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The Jury System at Risk from Complexity, the New Media, and Deviancy

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THE JURY SYSTEM AT RISK FROM COMPLEXITY, THE NEW MEDIA, AND DEVIANCY

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One could surmise that 1994 was a propitious time to publish a book on the jury system. Media-intensive trials ending in discordant verdicts created tremendous concern about the jury as an "extraordinary institution."[1] One could also conclude that 1994 was the worst of times to publish a jury analysis. Kamikaze media coverage so sensationalized the jury process that a book like Stephen Adler's, *The Jury: Trial and Error in the American Courtroom*,[2] might be ignored as too noncontroversial.[3]

A plethora of jury scholarship already exists,[4] so why add to the pile?[5] The justification for Adler's book is angle and range. Adler's angle is that of a reporter; using his reporter's instincts and experience to interview jurors.[6] The range is in the variety of cases he addresses: two murder trials (one focusing

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1. Benjamin Kaplan, *Trial By Jury*, *in* TALKS ON AMERICAN LAW 45, 47 (Harold J. Berman ed., 1961).

2. STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM (1994).

3. The book has not been ignored by reviewers. *See, e.g.*, James Andrews, *The US Jury System: Of, by, and for the People, but Does It Work?*, CHRISTIAN SCI. MONITOR, Oct. 31, 1994, at 13 (book review); Herb Brown, *Indicting Jury System On Suspect Evidence*, CLEV. PLAIN DEALER, Oct. 30, 1994, at 11J (book review); Teresa Burke, *The Jury: Trial and Error in the American Courtroom*, VA. LAW., Feb. 1995, at 36 (book review); Gail D. Cox, *Law and Disorder*, NEWSDAY, Nov. 13, 1994, at 37 (book review); Richard Grenier, *Back in the Good Old Days, Before Juries Wrecked Justice*, WASH. TIMES, Nov. 2, 1994, at A17; Linda Himelstein, *A System Found Guilty As Charged*, BUS. WK., Nov. 21, 1994, at 16 (book review); Kathleen Kahn, *The Jury's Sad Verdict on State of the Courtroom*, SAN FRANCISCO CHRON., Sept. 26, 1994, at E5 (book review); Martin Kimel, *Does the Jury System Need Repair*, LEGAL TIMES, Jan. 30, 1995, at 58 (book review); Richard Lacayo, *Questionable Judgment*, TIME, Oct. 3, 1994, at 62.

An excerpt from the book was also reviewed by Chief Judge Frank Bullock, Jr., the trial judge in the *Brooke Group* case, which will be discussed in more detail *infra*. Bullock chastised Adler for not recognizing that the Supreme Court had affirmed his decision. Chief Judge Frank W. Bullock, Jr., *Let the Record Show . . .* , AM. LAW., Dec. 1994, at 23.

4. The best known is the extensive study conducted by Harry Kalven and Hans Zeisel at the University of Chicago. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

5. Also appearing in 1994 was JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994). Abramson discusses history, selection process, and juror decisionmaking in arguing for the jury "as a deliberative rather than a representative body. Deliberation is a lost virtue in modern democracies; only the jury still regularly calls upon ordinary citizens to engage each other in a face-to-face process of debate." *Id.* at 8. It is a provocative book but, with the exception of a few comments on scientific jury selection, beyond the scope of this article. For a review, see George P. Fletcher, *The Deliberators*, N.Y. TIMES, Dec. 11, 1994, § 7, at 14.

6. Adler is the legal editor of *The Wall Street Journal* and a former writer at *The American Lawyer*.

on sentencing, the other on guilt); a celebrity trial (Imelda Marcos); a complex commercial litigation trial (antitrust); and two negligence trials (AIDS, deep pocket recovery). The objective is to describe the jurors' perceptions of a variety of stimuli—lawyers, judges, witnesses, and other jurors—to ascertain what really goes on in the jurors' minds over the course of a trial. Ultimately, Adler concludes that "[w]e sense, rather than know, that the jury isn't working properly."[7]

I agree with Adler; problems do exist with the current jury system. However, Adler, like many others, fails to make an important distinction—there is a vast difference between the present condition of the civil and criminal jury systems. While the civil jury system may not be working as effectively as it should, it is salvageable. The criminal jury system, on the other hand, may be beyond rehabilitation.

This article uses Adler's book as a frame of reference to flush out the problems of the two jury systems. Part I scrutinizes the civil jury system, focusing specifically on the many difficulties that arise when civil juries are asked to resolve complex litigation disputes. Part II examines the effectiveness of the criminal jury system and, in particular, the present and future impact of the "New Media Culture of Deviancy" on the system. Finally, Part III discusses the differences between the two systems, predicting a different future for each of them.

I. THE CHALLENGE TO THE JURY FROM COMPLEX LITIGATION

I used an interview technique similar to Adler's on four antitrust juries, and confess an interest and stake in the technique's effectiveness.[8] Additionally, we both surveyed the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[9] antitrust jury. For the most part, our results were consistent.

Brooke Group involved the Robinson-Patman Act;[10] the Ulysses of antitrust.[11] Threatened with extinction in the brand-name cigarette market,

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7. ADLER, *supra* note 2, at 43.

8. I conducted two interviews in Cleveland, Ohio (the first trial ended in a hung jury and was subsequently re-tried). These surveys are discussed in some of my other works. *See, e.g.*, ARTHUR D. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY (1984) [hereinafter AUSTIN, COMPLEX LITIGATION]; Arthur D. Austin, City of Cleveland v. Cleveland Electric Illuminating Co.: *Monopolization, Regulation and Natural Monopoly*, 13 U. TOL. L. REV. 609 (1982); Arthur D. Austin, *Second Trials*, LITIG., Winter 1984, at 34.

I also conducted juror surveys in New Mexico and North Carolina. For the respective trial court opinions, see New Mexico Natural Gas Antitrust Litig. v. Southern Union Co., 607 F. Supp. 1491 (D. Colo. 1984); Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 1990-2 Trade Cas. (CCH) 69,182 (M.D. N.C. 1990). The New Mexico case ended in a hung jury but eventually settled for over $100 million. Jonathan Dahl, *Consumers Gain Unlikely Victory in Antitrust Action in New Mexico*, WALL ST. J., June 5, 1984, at 37.

For a more in-depth discussion of the New Mexico and North Carolina surveys, see Arthur D. Austin, *The Truth-and-Consequences of 'Juror Bonding'*, N.J. L.J., Oct. 4, 1993, at 26 [hereinafter Austin, *Juror Bonding*]; Arthur D. Austin, *Another Viewpoint on Juries*, NAT'L L.J., Mar. 22, 1993, at 15; Arthur Austin, *How the Dominant Juror Dominates*, 21 TRIAL LAW. Q. 23, 23-24 (1991) [hereinafter Austin, *Dominant Juror*].

9. 113 S. Ct. 2578 (1993).

10. 15 U.S.C. §§ 13-13b, 21a (1994).

