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# ESSAYS

## THE IMPOSSIBLE DREAM COMES TRUE— A CRIMINAL LAW PROFESSOR BECOMES JUROR # 7\*

*Stacy Caplow*<sup>†</sup>

### INTRODUCTION

When it first arrived, the jury summons to the United States District Court for the Eastern District of New York felt like a joke. With my resume, set forth in detail below, each entry of which arguably provides a basis for a peremptory challenge, what remotely sensible or competent lawyer would ever want me as a juror, particularly on a criminal case? The joke quickly transformed into an exciting long shot, an improbable opportunity.

Now that the elimination of professional exemptions for jury service<sup>1</sup> allows for routine participation on New York

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† Professor of Law and Director of Clinical Education, Brooklyn Law School. With appreciation to Brooklyn Law School's Summer Research Stipend Program and gratitude to Gene Cerruti, and my "buddies" Susan Herman, Nan Hunter, Minna Kotkin, and Liz Schneider. I also would like to thank the lead prosecutor and the defense attorney for speaking with me so frankly and graciously after the trial, and, most of all, for not bumping me from the jury.

<sup>1</sup> Almost 100 years ago, the Supreme Court held that exclusion of certain professions from state jury service exemptions does not violate the Fourteenth Amendment. *Rawlins v. Georgia*, 201 U.S. 638 (1906). Federal law does not specifically exempt lawyers, 28 U.S.C. § 1863 (West 1994), but permits each judicial district to formulate its own plan which might excuse groups or occupational classes if such a plan would neither interfere with the fair cross section requirement (§ 1861), nor discriminate on account of race, color, religion, sex, national origin, or economic status

juries not only of lawyers, but even judges, the Governor of New York State, and the Mayor of New York City,<sup>2</sup> what trial lawyer has not fantasized about being inside the jury room, that domain of mystery and speculation? Trial lawyers devote considerable energy and attention to selecting and persuading a jury, second guessing the decision to exercise a challenge, divining what jurors are thinking by examining every expression of facial or body language, and guessing which of those impassive faces masks a sympathetic listener. Even though many researchers are intrigued by and have made many assumptions and assertions about the psychology and process of jury deliberation, how jurors see, hear, and evaluate evidence and argument, how subjective or personal factors affect decision making, and whether jurors understand the judge's instructions,<sup>3</sup> the process is still clandestine and the research is often based on simulated jury deliberation. The

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(§ 1862). Many state statutes contain professional exemptions for lawyers. See generally, Michael P. Sullivan, Annotation, *Jury: Who is Lawyer or Attorney Disqualified or Exempt from Service, or Subject to Challenge for Cause*, 57 A.L.R. 4<sup>th</sup> 1260 (2001). Sections 511 and 512 of the N.Y. STATE JUDICIARY LAW, exempting many categories of professionals and disqualifying elected official and judges from jury service, were repealed effective January 1, 1996. A judge who sits in the Criminal Term of the Supreme Court of the State of New York told me that in recent years there has been a lawyer on almost every one of his juries.

<sup>2</sup> James Barron, *Public Lives: Seeking a View on the Other Side*, N.Y. TIMES, Aug. 18, 1999, at B2 (describing New York Court of Appeals Chief Judge Judith Kaye's second tour of duty as a potential juror); Lynette Holloway, *Pataki is Summoned for Jury Duty*, N.Y. TIMES, Feb. 21, 1997, at B2; Dan Janison, *City Briefing—A Report on People and Issues in City Government: Big Fish Enter Pool—Pols et al. Called to Serve on Juries*, NEWSDAY, Apr. 14, 1997, at A14; Robert D. McFadden, *Court Surprise: Giuliani Picked as Juror No. 1*, N.Y. TIMES, Aug. 31, 1999, at A1; David Rhode, *One Angry Man; What's the Verdict When the Mayor Is Also Jury Foreman?*, N.Y. TIMES, Sept. 5, 1999, § 4, at 6; David Rhode, *Mayor is Praised as Just Another Juror*, N.Y. TIMES, Sept. 8, 1999, at B3; Janney Scott, *Line of Work Ma'am? Chief Judge*, N.Y. TIMES, Aug. 16, 1996, at B3.

<sup>3</sup> See generally A HANDBOOK OF JURY RESEARCH (Walter F. Abbott & John Batt eds., 1999) [hereinafter HANDBOOK]. See also JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* (1987); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986); REID HASTIE ET AL., *INSIDE THE JURY* (1983); MICHAEL J. SAKS & REID HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 47-71 (1978); DONALD E. VINSON & DAVID S. DAVIS, *JURY PERSUASION: PSYCHOLOGICAL STRATEGIES & TRIAL TECHNIQUES* (1996); Robert K. Bothwell, *Social Cognition in the Courtroom: Juror Information Processing and Story Construction*, in HANDBOOK, *supra*, at 17-1-17-45; Joan B. Kessler, *Social Psychology of Jury Deliberations* in *THE JURY SYSTEM IN AMERICA* 69-89 (Rita James Simon ed., 1975); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

opportunity to be one of those people about whom there is so much theorizing was tantalizing. But like Tantalus, I feared that the no longer forbidden fruit I craved still would be frustratingly elusive given what I assumed would be well-warranted skepticism about my capacity to be impartial (there were reasons for either side to presume a predisposition or bias), or my ability to function with the same degree of openness and impressionability as the rest of the jurors.

Although I had postponed jury duty until classes were over, I grouched that it was bound to be a waste of two weeks.<sup>4</sup> I would never get picked. But, I was!—to the amazement of family, friends, colleagues, students, and indeed everyone I told. All week I received comments such as: “You’re kidding!” “Who would want *you* on a jury?” Even though people who know me well thought that my selection was preposterous (Did this reaction reflect on their perception of my inability to be fair? I won’t go there!), three lawyers (two for the government and one for the defense) were willing to take the risk.

Meet juror # 7 in the case of *United States v. Richard Lyon*,<sup>5</sup> a four-day marijuana distribution conspiracy trial. My original expectation of a few days reading a book in the central jury room turned into a remarkable opportunity to engage with the criminal justice system from a totally new perspective.<sup>6</sup> Over the next four days, this experience, which I entered into with a certain detachment, like an observer at an experiment or a participant in a diverting academic exercise, evolved into a real moral responsibility, one which kept me awake the night before our deliberations. The verdict was followed by endless questions from friends, family, and students. Most commonly, I

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<sup>4</sup> Jury service in the Eastern District of New York (“EDNY”) is made somewhat less onerous by a telephone alert system. During my first week, I appeared on Monday, along with a huge crowd of other potential jurors, many of whom were selected for one of the four cases or the grand jury scheduled for that day. Since I was not picked, I was excused until the following Monday when only one jury trial was starting.

<sup>5</sup> To protect their privacy I have changed the names of all of the participants, or I simply refer to them by role.

<sup>6</sup> Ironically, I have never been treated with more deference in a courtroom. This judge, who repeatedly thanks the jury for being so punctual, has everyone stand each time the jury enters or leaves the courtroom as a sign of respect for the judges of the facts.

heard a wistfulness and even envy from other lawyers who all seemed to say, "I would love to be on a jury."

What is so intriguing about jury service, especially since so many people try to avoid it? What makes a lawyer-juror, and even more so a law professor-juror, such a curiosity? Could the answers to some of the questions I was asked offer any new information or insights?

Having been privileged to participate in a normally confidential phenomenon, a thrilling and fascinating experience, connected to so many ideas I have taught or encountered as a practicing attorney, my destiny was inescapable. And, as a clinical law teacher, who preaches that experience should be followed by reflection, it would be unforgivable to squander an opportunity to probe such a rich subject, especially since the trial was held at the beginning of a summer free of classroom responsibilities. Although jury duty has been a fertile topic for other commentators,<sup>7</sup> I write to share my perceptions with the eager, inquisitive audience of juror-wannabees and voyeurs. My reflections might shine just a bit more light into the off-limits jury room and offer additional anecdotal evidence to more serious students of the jury trial process.<sup>8</sup>

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<sup>7</sup> Insider accounts of jury service are not uncommon and often are considered desirable windows into a usually invisible process. Lawyers speak to jurors for feedback. Jurors in sensational cases occasionally write, or more likely talk, about the case, a form of profiteering and grandstanding that is often criticized. See, e.g., Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389, 391-95 (1994). Occasionally, a thoughtful juror will write about the experience. See, e.g., D. GRAHAM BURNETT, A TRIAL BY JURY (2001); William Finnegan, *Doubt*, THE NEW YORKER, Jan. 31, 1994, at 48. Law teachers seem markedly drawn to writing about jury service as an opportunity to extrapolate broader themes. See, e.g., Donald H. Cook, *How I Spent My Sabbatical, or What Happens When A Torts Professor Is a Juror in A Negligence Case*, 14 REV. LITIG. 219 (1994); Richard L. Cupp, Jr., *The "Uncomplicated" Law of Products Liability: Reflections of a Professor Turned Juror*, 91 NW. U. L. REV. 1082 (1997); Richard H. McAdams, *A View from the Box: The Law Professor as Juror*, 68 CHI.-KENT L. REV. (1992); Stephen Shapiro, *A Law Professor's View from the Jury Box*, 26 U. BALT. L.F. 41 (1996); Mary Pat Truhart, *A Summer's Tale: Of Marriage, Feminism, and Jury Duty*, 19 HARV. WOMEN'S L. J. 292 (1996).

<sup>8</sup> The public has almost no opportunity to see the inner workings of a real jury. There have been two television shows in which cameras were permitted to film deliberations. The first, *Frontline: Inside the Jury Room*, filmed by Professor Stephen J. Herzberg of University of Wisconsin Law School, aired on PBS on April 8, 1986. The other, *Enter the Jury Room*, was shown on CBS on April 16, 1997. For a discussion of both shows, see generally William R. Bagley, Jr., *Jury Room Secrecy*, 32 SUFFOLK U.L. REV. 481 (1999). On the other hand, jury trial movies are legion. From the classic 12

"What are you planning to write about?" I was asked by the prosecutors and defense attorney after contacting them about my intentions. My goal is not to critique the lawyers' skills, to second guess the verdict, to tell a personal tale of revelation, or to pontificate about the criminal justice system. Instead, I intend to identify some of the common beliefs, assumptions, and questions raised about the jury trial process generally, and attempt to relate my experiences to these concerns.

