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# Judge-Jury Communications: Improving Communications and Understanding Bias

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**Panel One:**  
**Judge-Jury Communications:**  
**Improving Communications and Understanding Bias**

PANELISTS: THE HONORABLE LADORIS HAZZARD CORDELL, Judge,  
Superior Court of California for Santa Clara County  
ROBERT ROSENTHAL, Professor of Social Psychology, Harvard  
University  
CHARLES F.C. RUFF, ESQ., Covington & Burling

MODERATOR: STEVEN J. ADLER, ESQ., News Editor for Law, *Wall Street  
Journal*

MR. ADLER: Thank you very much. Let me just tell you a little about why I am interested in juries and where that comes from, and then I will lead into the discussion. I have been covering trials and covering court cases for a number of years, and while working at the *American Lawyer* I got very involved in the genre of interviewing jurors after trials. Inevitably, the conclusion, which turns out to be a little on the simplistic side, was that at some key moment in the case the jury misunderstood the case and the result turned on this misunderstanding. We rather dramatically presented this as our finding. I found this turned out to be the result time after time after time, and the stories seemed to me to get a little bit stereotypical. I became more interested and got myself a contract to work on a book on this issue.<sup>1</sup>

In the last couple of years, I have been talking to juries and have discovered that when you talk to juries in greater depth, when you do not simply interview them for fifteen or twenty minutes after the trial, obviously a much more complex understanding emerges of how juries make decisions. One finds that it is not necessarily that at some key moment a jury that is operating rationally from the start makes some key rational mistake and goes off the edge. Rather, the entire process is much more complex. It involves the relationship among the jurors and the kinds of clues they are getting from the judge, the witnesses, and the lawyers. It is a very complex system, and therefore far more fascinating and interesting than I had previously understood.

However, despite that, one still comes down to the purer question of whether the jury is understanding the facts of the case and understanding the law that they are supposed to be applying. I thought I would use a couple of the cases that I have looked at recently as illustrations. As a journalist, one

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1. STEVEN J. ADLER, *THE REAL AMERICAN JURY* (forthcoming Feb. 1994).

argues by illustration and leaves more systematic analysis to the academics. I wanted to give a couple of illustrations just so they would be out there.

There is a sense that there is a great deal of awareness of the communication problem, that people have activated ways to address it, that there have been model instructions, that a lot of people out there are studying it, and that there is a great deal of sophistication. But, in these two cases that I am just going to mention, both of which are very recent cases with very fine federal district judges, with all of this material out there, you still end up with instructions that I think you would agree are somewhat problematic.

In a recent antitrust case in North Carolina,<sup>2</sup> there was an eighty-page jury instruction. The following quote is a typical passage from it:

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of supply and demand between the product itself and substitutes for it." All of these factors must be examined in determining whether a well-defined submarket exists in a broader market. However, the existence of a submarket or its lack of existence does not require the presence or absence of all of the factors. The submarket test is not merely whether one product can be substituted for the use of another product, but whether products may be reasonably interchanged for the purposes for which they are produced.<sup>3</sup>

And so on. I had to read this seven or eight times to even have the vaguest sense of what it meant. The typical juror on this jury was a textile worker, but he could have been a Ph.D. and it would not have mattered. The fact is, though, that the typical juror was a textile worker with a high school education. These jurors found Greensboro to be a very difficult city to get around because they were mostly from the surrounding countryside, and one of them had never used a parking meter before. You are dealing with two very separate world views: the world view of the lawyers and the judges who are trying to fit instructions into a scheme that will appeal to appellate court judges and the world view of the audience—in this case, the people trying to make the decisions: the jury.

It seems to me that from the jury's standpoint, a jury trial is often very much like watching a foreign movie without subtitles. If there's a lot of action, you have a general idea of what is going on. If there isn't a lot of action, you're in trouble. But as a general rule you only have the vaguest sense of what is going on.

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2. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 748 F. Supp. 344 (M.D.N.C. 1990), *aff'd*, 964 F.2d 335 (4th Cir. 1992).

3. Jury Instruction, *Liggett Group*, 748 F. Supp. 344 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

In another case, the Imelda Marcos case, there was a very similar passage involving the RICO statute. In both cases, you are dealing with judges who are aware of the potential jury communication issues; who, when they can, are trying to boil down definitions of things like "beyond a reasonable doubt"; and who are trying to describe "circumstantial evidence." They are finding analogies involving baking cakes or Robinson Crusoe. They really are aware of these issues, and yet you have this intractable problem of trying to translate what is often very complex law and very legalistic language for an audience that is in no way equipped to deal with it. My point is that while we are going to get very sophisticated today, talking about nonverbal communication and bias and documenting some of the subtle areas of difficulty, I do not think we should lose sight of the fact that, even with the most direct way of communicating (for example, written jury instructions), very, very often nothing of tremendous use is coming across.

My approach for my book<sup>4</sup> is basically to take these trials from the standpoint of the jurors. I can certainly tell you that their reactions to these instructions suggest that there is a very serious problem. For example, in the Imelda Marcos case, the jury simply ignored the wire fraud charge. They simply passed over the charge because they did not understand it, and jurors tend to get aggressive when they do not understand things. They wanted to blame it on someone, so they simply ignored the charge. They would not consider it. Of course, sometimes the jury cannot avoid considering it, so perhaps they misunderstand it, but either way they operate out of a tremendous amount of frustration.

Another thing that I think we should not lose sight of is that the problem is not only with complex law. Despite the high level of awareness of the issue, I found jurors having tremendous problems just with the words being used in jury instructions, words such as "ambiguously," "representation," "conversion," "tacitly," "nucleus," "executing," "artifice," and "immaterial." These are words that lawyers are extremely comfortable with and use regularly, words that find their way into jury instructions, and words with which I have found jurors have a tremendous amount of problems. Sometimes they ask for dictionaries, and usually the judge does not permit them to have a dictionary. They are simply seeking a definition of the word that they can understand so they can make use of it. As most people have observed, jurors are tremendously hard working and sincere, and they pull together everything they know to give their best effort. However, there is this huge disparity between what they are receiving and what they can actually make use of.

