roads led to the city. The expansion of mercantilism and later, manufactory, gave the swelling urban population an economic base for survival.

With increased numbers came anonymity. No longer was it necessary to acquire evidence at the expense of impartiality; both were now possible. Witnesses continued to provide evidence; jurors continued to provide verdicts, but these different functions were now performed by different persons. As the legal system evolved into its present manifestation, the juror became the deliberative decisionmaker with which we are familiar. The juror's decision-making role involves a fundamental

2. The law of evidence is a body of exclusionary rules designed to control the entrance of evidence on fact at issue in a trial. That the judge can exclude evidence from the jury on grounds of prejudice or confusion shows a countervailing bias against the objectivity and rationality of persons of the jury.

3. In the 11th Century A.D., the Norman practice of relying upon persons of the neighborhood to make accusation was imported into England. The early juror was accuser and witness against the defendant, though the verdict in the baronial courts was rendered, not by a juror, but by ordeal of combat. See L. CLARK, *THE GRAND JURY* 7-9 (1975).

4. See generally A. VANDERBILT, *JUDGES AND JURORS* 51 (1956).

process of perceiving the courtroom events of a trial. But there is nothing which requires that this perception be, among other things, visual. The real issue is whether a blind juror can perform this process of perception effectively.

II. "OF ONE'S PEERS"—THE BLIND JUROR AS JUROR

In the sixth amendment of the Constitution persons accused of a crime are entitled to speedy and public trial by jury. Constitutional interpretation has firmed; it was thought that juries ought properly to reflect the multifarious classes and subclasses in the wider society despite the rampant prejudices of these classes. Such defects were moderated by the fact that membership in such classes was neither fixed nor exclusive. Since the accused has been charged with the commission of a crime against the laws, a jury which is a reasonable facsimile of the society at once meets the needs of society and of the defendant. Thus, the right to a trial by a jury of one's peers can be understood as a right to a jury selected from a pool of citizens which is a microcosm of the important classes and subclasses which constitute the society.

If today, disabled persons are systematically excluded from juries as women and blacks were in the past, on the footing they impede or defeat the fair and efficient administration of justice,⁵ then all defendants, including defendants from these groups, are denied their right to a trial by jury of their peers. The disabled person is a peer within the intent of "a jury of one's peers" in a way that the automotive engineer is not. The criteria for carving out peer groups from among all groups in society minimally requires the group: (a) have an involuntary mem-

5. Referring to a blind prospective juror, Justice Christ writes in *Lewinson v. Crews*, 28 A.D.2d 111, 282 N.Y.S.2d 83 (1967), *aff'd.*, 21 N.Y.2d 898, 289 N.Y.S.2d 619, 236 N.E.2d 853 (1968):

In requiring "natural faculties" as a qualification for service on a jury the Legislature may have considered not only the function of a juror, but also the effect his disability would have on the orderly and practical operation of the court's processes. While this factor alone would not support the construction we make, it is a pertinent consideration.

Id. at 114, 282 N.Y.S.2d at 86.

Surely the ordinary blind person may be forgiven if he thinks the court's "pertinent consideration" is a piece of impertinence. Courtroom operations are dramatically influenced by the personality and work habits of the presiding officer. At times they leave the visitor with the impression of a personal preserve and not a public place. The combination of judicial privilege and social deference has produced a staggering number of cases awaiting disposition. When the "time awaiting trial" is credited against the sentence of a person convicted of a crime, a person acquitted of such charge has in actuality served some part of a sentence never imposed. The response of plea-bargaining to clogged court dockets is a further affront to justice and a necessary expedient to prevent the "orderly and practical operation of the court processes" from collapsing. Though our administration of justice may be threatened, it is not threatened by the special assistance which a blind juror will occasionally need.

bership; (b) be reasonably numerous; and (c) contain members who individually or collectively pursue activities and goals which do not significantly disrupt the operation of society and its major institutions.