11. For a more detailed discussion of the Robinson-Patman Act, see F.M. SCHERER, INDUS-

Liggett[12] entered the generic market and immediately diverted customers from brand-name cigarette producers.[13] As brand-name prices increased, Liggett dropped its generic prices and successfully enhanced its sales.[14]

Brown & Williamson (B&W) responded to Liggett's success by also entering the generic market. Liggett alleged that B&W violated the Robinson-Patman Act when it entered the market and began selling its generics below cost.[15] Liggett claimed it lost business as a result of B&W's entry into the generic market.[16] Liggett insisted that B&W's only purpose in entering the generic market was to take away Liggett's customers and force Liggett to make up its losses by raising generic prices.[17] B&W's predatory plan, according to Liggett, was to reduce the price difference between brands and generics and thereby entice customers back to brands.[18] The linchpin of the complaint was that B&W would recoup its losses from below-cost-pricing by joining its other rivals in a conscious parallelism conspiracy to charge supracompetitive prices for brands.[19]

By making a favorable impression on the jurors, Adler made my survey easier.[20] My client was a law firm that was using a well-known expert economist in a pending case involving the same allegations. Adler and I pursued a similar objective: getting into the jurors' minds to trace their perceptions from *voir dire* to the judgment.

TRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 504 (1970) ("The Robinson-Patman Act has on occasion been called a jungle, a hodgepodge of inconsistencies, and worse. The appellations are well deserved."); *see also* DONALD DEWEY, MONOPOLY IN ECONOMICS AND LAW 196 (1959) ("In short, the Robinson-Patman Act, on its face, outlaws all bargaining as the process is understood in the business world."); A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 468 (2d ed. 1970) ("It is interesting that its case law is the richest in muddle and anomaly.").

12. Liggett is the former corporate name of Brooke Group Ltd., and is the name the Court and the parties use to refer to the entity. *Brooke Group*, 113 S. Ct. at 2582.

13. *Id.* at 2583.

14. *Id.*

15. *Id.* at 2584.

16. *Id.* at 2592.

17. *Id.*

18. The result would be that

> higher list prices to consumers would shrink the percentage gap in retail price between generic and branded cigarettes; and this narrowing of the gap would make generics less appealing to the consumer, thus slowing the growth of the economy segment and reducing cannibalizations of branded sales and their associated supracompetitive profits.

Id.

19. *Brooke Group* "posed a new and controversial theory of oligopolistic predatory recoupment. It was a hotly contested and high-profile lawsuit in which the litigants were assisted by highly skilled attorneys and economists." Kathryn M. Fenton, *Editor's Note, Symposium: Predatory Pricing After* Brooke Group, 62 ANTITRUST L.J. 537 (1994). For other commentary, see Stephen Calkins, *The October 1992 Supreme Court Term and Antitrust: More Objectivity than Ever*, 62 ANTITRUST L.J. 327, 377-402 (1994); Daniel J. Gifford, *Predatory Pricing Analysis in the Supreme Court*, 39 ANTITRUST BULL. 431 (1994); *The Supreme Court—Leading Cases*, 107 HARV. L. REV. 144, 322-31 (1993).

20. A juror told me that Adler had preceded me by approximately three months. The juror also indicated that he had been interviewed by representatives for the litigants. Interview with Cleo Stanley, jury member, in Durham, N.C. (July 9, 1990). The Interview Notes are quotes from taped interviews that I used to summarize material relevant to my survey conclusions. Both the tapes and notes are on file with the author.

We came to the same conclusion: the jurors were overwhelmed, frustrated, and confused by testimony well beyond their comprehension. I concluded that at no time did *any* juror grasp—even at the margins—the law, the economics, or any other testimony relating to the allegations or defense. When Adler noted that "[v]ocabulary was a particular problem,"[21] he was correct. This jury was no different than any other jury I have surveyed; at no time have I ever encountered a juror who had the foggiest notion of what oligopoly, market power, or average variable costs meant, much less how they applied to the case. Typical is the response I received when I asked a juror whether he remembered average variable cost. The juror replied, "Yes, explain it to me. I still don't know what it means."[22]

When jurors tune out substantive testimony, serious consequences follow. Adler observed, "Rocky and the others often found themselves focusing on more concrete matters. Foster wore his suits too tight; another lawyer picked his nose."[23] He is right—the irrelevant becomes relevant, and often amusing. A juror told me that one of the attorneys came into court with his fly open, ruining his carefully developed image as a sharp dresser.[24] On the other hand, lawyer lapses, such as nodding off or writing a letter to Mom during the trial, can antagonize jurors.[25] In their constant audience gazing, jurors invariably look to see who supports the plaintiff or defendant.[26]

More importantly, critical testimony can be trumped by subjective reactions. For example, when B&W's attorney, during an aggressive cross-examination, pressed one of Liggett's witnesses (a tobacco wholesaler) to admit to his lack of education, the jury responded with resentment, thereby elevating the impact on the jury of the wholesaler's testimony regarding below-cost-pricing.[27] Adler correctly noted that the jury saw it as an "elitist attack."[28] Dianne was still steaming when Adler interviewed her.[29] In fact, she was still steaming when I got to her, claiming that the lawyer was "a smart aleck."[30] Another juror expressed a similar sentiment, saying, "I [will] never forget it . . . they belittled him."[31]

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21. ADLER, *supra* note 2, at 132.
22. Interview with Polly Hurley, jury member, in Durham, N.C. (July 9, 1990).
23. ADLER, *supra* note 2, at 126. Another juror noted, "Mr. Barker wore the same suit every day, he was sloppy." Interview with Dianne Goodman, jury member, in Durham, N.C. (July 8, 1990).
24. Interview with Cleo Stanley, jury member, in Durham, N.C. (July 9, 1990).
25. *See* AUSTIN, COMPLEX LITIGATION, *supra* note 8, at 89 (describing such an incident and explaining how it diminished the lawyer's credibility).
26. A New Mexico juror told me that both sides were stacking the audience and that neither side fooled anyone. Arthur D. Austin, New Mexico Natural Gas Antitrust Litigation Jury Survey (1984) (unpublished survey, on file with the *Denver University Law Review*). During the simulated deliberation that I conducted, all the jurors remembered with great interest and amusement the appearance of a young woman in a red dress. *Id.* They could not figure out if she was a plaintiff or defendant "plant" to divert their attention. *Id.* The plaintiff's lawyers denied any knowledge of the "lady in red." *Id.*
27. ADLER, *supra* note 2, at 135. It was also a stupid attack because several of the jurors had a similar educational background.
28. *Id.*
29. *Id.* Dianne remarked about Liggett's witness, "[t]hat man worked for what he got." *Id.*
30. Interview with Polly Hurley, jury member, in Durham, N.C. (July 9, 1990).
31. Interview with Darlene Hall, jury member, in Durham, N.C. (July 10, 1990).

