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PERSUASION, RULES OF EVIDENCE AND THE PROCESS OF TRIAL

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The Rules of Evidence reflect society's preference that conduct be judged by reason and morality. They are standards that strongly presume the operation of logic in conduct and judgment, or at least that conduct is not governed by blatant illogic. They are safeguards that seek to develop or sustain fairness in judgment, or at least they intend that common moral sensibilities not be violated. Rules of Evidence are mostly a heritage of common law and reflect accumulating traditions in common juridical experience. Their intent alone makes them a high water mark of civilization.

We propose to examine the rationale and consider the operation of Rules of Evidence to illuminate their true effects. It may be, as we are are inclined to believe, that they are substantially out of tune with the character of human experience and do little or nothing to assure rationality and fairness in the judgment of conduct.

There is implicit in the promulgation of the Rules a notion or even a system relating to the process of human judgment. The schema is simple. The fact and opinion that are the principal data of judgment must be material and relevant to the kind of decision to be made. For example, an account of speeding behavior may be logically connected to a decision about fault in an automobile accident but an account of the political beliefs of the speeder is ordinarily of no materiality or relevance. Fact and opinion which influence judgment must also influence by logic and not by emotional or other non-logical prejudice. To draw attention to speeding conduct in an accident case is relevant to culpability and the allocation of responsibility. To point to the minority religious beliefs or uncouth eating habits of the party being judged is not.

The schema is made complete with the implied belief that if illogic and prejudice relating to the data for decision are barred by rule, the process of judgment will then somehow be reasonable and fair. An orderly presentation (Rules of Procedure) in sequence provides data, rebuttal and summation under the safeguard of rules and reminders

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against the operation of illogic and prejudice. Since the schema is fair and orderly on its face it follows that judgments deriving from it must reflect the prevailing principles of reason and morality.

Our knowledge of the processes of human conduct has advanced considerably beyond the confines of Aristotelian logic and Thomistic morality. In fact, the schema for behavior and judgment, on which the Rules of Evidence are based, is naive by any current measure of knowledge of behavior. It is not that particular rules of evidence alone are or may be inconsistent with a better understanding of principles of human behavior. It is that the entire psychological system, thought to govern the operation and effect of Rules of Evidence in human decision and judgment, is out of step with reality.

The keystone to the process of judgment is persuasion. That is to say, we begin not with mechanical rules to govern the operation of judgment but with an understanding of the processes by which judgments are made.[1] Judgments are the product of *persuasion.*

Persuasion, we may say, is the massing and processing of experience in relation to particular matters. An individual confronting a situation or matter which he is to judge is no *tabula rasa.* He already has, knowingly or not, certain dispositions, capacities, attitudes and biases that define and limit the character of his judgment and his judging capabilities. Beyond this he may be persuaded by the immediate means used to influence his thought and feelings. He will also be influenced by the issues, events and circumstances around which his judgment is to be formed. In formulary terms, it is not procedural form plus evidence plus judgment which equals decision. Judgmental decision is more correctly a product of the adjudicator's dispositions and capabilities, the means of persuasion and the focal issues, and certain events and circumstances.

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[1] Problem solving, thinking and judgmental processes and persuasion are the subject of concentrated study in scientific psychology. Perhaps the best reference identifying the steps in thinking and judgment is still J. DEWEY, HOW WE THINK (1910). *Compare* M. WERTHEIMER, PRODUCTIVE THINKING (1959) *and* J. BRUNER, J. GOODNOW & G. AUSTIN, A STUDY OF THINKING (1956) *with* L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). The distinguished psychologist Piaget traces reasoning and growth in mental capacity from infancy to later growth in J. PIAGET, JUDGMENT AND REASONING IN THE CHILD (1928). Notable empirical investigations of the process of persuasion can be found in C. HOVLAND, I. JANIS & H. KELLEY, COMMUNICATION AND PERSUASION (1953), I. JANIS, PERSONALITY AND PERSUASIBILITY (1959) and H. ABELSON, PERSUASION (1959). The important influence of Freudian thinking and psychodynamic explanation in matters of persuasion are partly reflected in I. JANIS, PERSONALITY AND PERSUASIBILITY (1959).