In light of the preceding external criteria delineating peer groups it becomes incumbent that we provide an internal criterion tied to the concept of a defendant's rights. When selecting jurors, a defendant has a right to the attitudinal and experienced perspective of a group if and only if it (a) satisfies the three external criteria, and (b) its perspective is unique, not provided by any other peer group or combination of peer groups. In the case of disabled persons, their unique history of being treated as non-persons in pure isolation from one another creates a perspective that cannot be replicated by any other disadvantaged group or combination of groups in our society.

In the recent past families had their resident cripple conveniently set in a corner of the room, but outside the mainstream of family activity. They were in the family but not of it. They were noticed only when they no longer occupied their accustomed place. Their very disabilities kept them in isolation from one another. Even the reservation or the ghetto provided for cultural identity and individual achievement, but a "shut-in" was shut away from normal society and was kept away from fellowship with his fellows. The one stark and dreadful exception to what is here described was the asylum in which mental and physical misfits were stored in unholy amalgam.

In the recent history of the civil rights movement the disabled were the last to organize. They were the last to achieve civil rights, the last to secure a full participation in the economic, educational, and legal spheres. Disabled persons are not thought of as lazy, shiftless, or indolent; they are not condemned as social parasites; they are not, because they are genuinely believed to be parasites. They are perfectly dependent beings. It is from this unique and disabling history that disabled persons in general and blind persons in particular will receive evidence and render verdicts on their fellow citizens. The very fact that women, native Americans and blacks are commonly accepted as jurors in a way that the blind, deaf and those of impaired mobility are not is evidence of what is here alleged.

The Requirement of Natural Faculties

Most state jurisdictions hold fast to the requirement and the language of "natural faculties" in the determination of jury service. By reference to these statutes and prevailing interpretations, blindness is

not merely prima facie evidence of the absence of natural faculties, it is conclusive. Blindness is straightforwardly a disqualification. Despite the dominion of this interpretation, there is good reason for thinking that a blind person who consistently exercises his political franchise and is otherwise qualified as a juror, will not be so severely disabled as to pose a clear impediment to the fair and efficient administration of justice.

It is this dawning awareness which has prompted the California State Assembly to amend the California Civil Procedure Code⁶ to allow the blind to serve as jurors. The blind person becomes the exception to the received view that jurors must possess all their natural faculties. Under this amendment the law has moved from no blind person may be a juror to any blind person may be a juror, other things being equal. Courts, sensitive to the concern that motivated the amendment, are nevertheless on the cutting edge of law's application to society, and have sought to preserve grounds for a rational objection to some blind persons serving as jurors.⁷ On the one hand the court will not allow blindness *simpliciter* as cause for challenge, this after all is the received view; on the other it will allow a blind prospective juror to be challenged for cause on the ground that his blindness would defeat a litigant's right to fair trial. It seems to require the articulation of some specific way in which the blind juror's blindness would thwart justice. This simply is the received view in different dress and despite the purity of motivation, the reasoning has moved in a circle. Here we have arrived at the boundary of law. The legislative intent is to allow the blind to serve as jurors, and the judicial intent is to preserve the possibility of offering a rational objection to such service.

The difficulty issues from the form of the *ratio decidendi*. By its very nature it transcends the case which gives rise to it and constrains an indefinite range of possible future cases. Yet the need is to rationally object to this particular blind person performing as a juror in this particular case. The particularity of the need is antithetical to the universality of law. Are we arrived at a point where to avoid circularity of reasoning borne of the logic of the law we must escape its sphere altogether? Shall we have recourse to something analogous to equity

6. See CAL. CIVIL PROCEDURE CODE § 205(b) (West 1977). This change is not, however, a complete victory for potential blind jurors. Section 602(2) of the Code still allows a challenge for cause for hearing impairment or other physical infirmity.

7. When as a district judge he was called upon to hear the case of four blind petitioners, Justice Warren Ferguson, of the Ninth Circuit Court of Appeals said that, "regardless of the amendment, there need only be a 'rational basis' for excusing the blind." See Winter, *Should Deaf, Blind Serve as Jurors*, 66 A.B.A.J. 133 (1980).

proceedings where the governing conventions tailor interest to fact according to some finer sense of justice?

