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LaDoris H. Cordell

Santa Clara County, California

Florence O. Keller

Department of Mental Health, Santa Clara County

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Pay No Attention to the Woman Behind the Bench: Musings of a Trial Court Judge

THE HONORABLE LADORIS H. CORDELL*
FLORENCE O. KELLER**

"Pay no attention to the man behind the curtain!"¹

When all else fails, keep a journal.

November 16, 1987

11.33 a.m.: People v. Jeffrey B., charged with resisting arrest and giving false identification; he's representing himself; it's going to be a long day; he's white, 27, sitting at counsel table with his pregnant wife; he's questioning the first 12 jurors and it's going very badly; "How long have you been married? Do you have children? How old are they?" The D.A. offered to dismiss the false i.d. charge, and I indicated no jail time, no fine, just counseling. He turned it down.

11:50 a.m.. The D.A. is now questioning the jurors.

Noon: Recess.

1.34 p.m.. Back in session; D.A. is questioning; sometimes I hate voir dire; it can be so tedious; first they ask questions that I have already asked; then the questions they come up with are: "How did you feel when you came home and found your stereo missing? How do you like being a dad? Do you get a chance to see your grandchildren often? Does everyone here feel comfortable with their level of common sense? Did you go through a contested divorce? Have you been a single parent for a long time?" These questions were just asked by the D.A. in this trial.

2:02 p.m.: Both sides have passed for cause; the first peremptory challenge was by the D.A.; he kicked off juror #5, a Chicano who has a drunk driving conviction and who fought her last traffic ticket; replaced by a man (white, 30s) who works with computers. The defendant is questioning him; his wife is sitting with him, taking notes for him.

* Superior Court Judge, Santa Clara County, California.

** Clinical Psychologist, Department of Mental Health, Santa Clara County.

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1. Words spoken by the Wizard to Dorothy et al. in the movie, THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

2:12 p.m.: Now the defendant has come up to the bench and asked for a continuance to hire an attorney; request denied because it isn't timely; he looked shocked.

2:23 p.m.. The defendant has kicked off juror #5, who was replaced by a woman (white, 30s), a secretary; defendant is questioning her; "Did you play high school sports? Do you like violent movies? Were a lot of things taken from your apartment when it was burglarized? Were you injured in the car accident?"

2:35 p.m.. The D.A. accepted the jury; the defendant kicked off #11, a high school administrator; he was replaced by a cable splicer (male, 30s, long bushy beard).

2:38 p.m.. The D.A. accepted the jury again; the defendant kicked off #7 (male, 50s, executive), and he was replaced by another male executive in his 50s.

2:50 p.m.: The D.A. again accepted the jury; the defendant kicked off #7 and he was replaced by a woman bus driver (white, 30s); this defendant has kicked off some very good jurors; he doesn't know what he is doing.

3:00 p.m.. The jury is selected; recess.

3:15 p.m.. Back in session; during the break the D.A. said he intended to call the defendant's wife to the stand; she asserted the marital privilege; the defendant then asked, "How am I doing?" I shook my head; he said, "Well, I feel that if the truth comes out, then "

3:37 p.m.. First witness, Officer H., he is a rookie having just graduated from the police academy

3:47 p.m.. The cop has drawn a diagram of the city park; he was on patrol and saw a car there after hours; he checked out the car and ran a check on the license plate; he saw defendant and two kids on the basketball court; he called the defendant to come over, three times; during the recess my bailiff told me to cool it; my facial expressions, she said, were too obvious: "It looks like you're going to jump out of your seat and pounce on someone." This trial is such a trial; the defendant doesn't know what he is doing; the D.A. is going to roll over this guy; the case is open and shut; my bailiff suggested that I pretend that there is a TV camera in the courtroom, trained right on me; okay, I'll do better.

4:03 p.m.. The cop told the defendant to leave the park; he refused and then said, "Give me a citation.", the officer wrote it up and when he asked for the defendant's name and date of birth, the defendant gave a name and birthdate; he hesitated in giving it, so the cop ran a check on it; the name came back phony; he asked the defendant for a phone number and a call was placed to his wife; she identified him with a different name and date of birth; the cop

ran a check on the real name and it came back with a warrant outstanding; so the cop arrested him.

