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Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol1998/iss1/2
The Right to a Fair Trial

Danny J. Boggst†

In reviewing the topics for our forum about the challenges that confront society and the law in guaranteeing and defining “a fair trial,” I was reminded of the story that was told about General Curtis LeMay, the noted (or notorious, depending on your politics) Commander of the Strategic Air Command in the late 1940s and 1950s.

A young officer, to whom had been entrusted some difficult task, reported to the General and stated, “Sir, we have encountered an insurmountable obstacle in carrying out your orders.”

The cigar-chomping General removed his stogie, blew smoke in the young man’s face and bellowed, “Son, in my command, we don’t have any obstacles. All we have are opportunities.”

Quick as a wink, the officer (obviously a Chicago-trained lawyer) responded, “Yes, Sir. We have encountered an insurmountable opportunity, Sir!”

Whether or not they will turn out to be insurmountable, the three issues that will be addressed in this symposium can be seen as representing obstacles to a fair trial, but they can also be seen as opportunities to improve both our fair trial rights and our overall system of justice. Thus, some commentators will argue that each of these general syndromes are obstacles to a fair trial: (1) excessive publicity, through media coverage and otherwise; (2) an increasing awareness of race and increasing use of race-conscious arguments and cues; and (3) increasingly detailed procedures, with drastic consequences for even small deviations.

On the other hand, each of them can be seen as an opportunity — either specifically for a better or fairer trial in the courtroom, or for a better understanding and appreciation of our justice system and fair trials in the broader society. For example:

• Greater public awareness of and vicarious participation in high-profile trials could be a benefit of greater media attention. Jurors who actually serve usually come away with an

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enhanced understanding of and respect for our justice system. Perhaps seeing the system operate in practice in the media could do that as well.

- The heightened awareness of the role of race in our trial system could be seen as an opportunity to integrate more fully people who have felt a sense of exclusion from the system. It could also be seen as an avenue to overcoming sources of error or unfairness.
- And, it may be possible that new or different procedures could lead us to fairer trials.

In short, in each of these three areas, as well as others involved in our trial system, the question is how to maximize the opportunity that they present, while minimizing the obstacles that they pose.

I. DEFINING THE FAIR TRIAL

The first question that confronts a speaker asked to keynote this broad topic is this: Does a fair trial depend strictly on what happens in the courtroom and in the attendant legal system — that is, on the results in individual cases? Or does “fair trial” also encompass both the effects and perceptions in the wider society? I know that some of the speakers tomorrow will be looking at the wider context, but I will primarily take the narrow view that a fair trial and, even more, the right to a fair trial, is the property of the defendant, and that what happens to the individual defendant is the measure of a fair trial. Thus, by my definition, if a trial is, in reality, a fair trial (depending on what that means, as I will discuss later), then the fact that the perception of the trial has caused various types of social ills may call for solutions in other areas of the society, but it is not an appropriate criticism of the fairness of the trial itself.

I also want to make a preliminary point about the difference between a fair trial and the right to a fair trial. In any individual case, there may be some things central to the legal concept of the right to a fair trial that are shaded, modified, or even omitted altogether, and yet the overall effect may be a metaphysically fair trial. Sometimes these discrepancies are covered by the doctrine of harmless error; in other cases, the rights, while generally of great significance, have little impact in the particular case. Yet our society and our Constitution generally have made the judgment that the measure of a fair trial is its adherence to stated processes. We may believe that this will ultimately lead to the
fairest outcome, but we are certainly aware that in any given case the vindication of the right to a fair trial may not be exactly the same as a fair or correct outcome.

Since text and history are always a good starting place for a judge, I thought I would look first at the origin of "fair trial" as a term and concept. The term "fair trial" does not appear in the Constitution, despite at least one exuberant law review author who stated that the right to a fair trial is specifically accounted for in the Constitution itself. But many writings contemporaneous with the framing of the Constitution spoke of the concept of a fair trial and frequently discussed it in terms that themselves were to become parts of the Constitution and the Bill of Rights.

In my search for the first use of the term "fair trial" in the United States Reports, I found the 1784 Pennsylvania case of Respublica v De Longchamps, which referred to the defendant as having put himself "upon the country; an unbiased jury, upon a fair trial, and clear evidence, [had] found [him] guilty."

Most of the other early references I found simply used "fair trial" as a synonym for the right enshrined in the Constitution to trial by jury. Trial by jury was a fair trial in the common law sense, and the processes encompassed within the meaning of trial by jury necessarily embody the concept of a fair trial.

My old Black's Law Dictionary defines "fair trial" in terms of language drawn primarily from two Eighth Circuit cases, Goldstein v United States and Sunderland v United States, which read as follows:

The term "fair trial" is often used, but not often defined [a truism, as you will find]. It is of broad scope. While we shall not undertake to give a formal definition of the term, yet it may not be amiss to mention, in part at least, its content. . . . It means a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. . . . Being impartial means being indifferent as between the parties. 

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1 Leonard Pertnoy, The Juror's Need to Know vs The Constitutional Right to a Fair Trial, 97 Dickinson L Rev 627, 627 (1993) ("The right to a fair trial is a guarantee so fundamental that it was specifically accounted for by the Constitution itself.").
2 1 US (1 Dallas) 111 (Pa Ct Oyer & Terminer 1784).
3 Id at 115.
4 63 F2d 609 (8th Cir 1933).
5 19 F2d 202 (8th Cir 1927).
6 See Goldstein, 63 F2d at 613; and Sunderland, 19 F2d at 216.
Another definition states it as: “A hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.” And yet one more states:

A fair and impartial trial by a jury of one’s peers contemplates counsel to look after one’s defense, compulsory attendance of witnesses, if need be, and a reasonable time in the light of all prevailing circumstances to investigate, properly prepare, and present the defense. One wherein defendant is permitted to be represented by counsel and neither witnesses nor counsel are intimidated.