The verdict was sealed when Judge Bullock finished reading the instructions and the plaintiff moved, with the defendant's approval, to merge the three alternates with the six regular jurors to create a jury of nine.[32] While Adler mentioned this switch, he failed to note the staggering consequences that resulted from it. The switch changed the course of deliberation: an early poll taken during the jury's deliberation revealed that the original jury lined up four to two in favor of B&W.[33] In their study, Harry Kalven and Hans Zeisel note that "*with very few exceptions, the first ballot determines the outcome of the verdict.*"[34] Moreover, the four jurors who sided with B&W included Rocky, who became a dominant factor in deliberation, and three other strong-willed people who sided with Rocky until the very end.[35] In other words, with this strong-willed group, a B&W verdict would have been virtually certain. With the addition of the three alternates, however, the vote went five to four in favor of Liggett.[36] The key to the ultimate verdict was the addition of Cleo, who was also a dominant juror.[37]

A dominant juror uses an amalgam of persuasion, education, and management skills to guide fellow jurors to a verdict.[38] Other jurors are attracted by the dominant juror's sincerity, lack of temperment, and ability to keep the discussion focused.[39] Because both Cleo and Rocky fit the dominant juror profile, a face-off between the two was destined. Their conflict is illustrative of what really takes place in the juryroom during a complex antitrust trial.[40] It also shows why the verdict was not, as Adler asserts, "illogical."[41]

The legal and economic issues of antitrust force jurors to make ideological judgments. Stripped of its legal and lawyerly fluff, the argument at trial is about the acceptable types of competitive conduct and the level of tolerance for enterprise size. On the spectrum of possibilities, Cleo and Rocky were at extreme opposite ends. Cleo, a classic Southern populist, explained, "B&W got too greedy. All of them [big businesses] are crooks."[42] Conversely, Rocky, a strong advocate of competition, stated, "[t]his [case] don't even belong in a courtroom, it belongs in a supermarket."[43]

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32. ADLER, *supra* note 2, at 131.

33. *Id.*

34. KALVEN & ZEISEL, *supra* note 4, at 488 (emphasis in original); *see also* JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 286-87 (1987) (stating that the "final decision can be predicted fairly by knowing the initial distribution of verdict preferences at the start of deliberations").

35. ADLER, *supra* note 2, at 133.

36. According to Cleo, Rocky initiated the poll by saying, "let's see where we stand." Interview with Cleo Stanley, jury member, in Durham, N.C. (July 9, 1990).

37. ADLER, *supra* note 2, at 133.

38. *See* Austin, *Dominant Juror*, *supra* note 8, at 25-26.

39. The second Cleveland trial produced the paradigmatic dominant juror. As foreman, he convened the jury as a committee, avoided a poll that would have hardened positions, and proceeded to let each juror give a general impression of what they thought about the case, saying, "let's take it step by step. You tell me what you find wrong and then we [will] dig up the evidence and prove it . . . ." AUSTIN, COMPLEX LITIGATION, *supra* note 8, at 53.

40. I have described this as *"What Happens when a Dominant Juror Meets a Dominant Juror?"* Austin, *Dominant Juror*, *supra* note 8, at 26.

41. ADLER, *supra* note 2, at 143.

42. Interview with Cleo Stanley, jury member, in Durham, N.C. (July 9, 1990).

43. Interview with Rocky Phillips, jury member, in Durham, N.C. (July 8, 1990).

Dominant jurors intuitively know that the issue is ideology and gravitate toward evidence which supports their vision. Cleo's primary weapon was something antitrust lawyers dread, a "smoking gun" document in which B&W executives made comments like "bury them" and "put a lid on Liggett."[44]

Cleo repeatedly told his colleagues that the document proved the evil intent of B&W, a corporate giant.[45] He said, the "[p]lanning papers got me going—then I started looking for things on B&W's part. They did what their intent was. They intended to do it and did . . . [the] document[s] spoke for themselves."[46] Rocky countered with wisdom from Adam Smith, "Every businessman dreams to become number one. If me and you are competing, I want to be first."[47] A Rocky supporter was more practical, "In any bull session, people [will] say get rid of them . . . no one is going to say let's help them across the street."[48]

The irony of expert testimony is that while no one can comprehend the message, experts nevertheless play a critical role in the result. Jurors pick over their testimony like buzzards on roadkill, trying to find some word or sentence to support an ideology. Cleo had an advantage in William Burnett, the plaintiff's economist expert who testified about a "study" of the tobacco industry which he had compiled to support his theory of predatory pricing and recoupment.[49] Kenneth Elzinger, B&W's expert, rebutted Burnett's testimony by arguing that his conclusions were inconsistent with accepted economic theory.[50] Cleo was not deterred. Burnett's message was an ideal cover for Cleo's populism, and Burnett's premise, that fact always trumps theory, appeals to most people, especially jurors with a high school education. Cleo remarked, "Burnett was practical . . . he done his homework. . . . Elzinger was just giving his theory without any research on it. . . . Burnett had the facts, Elzinger had his philosophy."[51]

How did they avoid a hung jury? Rocky struck me as a tough young man who would not back away from a fight. To Adler, the "breakthrough" to a compromise came when Cleo conceded to cutting $35 million for the trademark allegation and $5 million for another claim.[52] While I agree that Cleo's concession was a factor, it was not *the* factor. What ultimately caused Rocky and Polly to fold was a phenomenon known as "bonding."

Jury bonding is an imperceptible process that develops during long, complex trials.[53] It results in a group mindset on every aspect of the trial.[54] Per-

44. ADLER, *supra* note 2, at 133.
45. *Id.*
46. Interview with Cleo Stanley, jury member, in Durham, N.C. (July 9, 1990).
47. Interview with Rocky Phillips, jury member, in Durham, N.C. (July 8, 1990).
48. Interview with Polly Hurley, jury member, in Durham, N.C. (July 9, 1990).
49. ADLER, *supra* note 2, at 134-35.
50. *Id.*
51. Interview with Cleo Stanley, jury member, in Durham, N.C. (July 9, 1990).
52. ADLER, *supra* note 2, at 138-39. It was a good ploy since only one juror took the trademark claim seriously. *Id.*
53. *See generally* Austin, *Juror Bonding*, *supra* note 8 (discussing the jury bonding phenomenon).
54. *Id.*

sonality differences fade into tolerance and friendships as the trial progresses.[55] Rocky and Cicero, the only African-American juror, became drinking buddies.[56] The women counseled Rocky during his divorce. Most importantly, the group developed a family mentality, which became a critical factor in deliberation.[57]

There was, after eight months of bonding, a group commitment to doing what they were sworn to do, bring in a verdict. A hung jury would be a rejection of the family ethos nurtured by everyone. Rocky explained, "[m]e and Cleo sat there and argued and argued and that's not me."[58] Rocky knew that a hung jury by a younger man would have hurt Cleo's pride. Rocky capitulated. "A lot of people were tired. It was hell, I respect my elders, I loved them."[59]

Was the verdict "illogical" as Adler concludes? Suppose a jury of nine lawyers and economists, all experienced in antitrust, were convened for the *Brooke Group* case. Would we get a reasoned and "logical" verdict? Would we get a more rational deliberation? No, we would probably get wild argument and a hung jury.

There are three distinct positions on the role of antitrust. First, there are populists like Cleo who are suspicious of corporate size and assume evil intent from every medium to large firm.[60] The fight song is attack 'em, break 'em up. Then there are people like Rocky, from the Chicago School of Economics, who argue that the market will cure most defaults and that antitrust is a last resort in only the most blatant cases.[61] In between are the moderates, who tolerate some imperfections and rely on antitrust to promote workable competition.[62] Like the jury, each group has its biases and filters out antagonistic static from rival camps. The difference is that Rocky compromised. Economists and lawyers, on the other hand, have never agreed on anything.[63]

55. *Id.*

56. ADLER, *supra* note 2, at 137.

57. *See* NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES § 18.09 (Elissa Krauss & Beth Bonora eds., 2d ed. 1983) ("Particularly in long trials, jurors tend to see themselves as families. The social leaders in a jury often feel that the family harmony must be maintained at all costs, so they jump right into the negotiator role.").