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4. ADLER, *supra* note 1.

Having said that, if it is true, one is tempted to say that the entire jury system is a sham because if jurors are not able to make decisions based on the instructions, which is the system that we have devised, what are they doing there? What is going on? I think what one discovers is that because the law is actually in close association with justice, the law and the equities are usually in keeping with each other. A large percentage of the time, juries end up finding a way to a decision that we consider relatively just. It is not because they understand the instructions. It is not because the instructions are coming through. It is because the entire trial is sending a message to them. At the same time, they are coming up with a sense of who is right and who is wrong. That is what they are trying to find out, and they generally answer that question in a way that we are comfortable with.

One of the questions we will be discussing today is, "Is that enough?" If juries are not understanding instructions, or if they are being biased by instructions, is that the system that we have contracted to have? I think juries will often apply commonly accepted norms to come up with the result, but the questions remain: Are they applying law? And are we as much a society of law as we want to be if juries do not quite understand what it is they are supposed to be deciding?

Having made my pitch on that subject, I wanted to get into the more specific and perhaps the more interesting area of what we are learning about more subtle forms of communication. How can lawyers start to uncover bias and what can be done about it? I want to ask Judge Cordell if she might talk a little bit about the California study in which she and Professor Rosenthal were both involved.<sup>5</sup> That study goes into some of the nonverbal messages and some of the profound influences of those messages.

JUDGE CORDELL: There was also a third person, Professor Peter Blanck, who was involved in the study. What was unique about the study, which was conducted in about 1985, was that it came about because there was a coalition. It was a coalition of academicians, social scientists, and judges. In the study, we videotaped judges giving jury instructions in actual trials. There were five judges who participated in the study, three men and two women. The instruction part of approximately thirty-four trials was videotaped. A video camera was set up next to the jury box and focused directly on the judge so that when the judge was giving instructions the videotaping was from the waist up. After all the taping was done, the videos were rated by about eighteen paid students, mostly from Stanford, who rated the videos on certain

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5. Peter D. Blanck et al., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985).

criteria. The results of the study are contained in an article in the *Stanford Law Review*.<sup>6</sup>

My input in the study was to get the judges to buy into the idea of being videotaped and being the subjects. Basically, I had to trick them in a way. I went to them and said, "We are going to do this study. We would like to look at and observe your verbal and nonverbal communication with jurors." The tack was to get the judge who I felt would be most receptive first. Once one judge bought in, the others would be more willing to participate. Certainly it helped that the Stanford name would be attached to the project and that they could be a part of the Stanford Study.

The study is very interesting because the results showed that there were some problems in how judges were communicating, either consciously or unconsciously, with jurors. Dr. Rosenthal will talk to you about the results. The judges were somewhat disappointed when they read our article because it did not say that they were these wonderful unbiased individuals. They were very decent people; I want to stress that. But the results show that, indeed, there are some problems in what we do on the bench.

At the time this study was conducted, I had been on the bench for about three years. I have now been a judge ten years, ten years next week. I was in the municipal court and I venture to say that getting judges in the municipal court was a bit easier than if we had focused on the next level up, which would have been the superior court, where I am now. Judges on the municipal court tend to be newer. They also are the ones who want to get out of municipal court and move up as quickly as possible. That was yet another incentive for them to get involved in something that was innovative and groundbreaking in this area.

MR. ADLER: Maybe Professor Rosenthal can pick up and talk a little about the results and also sort out the different ways in which judges appear to be imparting information.

DR. ROSENTHAL: If I may, I would like to back up a bit and give a social science context to the particular dynamic of the courtroom in which we have been most interested, which is the interpersonal self-fulfilling prophecy—the idea that one person's expectation for another person's behavior can come to function as a self-fulfilling prophecy. For example, in early experiments that we did on self-fulfilling prophecies in a science context, we worked with animal subjects.<sup>7</sup> In these experiments, we hired experimenters to run rats through mazes, but we told half of the experimenters that the rats that they

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6. *Id.*

7. ROBERT ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH (1966).

were being given had been carefully bred to be maze-bright, and we told the other half that the rats that they were given had been specially bred to be maze-dull. Now, there really are maze-bright and maze-dull rats in the world, but we did not have them. These were ordinary, garden variety, North Dakota rats that we assigned at random to the experimenters. But, if the experimenter thought the rat was bright, that rat actually became brighter and performed better in the maze. If the rat was believed to be dull, the animal performed more poorly in the maze.

I reported the results of this research<sup>8</sup> and got a letter from a school principal who had read about this work in *The American Scientist*. She said, "Well, if it can work for rats, maybe it can work for children." So we did the same experiment in the California schools, except this time we labelled some of the children as having unusual potential for intellectual development. We created in the mind of the teacher a belief and expectation that certain children were going to learn better, were going to get smarter, and were going to have raised IQs. We went to a table of random numbers, chose a handful of children for each classroom, reported the names of those children to the teachers, and then we waited. We waited a year and we retested the children's IQs. Those children who had been alleged to their teachers to have unusual potential for intellectual growth in fact gained more IQ than did those children of whom nothing special had been said. That was the so-called pygmalion experiment.<sup>9</sup>

In the clinical context, the same kind of work has been done, most recently with Lee Learman,<sup>10</sup> who was in an M.D.-Ph.D. program at Harvard. We went into a nursing home and created especially favorable expectations for some of the residents in the mind of some of the caretakers. We found that in a fairly short period of time, if a favorable expectation had been created in the mind of the caretaker, the elderly residents who were being cared for by these caretakers did better medically and became less depressed.

The reason I am backing up to give you this context is because I have a subtext, which is for you to never believe a social scientist. They can tell you anything, but you have to look at all of the evidence that has been accumulated, and the social scientist is obligated, I believe, to tell you what that evidence is. I can report to you that there are some 460 experiments in which

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8. See Robert Rosenthal, *On the Social Psychology of the Psychological Experiment: The Experimenter's Hypothesis as Unintended Determinant of Experimental Results*, 51 *AM. SCIENTIST* 268 (1963).

9. ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM* (expanded ed. 1992).

10. Lee A. Learman et al., *Pygmalion in the Nursing Home: The Effects of Caregiver Expectations on Patient Outcomes*, 38 *J. AM. GERIATRICS SOC'Y* 797 (1990).

one person's expectation for another person's behavior can come to serve as a self-fulfilling prophecy.

Taking the same kind of dynamic into the courtroom, then, is really just a small further extension of a social science research enterprise that has been going on for many years and that has been widely replicated in a variety of settings. When Peter Blanck and Judge Cordell organized this experiment, one of the main things we were looking for was the expectation of the judges.

To make a long story short, as a consequence of this research we found that, if a judge believed a particular defendant to be guilty, sixty-four percent of the jurors found the defendant guilty. If the judge believed the defendant innocent, then only forty-nine percent of the jurors reported guilty. There was a fifteen percent difference (between sixty-four percent and forty-nine percent) that was, in a sense, in the mind and expectation of the judge.

The other kind of social science background is, "How is this expectation communicated?" In the case of pattern instructions, where judges were saying essentially the same thing to all of the jurors, regardless of their expectations, the key was not what the judge was saying. Rather, it was how the judge was saying it, defined by tone of voice, which we study by content filtering. That is, we take the words out, and what is left is just the music. It is the high frequencies, tone of voice, and everything but the words. We also looked at judges' facial expressions and body movements. These are the mediating mechanisms for interpersonal self-fulfilling prophecies.

In some of the very recent work we have done,<sup>11</sup> for example, we found that it only takes thirty seconds of silent videotape of Harvard teachers teaching their class to predict very accurately how the teachers will be rated by their students at the end of the whole term.<sup>12</sup> Thirty seconds is all it takes to get an effective tone of how the judge is coming across to the jury, whether it is a warm, a cold, a judicious, a wise, an injudicious, or an unwise demeanor. These things are communicated very quickly in what we call "thin slices of behavior."<sup>13</sup> We do not know enough yet about exactly what these behaviors are, but we do know that, depending on what the judge believes about the defendant, the judge communicates in different nonverbal channels, and that is probably communicating a great deal to the jurors.

MR. ADLER: Is this something that a lawyer in the courtroom is able to observe and to do anything about? I guess I should ask Charles Ruff that question.

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11. Nalini Ambady & Robert Rosenthal, *Thin Slices of Expressive Behavior as Predictors of Interpersonal Consequences: A Meta-Analysis*, 111 PSYCHOL. BULL. 256 (1992).

12. *Id.* at 267.

13. *Id.*



MR. RUFF: I guess I have to begin by saying that if there was ever anybody here under false pretenses, it is I. I should have explained to Peter when he asked me to appear here that I come to this exercise with a fairly substantial set of cynical baggage because the answer to your question is, "of course, we observe it all the time." And the other half of the answer is, "there is not a hell of a lot that we can do about it."

My cynicism has been ameliorated somewhat because I think the description that Professor Rosenthal has given is directly applicable to what we do. The notion of rats in a maze is just exactly what is involved in the work that some of us do in courtrooms, and I am clearly a maze-dull rat. I wish that my favorable expectations could somehow be translated into favorable response by judges, and maybe I will work on that aspect of your research.

I find, having been on both sides of the criminal trial, that the issue from the perspective of defense counsel, in most cases, is to try to break down the sterility of the courtroom. I have tried two cases recently before a judge who was superb in almost every respect but who controlled his courtroom with a sense of austerity, distance, coolness, and sterility that made it very difficult to humanize the trial process. I do not think, and I am not at all an expert here, but I do not think that much in the way of specialized bias, nonverbal or verbal, could be seen if one watched this particular judge at work either in the instruction stage or in the management of his courtroom. However, there was not a moment of humanity, not a moment of levity, not a moment of relaxation in that courtroom from the beginning to the end. It seemed to me, from the perspective of a criminal defense lawyer, that I wanted more humanity from my judge, but I also recognized that to the extent one moves down that spectrum to the point where the judge is being more human, more relaxed, more friendly, he is risking opening himself up to the kinds of intentional or unintentional bias that is reflected in this study.

From my perspective, I would much rather be in a less sterile criminal trial setting, where, as everybody knows, the Government wins the vast majority of their cases. For me, it is difficult dealing in a sterile environment and trying to break through to a jury in a setting in which everybody else is very stiff and the Government says to the jury, "I am right, and I can put on my case and get out of here and expect you to return your verdict." If I do not break through that barrier with both the judge and the jury, then I might as well not be there. So I would much rather have a judge who runs the risk of a little humanity and a little bias that goes with it, than a judge who simply says, "This is the beginning of the trial and this is the end, and I expect everybody to play their roles and go on about their business."

I have not figured out how to change the judge's conduct, and if anybody here has, I would very much like to know about it. But what you try to do,

from a criminal defense lawyer's perspective, is bypass the judge and get to the jury despite what the judge is doing and not because of it.

MR. ADLER: I wonder if there has been any research on the effectiveness of efforts to bypass the judicial bias, because if the study is correct and so much bias comes through in such subtle ways, one wonders what the role of the evidence is. Other than in terms of guilt or innocence based on the position of the trial judge, to what extent has anybody found specific data on gender or racial bias coming from judges? I mean, is this pervasive? Have you seen this, Judge Cordell?

JUDGE CORDELL: Very little, I think, has been documented about bias because, number one, judges are quite reluctant to be looked at and to be self-critical. I have taught for the last five years at the California Judges' College. California has really taken the lead in educating its judges. Unfortunately, you cannot go to the Judges' College until you have been a judge for about a year. So before you can even start to become aware that these biases might exist and might be within yourself, you are on the bench for a while doing your thing and probably locking yourself into a certain style on the bench for quite a while.