But in all these general ways, I think the traditional view is essentially, though not exclusively, a search for the truth. The characteristics set out above — an impartial decision maker, an atmosphere conducive to consideration, with relevant evidence considered and irrelevant evidence excluded — are aimed primarily at improving the chances of arriving at a verdict that accords with some notion of preexisting, objective truth. Of course, if you dispute the notion of objective truth, as some do, this may be problematic; but I will not try to enter into that fray today.

II. FAIR FOR THE GUILTY OR FOR THE INNOCENT?

Although the system is designed to give defendants various rights, so that the chance of an incorrect conviction is minimized, nothing in the traditional view indicates that the defendant deserves a “sporting chance” at acquittal if he is actually guilty. Such a perception may be a result of a system that is designed to prevent abuse of government power, but it is not part of the traditional model. We hope to convict the guilty and to avoid convicting the innocent. At the same time we recognize that a fair trial is not always a perfect trial. The system accepts with relative equanimity the notion that some people who are objectively guilty will not be convicted. The very notion of guilt “beyond a reasonable doubt” contemplates, and even glories in, that principle.

At the same time, any dispassionate and informed observer must be willing to concede that some innocents will be convicted. In practice, the system can live with that as well. Error-

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8 Id at 718.
correction mechanisms, through appeal and later opportunities at redress, are designed in part to deal with such mistakes. But we know that in any system of human decision-making, errors will still persist.

One relevant question, as we look at criticisms of existing practice and proposed alternatives, is how the proposed reforms will alter the numbers and balance of those errors. It is a commonplace from Blackstone that it is better that ten guilty escape than one innocent be punished.\(^9\) While that is a nice rhetorical point, I don't think the legal system has ever explicitly tried to come to grips with whether that number, ten, is the right number. Would it be better for it to be more or less? Interestingly, other noted commentators have rhetorically used quite different numbers. Voltaire suggested that only one or two true criminals should go free in order to avoid convicting one innocent person.\(^1^0\) Franklin suggested a hundred,\(^1^1\) and Maimonides, a thousand.\(^1^2\)

If we have rather different reactions to each of those numbers, it might be well for everyone commenting in this area to search their hearts and minds as to what is an acceptable balance of errors in favor of guilt and in favor of innocence. While it may seem a bit cold-hearted or cold-blooded to do so, in fact we are operating a system in which there is an unknown but discoverable relationship of those two numbers. These are, of course, the kinds of errors that statisticians would call Type I errors (convicting the innocent) and Type II errors (acquitting the guilty), and their relative balance should be a consideration in contemplation of changes in the system or improvement in the system.

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\(^9\) William M. Blackstone, 4 Commentaries 358.

\(^1^0\) Voltaire, *Zadig; Or, The Book of Fate* 53 (Garland 1974) (Claude de Crebillon, trans) (“tis much more prudence to acquit two persons, tho' actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent”); Voltaire, *Zadig and Other Romances* 21 (Dodd, Mead & Co 1926) (H. I. Woold and Wilfrid S. Jackson, trans) (“it is better to try to save a guilty man than to condemn an innocent”). See also Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 Tenn L Rev 759, 761 n 6 (1995).

\(^1^1\) Benjamin Franklin, 9 *The Writings of Benjamin Franklin* 293 (MacMillan 1906) (Albert Henry Smyth, ed) (“That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long and generally approved.”); see also Gifford, 62 Tenn L Rev at 761 n 6.

\(^1^2\) Maimonides, 2 *The Commandments* Commandment No 390 at 270 (Soncino 1967) (Charles B. Chavel, trans) (“it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death”); see also Irene Merker Rosenberg and Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 NYU L Rev 955, 1039 n 304 (1988).
III. IS THERE SUCH A THING AS A FAIR OUTCOME?

A second interesting computation that arises here is the proper number or proportion of acquittals in a system of truly fair trials, as well as the proper proportion of guilty pleas to trials. Some have said that trials are the least important part of the system, because perhaps 90 percent of cases never go to trial.13

I first thought we might say that the truly proper number of convictions at trial would be 100 percent. People should not be brought to trial unless they are in fact guilty, and the prosecution has the means to prove them so. This might seem utopian in one sense, and of course an alternative theory would say that the proper number of acquittals is 100 percent. Those who are guilty, and who would surely be convicted at trial, should all plead guilty, and the only cases left to go to trial would be those where the innocent correctly maintain their innocence. Now either of these idealistic conceptions, of course, is unlikely to be realized in practice, and a subtle application of game theory might give us a more nuanced exposition of the proper proportion. But these thoughts sharply emphasize the question of what our ultimate goals should be in contemplating an overall trial system.