58. Interview with Rocky Phillips, jury member, in Durham, N.C. (July 8, 1990).

59. *Id.*

60. The Sherman Act and state antitrust laws were inspired by populist aspirations. "The Populist's bugles called for a Pickett's charge on Wall Street." Will Wilson, *The State Antitrust Laws*, 47 A.B.A. J. 160, 160 (1961). Populism endures in the anti-corporate activities of people like Ralph Nader. *See* Paul Reidinger, *Separating Powers, Nominating Judges*, 75 A.B.A. J. 60, 60 (1989) ("Public Citizen means Ralph Nader—and that means populist rhetoric tending toward the left and an ongoing legal guerilla war against various establishment enemies.").

61. The Chicago School of Economics teaches that in enforcing the antitrust laws, the first priority is efficiency, not "legal rules designed to move the economy closer to a model of atomistic competition . . . ." Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 (1986); *see also* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (discussing the development of the Chicago School of antitrust analysis, and the erosion of the distinction between the Chicago and Harvard positions on antitrust policy).

62. For a description of workable competition see CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1965).

63. Both Rocky and Cleo would have a problem with an economist who says, "You can't argue about what's inside my black box (*i.e.* economic model) because I made it. The God's truth

In fact, Rocky and Cleo may have anticipated the Supreme Court's reasoning on appeal. After positing that a "reasonable jury" is presumed to know the law, the facts of the case, and the "realities of the market," the Supreme Court concluded that since the plaintiff could not prove that B&W had a "reasonable prospect" at recoupment, the case should not have been submitted to a jury.[64] Rocky, in his own Mayberry style, said the same thing. He discounted the significance of the planning document and the relevance of intent, stating, "I used common sense . . . [they were] competing . . . [everyone] wants to get all the business."[65] Moreover, like the Supreme Court, Rocky said the case did not belong in court—he felt it belonged in the competitive arena of a supermarket.[66]

In a sharp criticism of the majority, Justice Stevens, writing for the dissent,[67] vindicated Cleo's reliance on the planning documents, explaining that "the jury would surely be entitled to infer that B&W's predatory plan, in which it invested millions of dollars for the purpose of achieving admittedly anticompetitive results, carried a 'reasonable possibility' of injuring competition."[68]

In other words, the jury system, at least in antitrust, is not as faulty as Adler suggests. Instead, the problem stems from the Supreme Court's inability to compose a consistent, rational, and workable antitrust policy to guide lawyers and jurors. Comparable to the evolutionary process of a constitutional provision,[69] the antitrust laws were supposed to produce a series of decisions charting a vision for an efficient and productive competitive system. The failure of the Court to achieve this objective is confirmed by the string of antitrust decisions that have left a blurred vision of contradiction, confusion, and waffling ideology.[70]

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isn't in the black box, I *am* the God's truth." *But* Ceteris *Are Never* Paribus, FORBES, Dec. 15, 1974, at 22, 23 (remark attributed to an economist).

64. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2598 (1993).

65. Interview with Rocky Phillips, jury member, in Durham, N.C. (July 8, 1990).

66. *Id.*

67. *Brooke Group*, 113 S. Ct. at 2604 (Stevens, J., dissenting). Justice Stevens explained that contrary to the judgment of the jury, the majority's "conclusion rests on a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence." *Id.*

68. *Id.* at 2606.

69. The Supreme Court has said that the antitrust laws possess a "generality and adaptability comparable to that found to be desirable in constitutional provisions." Sugar Inst., Inc. v. United States, 297 U.S. 553, 600 (1936).

70. One court noted:

> [A] District Judge knows that he cannot give any authoritative reconciliation of opinions rendered by appellate courts. And [in connection with the Sherman Act], it is delusive to treat opinions written by different judges at different times as pieces of a jigsaw puzzle which can be, by effort, fitted correctly into a single pattern.

United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

Professor Arthur analogizes Supreme Court antitrust opinions to the split personality heroine in Thigpen and Cleckley's book *the three faces of Eve*. He concludes that the Court wears three faces: sometimes it follows precedent, sometimes it follows economic theory, and sometimes it engages in "policymaking." Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 309-10 (1986).

Jurors cannot be expected to cope with the blurred vision of antitrust. When the Supreme Court reforms antitrust law by drafting consistent opinions aimed at the real world of the market place, jurors, business people, and lawyers will be able to speak the same language.[71]

Despite the serious failures flushed out in his case studies, Adler endorses the jury as necessary to sustain the nation's "democratic vision."[72] He concludes, "[t]here's disorder in the court but not despair."[73] His solution is to "empower" jurors by giving them the opportunity for greater participation; they should be allowed to take notes, ask questions, and be given pre-trial instructions followed by periodic mini-instructions.[74]

Adler's proposed remedies, however, are in no way unique.[75] Critics have long recognized the defects that result from the one-sided linear flow of information directed to passive jurors.[76] An increasing number of courts now allow note taking,[77] and others even permit questions from jurors.[78] Additionally, many lawyers and judges now use readability experts[79] in order to help jurors comprehend the jury instructions. Finally, all parties give high priority to improving the management of exhibits and witnesses.[80]

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71. *Brooke Group* continues the Court's "blurred vision." Professor Calkins calls it "a challenge to interpret . . . ." Calkins, *supra* note 19, at 378. Participants in a symposium on the decision:

> differ[ed] not only in their views on the likely impact of *Brooke Group* on future predatory pricing claims, but also on the opinion's possible implications for broader antitrust issues, such as the ascendancy of post-Chicago economics and the relative roles of the judge and jury in dealing with economic issues in antitrust litigation.

Fenton, *supra* note 19, at 538.

72. ADLER, *supra* note 2, at 242.

73. *Id.*

74. *Id.* at 226-40.

75. *See* H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 378 (Robert E. Litan ed., 1993).

76. *See, e.g.*, Arthur D. Austin, *Why Jurors Don't Heed the Trial*, NAT'L L.J., Aug. 12, 1985, at 15 (discussing possible reforms of the jury system aimed at making the juror a more active, and thus, more informed, participant); Robert F. Forston, *Sense and Non-sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601 (presenting two empirical studies illustrating jury confusion and suggesting areas in which communication could be improved); William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731 (1981) (proposing a variety of ways to improve jury instructions).

77. Arthur D. Austin, *Research Supports Note-Taking by Jurors*, CLEV. B.J., Dec. 1984, at 46; David Ranii, *Judges Push Increased Jury Role*, NAT'L L.J., Aug. 16, 1982, at 1.

78. Several federal judges who have allowed juror questions indicate that the main problems are controlling the substance of the questions and filtering out irrelevant inquiries. Second Annual Alvin B. Rubin Federal Law Symposium, *The Role of the Jury in Modern Litigation*, New Orleans, La., Feb. 1, 1994.

79. One of the more promising techniques for improving readability is psycholinguistics, which identifies linguistic factors that cause comprehension difficulties. *See* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

80. One of the most successful exhibits I have encountered was a flow chart developed by the plaintiffs in the New Mexico litigation. The exhibit charted what the plaintiff intended to cover each day. As the days went by, the jurors could see where they had been and where they were going. A juror told me, "[i]t was one heck of tool that got everything together." Arthur Austin, *What Jurors Like—And Dislike About Exhibits*, *in* PRODUCTS LIABILITY: COMMENTARY & CASES 8-9 (May, 1986).