Something else is also interesting. We talk about bias and about what judges are doing on the bench, but the biases go both ways. I say this because when I started judging ten years ago I was the only African-American woman judge in Northern California, and today I am still the only African-American judge of either gender on the Superior Court in Santa Clara County, which is third in size to Los Angeles and San Diego counties. The responses judges get when they first come into the courtroom and take the bench are very interesting. When I was introduced ten years ago and the bailiff said, "All rise," and I walked out, there were three responses, all of which I still get today. First, there are frowns immediately from the prospective panels of jurors, absolute frowns that mean, "Oh, no. This cannot be. This is a nightmare." The second reaction is smiles and sometimes even raised fists in the back. These are usually from people of color and young people who find this totally bizarre. The third reaction is people raising their eyebrows and wondering "What is going on?" and "When is the judge coming out?"

These reactions are interesting because ten years later the same responses still exist. What that says to me, not surprisingly, is that there is still stereotyping going both ways so that I am already pegged before I even speak. I have to dispel those stereotypes by how I communicate in order to try to get information across to the jurors. I do not know if there have been studies about how race and gender affects jurors once judges come into the courtroom setting.

Another point I want to make is that we judges do not get feedback. We do not get told how we are coming across for two reasons. First, I think we are reluctant to accept it; and second, there are just not that many people interested in giving information back. One of the things that I did starting a few years ago was ask jurors to evaluate me once the trial was done. At the end of the trial, I would give each juror a form to fill out and I would say, "Send it back to me if you want and you can send it in anonymously." Interestingly, I got about a ten to twelve percent response rate, and they were very, very clear in how they felt and about how I was coming across. I brought two letters with me today. I am not going to read them all, but there are a couple of excerpts I want to run by you. One says in part:

After the trial I remarked to the bailiff about my surprise at seeing such a youthful, or so you appear at least, judge about to preside. I am particularly sensitive to the problems that occasionally confront youthful looking people in positions of authority as I remember my experiences as a nineteen-year-old officer at sea in World War II. Your superb blending of firmness and compassion and of seriousness and lightness was heart-warming to see. I sympathized with your dismay over the defendant's seeming inability to comprehend what struck me as a simple and precise instruction and interpretations from the bench. Other than for an occasional stroking of the brow, you maintained your composure beyond the point that most mortals would be able to endure.

After thirty years experience as a college professor, I know that I have been tempted many times to be overbearing, insulting, and even demeaning to some of my students who have seemed similarly unable to understand. I can only hope that I have comported myself as professionally as you.

It is clear in that case what the juror thought, and I do remember that the defendant was representing himself and driving me crazy. One thing the defendant did when he was picking the jury was say, "I don't want that juror because he's Vietnamese. I don't like Vietnamese." It was all I could do to try to get through that.

I have one other quick quote from a juror's letter.

Sitting in your courtroom as a juror was my first experience with your judicial system. To say the least, my feelings are ambivalent. I do realize that we all have the right to trial by jury, but why this case ever came before you and a jury is beyond me! The evidence was air tight beyond a reasonable doubt. The D.A. argued a case on behalf of the people for which there was no need for argument. The defense attorney defended the case that was indefensible. It was apparent to me from her cross-examination and closing arguments that she knew it too. This proceeding was a waste of my valuable time, as well as yours, and a deplorable waste of my taxpayer's dollars. It's no small wonder our courts are so backlogged. Why

the constant repetition by the attorneys? It reached the point where tedium prevailed. Did I project an image of feeble-mindedness to them?

Having performed my duty I now have to place my trust in you, not knowing you or your past decisions. I would hope that you would see fit to punish this crime to the full extent allowed by law. To do any less would negate all that transpired, and that would be a crime.

What I found is that many jurors are not hesitant at all to give feedback on how we behave, and it might be interesting to take a look at that by fashioning some sort of study or experiment that gets that immediate feedback. Jurors are quite willing to talk.

MR. ADLER: I have been fascinated about why jurors seem to be so hungry for clues from the judge. As they are instructed, at least, they know they are supposed to make this decision themselves based on instructions they get. Yet every study and every interview one does indicates that jurors are just desperate to be given some hint about what the right answer is.

In the Imelda Marcos case, as one example of where the jury was tremendously confused, there was a discussion on a motion, probably a motion to dismiss, outside of the presence of the jury at which the judge simply raised the question as to whether it was appropriate to bring the case in the United States. The judge eventually rejected the suggestion that jurisdiction was inappropriate. However, during the deliberations one of the jurors got wind of this conversation because a co-worker had told her about it, and she mentioned it to the other jurors. Most of them considered it pretty much definitive. The way it came across to them was that the judge had said, "This case does not even belong in this courtroom," and that was tremendously powerful in reinforcing the jury's sense of the case. It was an important piece of data for the jury, and they were very happy to hear it.

I wonder if the panel could talk a little about what the jury's hunger for information stems from. Why are jurors looking for clues? Why don't they just do their job?

MR. RUFF: Well, I think part of it is a level of fear, for want of a better word, that is similar to that which lawyers bring to the courtroom, particularly for folks like the ones who wrote to Judge Cordell. This is their first experience in a very strange world. They are looking for some hook to hang onto that will make it seem less strange and less frightening.

People rise when they come in, probably for the first time in their lives. They are treated in one sense as though they are very important, and in another sense as though they are pawns in the game. Juries are shepherded in and out of courtrooms, deprived of an opportunity to hear all those exciting things that go on at the side-bar, frequently not truly understanding much of the process, and searching for something in their common experience that they

can use as a way to guide them through this otherwise strange procedure. They know that the Government is there prepared to state its case. They know the defense is there to represent this presumably (but not really) innocent individual sitting at the table farthest from their area of the courtroom. They probably have more confidence in the Government, at least in most cases, than in the defense. Who is left? The person left is the judge.