IV. A PICTURE OF TRIALS IN THE UNITED STATES

There is some empirical evidence for what our present system gets us at trial. Federal court figures in both jury and bench trials for conviction and acquittal rates exist for the past fifty years.14 I want to stop here to mention that generally when we talk about the interesting issues of criminal trials (and particularly fair criminal trials), we think of jury trials. But the role of bench trials is a large and important one — and I think larger than most people realize. We know, of course, that a change in the rules of trial may seem to raise or lower conviction percentages, and we may argue over whether such changes make the system more “fair,” depending on whether a change truly serves a truth-seeking function, or is only of generic advantage to the defense or to the prosecution. At the same time, however, since the

13 See, for example, Angelique M. Paul, Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?, 58 Ohio St L J 655, 666–67 (1997) (discussing studies showing that high percentages of civil and criminal cases never reach trial).

large majority of all cases are resolved before trial, either by
guilty plea or dismissal, a change in the rules or cultural norms
that will alter the nature and number of cases that enter the trial
pool is likely to have a profound effect on those total numbers.
And, of course, a change in the rules of trial may affect the pro-
portion of people who will choose to undertake the trial.
These are the numbers I found. First, at the state level in
1992, about 50 percent of felony trials leading to conviction were
bench trials and 50 percent were jury trials. This ratio is af-
fected by the type of case: murder cases were four to one jury
trials, while drug possession cases were over four to one bench
trials.
In the federal system, the balance today is overwhelmingly in
favor of jury trials, although there have been interesting changes
in that pattern. Bench trials represented the majority of federal
criminal trials until the 1960s. Starting in the late 1960s, the
proportion of jury trials mounted steadily, to the point that jury
trials now represent well over 80 percent of all criminal trials.
But at the same time, the relative proportion of acquittals in
bench and jury trials also shifted. In the earlier years, there were
very substantial proportions of acquittals in both areas, but ac-
quittal rates were consistently lower in bench trials. As we came
closer to the present, both figures shifted in opposite directions.
Between 1991 and 1995, only 20 percent of federal jury trials
ended in acquittal, down from 36 percent in the post-World War
II decade to 24 percent in the seventies. By 1995 the acquittal
rate was down to 16 percent. The rate of acquittals in bench tri-
als started out at 10 percent in the late 1940s, rising fairly stead-
ily into the twenties, until the last five years, when the percent-
age of acquittals in federal bench trials skyrocketed to 49 percent.
This may, of course, simply reflect a strategic shift as defen-
dants who are in fact guilty opt for jury trials, in the belief, mis-
taken or not, that they have a better chance of bamboozling the
jury. Defendants in situations where they may have a clear and
logical claim of innocence, on the other hand, may feel more con-
fident in convincing a judge of that fact.
If this is the case, the rising conviction rate in jury trials may

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16 Kathleen Maguire and Ann L. Pastore, eds, Sourcebook of Criminal Justice Statis-
17 Id.
18 The statistics in this paragraph are from 1995 Sourcebook at 476.
not mean a shift either in the attitudes of juries or in the playing field created by the rules, but may mean simply that the group of cases being taken to a jury has increasingly involved defendants who are guilty and whose guilt can be proved. I cannot take a firm position on this, but I think these are intriguing areas for further commentary and scholarship.

As one might expect, defendants demand jury trials much more frequently in cases involving serious crimes. A survey of state convictions in 1992 showed that murder cases represented just 1 percent of felony convictions, but 11 percent of convictions after jury trials. Rape cases represented 2.4 percent of all felony convictions, but over 8 percent of felony convictions after jury trial. At the other end of the spectrum, convictions on the more minor crimes of drug possession (and even drug trafficking) were overwhelmingly concentrated in bench trials.

Another very interesting fact revealed by the figures is that the popular impression that criminal trials are increasing in length (which is of course fed largely by the mega-trials of the O.J. Simpson or McMartin preschool variety), is quite justified. The figures from 1987 to 1995 show that federal criminal trials have lengthened significantly. In 1987-88, the modal number of trial days, that is, the length of time for the largest single group of trials, was one day. By 1995, it was two days. The median number of trial days, that is, the number where half the trials were longer and half the trials were shorter, had risen from less than a day and a half to more than two and a half days, in just an eight-year period. Perhaps the most significant increase was in the proportion of extremely lengthy trials. While still fairly small, this proportion had risen sharply. Trials of more than twenty days rose from 1.3 percent of all trials to 2.3 percent, nearly doubling, while trials of 10–19 days actually did double, from 3 percent to 6 percent. These increases contributed to the fact that the average length of trials rose 50 percent, from 3.2 days to 4.7 days. Whether this can be laid at the feet of overproceduralism, increased voir dire, greater complexity, or other fac-

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19 The statistics in this paragraph are from 1995 Sourcebook at 498 (cited in note 16).
20 The criminal trial of O.J. Simpson lasted more than nine months, and the trial in the McMartin case lasted almost three years. See The Verdict is in: A City Divided; The Simpson Trial has Raised Questions of Police Propriety and Racial Antipathy, LA Times 8B (Oct 4, 1995); Bruce Buursma, LA child abuse case ends in acquittals, Chi Trib 1A (Jan 19, 1990).
tors, is something that I believe also warrants considerable further research if we are to understand how the criminal jury system really operates. Are these increasingly lengthy trials (and these are numbers from federal court where, I believe, courts have been freer of the monster mega-trial) actually contributing to or detracting from a fair trial?

V. OPPORTUNITIES AND OBSTACLES

Having set out some thoughts on the wide metaphysical issue of a fair trial, let me turn directly to the three opportunities, or obstacles, that are posed by the issues raised in this forum.

I will try to do this in a somewhat provocative fashion, both to earn my keep and to keep my contract with Dean Baird and the Legal Forum, and also to raise some considerations that you may wish to keep in the back of your mind as you consider the papers of the participants. I will also beg indulgence here, as I am commenting based on necessarily incomplete information, and since I am only one person commenting on approximately ten papers.