4:15 p.m.. Now we get to the meat of the matter: the cop put an arm hold on the defendant; the defendant pulled away and took off running; the cop and his back-up followed; the defendant suddenly stopped and faced the cops and crossed his arms in front with clenched fists; the cops told him he was arrested; they couldn't get the defendant's arms behind his back; finally all three went to the ground; defendant got in a fetal position and kept turning away from the officer, who then hit the defendant three times in the ribs with his baton; on the third strike the defendant loosened his arms and was handcuffed; he was put in the patrol car; his children were wet and muddy because they had been playing in the grass at close to midnight; all were taken to the police department.

4:35 p.m.. The jurors just looked at the defendant's booking photo; the defendant is cross-examining now; this is pathetic; the man doesn't know how to ask a question, "If I were wearing a sweatband, where would I have worn it?"

4:47 p.m.. The defendant is still struggling along; this is really painful to watch.

4:55 p.m.. Recess.

November 17, 1987

9:08 a.m.. Back to the trial; Mr. B. is continuing cross-examination of Officer H.; he asked for a one day continuance this morning; I held a hearing in chambers and denied the motion; his reason, "My child has a fever and my other child hurt his arm last night when we were horsing around." "Why can't your wife take them to the doctor? She asserted the privilege and will not testify. Who is watching the children anyway?" "A neighbor. My wife isn't supposed to drive." "So, she can take a cab." "We have no money" I think he's lying—that the kids are fine, but that his character witness did not show up today I saw someone standing around all day yesterday, but he's not here today

9:50 a.m.. Cross-examination is still going, if that's what you want to call it.

10:32 a.m.: Mr. B. has been going on and on asking the dumbest questions.

10:37 a.m.: I just told Mr. B. that he has 3 more minutes with this witness.

10:45 a.m.: Cross-examination is finished; recess.

11:00 a.m.. Back in session; the D.A. has rested his case; Mr. B. wants a recess because his wife isn't here to testify; denied.

11:08 a.m.: He is testifying; "The cops just came at me, I didn't flee, they repeatedly hit me! I didn't struggle at all."

11:38 a.m.. He's crying now; he's describing how his sons were crying; now he's continuing; the cops got him cuffed and then commenced to beat him; now cross-examination by the D.A.

11:50 a.m.. Recess.

1:40 p.m.. Back in session; the defendant is no longer testifying; he has recalled the officer—for what, heaven knows; the guy is driving me nuts; it takes him 5 minutes to ask a question.

2:00 p.m.. Now he has called his wife to testify; so now she has waived her privilege not to testify against her husband.

2:43 p.m.. The wife is done; she added absolutely nothing; now Officer B. is testifying.

3:00 p.m.. The defendant is cross-examining the officer.

3:18 p.m.. Juror #10 just fell asleep; recess for the day

November 18, 1987

1:35 p.m.. The defendant has called his roommate to the stand; I am now limiting questioning to 10 minutes; now he is asking questions about the lighting; he has established that the roommate took the photos, and he does not know the defendant to be a violent person.

1:52 p.m.. Closing arguments; I've given each 10 minutes; this man is bizarre; "Sure I was in the park after 10 p.m., but it's American to be there. The officers used excessive force; they attacked me. There were lights in the park."

2:03 p.m.. The D.A. is arguing.

2:25 p.m.. I've instructed the jury, and they left to deliberate; if they are out more than 10 minutes, I'll eat my robe.

3:00 p.m.. I guess I'll start eating; they just came back with a verdict—guilty, but only after a lot of arguing in the jury room; I sent him to the probation department and set a sentencing date for the end of December.

* * * * *

These excerpts are a part of a journal I kept during the latter part of my tenure as a trial judge on the Municipal Court, shortly before I was elected to the Superior Court. It seems quite clear, in retrospect, that after five years in the trenches, I was suffering from an advanced case of judicial burnout. I had presided over thousands of drunk driving arraignments, hundreds of traffic court cases, and many tedious jury trials, the high point of which was the case of the man prosecuted for cutting to the front of the line at a local amusement park. The notes in my journal reflect my growing dismay

About the same time I was writing in my journal, I became curious about how jurors viewed the legal process. In order to at least try to make some order out of the sometimes disorderly life of a judge, I decided that I needed more information. Upon termination of each trial, I sent the jurors letters soliciting impressions of their courtroom experience. The following are some typical responses:

Juror Sharon P.:

Some things did strike me after being part of a jury and hearing the particular case in front of us. The first aspect concerned your reactions and, particularly, your facial expression. Though you admonished the jury not to pay attention to any of your reactions, I felt that you could have been more objective sitting on the bench. I did not feel that your handling of the proceedings was biased, however, and that was what was truly important to the fairness of the trial.