I. The Adjudicator's Disposition and Capabilities

Persuasion, for the individual, is something that has already happened, is happening and may yet happen to him. Let us explain. In the process of growth and experience a person acquires certain mental and emotional sets. Some of these sets may be relatively amenable to change. Personal capacities may be exercised, experience had and the correct means of influence used so that the individual can modify his set or can think and act notwithstanding its presence. Other mental and emotional sets may be more intractable; they may represent unconscious needs and dispositions of the individual and direct his behavior almost without exception to his subsequent experience. The mental and emotional sets of the individual tend to define future ways of experiencing and the kinds and limits of judgment of which the individual is capable.

In order to elucidate we shall give examples of a mental limit, an emotional block and a social bias, all of which may be construed as forms of "set" that are relatively intractable and therefore narrow the scope of a person's judgment and judgmental capacity. We shall also cite mental and emotional sets that are modifiable and indicate how they may be modified.

A. Fixed Mental Limits, Emotional Blocks and Social Biases

Homer Sapiens is a person of average mental abilities. His grasp of ideas in verbal form had always been better than his grasp of ideas in mathematical form. In fact, he early took a dislike to things expressed in numbers because of his disaffection for his third grade arithmetic teacher. Her relentless manner and pedagogical approach resulted in an emotional block and mental limit notwithstanding the fact that Homer was experiencing difficulty and confusion. Homer unconsciously developed an "I don't understand" attitude without even trying to understand. Moreover, his "set" was to block out any matter presented to him in the form of tables, formulas, graphs, statistics or other numerical forms. These offered him no substance that he could or would absorb. It was just "too hard" and became irrelevant to him. He also tended to transfer some of his frustrated feeling to the parties who would confront him with these forms of numerical challenge. He experienced some hostility and felt some negative bias toward those who insisted that he understand by presenting an issue to him in numerical terms.

Clearly, Homer Sapiens exhibits a mental limit and an emotional block that is excessive even for persons who generally experience difficulties with numbers. Nonetheless, his and their experience reflect varying degrees of mental limit when faced with certain kinds of problems and judgments or, to put the matter in a juridical context, when faced with certain kinds of evidence or certain ways of presenting evidence.

Homer Sapiens, perhaps because of the inevitability that he would face some numbers during his life, did develop some shorthand mental processes to deal with numerical problems which he could not entirely avoid. He would endeavour to "reduce" the problem and yet arrive at a solution or judgment by selecting only one set of readings from the different dimensions of a problem that would be given. He would then employ simple arithmetic judgments and arrive at some approximation of an outcome or solution which he would then accept as an answer or evidence. Of course this was a private mental matter so that others might not observe his loose and erroneous approach to the numerical problem. This would especially be true if he did not have to relate his particular mode of reasoning or his specific thoughts and judgments in arriving at his solution to the problem. He could then appear as having exercised thoughtful judgment.

Psyche Angst is a rather sensitive person. Her behavior and feelings are not remarkable and do not distinguish her from other people. They belie the fact that Psyche has many substantial fears and unconscious emotional dispositions that "fix" or "set" how she is able to perceive and respond to different experiences in life. Psyche grew up in a "strict" home. Any disposition to rebel or disobey was treated with severity. Psyche learned to conform and to approve of order and discipline. Additionally, she disliked those whose behavior exhibited poor emotional control or some other form of unorthodoxy. Psyche experienced, entirely at an unconscious level, feelings that she would regard as immoral and shameful. She was unconsciously fearful that these might be revealed in her behavior. For some consciously unaccountable reason, she tended to be very critical and disapproved of matters that appeared to be unclean or disorderly. She also showed a strong negative bias toward any behavior that might suggest or reveal any impropriety or lack of moral character.

Psyche grew up with these feelings and attitudes. They were reflected in her cautious, sensitive and proper behavior and were as much a part of her as the shape of her nose and the color of her skin.

Psyche's emotional blocks could be revealed in her strong attitudes and biases about certain matters. However, they could go unnoticed if there were no cue that she could not stand disorder or that the mere suggestion of behavioral impropriety would arouse hostility and a negative bias toward the behavior source.