Again, as I indicated earlier, I think the role of the government lawyer is to maintain the image of invulnerability, of carrying the might and majesty of the United States or the State of California with him, and not to allow the defense lawyer or the judge to break through that. On the other hand, the defense lawyer's job is to break through that image and to convince the jury either that he represents a human being or that at least the Government is not entitled to the presumption of credibility that it usually carries.

I am a great believer in the ultimate sanity of juries, no matter how badly we screw up the process. On the other hand, I also accept the immovable irrationality of some juries. My most astounding experience as a prosecutor, and thank God I was not trying the case, was when an assistant U.S. attorney came back to me to explain why a not guilty verdict had been returned. He had received an explanation from a juror that seemed to make a lot of sense to the juror and, indeed, it did make a lot of sense once we heard it.

The question was, "Why didn't you call the defendant to the stand?" The juror said, "Your case was otherwise convincing, but I was waiting for the moment when you turned to the man at the other table and said, 'Take the stand so I can question you.'" Of course, there is nothing in the judge's instructions that says the Government cannot call the defendant to the stand. There are lots of instructions about a defendant's right to remain silent if in fact he chooses not to testify, but nothing that explains to a juror that the Government cannot call them to the stand like all other witnesses.

This case is probably an example of a moment of irrationality that presumably does not infect too many trials, and one that I think we have to live with. Besides, I do not think there's a heck of a lot that we can do about that. Regardless of the side of the case I was on, I would not ask a judge to instruct the jury that the Government is not permitted to call the defendant. Yet we have to live with those moments in which the system simply collapses, and we all hope that it does not happen in too many critical cases.

DR. ROSENTHAL: I would just like to add that the same conversation that we are having now, about why the jury hungers to know what the judge might believe, could be going on in a medical school seminar. Why does the patient so hunger to know what the doctor really believes? Why does the patient hang on every cue, verbal and nonverbal, and often leave the consulting chamber

believing that they have just received a death sentence simply because they have misread some cue of the physician, verbal or nonverbal?

I think that the judge-jury relationship is just one special case, perhaps a very extreme case, of other hierarchically arranged social interaction situations: doctor-patient relationships, student-teacher relationships, and boss-worker relationships. I think there is a generic need in those cases for the person who is one down to read accurately the cues of the person who is one up.

MR. ADLER: If there were more explicit instructions throughout the trial, if there were a system in which judges could periodically talk to the jury about why this testimony was being presented and what they were going to have to decide, if there were some method of making this more explicit, would the implicit messages be less compelling? Would juries look less for clues if they really understood what their mission was, or is there something else that judges who want to reduce the impact of their nonverbal cues should do?

JUDGE CORDELL: When we answer any of these questions, we have to keep in mind that when we talk about judges we are not talking about a monolithic group. Rather, we are talking about people who are on the bench for different reasons. Before the 1980s, judges predominantly were white males who were there because they had finished their law practice and wanted to finish out their legal career by doing something easy, relaxing—being a judge.

From the 1980s on, you are getting more younger people on the bench who are seeing this as a starting off point; they are very ambitious and want to move on. I really think that that mindset affects how judges are going to respond to juries when they come in.

Starting in the 1980s, for example, Jerry Brown literally revolutionized the judiciary in California. More women, more people of color—and I am certainly a product of all of that—were appointed to the bench, and things began to change. So when you answer these questions about judge-jury communications, I think we have to look at who the judges are and why they want to be there.

The other point is this: we are told that a measure of our success in a courtroom is how quickly we get cases done. You are a very good judge if you either settle cases or try them very quickly, and that is how your reputation builds in the system among your colleagues. Thus, we have yet another factor—the pressure of time. When you ask a judge, “How can you more effectively communicate with jurors?,” the first thing the judge thinks is, “Is the proposed measure going to take more time? If it is, then it is going to be a negative, and it will not help me.” If we are backed up in the system, we have to figure out how to improve communications with jurors while also fitting the improvement in with our other objectives, like being timely.

One of the things I do in criminal jury trials is instruct juries in the beginning, before any evidence comes along. When I told other judges I was going to try this, they reacted with horror. They basically said, "You cannot do that because that is not the way you are supposed to do it. Instructions come at the end." It really took a little bit of guts to say, "Well, I am going to try something different." My point is simply this: how in the world are you going to tell people to decide a case when they do not even know what the elements of the crime are? They have no idea what their job is to begin with. No one else goes into any kind of job without first knowing what their objective is and what it is they have to do. Yet that is what we do in the jury system. We tell jurors at the very end, "Now that you have heard all the evidence, you must use the following instructions to put it all together." One way to avoid this problem, perhaps, is to change the order in which we do things. Instead of giving instructions at the end, we can say at the beginning, "Here are the objectives, here is the crime, here are the elements of the crime, and here is your job."

Of course, there is the other problem of jury instructions in general and the words we use to communicate with people. They are clear to us because we have the legal training, but obviously they are not clear to others. For example, we would probably have less confusion and better communication if in complex civil cases—we have only been talking about criminal cases until now—such as cases involving complex computer technology, we had jurors who were all experts in the field. You would not have jurors looking for every cue from judges they saw as gods. They would not even be interested in the judges' cues because they would be honing in on the instructions, and the instructions would be understood by those jurors. It is certainly worth thinking about having people who have an expertise in the field sit as jurors, particularly in complex cases.

There is no judicial education on very complex cases. The law does provide that judges can have special masters to assist with complex cases. That option is really starting to be used more now to explain the complexities of cases because we judges do not know what we are doing in these areas any more than juries.

MR. ADLER: We should talk more about civil cases now that we are on that subject. I would assume that judges are more passionate about the results of criminal cases and that they tend to be pro-prosecution. I once clerked for a judge who every time I walked in and said, "My God! There is reasonable doubt in this case," he said, "Are you crazy? This guy has been in here twelve times, and he is always guilty." So my sense is that judges are conditioned in criminal cases to be pro-prosecution. Maybe I am wrong on that, but do

judges care less in civil cases about the outcome and therefore perhaps the juries get less in the way of clues? Do you have any sense of that?