Lewinson v. Crews And Credible Testimony

If we take blindness as an exemption from jury service, the blind prospective juror is no longer disqualified on the motion of others; he is exempt from such duty on his own motion, for the exemption of blindness becomes a personal privilege to be claimed or waived by him whose privilege it is.⁸ On W. N. Hohfeld's analysis reducing all legal relations to one among a set of four rights and their reciprocals,⁹ blindness as an exemption from jury duty becomes a privileged right whose reciprocal is such that neither party nor court has the right to demand that it be claimed or waived. It is also clear that the status of jury service on this showing is a right for the blind and a duty for persons with their natural faculties. We thus avoid confusing rights and duties.¹⁰

Does affording blindness exemption status infringe upon a party's right to fair trial? Referring to blindness as a personal privilege which if waived cannot be cause for challenge after waiver, Justice Christ in *Lewinson v. Crews* declares, "It is not an adequate protection to say that he [a party] may challenge the blind juror on the *voir dire* for if we hold blindness not to be a disqualification under the statute, a challenge for cause will not be available thereafter on that account. A peremptory challenge would be still available but these are limited in number and they are an important right possessed by a litigant; he should not be made to resort to such challenges in order to preserve his right to fair trial."¹¹ It is only unfair for a litigant to be constrained to

8. "[Juror's] exemption is a personal privilege, with which parties to the cause have no concern, and which furnishes them no cause of challenge . . . [a] Juror may assert or waive his privilege of exemption. If he assert [sic] it, the court would of course excuse him, and if he waive [sic] it, the parties have no ground of complaint." *State v. Albert*, 125 Me. 305, 133 A. 693-94 (1926).

9. W. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

10. Commonly when jurists and lawyers discuss blind persons and jury duty as a constitutional issue the talk turns to the constitutional right to do one's duty. "The statute must be considered in the light of the constitutional purpose to diffuse the right and duty of jury service throughout the whole citizenry." *Lewinson v. Crews*, 28 A.D.2d 111, 115, 282 N.Y.S.2d 83, 87 (1967) (Hopkins J., dissenting). It is the merit of making blindness an exemption to jury service that we avoid such category mistakes.

11. *Lewinson v. Crews*, 28 A.D.2d 111, 115, 282 N.Y.S.2d 83, 86 (1967) *aff'd*, 21 N.Y.2d 898, 289 N.Y.S.2d 619, 236 N.E.2d 853 (1968). It seems apparent that the statutory construction by Justice Christ is a correct reading of the legislative intent. It is equally apparent the Appellate Court's construction exhibits that same blindness about blindness so rampant in society. In this case it is more difficult to uncover as it is glossed by an authentic concern for litigant's right to fair trial.

use his peremptory challenge against a blind juror for cause of blindness if it can be independently established that the full power and completeness of a party's case cannot be adequately appreciated by a blind juror because of his blindness.

The court, seeing the need to justify this claim of "unfairness to parties," states that

[a] litigant who comes before the Bar of Justice, whether in a criminal case or in civil litigation, wishes to have the impact of his evidence fall with its full weight upon the jury, if there be a jury trial. If his evidence or exhibits are not understood or the force of his interrogation of witnesses is lost, he will not have been afforded his full rights.¹²

In a preliminary way, it should be noted that if by the use of the term "force" Justice Christ meant "logical force," then the force of an interrogation has little if anything to do with the body language responses of witnesses; it has everything to do with the selection of questions and their collective logical relationship to crucial aspects of the case. This is the most natural way to read this term given Justice Christ's antecedent claim that evidence or exhibits not understood fail to function as premises to a desired conclusion. If the juror gives careful and intelligent hearing to the thrust of the interrogation, the absence of visual signs can remove sources of distractions to understanding and objectivity.

This is an important and little appreciated point. The sighted community categorizes persons in accordance with views and values which if their basis were clearly understood then most sighted jurors would be dismissed in *voir dire* on grounds of bias or prejudice. Sighted jurors develop beliefs about defendants by observing their deportment and dress on and off the stand.¹³ They reinforce preconceived ideas by studying the family and associates of the defendant. They weigh testimony by watching the judge's facial expressions. In all of these instances, that which proves to be a channel of information facilitating understanding concurrently poses a clear threat to the objectivity of the information so acquired. On the other hand, what the

12. 28 A.D.2d at 113-14, 282 N.Y.S.2d at 86.