A. The First Amendment in the Courthouse

Turning to the subject of the first panel, I find the issues of the First Amendment in the courthouse to be at once the most interesting, and perhaps the least relevant, to the American system of fair trial. Almost by definition these issues will arise in the context of situations of great human interest. If the cases were uninteresting, the news media would not create the conditions that raise the prospect of a conflict between First Amendment rights and the right to a fair trial. But, by their very nature, such trials cannot happen very often. Though we have seen a “trial of the century” much more often than once every hundred years, I think it would be fair to say that cases of overwhelming national attention might happen, at most, once every year or two, and within any given local area with perhaps the same or lesser frequency.

In my own home area, I could immediately think of only two trials in the past decade where major First Amendment issues might have been raised. This judgment was somewhat vindicated when I surveyed a number of local lawyers and acquaintances, each of whom first came up with the same two cases, plus of course one or two others in which they perceived overwhelming interest — always cases they had participated in, but that none of
the other people surveyed thought had attracted the same degree of attention. This does not, of course, mean that the First Amendment issues are unimportant, either for the individuals involved or for our perception of the trial system. I simply make this point to indicate that public pressure and prejudice is not a problem that pervades or undermines the overall workings of our trial system in any significant way. At the same time, to the extent that these extraordinary cases color the public perception of the trial system, they can have important consequences both by bolstering or undermining confidence in the system and by having an effect on public support or demand for legislative change.

By way of analogy, let me just mention those two local cases, from my hometown of Louisville, Kentucky, because they at least add a little color to this discussion.

One of them involved a man named Joseph Wesbecker, who was a disgruntled employee of our local newspaper. He walked into the newspaper building (which is right across the street from our courthouse) with a duffel bag containing an AK-47, and proceeded to kill eight people, wound twelve, and ultimately kill himself. Obviously, there was not going to be a criminal trial in that case. There was, however, a civil trial against the makers of Prozac, which Mr. Wesbecker was taking at the time. Given the human interest of the victims from the very community, as well as the involvement of the newspaper itself, this trial naturally created an immense storm of public attention.

The second case merits a somewhat more detailed description simply because it is both interesting and raises a number of fair trial issues. In September of 1988, a young woman named Brenda Sue Schaefer disappeared. Her car was found on the highway, but no trace of Schaefer herself was found. Suspicion

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23 Leslie Scanlon, Lilly Gives In, Calls Deal A Settlement of the Prozac Case, Courier-J (Louisville) 1B (Mar 25, 1997).
24 The facts about this case are contained in various reports in Louisville's Courier-Journal over the last ten years. Particularly informative articles include: Cary B. Willis, Ignatow Lawyer Says Release of Tape Should Rule Out Death, Courier-J (Louisville) 1A (February 7, 1990); Gideon Gil, License Panel Disciplines Doctor who Threatened Man Charged in Schaefer Death, Courier-J (Louisville) 6B (Oct 3, 1990); Cary B. Willis and Andrew Wolfson, Key Tape Allowed to be Evidence at Ignatow's Trial, Courier-J (Louisville) 1B (Nov 21, 1991); Leslie Scanlon, Kenton Jury Acquits Ignatow in Death of Fiancee Schaefer, Courier-J (Louisville) 1A (Dec 22, 1991); Deborah Yetter, Federal Grand Jury Indicts Ignatow on Perjury Charge, Courier-J (Louisville) 1A (Jan 9, 1992); Andrew Wolfson, Finding Evidence in Home a Fluke, Courier-J (Louisville) 1A (Oct 3, 1992); and Kim Wessel, Ignatow Will Face Another Charge of Perjury, Courier-J (Louisville) 1A (Oct 24, 1997).
immediately focused on an older man, Mel Ignatow, who had been her boyfriend of some duration and who had been seen having lunch with her the day before the car was found. But despite considerable investigation for more than a year, no great progress was made. As an aside, during this time, the woman's former employer was convicted of terroristic threatening for threatening to kill the suspect if he did not confess.

Eventually, however, the police were able to find and then, to some extent, turn a former girlfriend. The ex-girlfriend wore an FBI microphone to a meeting with Ignatow, and recorded several incriminating statements along the line of: “Believe me: That’s not shallow, that place we dug; that’s not shallow,” and encouraging her not to speak to the police or take a lie detector test. With this and other evidence, they were able to get the former girlfriend to confess that the suspect had in fact brought the victim to her house. The former girlfriend had photographed Ignatow sexually abusing the woman and, after Ignatow killed the woman, the former girlfriend helped bury the body in her backyard. The police then excavated the backyard and discovered Schaefer’s body.

Obviously, these were people of no great fame, but of solid middle-class status in the community, and there was a great deal of publicity. As you might expect, there was a change of venue from the Louisville area to an area about a hundred miles away, in the Kentucky suburbs of Cincinnati. There was then a jury trial, and to the vast dismay of the people in the Louisville area, Mr. Ignatow was acquitted. Eighteen days later, he was indicted in federal court for perjury, based on his statements before a federal grand jury that he had not committed the murder. Approximately one year later, the people who had bought the house in which Mr. Ignatow had lived at the time of the murder decided to take up the carpet and re-lay it. Under a heating vent, they found a plastic bag containing the victim’s jewelry and three rolls of film showing Ignatow doing everything the ex-girlfriend had described in her testimony. Within seventy-two hours, he pleaded guilty to perjury in federal court and was sentenced to seven years, five of which he actually served. He was recently released, but he has now been re-indicted by the state court for perjury at the trial of the boss that I mentioned earlier. There, he had made statements to the effect that he loved the woman and that their relationship was perfectly fine. The question of the publicity and the effect of the media on a fair trial, on this
second state perjury charge, if Mr. Ignatow indeed does go to trial, will be extremely interesting.