## I. THE CASE-IN-BRIEF

None of my observations will make any sense without some understanding of the case on trial. Although a relatively simple trial—one defendant, two counts—with uncomplicated facts, there was enough personality, factual complexity, and lively testimony to keep jurors interested and engaged. Despite my intention to keep the description minimalist, even such a straightforward case, involving seven witnesses and lasting only three and one-half days, requires a certain amount of detail in order to understand the jury dynamics and the questions that I intend to address.<sup>9</sup> Moreover, the power of narrative, the pull of facts, is irresistible. This was a good story, and, for four days, I was swept up in its force. And, as any trial lawyer would admit, you can never tell what fact will impress or influence the jury. So, forgive the length of this section, but, at the very least, the details will enable readers to see the case as if from the jury box.

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ANGRY MEN (United Artists 1957) to the suspenseful THE JUROR (Columbia Pictures 1996) to the comedic JURY DUTY (Tristar 1995), filmgoers can see fictionalized juries on a regular basis.

<sup>9</sup> This is an opportune time to make some disclaimers. First, although I had access to the transcript of the testimony, including the bench conferences, and spoke with the lawyers so that I now have some additional information to supplement my impressions from the jury box, there are some aspects of the case I still do not know, particularly those relating to pretrial motions. Also, what I did glean from those post-trial conversations is, I am sure, very superficial. Finally, I forewarn that this is my narrative of the evidence that, as I now reconstruct the story, represents only one juror's recollection of the facts and reactions to the witnesses. My recitation clearly contains values, attitudes, and judgments which mirror my assessment of the evidence during the trial and the deliberations. In order to clarify the narrative, I have footnoted some of these points even though the rest of the jury was unaware of both the background facts and my perceptions at the time.

The two-count indictment charges Richard Lyon, a young, well-dressed, composed, black man, sitting at counsel table, with participating in a conspiracy to distribute thousands of pounds of marijuana and with possession of marijuana with intent to distribute. At the government table, two Assistant United States Attorneys ("AUSAs") are seated with the lead Drug Enforcement Agency ("DEA") agent assigned to the case.

The case begins in California where a large scale operation to ship huge quantities of marijuana across the country had its headquarters. The government's brief opening statement reveals that the conspiracy involved a transcontinental scheme in which large cardboard boxes of marijuana were shipped from California to New York via Federal Express, with the complicity of Fed Ex employees. The defendant, and many of the co-conspirators, worked for Fed Ex. The prosecutor's main point is the scale of the conspiracy, underscoring the quantity of drugs involved—between 250-2,500 pounds a day. As the AUSA says, "This is not about some kid smoking a joint."

The defense opening unpacks the theory of its case: the defendant did not know that the boxes he transported contained marijuana. The opening promises that this claim will be established by the weaknesses in the government's evidence. Although the defendant apparently suspected that there was something illegal contained in the boxes, probably guns, he claims to have been unaware of the nature of their contents. The jury would hear a tape of his conversation with a co-conspirator suggesting that he thought the boxes might contain guns.

The government's case consists of five witnesses. The first, an investigator from Fed Ex, educates the jury in substantial detail about how packages are routed through Fed Ex. Back in the jury room, the jurors joke that, between her testimony and the movie *Cast Away*,<sup>10</sup> we could never look at a Fed Ex truck the same. This witness introduces the records of the one delivery in which the defendant was involved. Her testimony concedes that a lot of contraband, in addition to drugs, is shipped via Fed Ex.

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<sup>10</sup> CAST AWAY (Twentieth Century Fox 2000).

In this conspiracy, which ultimately netted more than twenty-five defendants, narcotics were shipped out of a Fed Ex drop point in California to fictitious companies at real New York City addresses. The scheme required insiders in Fed Ex to create bogus shipping labels, and other employees to pick up boxes at the New York City sort location that would then be intercepted on the street by another member of the conspiracy. The courier would complete the records of the transaction as if a genuine delivery had taken place.

The next witness, a cooperator named John Cain, the Fed Ex driver who had recruited the defendant to help him with a larger than normal size shipment of boxes, had pled guilty—twice. This cooperator is the link between the conspiracy and the defendant, and offers the only proof that the defendant knew the contents of the boxes. Yet, Cain balks at definitively establishing the defendant's knowledge. He testified at one point, "I tell him it was drugs." But when asked "Did you tell him what sort of drugs?" he replied, "I didn't know myself."<sup>11</sup> He also describes a conversation that took place after the delivery in which they commented on how heavy the boxes were, speculating about what was inside, and "assuming" that it was marijuana because of the weight.

On cross-examination, the defense establishes the details of the cooperation agreement, notably that the cooperator had pled guilty earlier in the case without a cooperation agreement so that his anticipated sentencing guidelines were between twenty-four and thirty months.<sup>12</sup> His subsequent guilty plea, entered only a few days before the trial, risked a longer, mandatory minimum prison sentence but carried with it the possibility of a "substantial assistance"

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<sup>11</sup> Quotes from the testimony are based not only on my recollection but also on the transcript. (on file with author). Since this is not an appellate brief, I will not cite to specific pages or lines.

<sup>12</sup> This is an example of when my knowledge of the law was clearly greater than the rest of the jurors, none of whom had heard of the Federal Sentencing guidelines before. They did not, however, have any problem understanding the main point: the cooperators were likely to receive a substantial benefit from their testimony. Moreover, they understood that if the defendant was convicted, he faced a more severe sentence than either of these two co-conspirators, both of whom were considerably more involved in the scheme than the defendant.



letter<sup>13</sup> and a recommendation against deportation to Haiti.<sup>14</sup> The balance of the cross-examination exposes the witness's lack of candor. He is evasive and contentious. Also, according to the DEA reports of earlier debriefings with the prosecutors, he had not mentioned the defendant's awareness of the contents prior to his arrest.

The third witness is a DEA agent who, about eight months before the defendant's one delivery, had intercepted a shipment that was supposed to be part of the same conspiracy. He identifies the driver of the Fed Ex truck as John Little, a major player in the scheme, who the jury would hear from later that day as the second cooperator. The agent observed Little remove a large quantity of boxes from his Fed Ex truck which were loaded onto a van. The DEA followed that van, and arrested the driver, seizing twenty boxes, each of which weighed between thirty and fifty pounds. This testimony is critical to establishing the duration of the conspiracy and the total weight of the marijuana involved.

During this agent's testimony, the jury is treated to some visual aids: blow ups of mug shots of some of the other conspirators, pictures of twenty-seven seized cartons packed with compressed bricks of marijuana. Two or three bricks would be wrapped into a bale of bubble wrap and dryer paper

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<sup>13</sup> United States Sentencing Guidelines ("U.S.S.G.") § 5K1.1. Unlike the other jurors, I know what this type of letter looks like. The judge's instruction on this point stated:

[Y]ou have heard testimony about what has been referred to as a 5K1.1 letter. Since November 1, 1987, sentencing in federal courts in the United States is governed by statutorily mandated sentencing Guidelines. That means that federal judges are required to impose sentences between a minimum and maximum number of months determined by the nature of the offense for which sentence is being imposed and the history of the offender. One section of these Guidelines, § 5K1.1, provides that upon a motion by the government stating that a defendant has provided substantial assistance in the investigation or prosecution of another person who has committed a crime, the court *may* depart from the guidelines. . . . [T]he final determination as to the sentence to be imposed rests with the court whether or not a § 5K1.1 motion is made.

<sup>14</sup> This is another example of some tangential legal knowledge that I brought to the trial. Having been teaching an immigration law clinic for four years, a fact that never came out on voir dire, I was well aware of the consequences of a conviction of a narcotics crime and knew that these witnesses entertained false hopes of avoiding removal (deportation) even with a recommendation from the prosecutor. I.N.A. § 237 (a)(2)(B), 8 U.S.C.A. § 1227(a)(2)(B) (West 1999).

(to camouflage the odor). Each box contains two bales. We also are shown the contents of one of the bales which the agent cuts open while the lawyers are at side bar. For a brief moment before the lunch recess on the second day of trial, the unmistakable odor of marijuana fills the courtroom. After lunch, the box vanishes.<sup>15</sup> This testimony is relevant to both the duration and the extent of the conspiracy. On cross-examination, the defense draws attention to the weight of the boxes, suggesting that marijuana, normally a leafy, loose substance, would only have this much weight when compressed.

Following the DEA agent, the jury hears from Carl Little, an articulate thirty-three-year-old college graduate, born in Jamaica, who is a central figure in the conspiracy with contacts with its leader as well as with many of the Fed Ex employees and other couriers. We learn that he had testified in California also. He pocketed about \$25,000 in profits from his involvement in the conspiracy, using it to pay bills and student loans (but not taxes), and even managed to buy a \$3,000 certificate of deposit. Little also had signed a cooperation agreement in hope of a sentence lighter than the mandatory minimum of ten years he faces, and a recommendation against deportation to Jamaica.

Little offers the jury a glimpse into the larger conspiracy, describing how he was recruited, and how he knew the identity of the "stuff" he was supposed to "move" was marijuana since that is how Jamaicans usually refer to marijuana. He describes a pattern of deliveries, sometimes as many as ten seventy-pound boxes as often as every day for a few weeks. Little is a key participant who spoke to the ringleader of the conspiracy in California as often as five to ten times every day. During his testimony, the jury also hears a tape recorded telephone conversation between Little and this ringleader, a fellow Jamaican, that was conducted in Patois.

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<sup>15</sup> I learned from the transcript that the defense stipulated that the boxes contained marijuana so there was no more need to produce the cartons in court. While that made the prosecution's job easier, and shortened the trial, it deprived the government of the impact of carrying the oversized cartons into the courtroom.