Juror Patrick S..

I was impressed with the atmosphere in the courtroom, which I feel was the result of *your* ability to make jurors and potential jurors and everyone feel at ease. You impressed the seriousness of the institution yet managed to add a light touch.

Juror Maria A..

I felt deeply honored to be part of the jury this week. This was my first opportunity to serve on a jury, and I was very impressed by what I saw going on at the proceedings. Being a woman and supporting my sons alone, I felt a sense of pride seeing a woman judge preside over the sessions with a deep abiding dignity, tempered with kindness and strength. I was sincerely impressed.

Juror Susan B..

I was impressed with the way the court functioned, with the individuals involved, and with you. I speak for all eleven jurors in this trial when I say that we were extremely impressed by you. Your attitude toward the court, your soft-spoken words, and your obvious intelligence left a favorable mark on us all. We feel that your career knows no bounds.

Imagine my confusion. The thoughts and feelings recounted in my journal stand in stark contrast to the attributions of the jurors. My bailiff told me to "cool it," and, to my chagrin, a juror even made note of my facial expressions. Withal, the jurors were consistently in my thrall; they attributed to me

vast intelligence, dignity, patience, tolerance—a list of virtues unlikely to be assembled within the corpus of any one individual, let alone that of a judge. I had offered the jurors scant evidence on which to base any conclusions about me, and none on which to base those recorded here.

Two years prior to beginning my journal, I had co-authored a law review article, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, which became known as the Stanford Study.² In the process of developing that article, I gave a great deal of thought to what we judges communicate to jurors, the manner in which we do it in general, and to my style in particular. As I was one of the researchers and thereby excluded from the study, I was without the benefit of feedback about my own judicial conduct. Still, of one thing I was convinced: none of my spoken words, nor any of my nonverbal communication, suggested a judge of Solomonic proportion. Searching, then, for some way by which to reconcile the vast discrepancy between the agony reflected in my notes and the ecstasy expressed by the jurors, I sought answers in the annals of psychology.

Judges are, almost universally, held in high esteem and accorded special status. The psychological exaltation of my role as judge is cleverly reflected in my physical exaltation. My bench (my throne) is several feet higher than the seats of the litigants, jurors, and spectators. It is placed at the head of the room, dead center. My unique status is enhanced by the black robe and the appellation, "Your Honor." Within the confines of my courtroom, surrounded by all of the accoutrements of power, I am the supreme and ultimate voice. My regal trappings and my control of the courtroom may be perceived as evidence that I am all knowing and above reproach. It should come as no surprise, however, that, in fact, my knowledge is severely limited, and no one with whom I am acquainted has ever accused me of being above reproach. I am left to conclude, therefore, that the jurors' responses to me have only little to do with who I am, and a lot to do with who they are. Such is the wonderful power of transference.

Transference, which describes the tendency of people to endow the present with significant emotional residues of the past, is a central notion in psychodynamic theory.³ Its effects are most clearly visible in psychotherapy, where patients transfer onto their therapists feelings that they experienced toward their mothers, fathers, and other important figures in their lives. But transference is not limited to therapy. Wherever people participate in

2. 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).

3. 7 SIGMUND FREUD, *Psychical (or Mental) Treatment*, in THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 283 (James Strachey trans., 1974).

significant events, transference occurs. When jurors encounter the drama of the courtroom, they predictably undergo two experiences. First, they bring emotions of the past into the present and, therefore, construe the judge in terms colored by their histories. Second, they attend very carefully to the judge, ascribing to her most casual behaviors meanings that had never been intended.

In the initial stages of a relationship, transference is heavily positive rather than negative. Since trials in municipal court tended to be brief, jurors and I never got beyond the initial stages of transference. So I got off pretty easy. Even among jurors whose histories may have been suffused by abusive authority, trial brevity gave me a reprieve. I rarely heard from those jurors. Indeed, it may well be that only those jurors in the grip of a positive transference respond to judges' entreaties for feedback. In any event, I am convinced that independent of judicial pronouncements, independent of verbal or nonverbal communication, independent of body language—in short, independent of *who the judge is*—jurors attribute certain opinions, certain feelings, and certain biases to the judicial persona.

So what? What if the persona of the judge evokes a transference reaction, quite apart from the judge's behavior? What difference does that make to justice, which is, after all, the signal function of the court?