I turn now to the panel itself, which I notice features both Dean Stone and Professor Strauss, in what must be one of their first public appearances together since their defense of President Clinton before the Supreme Court. Equally provocative, I am sure, will be Stephen Jones, the lawyer for Timothy McVeigh, and Peter Arenella, the well-known commentator on the O.J. Simpson trial and on publicity in the courtroom as a whole, particularly with respect to televising cases. As I read the advance notice, it appears that all of these people will be relatively skeptical of the usefulness or desirability of wide publicity, and especially of televising trials, in the fair trial context. It does not appear that anyone is going to take a strong stand on the side of the media. But Mr. Jones makes a compelling case for the difficulties he encountered in the McVeigh case due to publicity. I think it is intriguing to compare the effect on the attitudes of the outside publicity in the O.J. Simpson case, the McVeigh case, and the very recent Louise Woodward case (the so-called “Boston Nanny case”).

It seems to me that in many ways massive publicity brings the facts of the individual case into a national storytelling context, as the phrase is used in the law reviews today. Thus, as Mr. Jones will maintain, one can certainly see the McVeigh case within the context of a pre-ordained media guilty verdict. But it also can be seen as bringing potential jurors within the similarly media-ordained story of the brave and independent jurors who are ready to seize upon the twists of plot that are brought into the jury room by the clever defense lawyer.

That story, too, is highly ingrained in our consciousness, and it could be argued that such a story played a major role, as much as the race issue, in the Simpson trial. Certainly from Perry Ma-

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30 See, for example, *Nichols jurors say most voted for death penalty*, Chi Trib 8A (Jan 11, 1998) (describing jurors’ varied reactions to trial proceedings).
son to L.A. Law to my favorite of this genre, My Cousin Vinny, the story of the apparent mass of evidence that melts away in the face of the brave, clever lawyer is one that publicity can lead us to believe as well. In the McVeigh and Simpson trials, jurors were largely of different colors, perhaps of different background sympathies, and perhaps of different potential sources of suspicion of the authorities. But, it seems to me that part of the story told in each case was that jurors should be suspicious of seemingly overwhelming evidence. Thus, we should think about whether the difference was in publicity, or perhaps in the process of jury selection. Or, if the trial judges had been reversed in the two trials, even in the face of identical publicity, would the results have been different?

I think we may give away too much if we see such publicity as contributing to a loss of confidence in the legal system. Only in a fairy tale could people believe that the legal system never makes errors. When you have two sets of very competent, very combative, and very verbal people (the lawyers) taking opposing sides of an issue, it is inevitable that each of them will, to some degree, persuade people to the rightness of their cause. That being the case, it is inevitable that in any individual case, many citizens will think the wrong decision was made. That is simply part of the process. I think that the citizenry as a whole, after some period of over-agitation, remembers and settles down to a belief that the system can and does operate reasonably well, even if the evidence that they get from their television set causes them to believe that it may have erred in a given case.

I think the recent and ongoing case of the British au pair has been intriguing in that it has acquired much more notoriety in the tabloid press and TV shows than I might have imagined, while not having achieved that profile in the more serious press. I was struck by the fact that public interest was sufficient enough that one internet poll on the question of whether the nanny’s sentence was too harsh received over nine thousand votes.\footnote{Annette Cardwell, The Louise Woodward Verdict: In Cyberspace, Majority Feel Nanny Wronged, Boston Herald 4 (Nov 1, 1997).} And the nine thousand, by two-to-one, thought the sentence was too harsh.\footnote{Id.} Of course, this is simply an indication of interest and not an objection to that interest. And there was no serious question that the publicity there had any direct impact on the jury.

It is also intriguing that the publicity and furor has, if any-
thing, intensified through the coverage of the judge's hearing on whether to overturn the verdict. Judge Zobel agreed to put his ruling out on the Internet so that it would be available immediately all over the country as soon as it was given in court. This brings me back to the theme I mentioned about remembering the role of the judge in each of the issue areas. In fact, the greatest television ratings of all seem to come from pseudo-court shows featuring bench trials, in the form of Judge Wapner of The People's Court, and now Judge Judy and her Court of Common Sense. This is probably because, by their very nature, bench trials are less diffuse, are better paced, and have a central protagonist in a way that is much more difficult for jury trials to achieve.

Finally, I would be somewhat remiss or self-serving not to mention the fact that massive publicity in a bench trial focuses that pressure on a person who has, or at least may hope to have, very extensive future reliance on the reputation that he or she acquires through that publicity. While an individual juror, even in the most high-profile case, may at most get some very fleeting fame (and possibly income) from revelations about the case, it is certain that five years from now, or even tomorrow, no one will actually remember, for good or ill, a single juror from that case. By contrast, publicity from a high-profile case will undoubtedly massively multiply the number of people who will be aware of the judge involved, and who at least believe that they have some basis for an opinion of him or her. While we should expect judges to be firmer in their resistance to pressure caused by publicity, we should also recognize that the impact may well be greater on a judge than on any individual juror.

