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MUSINGS ON THE JURY SYSTEM: REVERENCE AND RESPECT*

Hon. Andre M. Davis[†]

I would like to provide a few observations about the excellent preceding presentations.¹ First, on the question of impartiality, I think that Justice Marshall got it right. In his concurring opinion in *Batson v. Kentucky*,² he stated that peremptory challenges need to be scuttled, and I am confident that in due course they will be. But the truth of the matter is that before we get to that point in our development, it is fairly clear that judges—state and federal—will have to rethink their approach to voir dire, or as they say west of the Mississippi, “voir dyre.”

Clearly, in a regime without peremptories, the voir dire process has to be far more searching, probing, and thorough than is typical today. I have a very recent example of this problem. A very controversial murder trial took place recently in Baltimore state court.³ I teach criminal procedure in

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¹ This essay is a revised version of remarks presented at a plenary panel on “The Law’s Quest for Impartiality: Juror Selection and Juror Nullification” at *The Jury in the Twenty-First Century: An Interdisciplinary Conference* held at Brooklyn Law School on Oct. 6, 2000.

My experience with juries also includes being a juror on two criminal trials in state court.

² 476 U.S. 79, 103 (1986).

³ For more information on this unpublished case see Maureen O’Hagan, *An Untraditional Death: Trial Bares Promise, Pitfalls of Arranged Marriage*, WASH. POST, Aug. 29, 2000 at B1; Maureen O’Hagan, *Md. Murder Retrail Opens With Theatrics*, WASH. POST, Sept. 6, 2000, at B2; Maureen O’Hagan, *A Night of Blood and Death Recalled for Md. Jury*, WASH. POST, Sept. 12, 2000, at B4; Maureen O’Hagan, *Canadian Dentist Guilty*, WASH. POST, Sept. 19, 2000, at B1; Maureen O’Hagan, *Dentist Gets 3 Years in Husband’s Slaying*, WASH. POST, Oct. 25, 2000, at B3.

the evening as an adjunct professor at the law school in Baltimore, and one of my students told me that he had been selected to serve on the jury in a retrial of this controversial murder case. I was aghast, and I asked him how on earth he managed as a second year law student to get on this jury. No doubt he did not list on his jury questionnaire the fact that he was a student because he is a full time employee and only goes to law school at night.

He told me, and I knew it to be true, that the *voir dire* did not include what for most of us, certainly in the federal system, is a standard question: Are you or are any of your close family members trained or employed as a lawyer or in the legal field? That is a question that almost any judge would ask during *voir dire* in a criminal case, and most civil cases, as a matter of course. But today, my former colleagues on the circuit court for Baltimore City⁴ likely feel tremendous pressures to move enormous numbers of cases with limited resources, and, as a result, they take shortcuts that raise questions about the fairness of the process and the impartiality of the panel that is put in place. I think the day is coming when peremptories will be a legal historical fact rather than a current fact, but I think we are a good ways away from that now.

Second, on the question of nullification, I think that it is a fascinating topic. I have done a little bit of research myself, and my recollection is that only New Hampshire actually recognizes the right of a litigant to a nullification instruction from the judge.⁵ Maryland, as it turns out, is very often misidentified as a nullification state. This arises from the presence in Maryland's state Constitution of language

⁴ I served on the Baltimore City Circuit Court from December 1990 through August 1995.

⁵ See *New Hampshire v. Bonacorsi*, 648 A.2d 469, 471 (N.H. 1994) (“[I]t is within the sound discretion of the trial court to determine if the facts of a particular case warrant a jury nullification instruction when it has been requested by a party.”); see also *New Hampshire v. Preston*, 442 A.2d 992, 996 (N.H. 1982) (holding that the trial judge did not err when charging the jury that they could act on their “conscientious feeling about what is a fair result in this case” because “[j]ury nullification is an historical prerogative of the jury.” (quoting *New Hampshire v. Weitzman*, 427 A.2d 3, 7 (N.H. 1981) (citing *United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972))).

referring to juries as the judges of the law and of the facts.⁶ Indeed, the Maryland Court of Appeals⁷ effectively eliminated that provision from its state Constitution some years ago.⁸

I confess unabashedly to have absolute reverence for juries. After ten years of jury trials as a state and now federal judge, and after many years before that of trying jury cases, I still get choked up when I turn to the jury in criminal and civil cases and ask the foreperson to deliver the verdict. I get choked up most of all in those cases brought by state prisoners under 42 U.S.C. § 1983⁹ for Eighth Amendment violations. Few such cases actually survive summary judgment, but when they do, I always try them. Furthermore, I will not send them to a magistrate judge because I absolutely feel that such cases are what our country is all about: the voice of the community speaking to the least powerful among us after a process that is imbued with, in my judgment, a reverence. Certainly, as long as I am a judge, as long as I am a member of the Bar, and as long as those of us who care deeply about our system are in a position to do anything about it, I will work in appropriate ways to resist efforts to take away from juries the decision making in civil and criminal cases.