Psyche had an acute dislike of people who stuttered and of those who used poor grammar. For her this was symbolic of a lack of behavior control. She was also quick to think the worst of those accused of immoral or improper behavior but maintained that she was a fair-minded person. Psyche almost instinctively disliked people who, to her, appeared unkempt. Nor did she like "loud" people. She was more infuriated and terrified than she realized by people who expressed opinions or did things that seemed to be contrary to her concept of "fair play", "normal behavior" or "proper social conduct". Psyche experienced many of her attitudes and biases as tensions. Although not outspoken about these attitudes and biases, she might feel upset or demonstrate her sensitivity over them. To others she appeared to be a sensitive, cautious and retiring person—hardly one who might be emotionally blocked or strongly biased and prejudiced.

Psyche, like Homer Sapiens, had shown more than her share of emotional blockage and the consequent unconscious bias and prejudice that can occur in "normal" human beings. The matter is one of degree. The nature of the emotional blocks and the resultant emotional "sets" and biases may of course vary. In a juridical context this means that prejudgment occurs and the judging person may be "persuaded" about certain matters even before the immediate evidence is presented to him. Moreover, the prejudgment may be about something of limited relevance, such as the way a defendant speaks or wears his clothes. Despite these factors, prejudgment may go far toward determining whether the defendant is to be found guilty or responsible in regard to particular litigated behavior that is rationally unrelated to his clothes and speech.

Psyche Angst could be consciously persuaded to be fair in her judgments of persons or situations and to lay aside her biases. Her honorable intentions may be above question, but unconscious biases and emotional "sets" create a kind of "blindness", lack of perceptual skill or misperception that cannot help but influence, and even direct, judgment.

Babbitt Jones grew up in a community where Blacks, Jews, Russians and Arabs were scant minorities or scarcely known. Babbitt absorbed and reflected the ritualism, orthodoxy and faint bias that char-

acterized religion, social practices, politics and apparent business practices in his community. There was a scent of displeasure and rejection in all that seemed alien to this social system. Babbitt was subtly taught and learned to regard Blacks as disreputable and incorrigible, Jews as devious and mercenary, Russians as stubborn and revolutionary, and Arabs as wild-eyed and insane. Since Babbitt enjoyed the forms and practices in his social life, and felt very much a part of it, he did not wish to see it disrupted. He almost instinctively felt a bias against an alien presence and was quick to ascribe to aliens any negative characteristics or judgments that might be suggested. In fact, aliens were unconsciously experienced as a threat and Babbitt had more destructive feelings toward such "outsiders" than he may have recognized.

As we have mentioned, Babbitt Jones had little or no real exposure to the minority groups he disliked. One experience in childhood centered in his mind. A transient Black man was seen talking to white girls and Babbitt later heard his parents speak of what had occurred. The Black man was accused of accosting the white girls with an immoral intent. He was given the choice of being prosecuted on some charge of sexual transgression or leaving town. He left town. Babbitt recalled the vehemence of his parents' feelings about the incident. He also had recurrent dreams of big Black men waiting in hiding to assault little boys such as Babbitt, particularly if the little boys were bad. This imagery and association never quite left Babbitt and he has disliked aliens and especially Blacks all his life.

Babbitt Jones was not an unkind man. He held a strong belief in the system of law and justice in his country. Without flinching, however, he was not above "bending" a legal result where Blacks and other aliens might be involved. To put the matter differently, in any given juridical matter involving alien persons he was at least partly persuaded of their culpability or guilt even before the matter was heard. This was a social bias that he shared with, and that may have been supported by, his community.

Social biases reflected by the individual and enjoying community aderence may be construed in such a way that they appear not to be biases at all. The individual is absolved of any guilt or impropriety in his attitude if he can adapt a community norm stating, for instance, that Blacks are "different" and should be judged by different standards. Babbitt Jones could, with just a bit of mental legerdemain, claim if pressed that he truly had no bias against Blacks or aliens.

It is only that there may be an unstated assumption that foreigners or, more correctly, intruders can properly be judged quite critically. This may be a "correct", culturally shared emotional "set".