Despite these efforts, serious problems of comprehension persist. The reason is obvious—complex litigation is complex. And it is complex for *everyone* involved.[81] The only question is whether we can tolerate comprehension problems as the price for maintaining jury participation in resolving conflicts. I agree with Adler that it is a price we must pay. Moreover, with continued fine-tuning of trial management, the price can be reduced. Two of Adler's suggestions could have a positive impact: (1) no jury service exemptions for individuals such as professionals who can best handle complicated testimony; and (2) the elimination of peremptory challenges.[82]

Adler can be faulted, however, for not giving more attention to the differences between the problems confronting civil and criminal juries. Civil juries are challenged by problems that can be moderated. Moreover, the legal system could tolerate the elimination of the civil jury in complex litigation cases.[83] Criminal juries, however, whose elimination could not be tolerated, are under siege by destructive pressures. The threat comes from the cumulative effects of events and institutional changes that embarrass, trivialize, and subvert the ability of the jury to produce results consistent with its symbolic function.

II. THE CRIMINAL JURY IN THE NEW MEDIA CULTURE OF DEVIANCY

The O.J. Simpson case was a historical event in criminal law, comparable to the Leopold and Loeb case.[84] The difference is that the Leopold and Loeb case was a singular event. *California v. Simpson*, on the other hand, was the showcase in an unprecedented cluster of bizarre trials. The "cluster cases," that include the trials of Bernhard Goetz, William Kennedy Smith, Lorena Bobbitt, Rodney King, the Reginald Denny assailants, Heidi Fleiss, and the Menendez brothers,[85] involved the most volatile issues of the century: race, gender, poli-

81. Judges who lack an understanding of complicated material may "pass the buck and let a jury decide." They "also may allow lawyers to offer evidence to juries in ways that can't help but confuse." Junda Woo, *New Guide for Judges Tries to Clarify Scientific Issues*, WALL ST. J., Dec. 14, 1994, at B1. Private programs to educate federal judges to the subtleties of economics have been attacked as efforts to promote biased perspectives. *See Institute's Analysis of Privately Funded Judicial Seminars*, LEGAL TIMES OF WASH., Sept. 15, 1980, at 19.

82. ADLER, *supra* note 2, at 219-24.

83. Many firms avoid the challenge and cost of trying complex cases before a jury by including clauses in agreements that require arbitration or mediation of disagreements by experts. *See* BERTHOLD H. HOENIGER, COMMERCIAL ARBITRATION HANDBOOK § 1.01 (1991).

Professor Calkins suggests that as a result of *Brooke Group*, "[s]ome judges may follow the Court's lead and begin reviewing the sufficiency of evidence supporting jury verdicts with new vigor." Calkins, *supra* note 19, at 393.

84. The Leopold and Loeb case involved two brilliant teenage students (from the Universities of Chicago and Michigan), who committed what they thought was the "perfect crime" (murder), admittedly "for the sake of a thrill." ATTORNEY FOR THE DAMNED 16-88 (Arthur Weinberg ed., 1957). Clarence Darrow defended them, arguing that they lacked the mental state required to support a murder conviction. *Id.* The court sentenced them to life imprisonment. *Id.*

85. Trial conclusion dates: Bernhard Goetz, June 16, 1987 (conviction); William Kennedy Smith, Dec. 11, 1991 (acquittal); Lorena Bobbitt, Jan. 21, 1994 (acquitted, temporarily insane); Rodney King Number 1, Apr. 30, 1992 (four police officers acquitted); Rodney King Number 2, Apr. 17, 1993 (United States v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993)) (conviction); Reginald Denny assailants, Oct. 19, 1993 (attackers of Denny acquitted of serious charges); Heidi Fleiss, Dec. 3, 1994 (convicted on three counts of pandering); Erik Menendez, Jan. 14, 1994 (mistrial); Lyle Menendez, Jan. 29, 1994 (mistrial).

tics, sexual abuse, urban violence, and police brutality. These "cluster cases" were influential in shaping what I term the "new media." In turn, the "new media" is playing a major role in subverting the symbolic value and effectiveness of the criminal jury.

Before the new media, "snoots"[86] such as the *New York Times*, dominated criminal trial coverage. These "snoots" emphasized quality with the motto, "All The News That's Fit to Print." Edward R. Murrow set a similar tone in TV news journalism. Gossip was anathema while objectivity (albeit with a liberal skew) was exulted. The "dirtballs" who operated across the tracks thrived on sex and scandal, as tabloid competed with TV talk shows for the trailerpark audience.[87]

Then came CNN, followed by news with a soap opera spin. CNN redefined and diverted the news "toward the specialized form of garbage collection known as gossip."[88] The networks responded with TV magazine programs, thereby blurring the distinction between "hard" news, "soft" news, and gossip.[89] The "new media" finally crystallized when the *Star* ran its expose of the Flowers-Clinton tapes.[90] To the public, the alleged scandal was news, a perception that forced the "snoots" into competition with the gossip industry.[91] Simultaneously, deviancy joined the new media—talk show hosts such as Sally Jessy Raphael, Donahue, and Geraldo titillated their audiences with topics like, "Mom's Ashamed of Stripper Daughters," "Gigolos," and "Women Who Kill and Use Abuse as a Motive."[92] By commingling the work of the *Times* and *The Enquirer*,[93] the O.J. case solidified the existence of the new

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86. The "snoots" designates the traditional hard news press while "dirtballs" describes the tabloids. Jon Katz, *Getting Juiced*, NEW YORK, Oct. 3, 1994, at 20.

87. A *Geraldo* producer, in describing the show's audience, stated, "[o]ut there . . . people live in trailers and work at the 7-Eleven, and they don't watch my shows for entertainment. They're looking at their lives." Cherie Burns, *Next on Geraldo*, NEW YORK, Dec. 5, 1994, at 100, 108.

88. A.M. Rosenthal, *On My Mind; Journalists As Performers*, N.Y. TIMES, Jan. 10, 1995, at A19; *see also* Dan Rather, Call It Courage: Act On Your Knowledge, Address Honoring Media Reporter Edward R. Murrow Before the Radio and Television News Directors Association Annual Convention (Sept. 29, 1993), *in* VITAL SPEECHES OF THE DAY, Nov. 15, 1993, at 78, 80 (complaining that "they've got us putting more and more fuzz and wuzz on the air, cop-shop stuff, so as to compete not with other news programs but with entertainment programs (including those posing as news programs) for dead bodies, mayhem, and lurid tales").

89. With the emergence of generation X, the blurring between "hard news" (reality) and MTV (deconstruction) will get worse. Gen-Xers, the core audience of MTV, are being conditioned by "Liquid Television . . . a whole new cartoon anesthetic. Gone are linear story lines or, for that matter, narrative structure. The operative style is anarchy, a barrage of chaotic, disconnected images for a generation raised on equally chaotic videogames (and ready to zap the instant an image begins to bore)." Harry F. Waters & Trent Gegax, *Beyond Beavis and Butt-Head*, NEWSWEEK, Dec. 19, 1994, at 74, 75.

90. Marion Collins, *My 12-Year Affair with Bill Clinton*, STAR, Feb. 4, 1992, at 24.

91. The *N.Y. Times* reported, "Gov. Bill Clinton of Arkansas today denounced as 'not true' a second wave of accusations of marital infidelity published by the tabloid newspaper Star." *Clinton Denounces New Report of Affair*, N.Y. TIMES, Jan. 24, 1992, at A14.