The intensive period of Little's involvement in the conspiracy lasted from about July to October of 1999, when he transferred to another Fed Ex station in order to extricate himself from the conspiracy. In February, however, the scheme was in trouble because there were no Fed Ex drivers in New York to receive the shipments. The telephone call played for the jury (along with a transcript in both Patois and English) relates to these problems. Little describes how the leader was "desperate" to find someone to take the boxes. At this time, Little recruited Cain, whom he described as being the kind of person who would want to make some extra money and be cool enough to keep quiet. Once Cain entered the loop, Little was only peripherally involved.

In contrast to Cain's evasive testimony, Little testifies forthrightly that he had told Cain that the cartons contained marijuana, largely to reassure him that they did not contain cocaine about which Cain had qualms. In April, Cain told Little that there was going to be a larger than usual delivery of fifty boxes, which was too big for Cain to handle alone, so he needed to find another Fed Ex driver to help. He also asked Little to pick up the boxes from both Fed Ex trucks.

Little drove a van previously rented by Cain from the Bronx to Manhattan where he first met Cain and took twenty-five boxes from him. From this meeting Little drove to another location where the defendant, who was well known to Little, arrived. Little, providing the key direct evidence linking the defendant to the marijuana, says he was "shocked" to see Lyon. Together they shifted the boxes to the van.

The government also plays a tape-recorded phone conversation between Little and Lyon that occurred after Little's arrest. The call was placed from DEA headquarters, not to gather evidence against Lyon, but to arrange a location to which Lyon, thinking that he was meeting Little, would go, and then be arrested. During the conversation, Lyon complains vehemently, but without any discernable accent, that he had not received enough money, saying the he would not have taken a risk of getting into trouble with the "feds" for the small amount of money he had received from Cain. Although this conversation is very incriminating, clearly revealing that the defendant knew he was doing something illegal beyond merely violating Fed Ex regulations, it also contains a key element of

the defense. During this heated exchange, Lyon refers to the box as containing "six or seven johns." The significance of this cryptic slang term had been alluded to during the defense opening and would become clearer during the testimony of the lead DEA agent the next day.

Two more law enforcement witnesses are called during the final day of testimony. The first is a detective with a New Jersey county prosecutor's office who, while assigned to an investigation of marijuana distribution through Fed Ex, made a seizure of seventy-four boxes in February, 2000. Describing the boxes and their contents in now familiar terms, this detective also testifies that drug dealers refer to drugs in all sorts of code words. He also testifies that this quantity of marijuana would be inconsistent with personal use. This testimony is relevant to establish the duration of the conspiracy and the amount of marijuana involved, but contains no direct link between the marijuana and Lyon.

The final witness is Craig O'Neill, the DEA case agent sitting at counsel table assisting the prosecutors. Unlike the other witnesses, O'Neill provides a more complete picture of the operation and the roles of Cain, Little, and Lyon. First, he describes a seizure in September, 1999 of a marijuana shipment that had followed the by now well known pattern, but which involved none of our trial's players. These are the other seven boxes that, combined with those described by the first agent, add up to twenty-seven. The jury again sees pictures of boxes, bales, and phony Fed Ex labels, and hears about the weight of the packages and DEA procedures for processing and testing controlled substances.

Through O'Neill, the government also introduces phone records to and from cell phones, home phones, and pagers, revealing many calls between Cain and Lyon both before and after the critical date of April 10, 2000, the day when Lyon transported the boxes and gave them to Little. The records also show calls between Lyon and Little after the tenth, the date of Lyon's single delivery.

Based on the promises in the opening, the cross-examination of O'Neill is essential to the defense of lack of knowledge. Two main points are made. First, the term "john" may be slang for guns. In response to a defense request, O'Neill checked out the term "johns" by talking to some informants,

one of whom was Jamaican and confirmed that in Jamaica "john" can be a slang reference to a type of gun used by soldiers. Second, Cain had not mentioned Lyon's knowledge of the marijuana until his third meeting with law enforcement representatives when his cooperation deal was struck. Unlike Cain, who resisted being pinned down on cross about his prior statements that failed to mention key facts, the defense is able to confront O'Neill with the fact that his written reports of two earlier meetings contain no reference to Cain having told Lyon what was in the boxes prior to the delivery.

The defendant does not testify or offer any affirmative evidence to support his defense.

## II. JURY INSTRUCTIONS<sup>16</sup>

The jury instructions are largely boilerplate, given the relative simplicity of the case. The judge instructs us about the general rules that define and govern the duties of a jury ["You are the sole judge of the facts." "Your recollection of the evidence controls." "Follow all the rules and instructions."]. He also tells us about how to consider the evidence ["Parties are equal before the court." "Defendant is presumed innocent," including having no obligation to testify or put on a defense. "Burden of proof beyond reasonable doubt."]; about the various types of evidence [sworn testimony, exhibits, stipulations, direct and circumstantial]; and what is not evidence [lawyers' comments, personal feelings, knowledge gained outside the courtroom].

The pivotal instruction concerns state-of-mind. The judge instructs us that Lyon has to have participated in the conspiracy with "knowledge of at least some of its purposes or objectives and with the intention of aiding in the accomplishment of those unlawful objectives." Here, the judge relates this general legal principle to the facts:

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<sup>16</sup> The judge distributes to the jury individual copies of his charge which we follow as he reads. We take the document into the jury room and are allowed to retain it.

I remind you that the defense in this case is that the defendant . . . did not know he was agreeing to distribute and possess with intent to distribute marijuana. It is the defense that the defendant . . . thought he was agreeing to distribute and possess with intent to distribute guns. I remind you that he was not charged with conspiring to distribute and possess with intent to distribute guns. If you are not satisfied that the government has proved beyond a reasonable doubt the defendant knew that what he was agreeing to was to distribute and possess with intent to distribute marijuana you must find him not guilty of this count.

He continues with the colloquially known "ostrich charge," which permits the element of knowledge to be inferred from a defendant's deliberate ignorance:<sup>17</sup>

It is not necessary for the government to prove to an absolute certainty that a defendant knew that the drugs charged in the indictment was [sic] marijuana. His knowledge may be established by proof that the defendant was aware of a high probability the boxes contained drugs. Knowledge that the boxes contained drugs may be inferred from circumstances that would convince an average, ordinary person that this is the fact. The government may satisfy its burden of proving a defendant's knowledge by proof that the defendant deliberately closed his eyes to what otherwise would have been obvious to him. So if you find that the defendant acted with reckless disregard of whether the boxes contained drugs, and acted with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied unless the facts show that the defendant actually believed that he was not agreeing to distribute and possess with intent to distribute.

The judge could not be clearer. As we file into the jury room, we each understand that our first task is to determine whether the defendant knew the cartons contained marijuana. Until we all agree about that, we cannot move to the other question of his intent to participate in the larger conspiracy, the scope of that conspiracy, or the quantity of drugs involved.

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<sup>17</sup> This instruction derives from the common law doctrine of "willful blindness" which establishes the knowledge element of a crime from deliberate avoidance of knowledge when a person strongly suspects criminal activity is sufficient. *United States v. Giovannetti*, 919 F.2d 1223, 1226 (7th Cir. 1990); *United States v. Scotti*, 47 F.3d 1237, 1243 (2d Cir. 1995).

### III. DELIBERATIONS AND VERDICT

Not guilty. We return a verdict in less than two hours.

Even our rather abbreviated deliberations follow the classic four step pattern described by jury researchers. First is the orientation or ice breaking stage when jurors, nervous about their task, become better acquainted, choose seats, designate a foreperson, and decide procedures. This relative cooperation cedes to the conflict stage when individuals advocate for their sides or viewpoints, often adamantly disagreeing. Finally, from conflict emerges consensus as jurors compromise or abandon previous positions. The final stage is reinforcement when a spirit of togetherness and group supportiveness develops, affirming the sense that justice has been done.

After we return to the jury room, we sit around a conference table for the first time, but not in any particular order. Until then, we had sprawled around the room, reading, eating, chatting. Now, we were slightly more formal and much more alert. We select Juror # 1 to be the foreperson without much ado. Finally free to talk, our doubts spill out in a free-for-all discussion that lasts about a half-hour with lots of cross conversations and interruptions. The jury immediately focuses on a single question: Lyon's knowledge of the exact nature of the contents. It is immediately apparent that almost everyone has at least a reasonable doubt that Lyon knew the boxes contained marijuana. Some jurors argue for actual innocence, believing that he did not and could not have known what was inside.

After chaotically debating, we finally settle down to a more organized discussion. Going around the table, each of us expresses our views of the evidence. There is almost immediate consensus that Cain's testimony was worthless. The jury resents his evasive and self-serving statements. His eleventh hour cooperation agreement is seen as opportunistic, undermining rather than supporting his credibility. His demeanor and motives are contrasted to Little's, who, although much more culpable, strikes the jury as truthful. Little, we remember vividly, described his "shock" at seeing Lyon at the delivery, an ironic testimonial to Lyon's basic honesty. Indeed,

Little himself had never tried to recruit Lyon, even when his boss was desperate. From this we infer that Little never considered Lyon to be corruptible. Since we know that this is the only delivery in which Lyon participated, we reason that Lyon was involved so marginally that his claim of ignorance of the marijuana is believable.

Once Cain's testimony is disregarded, the jury asks whether there was any other way for Lyon to have actual knowledge of what was in the boxes. Little, the only other source of information, never told him. We next consider the weight. Usually marijuana is a light, leafy substance, a point made by the defense attorney. The dense, compacted marijuana we saw does not comport with common experience. The defendant was more likely to have thought the contents were electronic equipment or computers since the boxes were described repeatedly by the government's witnesses as big enough to hold a computer monitor. One juror suggests counterfeit money plates, an example from left field. We also consider the smell. Little had testified that the distinct odor of marijuana, which some of us had smelled when the carton and wrappings were opened in the courtroom, was undetectable while the boxes were on the Fed Ex truck. We ask whether Lyon's expectation of a lot of money, and his anger over not being paid enough, imply knowledge of marijuana. No one considers the pecuniary gain to have been substantial enough to point conclusively to a drug conspiracy. Again, the jury fixes on the specific knowledge required, finding the suspicion or even awareness of some other crime is insufficient for guilt.