MR. RUFF: I am not sure it is true that they care less about the outcome in civil cases. It may well be that, depending on which court you are talking about, there is greater variety in civil cases than there is in criminal cases. Perhaps by the time you have seen your 428th drug case you glaze over much more quickly than your 428th civil jury trial. If there is an interesting civil jury trial to be had, it is sometimes an unusual experience for federal judges and something they are more comfortable with and can get more excited about than the typical criminal case. My sense is, though, that there are so few civil jury trials, at least in the federal system where I live, that a full-blown study of judicially conveyed bias to civil juries might not have a big enough sample to make a difference. Also, I am not sure that the judge plays as much of a role in the ultimate outcome by conveying messages to the jury in a civil case, especially a lengthy complicated case, as he or she does in a criminal case, regardless of whether or not the jury instructions are comprehensible. Maybe there are social science experiments that have explored that issue in a seven-week civil antitrust case.

MR. ADLER: Is there any research comparing civil and criminal trials?

DR. ROSENTHAL: Not that I know of, but I am not at all an expert in this area. It might be interesting as a scientific enterprise to set up mock trials where you have a series of judges trying different kinds of cases in moot court, in law schools for example, to see whether there are some judges who, regardless of the civil or criminal nature of the trial, typically get more guilty verdicts than others. Is there a difference between the civil and the criminal cases, and is there a difference with particular judges? For example, there may be some judges who always get more guilty verdicts. But, even with any one judge, there is still the additional need to measure bias based on the judge's specific belief about a particular defendant in a particular case. So there are these two kinds of biases operating. One is that some judges may just find more defendants guilty than other judges. The other bias is within the judges. Do verdicts go according to the expectations of the judges regardless of whether they are judges who have high or low rates of conviction?

MR. ADLER: Just one other thing since we are on the subject of comprehension. It strikes me as archaic that juries are sometimes prevented from bringing written instructions into the jury room, yet I recently heard a judge argue against allowing that practice. I do not know what people in general think, but his view was that juries would fixate on some specific piece of the instruction rather than on the jury instructions as a whole. Somehow, by hearing the instructions, they would sink in in important ways; whereas if the jury were actually studying the instructions, then maybe they would get really



excited about instruction nine and forget instruction six altogether. I was just wondering if anybody has thoughts as to whether allowing written instructions into the jury room is a useful guide to comprehension or an obstacle in the jury room?

JUDGE CORDELL: I think not allowing written instructions is totally contrived. I do not know that there is any basis for thinking that jurors would fix on any particular instruction. This is interesting because, before our study, it was my practice to tape record my jury instructions as I gave them and then to give the jury the tape recording to take into the jury room with them. After the study, I stopped doing this because the study revealed that there may be certain ways in which I would say things that might lead a juror to focus more on one part of the instruction than the other.

It seems the safest thing to do is to just send in the written instruction. Again, I see no reason why not. I see nothing that shows that jurors tend to just focus on one thing and limit their discussion to that. Also, sending in written instructions is less time consuming, because if jurors do not get a tape recording or something written, they will always ask for the instructions to be read to them at least once again, perhaps several times. Really, it becomes a pain to have to constantly go back and forth with the instructions. I see no problem with sending in written instructions.

If I remember correctly, I read that the reason that jurors did not get instructions going in, back when the jury system was just getting started, was because jurors basically could not read. They were not literate and they could not read written instructions. Since we do not have that problem anymore, I see no reason why we should be hung up on that.

MR. ADLER: I guess that is the same argument used as to why jurors could not take notes—because it gave an advantage to the jurors who could write.

MR. RUFF: Let me say that I disagree with Judge Cordell on that. I think that part of the process of interacting with the jury, both from the judge's perspective and from the lawyer's perspective, is during the deliberation process. The only moment in which you get any sense of what is going on in the jurors' minds and any opportunity to deflect them from clearly erroneous or irrational paths of decision making is in that moment when, fourteen hours into the deliberations, an often incomprehensible note comes from the jury. The lawyers sit down with the judge and say, "What does this note mean? What is it telling us about what the jurors are doing, and how are we going to respond?" Frequently the response is not simply a matter of reciting the same instruction that was given when they went out to deliberate. It is often a shaping of the instruction or a response to a specific question that is designed to deal with a very specific problem. Usually it reflects a failure of understanding or confusion about an instruction. I have the fear that if all you

had was the jurors staring at the same piece of paper that was read to them fourteen hours before and trying to figure it out without any additional judicial guidance, and without any input from the lawyers as to how to shape that guidance, you lose that one, sometimes very brief, opportunity to try to shape appropriately the way the jury does its job.

JUDGE CORDELL: I do not think we disagree, actually. Sending in the instruction does not necessarily say to jurors that they cannot ask the judge a question. I do not think it does that at all. I do not know if any studies have been done, but I do not think that written instructions and asking questions of the judge are incompatible.

DR. ROSENTHAL: Here is where social science can be useful. This is an eminently researchable question. You randomly assign half the trials to carry in the written instructions and you can then see what the effect is on the verdict, what the effect is on the way the jurors feel about the way things have transpired, and so on. That is an eminently researchable question.

MR. ADLER: I think some jurisdictions have been doing that test. I think the Second Circuit may have. I just have one more question that I would like to ask and then I will open this up to the floor to permit people to ask questions. If judges wanted to remove or reduce the bias that they are presenting, to what extent could they? I want to ask that in part as a psychological question to Professor Rosenthal. If people are trained, if they go to the Judicial College and they have a session on bias, to what extent do they have the power to do anything about it?

DR. ROSENTHAL: The problem is that I do not know who could train them, because we have not yet developed people who know how to train others to change their nonverbal messages. That is, even if we found out that certain nonverbal behaviors accompany belief about guilt, it does not mean we would know exactly what we should tell people to do differently. There is some literature in the social sciences that shows when you forewarn people about biases you do not eliminate the biases but you reverse their direction. One could imagine a judge doing a 180-degree chair-spin, but done now during the prosecutor's case instead of the defense in an effort to avoid the bias against the defendant.