92. Titles of *Sally Jessy Raphael, Donahue,* and *Geraldo* talk shows listed in *USA Today*. USA TODAY, Dec. 14, 1994, at 8D; USA TODAY, Dec. 13, 1994, at 8D.

93. Writing about *The Enquirer*, a *New York Times* reporter stated, "[i]n a story made for the tabloids, it stands head and shoulders above them all for aggressiveness and accuracy." David Margolick, *The Enquirer: Required Reading in Simpson Case*, N.Y. TIMES, Oct. 24, 1994, at A12.

media,[94] and consequently, "after years of hostility, the snoots and dirtballs . . . [took] notes side by side in the L.A. courtroom."[95]

The subversive effects of the new media on the jury are cumulative; it starts with lawyer "expert" commentators trivializing the jury process. With "a full menu of experts, pontificators and secondguessers,"[96] the new media has turned trials into soap operas. The president of the American Bar Association criticized these legal experts, calling them "$2 hookers" who "pimp their dubious talents and hustle the public" with their observations.[97] Invariably, the "expert" commentary focuses on jury selection or juror reaction, as was often the case in the Menendez trial. One lawyer, who refuses to do commentary because of the overreaching and second-guessing, explained, "[y]ou're forced to fill up dead time and what you end up doing is babbling. And when you don't know the answer to a question, you can't say, 'I don't know the answer,' because you look like an idiot."[98] The theme that emerges is that jurors are sitting ducks for various psychological ploys.

An even more influential player in the media blitz is the jury consultant.[99] While the lawyer commentator uses intuition and experience, the consultant impresses the new media audience with the psychobabble of the social scientist. They analyze body language, facial expressions, and clothes, as clues to juror bias.[100] The buzzword is demographics. According to jury consultants, a jury's demographics—race, age, gender, ethnicity, education, *etc.*—will often determine the verdict.[101]

Another favorite tool of the jury consultant is the "shadow jury," a group of mock "jurors" who are fed the highlights of a case and then asked to

94. "[T]he tide is running in the direction of lowest-common-denominator journalism, and that is very sad." Elizabeth Gleick, *Leader of the Pack; The National Enquirer's Aggressive O.J. Simpson Coverage Raises Legal and Ethical Questions*, TIME, Jan. 9, 1995, at 62, 62 (quoting Marvin Kalb, director of the Shorenstein Center on Press and Politics at Harvard University).

95. Katz, *supra* note 86, at 20.

96. David Margolick, *New Television Stars in the O.J. Simpson Case Galaxy: The Lawyer-Commentators*, N.Y. TIMES, Nov. 4, 1994, at A32.

97. Gail D. Cox, *Bushnell: O.J. Commentators are '$2 Hookers'*, NAT'L L.J., June 12, 1995, at A4.

98. *Id.*

99. Litigators, who are by nature insecure, will use anything that the client will subsidize. A veteran litigator told me, "I hire them to cover my ass. If I lost the case without them my client would give me hell. Besides, they are good for laughs." Arthur D. Austin, *The Jury System as a Bat*, CLEV. DAILY LEGAL NEWS, July 16, 1994, at 1.

100. Counsel should also pay attention to purses; a woman clutching her purse under her arm indicates "habits born of suspicion, nervousness, unsafe neighborhoods, feeling old and vulnerable." SONYA HAMLIN, WHAT MAKES JURIES LISTEN 73 (1985); *see also* NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES, *supra* note 57, § 18.08 (discussing observations of nonverbal communication in the courtroom); V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS (2d ed. 1993) (discussing nonverbal communication and its implications in the courtroom); DONALD E. VINSON, JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY (1986) (discussing nonverbal communication and juror assessment during voir dire).

101. *See* Barbara Franklin, *Gender Myths Still Play a Role in Jury Selection*, NAT'L L.J., Aug. 22, 1994, at A1, A25; Andrea Gerlin, *Jury Pickers Rely Too Much on Demographics*, WALL ST. J., Dec. 16, 1994, at B1.

"deliberate."[102] Lawyers use insights from the mock deliberations to identify problem areas and supply clues on jury selection.[103]

The consultants produce marketable new media copy. For example, audiences savored authoritative speculation by experts on the reactions of the Simpson jury—composed of eight women (who supposedly could identify with Nicole) and eight African-Americans (who supposedly would favor O.J.).[104] Ratings are assured from conducting shadow juries on TV, as was done in the Simpson case.[105]

While these gimmicks help ratings, they poison the legal process by dehumanizing jurors. The new media informs its audience, people likely to serve as jurors, that a juror is the target of manipulation, vulnerable to sophisticated techniques that can deduce the juror's deepest thoughts by reference to seemingly innocuous behavior like glancing at the ceiling.[106] Prospective jurors now know they are under the consultant's microscope.[107] Thus, within a short period of time, jury consultants, with the help of the media, have transformed jurors from factfinders into, as Adler says, disillusioned puppets.[108]

The consulting industry's use of race, however, has had an even more divisive impact on the jury system. To consultants, race is an inevitable predictor, achieving a "privileged status in popular accounts of why verdicts turn out as they do . . . ."[109] As a result, this notion of race as an inevitable predictor, once considered a myth, is rapidly becoming a reality.

Despite the new media's spin, however, the infallibility of scientific jury selection remains a myth. The most obvious problem is what Professor Abramson calls "fluid group dynamics," in which group interaction, personality collision, or other static, make it impossible to predict verdicts.[110] My research supports his point. For example, how could a consultant predict the shift that occurred in the *Brooke Group* trial when the alternates were allowed to participate in the deliberations?[111] Additionally, since there are no certifi-

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102. For a more detailed discussion of shadow juries, see Jeremy W. Barber, Note, *The Jury Is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1238-39 (1994).

103. *See id.*

104. Sally A. Stewart, *Simpson Trial Jury Selection Aids Both Sides*, USA TODAY, Nov. 4, 1994, at 8A.

105. In commenting on the Simpson shadow jury, *USA Today* reported, "[t]he jury, drawn from the audience, was presented with a taped rundown of the crime and evidence already made public. They also heard from a detective, a defense lawyer, and experts on spousal abuse and racial aspects of the case. Guests from two tabloids also furnished information." *Mock Jury: O.J. 'Not Guilty'*, USA TODAY, Sept. 8, 1994, at 10A.

106. It is, according to Hamlin, "a sign of thinking, searching the brain for a deeper truth." HAMLIN, *supra* note 100, at 75. However, my interviews indicate that when a juror is looking up at the ceiling it is a sure sign of boredom—the juror is probably counting light bulbs or paneling.

107. Larry Glenn, *Under Analysis: What Are We Doing to Our Jurors?*, CLEV. DAILY LEGAL NEWS, Oct. 25, 1994, at 1. He says that "[s]ome prospective jurors may dress or act in a way designed to achieve a desired result—inclusion or exclusion on the jury." *Id.*

108. ADLER, *supra* note 2, at 114. Adler also surmises that "many well-qualified individuals become disappointed in a system that, despite its promise of inclusion, rejects them as jurors precisely because they would be fair and thoughtful decision makers." *Id.*

109. ABRAMSON, *supra* note 5, at 144.

110. *Id.* at 171.