Finally, we ask for the transcript of the phone call in order to assess the only available evidence of the defendant's state of mind. Instead, the judge brings us into the courtroom to listen to the tape again since it is the tape, not its transcript, that is in evidence. We again hear the defendant's angry voice refer to "six or seven johns." Back in the jury room, we talk about how none of the prosecution witnesses were able to provide a drug-related meaning to this term. What did Little think Lyon meant? Even though there was testimony that drug dealers use all kinds of code words for narcotics, neither Cain nor Little tied "johns" to drugs. We assume they could not provide the link or else the prosecutor would have asked.



We take a preliminary vote now by the time-honored custom of a secret ballot, although our discussion has stripped most of us of anonymity. No surprise: 11-1 for acquittal. The dynamic now changes as the one dissenter is revealed to be juror # 4, an Orthodox Jewish woman, who defends her position with this argument: Lyon obviously knew he was committing a crime. He believed the boxes contained either guns or something else illegal. After all, he was violating Fed Ex regulations and was getting paid for his assistance. Why should it matter that he may or may not have known the precise identity of the contents? Not a bad argument. In fact, most of us readily agree that he knew his conduct was illegal in some non-specific way. Moreover, no one on the jury seems to remember the "ostrich charge." I remind the jury of this possible alternative but no one is willing to move on to a discussion of this option, even though the argument of our hold-out logically should lead to consideration of this theory of culpability.

At this point, the jury could have become contentious. But, instead of attacking the hold-out, making her defensive and hardening her position, the jurors politely articulate their reasons for doubt. Juror # 4 now reveals that on a prior jury she was in a similar position—the only juror voting to convict. She describes at length that robbery trial, explaining that she was talked out of her position and finally voted to acquit, regretting that decision ever since. Of course, everyone quickly points out that she cannot correct the other case by convicting this defendant.<sup>18</sup>

Inevitably, any lone voice feels the pressure to conform. It is not easy being the only dissenter in a small room with eleven strangers, even though no one was badgering or hectoring her. Juror # 4 is no exception. After listening to all of us, she formulates a version of reasonable doubt derived from the narrowness of the judge's explanation of the charge that the defendant had to know the specific nature of the contents, not a generalized illegal intent. "Well, if he has to know that

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<sup>18</sup> One of the questions asked on voir dire concerned prior jury service including the type of case and whether a verdict was reached. But what should the lawyers presume from this information? Possibly an amenability to deliberation and cooperation? More likely a predisposition to convict. *HASTIE ET AL.*, *supra* note 3, at 143-44. Certainly no one would have guessed this particular twist.

*exactly. . .*” She seems reluctantly, but inexorably, drawn to this reasoning. It is obvious to everyone that she does not have the strength or will to persevere. Perhaps if she were a better debater, or had more arguments to offer, or could motivate the rest of us to look at the evidence from fresh perspectives, she would have resisted the pressure longer, or convinced others to change their minds. Had her resolve endured, we might have turned into a much more obnoxious group.<sup>19</sup>

We leave the jury room as a group, chatting nervously about “doing the right thing,” but obviously feeling relieved and satisfied with the verdict. I am delighted that I do not have to be the advocate for doubt since the rest of the jurors are equally or even more inclined to acquit. This is not a traumatic or harrowing experience for any of us, although perhaps on her next jury, Juror # 4 once again will try to compensate for her malleability.

#### IV. JURY SELECTION: HOW DID *YOU* GET ON A CRIMINAL JURY?

Federal jury selection, conducted entirely by the judge, runs on express tracks and is remarkably perfunctory. The tradition of lawyer-conducted voir dire dedicated to educating the jury and developing challenges for cause is sacrificed in the service of speed, efficiency, and judicial control. In this courtroom, as is customary throughout the district, the lawyers submit suggested topics or questions related to the case to the judge who then decides what to ask in addition to the boilerplate questions posed in all cases. Our jury of twelve and two alternates is picked in less than two hours following very superficial questioning.

I am among the first twelve names called to the jury box which means, given the custom in this courthouse, that I could have been challenged at any point during jury selection until the lawyers exhausted their respective peremptory

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<sup>19</sup> Katherine E. Finkelstein, *Temper Seem to Be Growing Shorter in Many Jury Rooms*, N.Y. TIMES, Aug. 3, 2001, at B1 (describing conflicts and even violence arising during prolonged deliberations); D. Graham Burnett, *Anatomy of a Verdict*, N.Y. TIMES MAG., Aug. 26, 2001, at 32.

challenges.<sup>20</sup> Of course, I could have been challenged for cause, but nothing in the voir dire established that I would be unable to be fair and impartial, the prerequisite for such a challenge.<sup>21</sup>

The jury quickly learns that this case involves a marijuana distribution conspiracy so we are asked about any connections we might have to narcotics, including rehabilitation programs. Several prospective jurors do have rather significant contacts with narcotics including one woman whose brother-in-law is under indictment in California for marijuana distribution (challenged), another whose two brothers had been convicted of drug offenses and sentenced to shock incarceration in New York (retained), and a third who, while an alcoholic and substance abuser, had been arrested but now was clean (challenged).

When we are questioned about our contacts with law enforcement, the U.S. Attorney's Office, and lawyers generally, I raise my hand to each of these inquiries. So did many other jurors. The recovered alcoholic also has many close family members who were high ranking police officers. Another juror is the daughter of a FBI agent (challenged). Several are employed by the police department or the department of corrections (two are seated). The judge then turns to me and asks first who I know in the U.S. Attorney's Office. I hesitate over how to respond because I had worked in the office for a year and know so many people, including the last two U.S. Attorneys and the just appointed Interim U.S. Attorney, that I fear I might sound self-important (and thus obnoxious to the

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<sup>20</sup> Under FED. R. CRIM. P. 24(b), the prosecution has six peremptory challenges and the defense ten. Under the "struck" system of jury selection employed in the EDNY, jurors are first challenged for cause, excused jurors are replaced on the panel, and the examination of the replacements continues until a panel of qualified jurors is seated. The size of this panel is twelve plus the total number of peremptories allowed to both sides. The lawyers then exercise their peremptories until they are exhausted. This method enabled either lawyer to have bumped me during any of the several rounds of challenges so it clearly was not a game of "chicken" with each side waiting to see what the other does.

<sup>21</sup> Answering the question, "Is there any reason why you could not be fair and impartial?" or, in my case, "Is there any reason why any of your experience would prevent you from being fair and impartial?" is particularly daunting for lawyers. After all, we bring a lot of knowledge into the courtroom, if not about the substantive law in a case, at least about the rules of evidence and procedure. This baggage is impossible to ignore, yet few people, and here I would argue that no lawyers, want to admit that they cannot be fair.

other jurors with whom I might have to interact). So I simply mention that I had worked in the Civil Division of the Office in 1992-93 and that my husband had worked in the Criminal Division from 1994-95. The judge then asks whether this experience was the basis for my affirmative response about knowing people in law enforcement to which I mention that I had also worked in the Brooklyn District Attorney's Office during the 1980s. At this point, I offer that for four years I had been a criminal defense attorney with the Legal Aid Society.

The lawyers also hear that I teach at Brooklyn Law School, but never learn what subjects I teach. I sit there uncomfortably because the judge seems intent on ignoring the fact that I have known him for twenty years since he was the Dean of Brooklyn Law School, and that I had worked with his wife, and taught one of his sons. I therefore volunteer that I know the judge but never elaborate on the nature of our relationship. I sit there wondering whether he disclosed anything at side bar.<sup>22</sup> The lawyers learn a few more facts about me (and also about the other potential jurors): my neighborhood, that I had never served on a jury before, and the employment of my grown children.

That was the sum total of the lawyers' knowledge of me. After the trial, I asked each of them why they had not challenged me. The defense attorney gave his main reason: Given the mistake/ignorance of fact defense he mounted, he thought a law professor would understand it. He need not have worried—everyone on the jury got that point! The prosecutor said that she was running out of challenges and that basically I was the lesser of evils.<sup>23</sup>

As I respond to the judge's meager questions, I am uneasy about how much relevant information is unavailable. Which, of course, makes me wonder how much is missing from

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<sup>22</sup> He did not. Probably a juror's professional and/or social acquaintance with the trial judge would not by itself justify a challenge for cause since a social relationship between a judge and either the lawyers or the parties is not an automatic ground for recusal or disqualification. See JEFFREY M. SHAMAN ET AL., *JUDICIAL CONDUCT AND ETHICS* 136-40 (3<sup>rd</sup> ed. 2000). I wonder, however, whether the failure to disclose the relationship might create a different problem.

<sup>23</sup> Compared to the young unemployed juror wearing a "Jay-Z" (the rapper) t-shirt, and following defense challenges to nine white jurors, almost all of whom were professionals, I must have seemed safe enough to the prosecutor given my apparently balanced background which did contain more years of prosecution than defense work.

the other jurors' profiles. Here are the experiences in my life, any one of which could have been a rational, understandable basis for challenging me, but *none* of which the jury was aware:

1. I regularly teach Criminal Law, Criminal Procedure, and occasionally have taught Federal Criminal Law, White Collar Crime, and Trial Advocacy.
2. As a clinical teacher, I taught a Criminal Defense Clinic for six years and a Prosecution Clinic at Brooklyn Law School for six years. In 2000-01, I had taught a Prosecution Clinic at New York University School of Law as an adjunct. I now teach the Safe Harbor Project (an immigration law) Clinic. I also supervised both our criminal and judicial externship programs which place students in prosecution, defense, and judicial settings in the EDNY, and offices throughout the City.
3. Having taught for more than twenty years, I have former students working in every criminal justice agency and court in the City, including the EDNY.
4. I began my career as a criminal defense attorney with the Legal Aid Society, trying many narcotics cases in the early years of the reprehensible Rockefeller drug laws.
5. Under Brooklyn District Attorney Elizabeth Holtzman, I was the Chief of the Criminal Court Bureau and then the part-time Director of Training, a relationship that lasted for four years. The current Brooklyn District Attorney, Charles Hynes, teaches Trial Advocacy at the Law School, in a program I administer, and jokingly refers to me as "his boss."
6. In 1992-93, I worked in the Civil Division of the U.S. Attorney's Office in the EDNY on a sabbatical exchange program.<sup>24</sup> My husband, who I met while we both worked at Legal Aid, and who teaches Criminal Law, Criminal Procedure Evidence, and Trial Advocacy at another metropolitan area law school, also worked at the EDNY U.S. Attorney's Office in the Criminal Division on this same exchange program. At his law school, he teaches and administers a Trial Advocacy program in which the current Interim U.S. Attorney for the EDNY teaches, and they are friends.