13. [Theodore Koskoff] . . . president of the Association of Trial Lawyers of America, said he 'philosophically supports' the idea of handicapped jurors but thinks they have little chance of getting past *voir dire*. Koskoff said the blind . . . cannot detect subtle, but often highly significant nuances in a witness' or defendant's . . . posture, dress or other behavior.

Winter, *supra* note 7, at 133. The fact the blind juror does not see how a defendant is dressed does not jeopardize that defendant's right to fair trial; it does jeopardize the defense counsel's effort to package his product for the jury. The confusion in the heads of the legal community could scarcely be made clearer.

blind juror is supposed to lose in way of information he necessarily gains in way of objectivity.

The fact that the blind juror does not see the accompanying facial expressions, grimaces, gestures, and other bodily language cues commonly relied upon by the sighted juror to assess credibility of testimony does not deprive the blind juror of the ability to assess the credibility of such testimony. The nervous tic or darting glance, the uneasy shifting or revealing gesture is almost always accompanied by auditory correlates, e.g., clearing the throat, pausing to swallow, voice quavering or inaudibility due to stress or looking downward. The common belief that one can more quickly disguise the voice than one can disguise bodily language is an error. It is as reasonable to believe that a person who does not appear to be lying can be discovered to be so by special attention to voice, quality and other auditory cues as it is to believe the reverse.

Like the goddess of justice, perhaps jurors too should be supplied with scarves to be worn throughout the proceedings. They would be removed on those occasions where the evidence "must be seen." Of course, the sighted legal community instinctually responds like their sighted lay brothers, that any evidence which can be seen must be seen. Every piece of visual evidence or individual exhibit is treated as if it were a photograph. Let us therefore consider the visual evidence accompanying the testimony and examination of a fingerprint expert.

Evidentiary Testimony and Exhibits

Take as an example two sets of fingerprints. They are enlarged and projected on a screen in a darkened courtroom. The first set is that of the defendant taken on the occasion of his booking at police headquarters. "Now," entones a mythical assistant prosecutor, "compare this set with the one on the right taken from the murder weapon. Look especially at the left thumb and index prints from set one and compare them with the same prints from set two. Do you see the obvious similarity? Notice that interrupted line right here. Don't we have the same interruption here in set two at this point here? Back off and look at the entire contour of these pairs of prints. Aren't they something more than obviously similar? Aren't they, ladies and gentlemen of the jury, identical?" Under such circumstances what could a blind juror be said to believe? I answer that he can believe precisely what the other jurors have been encouraged to believe, namely that the fingerprints on the

murder weapon from set two are identical to those of the defendant's in set one.

The obvious difference that the sighted juror sees what the blind juror hears is not ultimately a significant difference. The context of evidential production is the open court. Here judicial circumspection and the surveillance of opposed parties may be relied upon to warrant the reasonableness of the belief that the evidence referred to and described is the evidence seen. Thus, the only difference in the probability numbers which may be assigned to the beliefs of the sighted and blind jurors is the scarcely thinkable situation that this episode of trial is an elaborate hoax perpetrated by bench and bar and designed for the purpose of deceiving the blind juror. Since such a hoax is remote to the point of absurdity the warrant for the beliefs of the sighted and blind juror are proximate to the point of equivalence.

On the other hand, defense counsel on cross-examination of the fingerprint expert might show by a working model that the canons of correct procedure were likely not or could not have been followed to obtain the particular fingerprint displays just presented. Possibly, higher illumination or magnification of the prosecutor's evidence reveals differences which opens doubt. He may introduce affidavits of witnesses affirming that the defendant was handed the murder weapon by a jail steward and asked if he had ever seen this gun before. Defense counsel will have discharged his duty "to go forward with the evidence," but he has done so in a manner to which the uninitiated lawyer and layman alike would contend that no grounds for reasonable doubt have been established for the blind juror.