MR. ADLER: That is interesting. Do you have any further thoughts on that?

JUDGE CORDELL: No, I do not.

MR. ADLER: I want to make sure that we do not leave anybody out, so we will now open this for questions or comments.

AUDIENCE MEMBER (Mr. Robert N. Saylor):<sup>14</sup> You have been focusing on the question of judicial signaling of what the judge thinks the weight of the evidence is and who should win. My own experience has been that judicial signaling does not happen very much, or I am not smart enough to see it happen. What happens all the time, however, is that the judge will signal what he thinks of the lawyers. Often judges will issue very preemptory denials of objections or sustain a motion even before the ground upon which the motion is made is out of the mouth of the objecting lawyer. That happens all the time. I wonder if any research has been done about the effect of the jury concluding that the judge loves one set of lawyers and thinks the other lawyers are bozos. I think it is outcome-determinative, and it seems to happen in almost every case.

DR. ROSENTHAL: Clearly we should have videotaped the whole trial and not just the part where the jury was instructed, because that also sounds eminently researchable and very interesting. I do not know of any work that has been done on that.

MR. ADLER: I think there can be a twist to that. Again, use the example of the *Marcos* case. The jury was fairly unanimously hostile to Jerry Spence, who was the defense lawyer for Imelda Marcos, but they did not hold that against her at all. In fact, he may have even served as a lightning rod for some of their potential animosity. The jurors were so into how angry they were at Jerry Spence that they said, "You know, he almost lost the case for her and we are not going to hold it against her." That is an odd reverse-result that Jerry Spence says actually happens from time to time in his cases.

JUDGE CORDELL: Were they angry at him because of the judge's conduct toward him?

MR. ADLER: Partly. People who remember the trial will remember that the judge and Jerry Spence were in constant conflict, but also it is Spence's style. He came in with the cowboy hat, Western style, and, as Bill Clinton discovered in New York, certain cultural backgrounds do not necessarily work in New York, and they were quite hostile to him. They thought he was a showboat, but it did not affect his client, or if it did, it affected her positively.

MR. RUFF: It may change Bob Saylor's whole approach to being a trial lawyer.

AUDIENCE MEMBER: Both criminal cases and civil commercial cases frequently have testimony from witnesses that the jurors can perceive as being

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14. Covington & Burling; Chair-Elect, Section of Litigation, American Bar Association. Mr. Saylor delivered the keynote address at the conference. *Communicating with Juries: Keynote Address, The Annenberg Washington Program, April 10, 1992*, 68 IND. L.J. 1093 (1993); see also Robert Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1, 1988 at 78.

expert: an investigating police officer, a judge, a bank examiner, an economist, a medical expert. I am curious what the opinion of the panel is, and did your research indicate if a judge can overly emphasize the credibility of one witness, expert, or pattern of expertise to the detriment of a fair and impartial hearing?

JUDGE CORDELL: I think the answer to the question is yes, the judge can do that. Does it happen? We did not get that information in this study. These were misdemeanor trials, mostly cases for driving under the influence of alcohol or drugs, petty thefts, and burglaries, but certainly it is an issue. That question brings up the whole other issue of expert witnesses—I call them the hired guns—and what they say that the jurors do or do not understand. Experts are supposed to come in to educate and give the jurors information. My experience is that they do not do that. The hired guns come in to say what they are paid to say, and then the jurors still have to figure it out and sort it out. What some judges are resorting to now is using more objective special masters and having the court's own hired gun to break through to the jurors. In my experience, lawyers have not been very receptive to the idea. They do not particularly care for that, but I am starting to see a direction now where the judges are saying, "We are going to stop all of this and get our own experts in here."

AUDIENCE MEMBER: Just on that note, though, Ted Newman, who was a judge here in the D.C. Superior Court, tells a story with regard to experts. It is a divorce case and the husband and wife are both doctors. Plaintiff's counsel for the husband stands up and says, "Your Honor, for sake of simplicity I would like to refer to my client as Dr. X, and I would like to refer to the other side as Ms. X." Judge Newman says, "That is a super idea, let's just flip it so she is referred to as Dr. X, and he is referred to as Mr. X." To the extent that experts are labelled it clearly can have an impact on perceptions in the courtroom.

AUDIENCE MEMBER: Has there been any research done on how the effect of all of these legal shows on television might improve the perception of jurors and their instructions from judges?

DR. ROSENTHAL: That is a very interesting question. I wish I knew the answer but I really do not.

MR. RUFF: I do not know that the impact is measurable, but just to show you how widespread the impact of our weekly television fare is, let me offer an example. I was in London a couple of summers ago and I had the opportunity to have lunch with some court of appeals judges in their red robes and other finery. The only things they wanted to talk about were what was going to happen next on *L.A. Law*, because they were running several weeks

behind us. I do not know if that tells you anything about where the focus of attention is.

AUDIENCE MEMBER: I am interested in learning more about the study that was done and whether there are any limits to the information that you have received. We are all talking as if judges always influence juries with their nonverbal behavior. I am wondering what other factors compete for the jury's attention and to what extent do those factors explain the differences in the outcome of the case. In other words, what are the limits of this study? Are judges' signals something that always affect jury behavior?

DR. ROSENTHAL: I think the question is a fundamental question about social science, but one that is often overlooked by social scientists. What you are asking is what are the limits of the phenomena we studied. We are not good at figuring that out. We know certain things from the research that we have done, for example, the effect of the belief of the judge about the guilt or innocence of a defendant. I can tell you the magnitude of the effect is the difference between forty-nine percent and sixty-four percent of the jurors deciding guilt. But that leaves a lot of other things that could be operating in the system.