I suggest that transference does make a difference. Worse, it makes an *unpredictable difference*. Transference is the loose cannon on the decks of justice, and it is that in two senses. First, we have long and often applauded the neutrality and objectivity of proper judging. The good judge is commonly described as unbiased, unprejudiced, and an intelligent and neutral dispenser of the law. Regardless that she may aspire to that characterization, she can never be that in the eyes of the jury, for if transference means anything, it means a perception colored by emotion and bias. Second, and paradoxically, transference flourishes most and best in an environment that strives for judicial ideal. Rather than retard it, neutrality and objectivity facilitate transference. In fact, one could probably replace a judge with a stuffed mannequin (not a significant change, cynics might argue), and, so long as the mannequin were perceived as humanoid, one would likely find that the mannequin had in some manner influenced the jury. The mannequin's very lack of expression would be construed as personally meaningful to any given juror. For without distinctiveness or individuality, a mannequin becomes a cipher onto which jurors may easily project their own histories. Transference thrives in a vacuum.

The dilemma posed by the metaphor of a mannequin is that the less the judge communicates to the jury, be that communication verbal or nonverbal, the greater the influence the judge may wield over the jury. Conversely, the

more real the judge is, the more she permits jurors to get to know *her*, the more difficult it becomes for them to create a judge in their own images. It has occurred to me that justice might be better served were I to move around a lot, whistle, or make strange gestures. So doing would certainly minimize the effect of transference, albeit replacing it with another set of problems. In the end, whatever the judge does or does not do, the way in which she is perceived by the jury is going to influence the decision-making process, affecting the verdict in an indeterminate and probably unknowable way. This is because transference effects are by definition idiosyncratic, arising from each individual's unique history. One prays, therefore, for a wash in which one juror's biases will cancel the biases of another. But that simple prayer is likely to go unanswered since cancellation effects cannot always be presumed, especially in small groupings, such as juries.

The fact that the bench is right in the middle of courtroom action is central to the degree of influence that the judge exerts over the jury. It is as if what was wanted was for the judge to command all of the attention, all of the time. A judge might influence the legal process less were she seated directly to the rear of the jurors, out of their view, overlooking them. But upon consideration, it becomes clear that such positioning of a judge risks inducing a massive element of paranoia into the proceedings. One can hardly win.

The way that courtrooms are presently structured, a judge's influence permeates all of the proceedings. Perhaps most insidiously, witnesses are seated directly adjacent to the judge. So when jurors are listening to a witness's testimony, trying to assess his or her credibility, the judge sits directly in the jurors' line of vision. Every time the judge makes a movement—each time she knits her brow, yawns, rolls her eyes, scratches her head—it is at some level interpreted as a commentary on the testimony of that witness. That commentary becomes particularly intense because it is, in the main, subliminal. The jury has not had the luxury of making a conscious choice to monitor the judge's reaction—the judge's nonverbal cues have become a part of the gestalt surrounding the witness's testimony. And that makes for very powerful communication indeed.

An alternative to placing the judge behind the jury might be to place the witness in a different part of the courtroom, putting the judge outside of the line of vision of the jury. For example, the witness might be seated between the two counsel tables and facing the bench, ensuring that the jurors would have to actively decide to turn their heads to assess the judge's demeanor. Simply repositioning the witness might serve to eliminate at least some of the subconscious influence of judicial nonverbal behavior on the jury.

The goal of the Stanford Study was to establish whether or not judicial communication, verbal and nonverbal, influenced jury decision making; and

assuming that it did, to give consideration to ways of reducing bias.⁴ Upon rereading my journal entries and the juror responses, I no longer wonder about whether or not we judges influence juries, but rather how much and in what way we influence them. The transference drama places the judge at the center of juror consciousness. The jury attends carefully to the judge, searching out each of her behaviors and imbuing them with meaning. Under such conditions, it is no wonder that jurors and judges agree on verdicts seventy-five percent of the time.⁵ It is difficult to imagine any other two bodies that would agree so well. The layout of the courtroom, heightened sensitivity, and the wish to please that arises from positive transference may well account for such blissful accord.

Herein lies the dilemma posed by the courtroom drama. On the one hand, our system of laws is committed to an independent jury. On the other hand, within the courtroom *mise en scene*, the centrality of the role of judge militates against that very independence. For no matter how much we may admonish them not to, jurors do pay a great deal of attention to the person behind the bench.

4. See Blanck et al., *supra* note 2, at 92.

5. HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 56 (1966).