It may be equally or nearly as informative to feel a working model as to see it. Counsel might provide a verbal analogue to the working model which is itself an analogue to or instance of a theoretic schema. A written or verbal question directed through the judge to witness or counsel may well supply the missing link or links entitling inference. Any rebuttable presumption, declaration, claim, or line of inquiry on facts at issue which is *not* rebutted may be taken with increased assurance of truth. It is the truth of this doctrine which gives a blind juror a reliable ladder at which to arrive at the same plateau of belief at which sighted jurors arrive through inspection. In a word, the opposing sides in this judicial contest each provide visual surveillance and information to a blind juror which sighted jurors provide for themselves. Moreover, there is nothing erroneous about the conclusion which a blind juror can infer by relying upon the partiality of the contending parties, the impartiality of the judge and other court officials, and the common, but

not commonly noticed, audible responses of jurors to various pieces of testimony, documents, and other evidentiary exhibits.¹⁴

*The Autonomous vs. The Actual Juror—The Blind Juror
as Decision Maker*

The ideally autonomous juror who receives, weighs and judges the evidence independently of every other juror is a standard of performance which ignores the setting in which proofs are offered, the purpose of sequestering juries, and the rough balance in the strength of cases which go to jury trial. Juries are treated by legal practice as deliberative bodies. The jurors are isolated from everyone and shielded from every influence except one another. The jury which is seriously divided and reports as much to the court is commonly ordered back to the jury room to continue deliberations in hopes of arriving at the required unanimity or near unanimity for verdict. The court recognizes and encourages debate and persuasion as appropriate to consensus. If perfect autonomy were the juror ideal, it would remain so after the jury is instructed. And we would speak not about "jury deliberations" but about "juror reflections." As it is, jurors are real, and the law is realistic.

In many jurisdictions, documents or relevant passages are read aloud by the offering party. Occasionally such pieces of evidence are passed among jurors. Of course the blind juror, like all the jurors, will have heard what his fellow jurors are now permitted to see. Should the jurisdiction follow the custom of permitting opposing counsel to view the document though it is not read aloud, what is inaccessible to the blind juror in open court becomes accessible upon request during deliberations. Such pieces of evidence are given to the custody of the jury, and reading can be provided by fellow jurors or a court official directed to do so.

Two persons may be presented with the same visual and auditory evidence and both may arrive at the same conclusion, which upon the evidence selected, has the same probability of truth. Yet each emphasizes or attends to different pieces of evidence. The result is the same and the probability of truth comparable. This can and presumably does happen among sighted jurors.

The blind juror will likely emphasize and attend to different pieces

14. Gestures of astonishment, approval, or revulsion all have their auditory correlates. The visually informative facial expression extends into other sensory realms—even a smile may be heard.

of evidence from those of his fellow jurors. It does not follow on this count that his conclusions are less sound or probable than the conclusions of his fellow jurors, some of whom will concur and others of whom will contest his findings.

Where we have "still photographs . . . moving pictures . . . mechanical objects which demonstrate working parts . . . enlarged fingerprints . . . diagrams upon a blackboard,"¹⁵ all apparently irreducible visual evidence, there is an alternative mode by which the truth of a belief so immediately visually supported may be mediately supported by a series of beliefs and inferences from beliefs. It is this mode of evidence acquisition and pattern of reasoning which may bring the blind juror to a tentative verdict absent jury room deliberations. When arrived at in the jury room, the shared inspection of evidence, the interpersonally influenced weighting of the evidence and the rational and critical exchange of beliefs among jurors may bring each of the jurors, including the blind juror, to a verdict on the evidence.

III. JUROR ASPECTS OF JUDGESHIP IN NON-JURY TRIALS

The nonjury trial is not a nonjuror trial. The judicial juror manages the pleadings, declares the law, and renders verdict. The trier of law and the trier of fact have merged in one person. Historically, our jurisprudence has distinguished these different jural functions. This difference has been progressively exaggerated by the increasing sophistication demanded of the judge and the ignorance of law demanded of the juror. It is obvious that he who manages the pleadings ought to know the law. It is less obvious why he who finds on the facts ought not. Still, we need not search far to uncover plausible reasons. Since jurors are drawn from a randomly chosen cross section of the people, the juror trained in law is familiar with the personal and political motivations given play in and about a trial. He has the training to persuade most juries and the temperament to hang the remainder. There is a better than even chance that the jury's verdict would be the legal juror's verdict. Traditionally, the lawyer as juror is believed to pose a real threat to the unbiased and thoughtful search after justice as determined by persons who are presumed the equals of one another. Here "equals" means "persons equally ignorant of the law." The actual inequalities among jurors in the way of experience, education and character are presumed to weight and counterweight one another in such