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<sup>24</sup> Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 CLINICAL L. REV. 1 (1996).

7. I know professionally and personally so many present and former AUSAs and defenders, and have worked with enough police officers and federal agents, that it is impossible to list them all.
8. I know personally many of the judges and magistrate judges in the EDNY, some of whom are former deans and colleagues at my law school. Some now teach as adjuncts, many I see at professional and social events, and most, at one time or another, have supervised students in the Judicial Clerkship clinical program I administered for more than five years.
9. I have served on numerous criminal justice related Bar Association committees with judges, prosecutors, and defense attorneys.
10. I co-authored a book about federal crimes and practice.<sup>25</sup>

As a trial lawyer in this case, what inferences would I have drawn from these many factors in deciding whether to challenge me? Some of my background does not disqualify me or cast doubt on my ability to serve. A law degree, which probably included a course or two in Evidence, Criminal Law and/or Procedure, and possibly Trial Advocacy, no longer automatically implies an unfitness to serve or is seen as undesirable by trial lawyers. Professional relationships, personal acquaintances, or friendships with lawyers, even prosecutors and defense attorneys, do not lead to bias or partiality. Nor do my spouse's similar credentials carry much weight.

On the other hand, clearly my knowledge of the substantive criminal law and the criminal justice system is broad, deep, and advanced. Solemn judicial pronouncements about venerable legal principles, like the presumption of innocence and reasonable doubt, produce no goosebumps of civic responsibility since I spend many class hours attempting to explain and demystify these concepts. Moreover, my familiarity with the workings of police and prosecutors gives me a much more nuanced, if not jaded, view of their activities in investigating and prosecuting crime. Certainly, I am more

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<sup>25</sup> STACY CAPLOW & LISSA GRIFFIN, *MULTIDEFENDANT CRIMINAL CASES: FEDERAL LAW AND PROCEDURE* (1998).

aware of some of the technicalities of such matters as plea and cooperation agreements, and substantial assistance letters. In addition, my years of criminal defense work allowed me a glimpse into the motivations and behavior of defendants faced with serious charges.

Would any of these factors have mattered to the lawyers had they known? It is difficult to imagine that they would be totally irrelevant to their decision whether to exercise a challenge, even if ultimately they let me sit. Honestly, *I* would have bumped *me* fearing that all my knowledge about the law, the system, and its participants would cause me to infer, speculate, and hypothesize in order to fill in blanks that other jurors might not even notice or consider significant. I would not have trusted my assurances of impartiality.

Even more than lawyers, law professors are considered experts in their fields and often testify as such, something I have done twice. This expertise has no place in the jury room, particularly if it competes with the judge's authority. But how can knowledge realistically be parked outside the courtroom? Will other jurors, at least unconsciously, value and respect a law professor's factual arguments more highly than the opinions of other jurors? Is a law professor's logic more reliable after all that education and study? Can a law professor exclude knowledge of the law that might conflict with the jury instructions? After all, incorrect jury instructions are the very stuff of appellate decisions. Law professors know very well that they are often imperfect and the cause of reversal.

In 2000, the New York Court of Appeals reversed a manslaughter conviction because a juror who was a registered nurse expressed an opinion about the toxicology evidence in the case based on her expertise. She became, in effect, an unsworn expert witness.<sup>26</sup> At lunch at school one day after this decision, several of us pondered how our expertise about the law might create similar problems on a jury. "What if I *knew* the judge had charged the jury incorrectly?" asked one of my colleagues. Should we explain a legal concept or a ruling when ordinarily

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<sup>26</sup> *New York v. Maragh*, 94 N.Y.2d 569, 575-76, 729 N.E.2d 701, 708 N.Y.S.2d 44 (2000). Not all courts agree with this analysis. *See, e.g., State v. Mann*, 39 P.3d 124 (N.M. 2002) (holding that a juror's special knowledge of statistical analysis was not "extraneous information" requiring reversal).

the remedy for any confusion would be a supplemental instruction. We resolved that it would be juror misconduct to substitute our understanding of the law for the judge's. Instead of being an unsworn witness, such an interfering juror would be an unconstitutional judge.<sup>27</sup> We also concurred, however, that we could not ignore the problem. We brainstormed, albeit inconclusively, about possible ways to intervene without disrupting the natural deliberation process by imposing our purported expertise which might either cause reversible error or get us into trouble, or both. The situation is fraught with risk to the integrity of the system however it is handled.

After reflecting about the peculiar decision to retain me on the jury, I draw some lessons. First, the entire voir dire process is not very calculated. It is still highly intuitive, superficial, and time pressured, so that it is probably a mistake to attribute too much deliberation and logic to the process of jury selection. Also, impartiality can take different forms. Although I have more information and opinions about the criminal law and its processes, they probably are more balanced as a result of my history than the layperson whose information and biases are drawn from the media or limited personal experience. Unlike many jurors with no preconceived notions, I had plenty, but they concerned both sides and all aspects of the case.

#### V. DO RACE, ETHNICITY, AND SEX ACTUALLY MATTER IN THE JURY ROOM?

Distracted by the novelty of my own unexpected jury service, I did not really pay attention to the overall jury composition until later in the trial. A lot has been asserted, either explicitly or implicitly, in the explosion of cases about the misuse of race (and now nationality and gender, and perhaps someday sexual orientation, religion, or age) in the

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<sup>27</sup> On one occasion, a Manhattan judge vacated a verdict after a lawyer-juror gave his fellow jurors an incorrect legal definition in a civil trial. David Rhode, *supra* note 2, at 6.



exercise of peremptory challenges.<sup>28</sup> Not only do discriminatory peremptories constitute a denial of equal protection, but also diversity of viewpoint is believed to advance more open, democratic, impartial deliberation.<sup>29</sup>

The Eastern District of New York comprises a geographically large, heterogeneous area including Brooklyn, Queens, Staten Island, and the Long Island counties, Nassau and Suffolk. While the first two counties are economically, racially, and ethnically diverse, densely populated urban areas, the latter three are suburban, more racially and socio-economically homogeneous. Juries for both courthouses in the District (one in Brooklyn, the other on central Long Island) are drawn from all five counties.<sup>30</sup> Judging from the crowd in the central jury room, the resulting jury pool mirrors the racial and ethnic composition of the District.<sup>31</sup>

My petit jury reflects this diversity based on appearances alone. The jury of fourteen (twelve regular and two alternate jurors) consists of nine people of color and five whites; eleven are women and three are men. Of the three men, two are African-American, and one is Hispanic. All of the white jurors are women; one is Romanian born, and one is a religious Jew. One alternate is of Indian background. Of the five remaining women, three were born in the Caribbean (Jamaica, Haiti, and Guyana). Although their nationalities quite properly are not revealed during jury selection, two speak with recognizable accents.

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<sup>28</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986), made unconstitutional using peremptory challenges to exclude potential jurors on the basis of race. See also *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Powers v. Ohio*, 499 U.S. 400 (1991).

<sup>29</sup> In the landmark *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court said that only juries "representative" of the community, a "fair cross section," can be truly impartial. Impartiality, therefore, embraces diversity and difference, enhancing the quality of deliberation. The verdict becomes more legitimate if the product of a variety of viewpoints.

<sup>30</sup> In 1995, a proposal to change the jury selection plan in the EDNY was approved permitting jurors from all five counties to be summoned to jury duty at both courthouses. Under the prior system, a pool was summoned from only two counties for the Long Island courthouse in contrast to all five for the Brooklyn courthouse. *In re Jury Plan of E. Dist. of New York*, 61 F.3d 119 (2d Cir. 1995).

<sup>31</sup> Michael Cooper & Elissa Gootman, *Diversity Here and There, Not Everywhere*, N.Y. TIMES, Mar. 25, 2001, at L1; Susan Sachs, *The Census/New York; City Population Tops 8 Million in Census Count for First Time*, Mar. 16, 2001, at A1; Janny Scott, *Boroughs' Rise Driven Largely By Immigration*, N.Y. TIMES, Mar. 16, 2001, at A1.

Professionally, the group is unremarkable. There is a mix of educational background, type of job, and level of responsibility. A few jurors are either retired or homemakers. The jury is fairly evenly split between the urban and suburban counties, although many had to travel considerable distances to the courthouse. None of the jurors are particularly young—no college students or people obviously in their twenties. Our ages range from the late thirties to the sixties. Most have grown children.

Do any of these factors matter in the jury room? We all treat each other respectfully and are friendly throughout the four days. There are no cliques, or lunch groups based on any discernable characteristics, and we all share small talk while waiting. We joke, compare commutes to the courthouse, and chat a little about work and families. Coincidentally, one juror's daughter was in my husband's Evidence class last semester. During deliberations, the polite harmony that had been the norm during the first three days continues. Each person's opinion is heard, although some jurors have less to say than others.<sup>32</sup> On the surface, none of our different perspectives interferes with our ability to cooperate or influences our decisions.