Finally, what sometimes gets lost in our system of justice is what to me is the profound truth: that the judge in our system is actually the servant of the juror. Currently, there are many criticisms of our system, and in particular, of jurors coming from certain quarters. Additionally, some people view the gatekeeper role of the judge as illegitimate, as infringing on jury prerogatives.

⁶ MD. CONST. Declaration of Rights art. XXIII (“In the trial of all criminal cases, the Jury shall be the Judges of Law as well as of facts, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.”). Georgia and Indiana are the only other states with similar rules. GA. CONST. art. I, § 1, para. XI (“[T]he jury shall be the judges of the law and the facts.”); IND. CONST. art. I, § 19 (“In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”).

⁷ Similar to New York’s highest court, Maryland’s highest Court is called the Court of Appeals.

⁸ See *King v. Maryland*, 414 A.2d 909, 912-13 (1980) (holding that a juror who disapproved of a law could not automatically be excluded, but that if a juror’s disapproval of a law would affect her deliberations or verdict, she could be struck for cause).

⁹ 42 U.S.C. § 1983 (2000).

As an example of these issues, I direct your attention to the fascinating case of *Logerquist v. McVey*¹⁰ that was recently decided in Arizona. In that case, the Arizona Supreme Court, when confronted with “repressed memory syndrome” evidence, held that neither *Frye v. United States*¹¹ nor *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹² would apply to the assessment of the admissibility of such evidence.¹³ The court held that if the witness who wished to offer such expert evidence had the appropriate credentials¹⁴ then Arizona would leave it up to the jury to decide what weight, if any, to give such testimony.¹⁵

I would not go that far. The judge, as the servant of the jury, has a role to play in serving a screening function, and certainly in the area of scientific evidence there is a legitimate role for the judicial officer to make the jury’s job “easier,” more manageable, and more rational.

Ultimately, jurors work hard to achieve the correct result for the correct reason. In doing so, it has been my experience that they take their lead from the judge in many different ways. The judge sets the tone in the courtroom. The judge, notwithstanding the justifiable criticism about jury instructions,¹⁶ can work hard to make jury instructions more understandable and functional to juries. In fact, judges have an obligation to do that.

But as a judge, I would not want to work in a system that lacked appellate courts, and I would not want to work in a system where jury nullification was not available. I do not think jury nullification is a right. Case law in the federal system certainly makes it clear that there is no right to jury

¹⁰ 1 P.3d 113 (Ariz. 2000).

¹¹ 293 F. 1013 (D.C. Cir. 1923).

¹² 509 U.S. 579 (1993).

¹³ *Logerquist*, 1 P.3d at 131.

¹⁴ The witness, who was educated at Harvard University, certainly did have appropriate credentials.

¹⁵ *Logerquist*, 1 P.3d at 131.

¹⁶ See generally Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; And Mitigation is No Excuse*, 66 BROOK. L. REV. 1011 (2001); Irwin A. Horowitz et al., *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1209 (2001); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1083 (2001); Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1123 (2001).

nullification.¹⁷ But a properly handled trial will allow sufficient flexibility so that the long nullification tradition, so important to our democracy, can be given sway in an appropriate case.

I will close with a quotation from a D.C. Circuit unpublished opinion that I thought was rather remarkable, although it is one of those back-handed ways in which we in the judiciary recognize the legitimacy of jury nullification. This opinion involved a claim in a criminal appeal that the defense lawyer had performed inadequately and perhaps violated the standard of *Strickland v. Washington*¹⁸ for adequate representation of counsel under the Sixth Amendment. A panel comprised of Judges Doug Ginsberg, Patricia Wald, and Dave Tatel on the D.C. Circuit wrote: "It may be possible for a defense lawyer to satisfy the *Strickland* standard while using a defense with little or no basis in law if this constitutes a reasonable strategy of seeking jury nullification."

That statement was a remarkable, almost unconscious recognition of the legitimate role in our legal scheme for jury nullification that, of course, comes with any number of different meanings.¹⁹ Although I do not want too much of it, I am happy nullification exists.

¹⁷ See *United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972) (describing the history of jury nullification in the United States and holding that even though nullification exists, nullification instructions to juries would run the risk of "degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny").

¹⁸ 466 U.S. 668, 695-97 (1984).

¹⁹ See generally Irwin A. Horowitz et al., *supra* note 16.