B. Race and the Criminal Jury Trial

I will turn now to the second panel on the role of race in trials, and especially the consideration of jurors' race and racial attitudes. It seems that we will have two interesting, perhaps opposing, views — from Jeffery Rosen, a writer and professor (certainly a very prolific popular writer), and Professor Deborah Ramirez. Professor Abramson, the third panelist, states well the

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tension between the view of the jury or juror as essentially an impartial arbiter and the juror as a representative of the community.33

The contribution by Professor Ramirez is at once interesting, provocative, and (to me) profoundly disturbing in its theoretical implications. It builds on her 1994 article in Boston University Law Review, which unearths the historical concept of the mixed jury with the wonderfully interesting and provocative title The Mixed Jury and the Ancient Custom of Trial by Jury de Meditate Linguae.39 If I correctly recall Mrs. Holland's third-year Latin, Professor Ramirez refers to a jury of mixed tongues — a jury half of the foreigner's community and half of the native community — for trials involving traders or others in an area where they are strangers. But it is historically predicated on a situation in which the defendant was clearly a foreigner, being tried in another country, a person who was outside the political community, and who acquired his rights and obligations by means of a law separate from that controlling and binding the regular members of the community.40 While that is perhaps the ultimate logic of a number of commentators on race in our legal system, both academic and political, to me it is violently at odds both with our prevailing ethos and with political reality. Although blacks and whites remain distinct in many areas of our society, and perhaps are distinguishable on an aggregate statistical basis in many more areas, the political reality is that even the most vocally radical want into the system, not out of it. When Al Sharpton is no longer simply a street demonstrator, but an extremely serious political candidate in our nation's largest city,41 and when his actions at the time of defeat are those of any other reasonable politico who looks to a future,42 we are not at the stage of wanting or needing to declare the black citizens of our country as being, in fact, strangers to our legal system.

An extreme version of the proposal, where defendants would be guaranteed half the jurors of their group, however that group would be defined, also would raise the interesting question of

40 Id at 783–85.
41 Vivian S. Toy, Al Sharpton Announces Candidacy, NY Times 6B (Jan 21, 1997).
42 Jonathan P. Hicks, Messinger Gets Vow of Support from Sharpton, NY Times 1A (Sept 29, 1997).
whether such a system would be thrust upon a defendant who did not want it, and whether the jurors themselves would know that this type of system was being used. The more extensive and nuanced proposal that Professor Ramirez presents, I think, contains a number of useful variations and helpful modifications, allowing, for example, affirmative peremptory choices, rather than peremptory challenges, of jurors. But for me her proposal continues to founder on the basic concept that people could go into the jury room labeled as jurors of a certain sort, whether by ethnic background, or as the prosecution's juror, or as the defendant's juror. In any event, as Judge Kleinfeld of the Ninth Circuit memorably observed, "[t]hought comes from the brain, not the blood." 

Various tactics could be adopted to try to keep the labels from being known, but I strongly suspect the jurors would be smart enough to figure out what was going on.

In connection with the issue of race in the jury room, I also want to consider the jury as representative of the community, and not just of the defendant's peers. Much of our legal scholarship and decisions rest on the concept of avoiding the "all-white" jury. This concept naturally possesses tremendous emotional power coming as it does with the cognitive baggage of centuries in the South, a place where black persons would be tried by a jury that was not at all representative of the community in which the crime was committed. This was generally a community in which the victim and the defendant both lived, where juries would be 100 percent white, but the community was 20, 40, or 60 percent black.

But the phrase should, in fact, have a different connotation in principle, if we are speaking of an all-white jury in Vermont or Wyoming or parts of rural Kentucky, where the community is, in fact, overwhelmingly white. There, it is not only the defendant but the society that is entitled to a jury, in the words of the Sixth Amendment, "of the State and district wherein the crime shall have been committed." And society will recognize that a representative jury may, in fact, be all white.

Statistics tell us that, when drawn perfectly at random from a community that is 10 percent minority, more than a quarter of the time, a fairly-chosen jury of twelve would contain no minorities. In a 5 percent minority area that would happen well over

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4 Monterey Mechanical Co v Wilson, 138 F3d 2170, 2172 (9th Cir 1998).
4 US Const, Amend VI.
half the time. And, of course, the converse would be true in the District of Columbia or certain cities that are overwhelmingly black. The fact is that race is only one of many relevant and useful characteristics of a juror. *Ceteris paribus,* "other things being equal," I agree that it is true that a black juror may add something that a twelfth white juror would not, and vice versa. But the same is true of college graduates as opposed to the uneducated, of entrepreneurs versus government bureaucrats, or of a twelfth person who was, perhaps, a Jew or a Mormon. We cannot get, in any twelve-person jury, all of the characteristics that exist in society.

Now it is true that consideration of more points of view and skills and experiences will be likely if we draw from a larger population area. This is one reason why it is generally thought that federal juries will be more broadly representative than state juries, simply because they are drawn from a much wider area. In contemplating that, it is interesting, however, to recognize the opportunities for what some would call jury-mandering if these choices are made *post hoc.* There is, of course, the relatively obscure section of the Sixth Amendment that follows the language that I just quoted, which states that you are entitled to a jury of the state and district, "which district shall have been *previously ascertained* by law." So I think those are considerations to keep in mind in the "jury-mandering" context.

C. Overproceduralism and its Consequences

I now turn briefly to the panel on procedure and overproceduralism, the panel I find the easiest to address. Conventionally, we always have topics like: "Procedure, boon or bane?" I was struck by two wonderful literary opposites here. Many of us know the scene in *A Man for All Seasons* where Thomas More is talking to his son-in-law Roper:

More: What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that.