There are two distinct, although not particularly vital, ways in which personal beliefs and background surface during deliberations. First, several of the jurors react somewhat emotionally, although not irrationally, to the responsibility of convicting a presentable, respectful young man whose involvement in this large conspiracy was so minimal. The women and men jurors express these emotions differently. In the women, these sentiments are quite maternal and protective, reluctant to convict such a nice man for such a small misstep, therefore demanding more solid evidence in order to reach a guilty verdict. The reaction of the men is more impatiently practical. A few of them comment how little Fed Ex paid even its longstanding employees and how petty crime seemed rampant in the company as a result, as if the

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<sup>32</sup> Since the jury consisted of nine voluble women and three more reticent men, the dynamics of this jury were inconsistent with findings of some researchers that men tend to dominate deliberation discussions. See, e.g., HASTIE ET AL., *supra* note 3, at 31-32; Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 594-98 (1987).

marijuana smuggling were similar to stealing pens or postage. Rather than sounding wistful or burdened by a grave responsibility, the men are impatient with the scarcity of the evidence and the incredibility of one of the cooperators. They want to express their opinions, articulate their doubts, and finish quickly.<sup>33</sup>

Race, ethnicity, and nationality play a more overt role during deliberations. Since the vast majority of the conspirators were Jamaican, the arguments of a Jamaican woman, the foreperson as it turned out, have a big impact. She imports into the jury room her knowledge of the customs and attitudes of Jamaicans about marijuana to support her argument that it is unlikely that the defendant knew the boxes contained marijuana. For example, she authoritatively tells the jury, and several others nod in recognition of her point, that Jamaicans do not think of or refer to marijuana as "drugs" so it was unlikely that the defendant thought he was carrying marijuana, even if he might have thought there were other kinds of drugs in the boxes. Her knowledge, she explains, was gleaned from interactions with Jamaican teenagers, and, other personal experiences. Her authoritativeness is quite compelling and is bolstered by the other Caribbean women. Two of these women are the most dominant voices during deliberations and, because neither was offensive or domineering, their views are very persuasive. Although neither of these women explicitly appealed to emotion, they seem to have reached a decision based on a previously held world view to which they conform the evidence. Their anecdotal personal experience informs their judgment and other jurors tend to understand, or at least accept, the images they paint.

Given the long list of facts the lawyers and the judge failed to elicit about my background, presumably there were just as many unknowns about the other jurors. Given the federal voir dire system on routine cases such as this, the lawyers' decisions to challenge a juror is based on very limited facts encouraging stereotyping. Some of these hidden

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<sup>33</sup> In Jeffrey T. Frederick's, *THE PSYCHOLOGY OF THE AMERICAN JURY*, *supra* note 3, at 278, the author observes that men tend to make statements that are more task oriented while women make statements that are emotionally supportive, aimed at reducing tension.

influences and values affected their analysis of the evidence and the witnesses.

Today, of course, peremptory challenges are carefully monitored to avoid race or sex discrimination. When I thought about our jury afterwards, reacting to the influence of the two Caribbean women, I first wondered how the lawyers could have left them on the jury. Their accents were so recognizable. Keeping me seemed a very questionable decision, but why didn't the lawyers realize that a Jamaican woman might have, or think she might have, specialized, almost expert, opinions about Jamaican drug trafficking conspiracy?<sup>34</sup> After voicing my incredulity several times, I stopped short, astonished at my own blindness and lack of perspicacity. Wrapped up as I was in post-trial exuberance, I had forgotten that any challenge to these jurors would be illegal, given the paucity of other information available to the lawyers. Absent other neutral explanations that the lawyers could cite—and there were none obvious given the skeletal voir dire—the only grounds for challenging them would have been their race and/or nationality, a constitutional violation.

The paradox of the *Batson* line of cases came to life on my jury.<sup>35</sup> Lawyers cannot exercise challenges based on certain categories, yet these very characteristics inevitably alter the jury dynamics and inform deliberations. Nationality, which in this instance, conflated with race and ethnicity, mattered a great deal, perhaps disproportionately, in shaping our deliberations and reaching a verdict. Was this so terrible? In some fashion, every juror brings into the jury room personal judgments and values that are derived from life experience. Yet, even if what happened in this trial was predictable, peremptories on this basis alone would be improper. Fortunately, our jurors argued rationally and non-dogmatically so their theories were not offensive or preemptive of other viewpoints, but our ambience might have changed over time if our conflict stage had lasted longer.

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<sup>34</sup> Although not a trained expert like the nurse in *Maragh*, 94 N.Y.2d 569, she came close to being an unsworn witness since no one openly questioned her knowledge, its source or its accuracy, and her opinions carried considerable weight.

<sup>35</sup> See authority cited *supra* note 28.

Does judge controlled, highly restricted voir dire create more problems than it solves? In its favor clearly are efficiency and speed. Only a few people with personal commitments, physical impediments or, in one instance, obvious disorientation, were immediately excused. No one was challenged for cause. This method communicates an affirming attitude about jury duty that implies inclusion and a presumption of fitness and impartiality. This has led critics of the system, such as Justice Marshall, to urge the abolition of the peremptory challenge,<sup>36</sup> and others to argue that seating the first twelve jurors seated in the box advances democracy since their selection is truly random.<sup>37</sup>

Extensive voir dire hunts for flaws and exposes biases, a process that can feel insulting and insinuating to the jurors. Often, the resulting jury will be the least objectionable to all parties, a pretty bland lowest common denominator. And even at their most probing, do the lawyers ever really weed out bigotry, prejudice, bias, preconceptions, or partiality, or does the process simply guarantee that some people will feel mysteriously "chosen" or "selected" while others feel excluded? It is difficult, nevertheless, to relinquish the received wisdom that extensive lawyer voir dire produces a more impartial jury.<sup>38</sup> Without inquiry, personal details that might have considerable bearing on deliberations, and might even provide grounds for a challenge for cause, are unrevealed. These

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<sup>36</sup> *Batson*, 476 U.S. at 107 (Marshall, J., concurring).

<sup>37</sup> See, e.g., Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995) (peremptory challenges should be eliminated). In one of my first felony trials, my opponent from the Manhattan District Attorney's Office loudly announced that he had no challenges for any of the jurors because, in his view, any citizen of N.Y. County, not subject to a challenge for cause, was qualified and welcome to serve, leaving me to be the heavy in the jurors' eyes. His gesture felt like insincere grandstanding at the time but maybe the problem was more his arrogant behavior than his claim about the system.

<sup>38</sup> For general discussions espousing open-ended voir dire as the best vehicle to obtain an impartial jury see, e.g., JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 150-51 (1994); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975). A less supportive conclusion is reached in Reid Hastie, *Is Attorney-Conducted Voir Dire An Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 721-26 (1991) (concluding that attorney-conducted voir dire is not effective but finding that jurors answer more candidly to an attorney than a judge). For a discussion of the advantages and disadvantages of lawyer-conducted voir dire see JURY TRIAL INNOVATIONS 53-56 (G. Thomas Munsterman et al. eds., 1997).

attitudes risk diverting or derailing the deliberative process, delegitimizing whatever verdict is reached, and possibly interfering with consensus.

The federal system does not abandon tradition entirely, but its abbreviated, impersonal, narrowly focused questions neither expose real impartiality nor permit the development of neutral grounds for exercising peremptories. In the end, our jury has no crackpots or extremists, but that good fortune was a lucky accident, not the result of a process that worked rationally or effectively.

## VI. DO JURIES UNDERSTAND AND FOLLOW THE LAW?

### A. *Admonitions About the Boundaries of Role*

Jurors learn about the law from the judge. Throughout the case, a trial judge frequently admonishes a jury to perform or refrain from certain conduct prior to its deliberations. The classic directions are to resist: talking about the case during the trial amongst themselves or with anyone else, forming an opinion about the verdict, speculating about what takes place during bench conferences, or drawing inferences about the absence of witnesses, including the defendant. I assume that most jurors take seriously these commands despite the strong temptation to talk about the testimony and the witnesses while impressions are still fresh.

Our jury obeys the judge's directions, although there are several jurors who were itching to talk about their feelings about particular aspects of the case and have to be reminded by others of this warning. Juror emotions surface on the matter of punishment, too. Although the judge had interrogated us about our attitude toward marijuana, reminding us that it was an illicit drug, and certainly, given the enormous amount of marijuana involved, no one considers this conspiracy to be anything other than serious, the matter of punishment affects most of us. We all realize that punishment is the province of the judge, but the testimony had made clear that the defendant faces a mandatory minimum sentence of ten years to life. This had been the unacceptable risk faced by Cain and Little that

had motivated their cooperation agreements. The jurors feel that this is unfair and most do not even try to hide this attitude. This information makes a conviction even more unlikely since no one thinks Lyon, even if guilty, deserves more punishment than either Cain or Little.<sup>39</sup>

Some jurors import personal values and knowledge into the jury room. The Jamaican mother talks about her community, her son's experiences, her own. One of the men also generalizes from obvious familiarity with marijuana, talking about "most people," and "whenever . . ." in a way that more than hints at personal experience. The defense argument that marijuana is usually thought of as a light, leafy substance, not the densely packed bricks that fit inside sixty plus pound cartons, easily persuades many jurors, another sign of familiarity with this drug.

Given the proclivity of eleven of the jurors to acquit from the very outset of deliberations, all of us obviously had been thinking about the case during the week, contrary to the judge's caution to refrain from reaching any conclusions until the end of the evidence and the instructions. If my own situation is at all representative, I felt after the first day of testimony that the prosecution had a weak case and unless some more damaging evidence was produced, I would have trouble convicting. Almost from the beginning, I have enough doubt that is "reasonable," and since I know the burden of proof already, I question whether the government could ever convince me to convict. From the occasional mutterings of a few jurors, I sense that others share my misgivings. While we are not incorrect to hold the government to its burden of proof, I suspect that many of us listened to the testimony skeptical that the burden ever could be satisfied. Our shared predisposition to acquit shapes the environment of the jury room as soon as we begin deliberations. We really do not need to make arguments to convince each other of a particular verdict. Rather, we hasten to give expression to all of the opinions and viewpoints that we had to silence during the days of testimony.

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<sup>39</sup> As it happens, Lyon might have been able to avoid the mandatory minimum sentence under the "safety valve" provisions of the Guidelines, U.S.S.G. § 5C1.2, but none of the jurors, including me, was aware of this possibility.

After a sleepless night prior to our day of deliberations, it is a relief to learn that so many jurors share my views. Yet, I worry that they are too hasty, too anxious to go home. For example, nobody even seems to notice or comment on the disappearance of the possession count.<sup>40</sup> No one plays the standard roles of devil's advocate or hold-out. No one advocates that we should prolong our deliberations for the purpose of airing all possible theories or arguments. Even our one dissenter is incapable of forcing the others to persist since she lacks the stamina and the skill to sustain her position through debate or discussion.