111. *See supra* notes 32-37 and accompanying text. Another example of "fluid dynamics"

cation barriers, regulations, or codes of ethics covering the field,[112] even a cabbie[113] or a former juror can be an expert.[114] Nevertheless, the infallibility myth continues to permeate the new media and is "responsible for a declining faith in the jury and the rise of cynicism about the possibility of achieving justice across group lines."[115]

Juror ego and greed also impugn the system. It is *"the juror as celebrity,"* conducting press interviews, selling personal accounts of deliberation, and appearing on Oprah and Donahue.[116] Jurors are no match for people who are after stories of confrontation and titillating gossip. Much of what comes out is self-serving and petty.[117] What kind of impression does the public get when jurors who supported the Menendez brothers appear for press interviews at Erik's attorney's home as part of a second trial strategy?[118] When it comes to celebrity juror exploitation, however, no one can top Geraldo. His most recent coup involved squeezing out an admission by the Heidi Fleiss foreman that she compromised on the verdict without knowing that Fleiss would receive a three-year sentence. She then alleged that the verdict was defective because "some jurors agreed to charges that ignored the evidence."[119] The *USA Today* headline read, "Fleiss Jurors' Loose Lips Could Sink Conviction."[120]

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occurred in the first Cleveland trial. The jury was composed of people who were expected to favor the city utility (plaintiff) against the larger private utility (defendant). They were blue collar, working class people, several of whom were retired and living on fixed incomes. During the trial they were openly receptive to plaintiff's lawyers and witnesses and equally disdainful of the defense.

The unanticipated occurred when the only person with previous jury experience was not elected foreman as she expected; instead the position went to a younger (26 years old) woman who got the job because she sat in the "first chair" throughout the trial. From the first discussion, the older woman resisted the authoritarian style of the young foreman, leading to a bitter personality clash. After 13 days of wrangling, the judge declared a mistrial. AUSTIN, COMPLEX LITIGATION, *supra* note 8, at 39-42.

112. Helen Lucaitis, *Use of Jury Consultants Increasing, but Many Lawyers Prefer Old-Fashioned Instinct*, CHI. DAILY L. BULL., Jan. 29, 1992, at 3; *see also* Robert Gordon, *Setting Parameters for Trial Science*, LEGAL TIMES, Feb. 6, 1995, at 34 (proposing a list of ethical standards for trial scientists).

113. Lucaitis, *supra* note 112, at 3.

114. George Gombossy, *Ex-Juror Retained As Trial Consultant*, NAT'L L.J., Dec. 30, 1985 - Jan. 6, 1986, at 3, 3.

115. ABRAMSON, *supra* note 5, at 146.

116. For example, a juror from the John Hinckley trial said, "I did just about every radio show there is. I didn't know there were so many of them." Bennett H. Beach, *The Juror As Celebrity*, TIME, Aug. 16, 1982, at 42, 42.

117. Wade Lambert, *After the Verdict: Will Juror Interviews Skew the Deliberations in Future Trials?*, WALL ST. J., Dec. 30, 1993, at B1.

118. One Mendendez attorney organized a media event:

> Barely pausing for breath after the six-month case ended in a mistrial with deadlocked jurors, lawyer, Leslie Abramson, has arranged for what she calls 'my jurors' to dine in her home, speak on the phone to her client . . . and give reporters striking accounts of their deliberations and of their support for her client.

Seth Mydans, *Menendez Lawyer Enlists Sympathetic Jurors to Defend Client*, N.Y. TIMES, Feb. 1, 1994, at A10.

119. Jill Smolowe, *A High Price to Pay*, TIME, Dec. 19, 1994, at 59, 59.

120. Haya El Nasser, *Fleiss Jurors' Loose Lips Could Sink Conviction*, USA TODAY, Dec. 13, 1994, at 3A.

An even more trivializing consequence results when a juror plays huckster and sells his "inside" version of deliberation to the highest bidder.[121] While books get big advances,[122] tabloids often provide the quickest source of income.[123] Juror hucksterism can make even used car salesmen look good. *The National Law Journal* recently reported a case in which, "[a]fter a three-month trial, and while the jury was in its 12th day of deliberation, Nina Krauss, the forewoman of the jury, sought to sell her diary to the highest newspaper bidder in town."[124] The O.J. trial is the obvious paradigm for juror capitalism, with allegations that three jurors were dismissed on suspicion that they were writing books about the case.[125] One of these jurors, Michael Knox, was discharged from the jury in March and produced a book that went on the market in June.[126]

The juror as celebrity or huckster has serious implications. Professor Hazard argues that going public encourages second-guessing.[127] Other concerns include: (1) the fear that public disclosure could inhibit free discussions in deliberation;[128] (2) the potential manipulation of the jury to reach a marketable and dramatic verdict;[129] and (3) the fear that jurors will "audition" during jury selection in order to get on the jury and make money.[130] But the most serious damage to the criminal jury system comes from the emerging public impression of the jury as a soap opera, in which the public equates the jurors with the other dysfunctional guests that travel the new media circuit.

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121. Kenneth Jost, *The Dawn of Big-Bucks Juror Journalism*, LEGAL TIMES, July 20, 1987, at 15.

122. A juror in the Westmoreland case got a $15,000 advance. *Id.* Other juror books include: MARK LESLY & CHARLES SHUTTLEWORTH, SUBWAY GUNMAN: A JUROR'S ACCOUNT OF THE BERNHARD GOETZ TRIAL (1988); M. PATRICIA ROTH, THE JUROR AND THE GENERAL (1986) (discussing *Westmoreland v. C.B.S.*); JAMES SHANNON, TEXACO AND THE $10 BILLION JURY (1988) (discussing *Penzoil v. Texaco*).

123. Another juror in the Goetz case got $2500 for a front page article in *The Daily News*. *See* Michael Freitag, *In the Right Case, Jury Duty Can Pay*, N.Y. TIMES, Nov. 22, 1987, at E9.

124. Marcia Chambers, *Little Room on Juries for Profit Motive*, NAT'L L.J., Jan. 25, 1988, at 13. Then there is Wayne Gaston, who served on the Chambers jury. His pitch had an "extra selling point: for the price of the diary, he'll throw in a song he wrote about the trial. 'It's kind of a folk song,' he said, refusing to disclose the title or lyrics without the promise of payment." Shaun Assael, *No Bidders for Diary of Chambers Juror*, MANHATTAN LAW., April 5-11, 1988, at 7. For a more elaborate discussion of jurors as authors, see Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389 (1994).

125. *See* Tony Mauro, *Simpson Jurors: Not by the Book*, USA TODAY, May 31, 1995, at 2A.

126. MICHAEL KNOX & MICHAEL WALKER, THE PRIVATE DIARY OF AN O.J. JUROR (1995). Knox stated that he was dismissed for failing to report that he had once been charged with kidnapping. *Id.* at 241. He also noted that on the day he got home from the jury he "had spoken directly to Ted Koppel, Katie Couric, Connie Chung, and producers for God knows how many other famous TV and radio shows. Katie Couric insisted on giving me her home phone number." *Id.* at 248. Knox then stated, "when I finally walked outside my house, there must have been about thirty-five reporters and TV cameramen. It was unbelievable. They were all trying to talk to me, to get an interview." *Id.*

127. *See* Beach, *supra* note 116, at 43 (noting that juror hucksterism "invites a case to be tried once in the courtroom and once in public").

128. *See* Assael, *supra* note 124, at 14; Jost, *supra* note 121, at 15; Lambert, *supra* note 117, at B1.