More: Oh? And when the last law was down, and the

45 \[ .912 = .28; .95^{12} = .54. \]
46 US Const, Amend VI (emphasis added).
Devil turned round on you — where would you hide, Roper, the laws all being flat? This country’s planted thick with laws from coast to coast — man’s laws, not God’s — and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil benefit of law, for my own safety’s sake.47

Well, now, that’s very nice rhetoric on one side. Conversely, my revered contracts Professor, Grant Gilmore, took the other side in saying that, in truth, “[i]n Heaven, there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law there will be. In Hell, there will be nothing but law, and due process will be meticulously observed."48 I mention these two polar views for you to think about as we consider over-proceduralism.

Most of the procedure materials that will be presented in this forum, as I see them, primarily relate to questions of social policy, rather than fair trials in a strict sense. Both Professor Livingston’s paper49 and the Meares and Kahan paper50 seem to me to address aspects of police crime control policies. These are certainly very grave and important questions relating to the interaction between police and citizens in our society, and those interactions are governed and moderated by a wide variety of factors. In part, because of the growing minority political power that is described by Meares and Kahan, it may well be that such factors as political oversight, public pressure, and the threat of tort liability are much more important in influencing and controlling such contacts than are the fair trial considerations brought into play almost exclusively through Fourth Amendment suppression motions. These issues are better considered under the rubric of a fair society rather than a fair trial. After all, again and again, even those who are advocating the suppression of evidence in a particular case generally take the position that the evidence might very well have been fairly and legally gathered, had the police simply taken other or better steps in their investigation. Thus, in a very significant sense, when you focus narrowly on the

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trial, the trial would be "fair" with or without the suppression of the evidence, and in most cases might be fairer with the evidence, in the sense of closer to the truth-seeking function. It is, however, from the perspective of a just society that we are rightly more concerned with police practices.

Certainly, from a judge's perspective, the multifarious stages of police-citizen interaction, from full arrest, to stop and frisk, to consensual encounter are very interestingly and well laid out in Professor Livingston's contribution. Her contrast of New York and federal practice, I think, is most instructive.

In federal law, we primarily have the duality, starting with *Terry v Ohio*,51 of probable cause and reasonable suspicion,52 while in New York law we have specific control of even earlier stages of consensual encounter — starting with the simple inquiry, and moving on to more intrusive questioning — before we even reach reasonable suspicion.53 But I would note that some commentators and judges in my circuit have indicated that there we may exfoliate the doctrine even further to a stage prior to the consensual encounter, which can be characterized as the "pre-contact" stage, before an officer even speaks to a person. In this regard, you may want to look at an interesting case just decided in our circuit, *United States v Avery*.54 Since it has come out just recently, it also reminds me of the one great advantage of judges over legal scholars: when we are ready to publish, we can publish the next day!

This case lays out one point of view as to the control of police action at the "pre-contact" stage. Mr. Avery was walking through the Cincinnati Airport and attracted the attention of some officers. There is a dispute as to whether the attention was just because he was a young black male, or because he was carrying a duffel bag, was wearing sweat pants and a short-sleeved shirt in December, and was focused straight ahead, "like a man on a mission."55 In any event, at first the officers did not approach him or encounter him at all. They simply followed him through the airport to see where he was going. He went to a gate area, walked immediately to the podium, sat down, and waited. The officers

52 Id at 27.
54 128 F3d 974 (6th Cir 1997).
55 Id at 977, quoting Officer Parker.
were intrigued. They went to the airline desk, where they were
told that he bought his ticket with cash thirty-five minutes before
departing from San Juan, on a flight connecting through Orlando
and Cincinnati on its way to Washington. The officers then got
on the plane, and did everything by the book; they didn't block
Avery's exit but only asked to talk to him. He didn't say he'd
been to San Juan; he said he'd come from Orlando. He said he'd
stayed there but he didn't have any receipts. His ticket was in
somebody else's name, and so on and so on. A fairly standard
Fourth Amendment kind of case, except for the question raised
by two of the judges as to whether the pre-contact stage could be
controlled under an Equal Protection analysis. In other words, if
the officer could be shown to have followed Mr. Avery because he
was black, rather than because of the "gym bag, focused walk,
etc." sort of thing, would this be a violation controllable by sup-
pression of the evidence?

As it turned out, even though the court's opinion discussed
the possibilities at some considerable length, it didn't find that it
applied here, so there is a brief concurrence by me saying that I
think this is all dicta. But I put the paradigmatic question as
follows:

An officer on routine foot patrol walks east on First Street
behind two men, one black and one white. First Street
dead-ends into Main, so at the corner of First and Main
each man, and the officer, must turn right or left. The
black man turns one way; the white man turns the other.
The officer chooses to turn the corner to follow one of the
men and, when questioned later, candidly admits that he
had no reason for deciding to go right rather than left save
the race of the man who also turned that way. However,
within a block of turning the corner, the officer sees the
man rob a store, and arrests the man. My intuition is that
the evidence of that robbery could not be suppressed.
However, that intuition is no less dicta than most of the
discussion in Part II B of the court's opinion.