Social scientists and biomedical researchers all want to convince you that their variable is the critical variable. Do not believe them. There was a recent aspirin study where 22,000 doctors got aspirin or placebo, and it greatly decreased the heart attack rate.<sup>15</sup> However, it was three per one hundred, which is a sizeable reduction in death rate or heart attack rate, but it means that you're accounting for less than one percent of all of the factors that contribute to myocardial infarcts or death. So, important as the aspirin findings were, they are a tiny proportion of the total picture, and I am sure that is true in the courtroom as well.

AUDIENCE MEMBER: Do you have any comparable figures for the extent of the variance that is explained by the study that was done in the *Stanford Law Review*?

DR. ROSENTHAL: Yes. The clear findings show the magnitude of that effect was about nine percent of the variance, or an average correlation of 0.3.<sup>16</sup> This is a substantial effect but leaves lots and lots of variation unexplained.

JUDGE CORDELL: The end of the article also contains other areas that need to be explored. In other words, this is really the tip of the iceberg, and, indeed, we do suggest other avenues that ought to be looked at.

MR. MINOW: We cannot have Mr. Ruff here without asking him a question about Watergate, which he prosecuted. When you prosecuted Watergate, a

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15. ROBERT ROSENTHAL, *META-ANALYTIC PROCEDURES FOR SOCIAL RESEARCH* (rev. ed. 1991).

16. ROBERT ROSENTHAL & R.L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH* (2d ed. 1991).

high-profile case, did you find that the jurors were able to concentrate on what they heard in the courtroom without regard to what they came to the courtroom with from the media?

MR. RUFF: I think most of the lawyers who were involved in that case came away quite surprised at the extent to which what had been such an extraordinary event over the course of two or three years for most of the world, did not really have much effect on what was going on in the courtroom. The jury selection process, which was subject to extensive debate at the trial level and then at the court of appeals level, was really quite extraordinary in my view for what it says about the ability to find a jury, at least in Washington, D.C., that is capable of dealing with these issues.

If you ask most of the folks, both on the defense and on the prosecution side, in that case, there was a tension in the courtroom and a special color to the proceedings just because the courtroom was jammed every day and there were well-known people in the courtroom. That created a special aura, but I do not think it was because of what the jurors brought into the courtroom with them.

MR. ADLER: I wonder if anybody could address more broadly whether we should be worried that judges are in fact getting their viewpoints to jurors through unintentional nonverbal signals. Are they really just serving as a thirteenth juror, and is there something good about that? Does it create a nice mix for a judge and jury system? That might not be so bad. We have documented this phenomenon, but we have not really talked about whether we have a problem with it or not. Does anybody have strong feelings about that either way?

JUDGE CORDELL: Well, I think as long as it is kept in check it is probably not problematic. What we want to be concerned about is when judges are out of control. You have cited one extreme example of the judge swivelling the chair and rolling the eyes. When you start seeing judges doing that, then we have a problem. As long as it is kept in check, it should not be a serious problem.

As it stands now, at least from the study, there are some problems. Yet, what we found was that the level of behavior observed did not rise to the point, I believe, that we could say that criminal defendants were being denied due process of law. But there is a concern, and I absolutely believe that there is a need for education.

It is interesting to note that after this study came out, and this was a profound study in my opinion, there was not a single course set up in response to it at the Judge's College in California. This study came out in 1985. We do have courses on gender bias and I think there needs to be a

focus on this communication problem. There needs to be more research done and judges' awareness needs to be heightened.

This discussion brings up, too, the whole system of how we select judges and from whence they come. In California, they are appointed or elected. I came to the bench via both routes, and there is something to be said for each. There are positives and negatives to each, but I think a lot depends on who we put on the bench, why we put them there, what their motivations are, and that they not forget what our mandate is.

AUDIENCE MEMBER: I had the opportunity to work on the *Westmoreland v. CBS*<sup>17</sup> libel case. I would like to make a comment on the issue of judges addressing the jury. The judge in the *Westmoreland* case addressed the jury prior to the trial, and on a daily basis he reviewed with the jury the prior day's events. He allowed the jury to take notes, and the judge also used visual aids, which was highly unusual.

MR. ADLER: Is it surprising to you, though, that since that seemed to have worked rather well, or at least most people think so, that it is not more widely done? What do you think the resistance is?

AUDIENCE MEMBER: Well, first of all, that was really the first case in which I have seen a judge employ visual aids. Second, regarding reviewing the prior day's events on a daily basis, I do not know what the resistance is. I think maybe time factors play a big role.

MR. RUFF: I think it has also become increasingly common to allow lawyers to make periodic mini-statements to the jury. I think this is really a marvelous development, particularly in long and complex cases, so that there is some structure to what is being presented. Also, these mini-statements can go beyond simple statements like, "Oh, you remember back eight weeks ago when I made my opening statement? Well, this is the witness I told you about at the beginning of the trial, who is now coming on to explain to you what I told you at the beginning of the trial."

AUDIENCE MEMBER (Chief Judge Robert M. Parker, E.D. Texas): For years, I have instructed the jury not only originally but as the trial progressed, and I have also used visual aids. It is not that extraordinary and a lot of people do it, as well as permitting attorneys to talk to the jury at anytime, which is a very effective means of communicating and reminding the jury of instructions.

Let me take issue with one other thing. I think the least effective way to communicate to a jury by way of instructions is to sit up there and read them a long document of legal gobbledy-gook. If you then give them the written instructions when they go in the jury room, and if they read it in there, they

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17. 596 F.Supp. 1170 (S.D.N.Y. 1984).

will not understand it there either. The most effective means of communicating is simply to talk to them and explain it to them in everyday language so they will understand it, and not give them a piece of paper.

JUDGE CORDELL: Do you know how many reversals we will have?

AUDIENCE MEMBER (Chief Judge Robert M. Parker): I have never been reversed on a jury trial.

JUDGE CORDELL: I can see judges thinking, "If I just chat with these jurors they will understand everything." The problem is that you can see the appeals and the reversals coming. I think that is probably one of the bigger dilemmas we face.

MR. ADLER: Okay. Thank you very much to the panel. I think a lot of questions were raised and they will continue to be discussed. We look forward to the rest of the program.