129. Freitag notes that "a juror/author could be tempted to opt for a dramatic resolution because it might draw attention." Freitag, *supra* note 123, at E9 (attributing this view to Professor George Fletcher of Columbia Law School).

130. *See id.* (attributing this view to Professor Hans Zeisel of the University of Chicago).

III. CONCLUSION

Compared to the criminal jury, the civil jury has only modest problems. With attention and continued work, it will survive. The criminal jury, however, is teetering on the brink of illegitimacy. It can be argued that the "cluster cases," capped by the O.J. Simpson case, are aberrations whose effects and influences will never trickle down to the everyday case and in time will be footnotes of history—like the Loeb and Leopold drama. However, in the tabloid age of the new media, it is quite possible that these aberrational cases will become the norm. Moreover, an additional tension will likely exacerbate and universalize the problems discussed above.

The jury is a prisoner of the prevailing culture of redefined deviancy. Deviant behavior is now "normal,"[131] and normal is now "deviant."[132] A forceful contributor to the deviancy culture is new media TV. As one professor has noted, "[t]elevision emphasizes the deviant so that it becomes normal. If you really are normal, no one cares."[133] Our culture has been transformed

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131. Senator Patrick Moynihan has noted that

> the amount of deviant behavior in American society has increased beyond the levels the community can 'afford to recognize' and that, accordingly, we have been re-defining deviancy so as to exempt much conduct previously stigmatized, and also quietly raising the 'normal' level in categories where behavior is now abnormal by any earlier standard.

Daniel P. Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17, 19 (1993).

132. Charles Krauthammer, in discussing Senator Moynihan's comments about deviancy in society, comments:

> Moynihan is right. But it is only half the story. There is a complementary social phenomenon that goes with defining deviancy down. As part of the vast social project of moral leveling, it is not enough for the deviant to be normalized. The normal must be found to be deviant. Therefore, while for the criminals and the crazies deviancy has been defined down (the bar defining normality has been lowered), for the ordinary bourgeois deviancy has been defined up (the bar defining normality has been raised).

Charles Krauthammer, *Defining Deviancy Up*, THE NEW REPUBLIC, Nov. 22, 1993, at 20.

133. Shari Roan, *Next! When Abnormal Becomes Normal*, L.A. TIMES, Sept. 6, 1994, at E1 (quoting Penn State Professor Vicki Abt). This sentiment is echoed by John Leo:

> The daily parade of bizarre creatures on 'Oprah' and 'Geraldo' has a long-term effect. It erases judgment and induces a generic tolerance for any kind of dysfunctional behavior. Weirdness goes mainstream every afternoon. In highly publicized trials now, the defense attorney has the same function as 'Oprah'—to create and enlarge pools of sympathy for the beleaguered and allegedly victimized underdog.

John Leo, *Watching 'As the Jury Turns Turns'*, U.S. NEWS & WORLD REP., Feb. 14, 1994, at 17.

Comparing *Oprah* and *60 Minutes*, two sociologists observed:

> Despite differences, it is no accident that both shows are exposes. Inexorably, they focus on the pathological and bizarre. One can only imagine what this constant attention to the fringes of society, to those who break rules, is doing to our society's ability to define and constrain deviance. One thing seems fairly certain: law abiding, privacy-loving, ordinary people who have had reasonably happy childhoods and are satisfied with their lives, probably won't get to tell their stories to Phil, Sally, or Oprah. But if they did get on a television talk show, they would have to highlight the problematic aspects of their lives. Television talk shows are not interested in adequately reflecting or representing social reality, but in highlighting and trivializing its underside for fun and profit.

Vicki Abt & Mel Seesholtz, *The Shameless World of Phil, Sally and Oprah: Television Talk Shows and the Deconstructing of Society*, J. OF POPULAR CULTURE 171, 187 (1994).

Alan Dershowitz says, "[j]urors who watch this stuff begin to believe it, despite its status as junk science." ALAN M. DERSHOWITZ, THE ABUSE EXCUSE 5 (1994).

into a politically correct vision of a "postmodern phenomenon," leveling hierarchies to the point where Doonesberry is equated with William Faulkner.[134] The themes are oppression, victimization, and dysfunction.[135] These themes combine to produce 'rights inflation,' which sociologist Amital Etzioni attributes to the "rights industry"; namely, "that whole railing mass of lawyers, lobbyists, and special interest groups who swarm over courts and legislatures with their grievances and demands for recognition of an astonishing array of new rights . . . ."[136]

A culture of deviancy impacts on the criminal justice system by challenging jurors to factor in bizarre victimization defenses, either explicitly, or as part of other defenses such as temporary insanity.[137] As one author notes, "[r]iot used to be an offense. Now it's a defense."[138] Alan Dershowitz, who compiled a "Glossary of Abuse Excuses,"[139] concludes that more and more defense lawyers are employing abuse excuses, and more and more jurors are buying them.[140] The Lorena Bobbitt, Reginald Denny, and Menendez juries are perfect examples. Jurors, in ever increasing numbers, are being asked to forsake their role as fact-finder to play social worker. Consequently, so long as the new media, particularly television, continues to redefine deviancy, we will continue to get more Bobbitt, Denny, and Menendez juries, and we will continue to get this nullification barrier to reasoned justice at every level of the system.

For a description of what a Geraldo producer looks for in guests, see Burns, *supra* note 87, at 100. "It's not enough to have a husband and the wife he cheated on. . . . You've got to have the mistress, maybe her boyfriend. You take things as far as they'll go." *Id.* at 103.

Perhaps the ultimate in deviancy occurred when a guest on the *Jenny Jones* show thought that he was to meet a female secret admirer and was confronted with a male admirer. Several days later he shot and killed his admirer. Columbia University professor Stephen Isaacs, in discussing the incident, noted, "[w]hat this says is that the media chaos is now total and that the sleazification that has been sweeping the land and the media for the last half dozen years produces bizarre events that no one could possibly imagine." Peter Johnson, *Guest's Death Leaves Talk Show World Abuzz*, USA TODAY, Mar. 13, 1995, at A30.

134. *See* STEVEN CONNOR, POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY (1989); JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington & Brian Massumi trans., 1984).

135. Sykes cites an expert who "insists that as many as 96 percent of American families are dysfunctional in one way or another." CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER 142 (1992).

136. John Taylor, *Don't Blame Me!: The New Culture of Victimization*, NEW YORK, June 3, 1991, at 26, 29.

137. They are headlined in new media vehicles like *USA Today*. *See, e.g.*, Robert Davis, *We Live In Age of Exotic Defenses*, USA TODAY, Nov. 22, 1994, at 1A; Tony Mauro, *Abuse as An Excuse Raises Public Outcry*, USA TODAY, Feb. 8, 1994, at 1A.

138. Paul Robinson, *Riot Responsibility*, 66 N.Y. ST. B.J. 6, 6 (1994); *see* Note, *Feasibility and Admissibility of Mob Mentality Defenses*, 108 HARV. L. REV. 1111 (1995).

139. It includes Antisocial Personality Disorder, Attention Deficit Disorder, Black Rage Defense, Chronic Lateness Syndrome, Nice-Lady Syndrome, Rock and Roll Defense, and UFO Survivor Syndrome. DERSHOWITZ, *supra* note 133, at 321-41.

140. *Id.* at 3.