15. *Lewinson v. Crews*, 28 A.D.2d 111, 113, 282 N.Y.S.2d 83, 85 (1967), *aff'd*, 21 N.Y.2d 898, 289 N.Y.S.2d 619, 236 N.E.2d 853 (1968).

manner that the verdict is the product of as much reason and objectivity as a group of twelve randomly chosen persons can marshal.

In preliterate communities the judge was called upon to give judgment. Commonly he applied law which was itself unspoken. This is scarcely surprising since the unwritten law is inscribed in the heads and hearts of those for whom it is intended. There is no declaration; there is only rigid application to a well-defined range of repeating occurrences. The law's origin is traced to divine ordination, its reaffirmation involves rituals of renewal and purification. It is that ethereal sinew that preserves the integrity of the tribe and its privileged place in the eye of the supernatural.

Early in our cultural childhood a judgment against the defendant upon which the defendant defaulted was the ground which authorized plaintiff or his kinsmen to seek remedy.¹⁶ Often custom attached a specific remedy to specific injury, but it was soon discovered that such reliance on "authorized self-help" guided by custom was an untrustworthy procedure to assure social tranquillity. The remedy became articulated in the verdict and eventually, the judge, or non-litigants authorized by the judge were employed to effectuate remedy.¹⁷ In either case, the archetypal feature of our "proto-law" experience is the verdict; it is designed to repair the tear in the social fabric.

Modern jurisprudence fastens great importance on the distinct functions of the judge and the jury; still, we show the imprint of our origin. Before legislation, even before enforcement, the germ of all law was the judge's decision. Though the separation between judge and jury is well developed and defensible on grounds of justice and efficacy, it is not a perfect separation. The lay juror never acts with the authority or responsibility of the judge, but the judge is commonly required to think and occasionally act as juror.

In the matters of preliminary fact finding and on parol evidence, the judge has recourse to the same standards in determining admissibility as the jurors use in weighing and assessing evidence. When a later oral expression bears on the claim that an earlier written instrument

16. *See generally* E. A. HOEBEL, *THE LAW OF PRIMITIVE MAN* 52-53 (1967).

17. Referring to the Karimojong of Africa, Lucy Mair says,

The kin of a homicide have the recognized right to take a life or cattle in compensation, and it is for them to judge how many cattle they should take But when one party is determined on its rights and the other equally determined to dispute them, the matter goes before a public meeting for discussion by everyone and decision by the elders. The decision usually involves some payment in stock, and if the man who has been told to pay does not do so, the elders send the younger men to take it.

L. MAIR, *PRIMITIVE GOVERNMENT* 94 (1970).

does not fully integrate the provisions of an agreement, it is given to the jury. When the oral expression is earlier and the written instrument is later, it is given to the judge. The exclusionary parol evidence rule applies. The jury takes the later oral expression as evidence in determining whether the earlier written instrument did fully integrate the provisions of the agreement. The judge, seeking to determine an exception to the parol evidence rule in the matter of "fully integrating the provisions of the agreement" will reason exactly like the jury. He goes beyond the face of the written instrument to consult the earlier oral expression as evidence of the intentions of the parties to the agreement.

Central to the judge's duty to determine whether the production burden has been overcome by the offering party is an appeal to the standard of "the rational juror." A piece of evidence is relevant when a rational juror would come to believe that a particular fact at issue is more probable than the fact appeared before the evidence in question was introduced. Again, a piece of evidence is prejudicial when an actual jury without the evidence would be closer to a rational juror's state of convincedness on the fact at issue, than the actual jury's state of convincedness on that same fact when in possession of the evidence. There is a sense in which the actual juror's reasoning when in possession of the evidence is a subset of the judge's set of considerations.