B. *Instructions on the Law*

The judge so decisively narrowed the issue for us that we have no trouble following the law. We only consider one question: Did the defendant know there was marijuana in the boxes? If the judge had not been so concise and clear, or if the law had required only that he know there was some kind of drugs inside, our verdict might have been different. Having a reasonable doubt about his knowledge of the marijuana does not necessarily mean that anyone accepts his gun story. Some believe he may have thought there were drugs inside, but the judge said "marijuana" not just any drug. That instruction confines our deliberations so conclusively that our task is unambiguous and simple.

Frankly, I was, and continue to be, confused by this instruction. I had thought that the federal narcotics conspiracy statute does not require proof of a specific type of drug, just

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<sup>40</sup> The second count was dismissed prior to the jury instructions on venue grounds since the marijuana that constituted the possession had no connection to the EDNY. Both the Fed Ex distribution center where the package had been shipped and the location where Little removed the boxes from Lyon's van were in Manhattan (the Southern District of New York).



any narcotic on the schedule.<sup>41</sup> Indeed, the prosecutor's summation says:

The law says that if the defendant thought there was drugs in the boxes, then he is guilty. He did not have to know that it was marijuana, leaf, ganja, whatever you want to call it. He didn't have to know it was that sort of drug. He had to know it was a drug.

Yet, the entire defense, as supported by the judge's instruction, constrains the jury to knowledge of marijuana only. We never address the possibility that Lyon might have thought the cartons contained another kind of drug since there was no evidence in the case that the conspiracy might have involved other drugs. Indeed, Cain's concern that there might be cocaine in the boxes was quickly squelched by Little, according to both of their testimony. We feel that we do not have to decide what else he might have thought was in the boxes, only whether he believed they contained marijuana.

Given what I thought the law required, I am really perplexed but never consider raising my confusion in light of the judge's unequivocal instruction and how it structures our deliberations. I have the same information from the judge as all of the other jurors. They are not confused so I stay quiet and simply followed the extremely clear instructions like everyone else. This reminds me of our faculty lunch conversation about the difficulty of substituting our understanding of the law for the judge's. I feel constrained not only to follow the instructions, but to keep my concerns to myself. Perhaps I rely on the prestige of the federal court, confident that, unlike other courts where the quality of practice is lower, the judges and

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<sup>41</sup> The law appears to be well settled that a defendant charged with a violation of 21 U.S.C. § 841(a) does not have to know the exact nature of the drug possessed. *See, e.g., United States v. Herrero*, 893 F.2d 1512 (7th Cir. 1990); *United States v. Cheung*, 836 F.2d 729, 731 (1st Cir. 1988); *United States v. Gonzalez*, 700 F.2d 196, 201 (5th Cir. 1983); *United States v. Lewis*, 676 F.2d 508, 512 (11th Cir. 1982); *United States v. Morales*, 577 F.2d 769, 776 (2d Cir. 1978). Federal Jury Instruction 56-6 states in pertinent part:

Although the government must prove that the defendant knew that he possessed narcotics, the government does not have to prove that the defendant knew the exact nature of the drugs in his possession. It is enough that the government proves that the defendant knew that he possessed some kind of narcotic.

3 L. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS (2001).

lawyers here do not make such fundamental mistakes. I am reticent to interject my interpretation, insecure about my knowledge of the law without double checking, but quick legal research obviously is out of the question.<sup>42</sup>

Reading the transcript reveals a surprise. Following procedure, the lawyers had submitted suggested instructions to the judge, then, prior to summations, the judge reviewed his proposed jury charge with the lawyers outside the hearing of the jury.<sup>43</sup> He listened to their requests for specific changes of terms, phrases, and concepts. Although the language of the judge's ultimate instruction was unambiguous, and was taken at face value by the jury, this language may not have reflected accurately either the judge's intent or the understanding of the lawyers. When the judge reads from his proposed instruction he says:

[W]ith respect to knowledge in this regard it is the defendant's contention that he did not know that what was in the boxes he agreed to transport in his truck and turn over to somebody else was marijuana. It's his contention he believed that the contents of the boxes was guns and not marijuana. It might be drugs instead of marijuana, but we are talking about marijuana. *If you find that the defendant did not know he had drugs in his possession, did not know what he possessed was, in fact, drugs, you must find him not guilty.* . . . In this regard, I charge you that the defendants knowledge may be established by proof that the defendant was

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<sup>42</sup> I later learn from one of the lawyers that my uncertainty may derive from the confusion spawned by the recent Supreme Court decision, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 490. In narcotics cases, the question is still unresolved whether the amount of drugs involved is an element of the offense that must be pleaded in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *See, e.g., Thomas v. United States*, 204 F.3d 381 (2d Cir. 2000), *cert. granted and remanded*, 531 U.S. 1062 (2001), *vacated en banc*, 2001 U.S. App. LEXIS 26431 (2d Cir. Dec. 12, 2001) (holding that quantity is an element of drug offense that must be pleaded and proved); *see also United States v. Jones*, 235 F.3d 1231 (10th Cir. 2000) (holding that failure to include drug quantity in indictment and to present question to jury violates *Apprendi*); *United States v. Buckland*, 259 F.3d 1157 (9th Cir. 2001) (holding § 841(b) quantity-based sentence enhancements unconstitutional), *petition for reh'g en banc granted*, 2001 U.S. App. LEXIS 20432 (9th Cir., Sept. 14, 2001); *but see United States v. Bjorkman*, 279 F.3d 482 (7th Cir. 2001). The judge gave an "*Apprendi*" charge with respect to quantity and perhaps he was being cautious about whether *Apprendi* also might apply to type of drug, another sentencing factor.

<sup>43</sup> FED. R. CRIM. P. 30.

aware of a high probability that the boxes contained marijuana unless despite this high probability the evidence show that the defendant actually believed that he did not possess drugs. Okay?<sup>44</sup>

Neither of the lawyers objected to this proposed language even though the judge referred to marijuana and drugs almost interchangeably. His final, even more unequivocal formulation, inexorably structured the jury's understanding of its mission, and guided us to our verdict more than any other aspect of the case. Some of the jurors might have been convinced by the circumstantial evidence that Lyon knew there were some kind of drugs in the boxes but for the precise wording of this instruction which led us away from this possibility. This microcosmic example suggests that juries do indeed follow the letter of the law, particularly when it pulls them in a direction it is predisposed to go.

### C. *Do Jurors Speculate Outside the Evidence?*

In his charge, the judge cautioned us that the only evidence to consider was that heard in the courtroom. Of course, we all refer to our own common sense derived from personal experience to assess credibility, accept facts, and draw inferences. There are very few unanswered questions in this case. Two occur to me, but I have no idea how much the other jurors speculate since we do not discuss either. First, this conspiracy involved more people. We know that the kingpin was prosecuted in California because Little says he also cooperated there. We see some pictures of other conspirators but have no idea what happened to any of them. I believe we all tacitly understand that they had all been convicted, but cannot guess whether they had pled guilty or gone to trial. Nevertheless, I, and probably some others, fill in the blanks. Richard Lyon was such a minor participant in the overall scheme, I guess that he is the only person who was unwilling to plead guilty. That assumption leads me, and probably some others, once again to feel sorry for the defendant who seems the least culpable of the lot. I guess that the government pled down the case, but that this defendant was so low on the totem

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<sup>44</sup> (emphasis added).

pole that he had nothing to offer in exchange for favorable treatment. Even without taking the stand to present his version of the events, I conjecture that he declined a tempting guilty plea, thereby implicitly bolstering his claim of innocence given the punishment he faces. For me, this reaffirms the strength of his case, a reaction that is pure speculation, of course.

Richard Lyon did not testify. Although I do not say anything because the judge tells us that he has a right not to put on a defense, I think I know why: He has a criminal record. This is lawyer-think. None of the others jurors even wonder aloud about his silence because the core of his defense is so successfully communicated through the government's witnesses. Because I genuinely feel that prior convictions have no bearing on current charges, I do not find it difficult to ignore my explanation for his silence. Moreover, as a seasoned criminal practitioner, I know that a defendant often risks more than he gains by testifying. His defense has been established effectively through the government's witnesses, so why endanger his case by subjecting himself to cross-examination? He could be asked about "johns" and have no ready, or truthful, explanation. His demeanor might be alienating.

I really jumped to the wrong conclusion. I later learn that a controversial ruling by the judge kept him from taking the stand. The defendant had tried to enter a guilty plea but could not be properly allocuted under Rule 11,<sup>45</sup> leaving the government no choice but to try the case or dismiss (a highly improbable option). Although the admissions in his failed guilty plea allocution are inadmissible on the case-in-chief, the judge held that the statements could be introduced to impeach him. Apparently, his partial admissions had been damaging enough to undermine his defense and to deter him from taking the stand. So my inference, based on my background, was all wrong. Our natural inclination is to refer to our own experience and understanding of behavior to fill in the blanks, but that tendency can yield incorrect assumptions. This is a lesson I often teach clinic and Trial Advocacy students, and my own

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<sup>45</sup> FED. R. CRIM. P. 11(f) requires the court to make inquiry about the factual basis of a defendant's guilt. Here, the defendant would not admit knowledge of the marijuana so the judge refused to accept a guilty plea.

mistaken conclusions make this point vividly. None of the other jurors, ignorant of "real life," even mention his failure to testify or speculate why he did not tell his own story.

D. *Do Jurors Employ the "Story Model" of Decision Making?*

The "story model" of juror decision making is a popular theory advanced by jury psychologists that jurors: (1) impose a narrative story structure to evaluate the evidence; (2) identify verdict category attributes, basically the elements of the legal claim; and then (3) find the verdict that best matches the story they prefer.<sup>46</sup> Others have built on the claims of this model by causally connecting jury psychology and advocacy.<sup>47</sup> By understanding this cognitive process, lawyers can build persuasive stories that juries can adopt.