I add that to the level of detail that Professor Livingston has very
Meares and Kahan have a very interesting presentation on the interaction of rights and politics. As I would state it in an oversimplified way, I read them to say that policies condemned as unconstitutional in the 1960s and 1970s (such as curfews, loitering ordinances, mass searches in public housing) might be fine now that we have a "Nineties Mentality" rather than the "Sixties Mentality." While I agree that it may be seen as an important difference that a larger proportion of the population in minority areas may support the police today than in the 1960s, I think both the extent and significance of this shift can be overstated. It is a commonplace even today, from recent evidence, that black jurors may be less inclined to trust police than whites. On the other hand, a concentration of both crime and police activity in minority communities also existed significantly in the sixties. Meares and Kahan emphasize that majorities of people living in crime-plagued minority communities, measured both by political representation and, in the case of the Chicago Housing Authority, by votes of building residents themselves, have supported more aggressive police measures.

Although Meares and Kahan chastise "suburban liberal ACLU types" for bringing these suits, even with today's relaxed standing rules, the challengers must have at least some genuinely affected parties from the affected community as clients. I read the thrust of their argument as being that, to the extent that a "Sixties Mentality" premises legal decisions on political judgments about the significance and effect of police actions, when those political judgments change, the rulings could change as well. I am not sure that those original rulings should have been made on such grounds, but insofar as judges who made them did so, I believe that Meares and Kahan may have raised some intriguing points that bear consideration. And yet, at bottom, I must adhere to the traditional view that the rights in principle come from God or from nature and in practice from the Constitu-

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56 1995 Sourcebook at 133 (cited in note 16) (while 65 percent of white respondents expressed "a great deal" or "quite a lot" of confidence in the police, only 31 percent of black respondents had this much confidence).
62 See, for example, Lee v Board of Governors of Federal Reserve System, 118 F3d 905, 910–11 (2d Cir 1997) (dismissing suit for lack of standing).
tion, rather than from the votes of the day. For this proposition I would quote (some might think it an unlikely source) Justice Scalia speaking for the dissenters (himself, Brennan, Marshall, and Stevens) in the case of *Maryland v Craig,* which upheld the ability of the state to present child-victim molestation evidence by closed-circuit television. After going through some of the political disputes on such testimony, Scalia said:

I have no need to defend the value of confrontation, because the Court has no authority to question it. It is not within our charge to speculate that . . . confrontation might 'in fact disserve the Confrontation Clause's truth-seeking goal.' If so, that is a defect in the Constitution . . . [that] cannot be corrected by judicial pronouncement that it is archaic, contrary to 'widespread belief,' and thus null and void. . . . The Court today has applied interest-balancing analysis where the text of the Constitution simply does not permit it. . . . The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional, I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.84

Well, I must confess to being an old fuddy-duddy and taking the Scalia-Brennan side of that argument.

I would also say that the sub-categorization of communities points up again, as in the race area, the troublesome nature of viewing ourselves as two communities or many communities, rather than as one America. As an example, in my own city of Louisville, the question of a teen curfew was recently widely debated.85 As Kahan indicates on the issue of teen curfews in San Antonio and other cities,86 there was significant support for such laws in Louisville from minority communities, though in fact the City Council was divided (not, I hasten to add, solely along racial

84 Id at 869–70 (Scalia dissenting) (emphasis added).
85 See Mary O'Doherty, Revised City-Curfew Proposal Includes Special Police Unit, Courier-J (Louisville) B2 (July 27, 1994).
86 See, for example, Kahan, 83 Va L Rev at 372 n 85 (cited in note 61).
lines). Our twelve person board of aldermen has four black members and eight whites. The whites from what we used to call the silk-stocking areas opposed the ordinance. The five whites from the more working-class areas supported the ordinance. Would the logical extension of the Meares-Kahan theory be that the ordinance is valid if all four black alderman voted for it, but not if they had all voted against it? And what about the plausible case where some of the representatives of the minority community supported it and some opposed it? It seems to me to be extremely dangerous to let ultimate legal decisions turn on such nose-counting of the nature of the representatives, rather than of the nature of the measure under consideration.

CONCLUSION

To summarize, frequently I may seem to have minimized the potential magnitude of the changes that either allegedly justify reforms or that would result from reforms. In part, I did that, but not to belittle the possibility of improvement, only to caution against expecting too much. It is perhaps a truism to say, "Be careful of that for which you wish, for you may, in fact, get it." For example, Professor Steiker once wrote a very interesting article on death-penalty proceduralism. He notes that more and more procedures were put in, frankly with an eye to undermining the possibility of and support for the death penalty. Ultimately he finds that perhaps they have facilitated and strengthened support for the death penalty. But for myself, I take away from my encounter with all of this some traditional lessons.

The fair trial is still a search for truth, with the appropriate pro-defendant discount where the defendant runs the risk of the deprivation of his liberty, a result we do not take lightly in a free society. But that search for truth is the key attitude of the jurors that we should seek.

I take the lesson that judges, especially today, generally will not impose broad social reforms not tied to a particular constitu-

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67 See Todd Murphy, Bather Again to Try for Youth Curfew, with New Provisions, Courier-J (Louisville) B1 (June 2, 1994). See also Sheldon S. Shafer, Louisville Youth Curfew is Approved: Yearlong Trial Set to Start on March 31, Courier-J (Louisville) A1 (Feb 12, 1997).
69 Id at 438.
70 Id.
tional text, as was to some extent the legacy of the 1960s. Legislative and executive action may be a more fruitful field than constitutional interpretation for some of the reforms that commentators are suggesting. But overall a search for the truth is what we should try to strengthen as the best way to preserve a sensibly-defined free trial right. That is a process that scholarship, such as is presented in the other papers in this forum, can well advance.