When we examine the reasoning and the status of the directed verdict and judgment notwithstanding the verdict we uncover another dimension of juror activity within the sphere of the judge's responsibility. In a criminal case when the evidence lines up in such manner that no rational juror could doubt that the defendant is not guilty and no further evidence is to be offered, the judge will render a directed verdict in favor of defendant. When he does, he finds on the facts and so forecloses the opportunity for the jury to do the same. Even where he refuses to render a directed verdict, though he does not perform as a juror, he reasons as a juror, or more accurately, a metajuror. He determines that rational persons, on the basis of all the evidence adduced, might reasonably dispute the facts of the case.¹⁸

In a civil suit, when the judge gives judgment notwithstanding the verdict on the grounds that the jury's judgment was contrary to law, he reasons as a judge concerning issues of law but acts as a juror. When

18. Part of what I mean by "metajuror" is that the judge may be called upon to cast himself as a hypothetical reasonable juror and then to reason about what such a juror would find or believe about a given piece or body of evidence. The judge is thus required to hypothesize and to be the hypothesized ideal. In this sense, the judge is performing the juror function and yet remaining outside it.

he gives the same judgment on the grounds that the jury's verdict was excessive, contravening the most elementary standards of justice, he reasons and acts as a juror. The logic of judgment is such that when the judge reviews the evidence and sustains the jury's verdict, he acts like the thirteenth juror.

Judge as Juror and the Blind Judge

In our legal system a defendant has the privilege of waiving his right to jury trial. When he does, separate functions of separate judicial organs expressly unite under the jurisdiction of the judge. In jury trials judges will occasionally reserve ruling on motion to admit evidence awaiting a clear indication of the propriety of its use. In the nonjury trial the incentive to reserve ruling is aggravated by the additional responsibility on the judge to render verdict and the appellate practice of sustaining judge rendered verdicts in the face of erroneously admitted evidence. In this case the appellate court reasons that if the admissible evidence which is admitted is sufficient to sustain the judge's verdict, then the erroneously admitted piece of evidence or any evidence upon which ruling is reserved does not appear in the judge's reasoning to verdict. In this matter the appellate court too finds itself called upon to reason like a juror, or more exactly, a metajuror.

Regarding the erroneously admitted piece of evidence, it is judged by the standard of "harmless error." It is "harmless" to the defendant's right to a fair trial and verdict based upon the evidence if all the evidence, absent the tainted piece of evidence, will nevertheless sustain the verdict. It would be an extravagant expenditure of social resources to declare a mistrial and so require a new trial to accomplish the old result. Curiously, an appellate court might invoke the same reasoning and policy considerations to sustain the verdict in a jury trial under identical circumstances. Surely this discrepancy in legal practice cannot be sustained on the footing that when tainted evidence is admitted, the judicial juror, unlike the lay juror, will not render a verdict which relies upon that tainted evidence. It is folly to believe that he who creates the taint by erroneously adjudging it admissible for purposes of verdict eschews its use in the verdict he renders.

One commonly recognized avenue of career advancement in the legal profession is from bar to bench. Since judges are drawn from among lawyers, some of whom are blind, it cannot be reason for astonishment that some of our judges are blind. As we have learned, judges are called on occasion to reason and act like jurors. It follows that the

blind judge in acquitting his duties as judge will on occasion be called on to reason and act like a juror. Since no prima facie case is made out against the blind judge presiding over a jury or a nonjury trial by virtue of his blindness, the legal custom of accepting the prima facie case against the blind juror by virtue of his blindness is utterly without merit.

CONCLUSION

The institutional bias of the law is transparent. The exclusionary rules of evidence rest squarely upon a well developed, if not well articulated, mistrust of the jury. The judge can prevent or reverse the jury's verdict. The judicial juror's verdict is given preferential treatment by the appellate court under select conditions. The pantheon of values clustered behind the various legal structures and practices described makes plain that the judge as judicial juror is sovereign and the lay juror suspect. As for the blind juror, the law espouses beliefs about the blind person as juror which are unwarranted and inconsistent with existing legal practices. It would be an act of enlightenment for the legal community and the several state jurisdictions to rethink their opposition to the blind juror.