Although our trial was relatively straightforward, there were still stories to tell. The acquittal is a tribute to the effective narrative presented by the defense—without even putting on any witnesses, or having any affirmative supportive evidence. It is a defense of smoke and mirrors, of compounded inferences, requiring a sympathetic jury to buy into the claim in the first place. Of course, the theory of the defense was very risky—"I knew something illegal was going on, and guessed guns were involved. I may have committed some other crime (attempted possession of weapons), but not the crime charged." By acknowledging his stupidity, greed, and dishonesty, the defense strategy was daring. In essence, the jury had to buy a cynical version of criminal justice that says, "Richard Lyon is a criminal, but just not *this* criminal," so he deserves acquittal. And, we will have to acquit without ever hearing Lyon's story in his own words, which means that the defense will have to extract convincing evidence of his story from the government's case.

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<sup>46</sup> Pennington & Hastie, *supra* note 3; HASTIE ET AL., *supra* note 3, at 22-23.

<sup>47</sup> See, e.g., Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. SCH. L. REV. 55 (1992); Philip N. Meyer, "Desperate for Love III": Rethinking Closing Arguments as Stories, 50 S.C. L. REV. 715 (1999).

This is quite a gamble, conceding from the outset that Richard Lyon is flawed, painting him as a criminal, but just not guilty of *this* crime. The jury has to be very forgiving and understanding about the legal technicality that a person can be convicted of only the crime charged. Since he was not charged with a weapons conspiracy or possession (impossible since no weapons were involved), he could not be guilty of those specific crimes despite his general culpability. This strategy depended on the narrow instructions given by the judge concerning specific knowledge and the jury's acceptance of those restrictions. After all, we all could have reasoned like Juror # 4 who was so loathe to acquit someone who admitted to some kind, but not the right kind, of criminal activity. When I later describe the defense to others, they laugh at how foolish and preposterous it sounds. I guess you had to be there, since it made sense to the jury.

We are given a few tools by the defense from the beginning. The opening sneaks in a lot of argument<sup>48</sup> and manages to plant the seeds of the defense theory effectively.<sup>49</sup> The defense attorney says:

Now, at the end of this case you may very well find that Richard Lyon did something wrong, that Richard Lyon did something he should be ashamed about, that Richard Lyon did something for which he should be fired, but you are not going to find that Richard Lyon knew or believed that there was marijuana in those boxes.

These promises are kept for the most part. Cain, whose testimony is supposed to establish Lyon's knowledge, is impeached so effectively that the jury entirely disregards his testimony. The defense uses both Little and O'Neill to bolster this impeachment. The phone conversation is another part of the story. It is the only opportunity the jury has to hear Lyon's

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<sup>48</sup> An opening statement, often compared to a table of contents or a road map, forecasts the evidence, and is not an argument or statement of personal opinions. See, e.g., THOMAS A. MAUET, TRIAL TECHNIQUES 61-93 (5th ed. 2000). During the defense attorney's opening, the prosecution objected and the judge intervened many times reminding him that he should not argue his case.

<sup>49</sup> Robert K. Bothwell, *Social Cognition in the Courtroom: Juror Information Processing and Story Construction*, in HANDBOOK, *supra* note 3, at 17-3 to 17-8 ("Opening statements that are well-organized overviews of the upcoming trial events may provide jurors with a thematic framework, or *schema*, that will influence their evaluation of the evidence . . .").

own words, to get a glimpse of him as a person. Although inculpatory, his words are also ambiguous in a context in which it would be reasonable to expect more self-incrimination. From O'Neill, the jury hears about the possible connotation of "johns." In retrospect, however, there really is no actual evidence of the defense theory other than these wisps from which the defense cleverly sews together a plausible version of the events.

During deliberations, the jury considers Lyon's story within the strictures of the judge's instruction. We see him as a young man with very bad judgment and questionable morals who made a stupid mistake.<sup>50</sup> We never discuss whether it made sense for him to think the cartons contained guns, but several jurors offer creative alternative contents that make more sense than marijuana such as electronic equipment, computer equipment, appliances, or even counterfeit money plates. Even if these other items might be stolen, we want to find less blameworthy illegal contents than guns, which implicitly demonstrates our discomfort with acquitting someone who believed he was profiting from transporting firearms. We want to find a more forgivable explanation. Eventually, we remember that we do not need to determine what he *did* believe was in the boxes, only whether the government has proven beyond a reasonable doubt that he believed *marijuana* was inside.

The government, however, does not offer a counter-story to the defendant's claim of ignorance, nor do the prosecutors knit together the evidence the jury has heard piecemeal. Ironically, the prosecution witnesses plant the seed of an alternate story by repeatedly and consistently comparing the cartons to packing large enough for computers, the kind of heavy object that actually might be inside a box this size. The government's summation simply asserts and concludes what Lyon must have known, but does not relate a story of its own or provide an argument to allow the story to mesh with the law. The prosecutor relies on characterizations such as the "plain and simple" fact that Lyon broke the law even if he only

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<sup>50</sup> Before we left the jury room, the defense attorney comes in to say thank you. One of the jurors tells him how lucky his client is and urges him to talk to Lyon about his close brush with disaster.

committed one act, or that it would be “somewhat ridiculous” to deny his awareness that others were involved besides Cain, and that the boxes were filled with drugs. The government summation offers analogies and parables but no fact-based accounts based on any recognizable schema.<sup>51</sup> None of these images resonate with the jurors as such rhetoric should.

Because the defense does not dispute his involvement in a scheme to use Fed Ex to transport illegal goods in violation of Fed Ex regulations, we know there was a larger conspiracy taking place. But since we begin—and end—with the question of knowledge, we can basically ignore all of the law enforcement testimony about other deliveries and other conspirators. In addition, the AUSA does not use the summation to tie together this testimony or explain its significance. The calculations of the aggregate weight of all of the deliveries which preceded Lyon’s involvement were confusing and the link to Lyon sufficiently vague that the summation needed to connect the dots more thoroughly.

With the benefit of hindsight, I wonder why the government did not tell a simpler story. If the defendant was charged only with a conspiracy to distribute the marijuana in the boxes on April 10 (a considerable amount that might have yielded an adequate punishment anyway), and if the government had focused more sharply on what Lyon must have known in order to take part on that single day, perhaps the jury could have been convinced differently. The other law enforcement agent’s distracting testimony about other shipments, seizures, and individuals, therefore, could have been eliminated.

To do this, the government could have relied on its stronger witnesses, leading with Little and finishing with O’Neill to describe the core facts, and could have reduced the negative impact of Cain’s testimony by sandwiching him in the middle. Instead of hearing Cain’s equivocations about whether and when he told Lyon about the marijuana, and concentrating

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<sup>51</sup> For example, the AUSA analogizes participating in a conspiracy to being employed by the Department of Justice with its ever changing personnel, including the Attorney General; offers a parable about how her young niece ate a birthday cake but was “man enough” to admit her wrongdoing; and asserts that everyone knows a blue Tiffany’s box contains jewelry even if it is closed. These disjointed images do not connect to a coherent theory.



on Cain's inconsistent statements to the agents, Little would have related how Cain did know what was in the boxes. Lyon was doing exactly what so many others had done before to assist in the conspiracy—with full knowledge of the contents of the boxes. Lyon incredibly was the only person in the conspiracy who claimed ignorance of the cartons' contents, and would have been believably portrayed as an "ostrich" who probably did know what the boxes contained. O'Neill could be the disinterested law enforcement officer who diligently followed up the defense request for investigation but whose findings were inconclusive at best, instead of the somewhat desperate case agent who finally was able to extract an admission from Cain that was damaging to Lyon. This could have been the story of a tragic misstep whose inspiration was greed and easy money (borne out by the tone and contents of the tape) that indeed was "plain and simple" criminal conduct. By presenting us with the big picture, when this defendant was so low on the totem pole as to be underground, the jury did not have the heart to convict, particularly given our knowledge of the sentencing consequences, without substantially more evidence.

In retrospect, the defense did a remarkable job of weaving a story from flimsy threads pulled from the much more tightly woven prosecution case. It might well be that the defense amounted to no more than the "Emperor's new clothes," illusory and insubstantial. Yet, such a story told to a more than receptive audience, a jury heading toward acquittal, gave us the arguments we needed to reach our verdict.

## CONCLUSION

A novelty—yes. An oddity—yes. But did a criminal law professor with a criminal practice career serving on a criminal jury influence or alter the dynamic or the outcome of the case? Did my presence make a difference?<sup>52</sup> No—neither the process nor the verdict was distorted or even affected.

During the trial, I worry about how the jurors perceive me. I want to be neither an authority figure nor a leader. I do

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<sup>52</sup> David Rhode, *Do Diplomas Make Jurors Any Better? Maybe Not*, N.Y. TIMES, Apr. 10, 2000, at B1.

not want to have a disproportionate influence. From time to time while we wait, jurors ask me questions about the legal system such as what would happen if we do not reach a verdict or how the grand jury operates. When deliberations begin, I sit quietly until many of the jurors express their views.

My concerns are groundless, and perhaps self-important, exaggerating the significance of my legal training and experience. The jurors never look to me for information, clarification, or leadership. I only once self-consciously engage my co-jurors from a perspective that draws on my legal training and awareness when I redirect the discussion to take into account an idea that I thought the jury was ignoring and which I thought they should consider in order to reach a just, legitimate decision. I draw their attention to the "ostrich charge" to make sure we evaluate his claim of ignorance from all directions. Until then, the jury was overlooking and ignoring this alternate option of inferring knowledge. This was the only aspect of the deliberations in which I set the course of the discussion, and my colleagues are not in the least enthusiastic about considering this possibility. They basically ignore my comments. Perhaps if I had intervened or been more assertive the interactions might have been more imbalanced, but there was so much consensus that no redirection from anyone was necessary. There were so many articulate, assertive individuals who expressed their ideas logically and sensibly that my professional training was superfluous.

In retrospect, what was the big deal? Since everyone I know was astonished at my news of being on a jury, I just want them to know we law professors are just regular folks who take the job seriously. Unlike many citizens, for us, jury service is not a burden, but a precious gift, a wish come true.