B. Modifiable "Prior Persuasion"

The degree of "prior persuasion" experienced by an individual may not be so immense or so intractable that it is practically beyond further influence. The prior persuasion may be a function of some limited or distorted information and knowledge. It may be modified where information can be correctly perceived, substantially understood and, preferably, rationally interpreted. The intensity of emotional commitment to particular social values also bears on the possibility that seemingly fixed attitudes may be further persuaded. A lesser or uncertain commitment may be subject to rational and emotive influences that may move a person away from a fixed and seemingly intransigent position.

Again, an illustration may be helpful. Carl Schmidt grew up in an authoritarian family structure where strict obedience was required of children. When transgressions occurred it was commonplace that the offender be severely punished physically. Physical punishment of children was not unusual. Carl, experiencing these patterns of authority behavior as normal and conventional, unthinkingly had come to accept and believe that there was no offense in an adult's administration of severe physical punishment to a child. His "prior persuasion" took the form of acceptance and approval of physical beatings as a means of punishment if asked about or exposed to the problem.

At a later point in life Carl Schmidt was asked to judge a situation in which it was claimed that the severe physical punishment of a child by an adult constituted cruelty and that some sanction or remedy be invoked. His emotional leanings reflected childhood experience and his sense of values argued that there was no proper claim. However, in the course of decision he was exposed to the presentation of a psychological expert who offered meticulous evidence and opinion to show that severe physical punishment was severely damaging to the child's personality. He also heard the account by the victim, revealing a feeling of torture and upset, that Schmidt had not felt or recognized in his early experience. Carl Schmidt's emotional leanings and value judgments were not so strong that he could not be influenced by persuasive observation and information. His disposition on matters of adults punishing children notwithstanding, he was able to render a decision that departed from his prior persuasion. Parenthetically, it

may be noted that this might not have been the case if his own experience had involved uncertain repression of angry feelings over physical beatings. His uncertainty and need to resolve his psychic tensions might have led him to take a strong restrictive attitude approving physical punishment in order unconsciously to reinforce control over his own feelings. The modification of a prior persuasion also might not have occurred if he had not been exposed to more thorough information persuasively presented or to emotional reactions and experiences that offered a meaningful contrast to his own.

C. The Basis of Judgment: Internal Disposition v. External Evidence

The thrust of "prior persuasion" is that the key to convincing and conviction may lie in the judge's person and his experience more than it lies in the evidence around him. If this is so, then evidence aimed at rational persuasion, or on appeal to emotions and values that are alien or opposed, has no real value or influence for the judging individual. We can put this observation in the form of a proposition. The best assurance of fair consideration and thoughtful decision in a justiciable matter is the personal qualification and self-knowledge of the judge. He must be able to identify and eliminate the influence of "prior persuasion" in his judging. Awareness and control of mental and emotional processes assures a freer flow of information and accessibility to a variety of influences and thus a more undistorted judging process. We should look to the careful selection and preparation of adjudicators for effective judging more than to the influence and implied infallibility of mechanical rules of evidence that seek to control the judging process externally. Prospective adjudicators might best be schooled in the mental and emotional processes that relate to judging. This may be a better and more pertinent preparation than instruction in rationally-rigged, emotionally unconscious methods of procedure and rules for discriminating evidence.

There is a feeble equivalent to the "freedom from undue influence" kind of judging. That is to allow the representation of bias and prejudice into the decision-making process and assume that individual biases or prejudices balance or cancel each other out. This is a premise, stated or unstated, behind the "cross section of the community" idea in jury selection and decision (noting that juries are supposedly restricted by mechanical rules to decision only on the facts). There is no assurance that biases will either be balanced or cancelled. They

may be stacked or, put differently, the stronger or more persuasive bias may dominate. Some biases in the range of human experience may not be represented at all. Even if biases could balance or cancel each other, the decision rests only on an emotional interplay and there is usually insufficient indication that intelligence and careful reflection or thought have played their role in the decision. There is a truer cross-sectional representation of mental and emotional dispositions, and resulting consideration of opinion, in one individual who can sense and understand many reasons or feelings than there is in three, six or twelve individuals who provide untamed biases and unevaluated intelligence.

II. The Means of Persuasion

Reason, in the trial process, is officially the means of persuasion. That is, presentation according to a logical order and disputation based on syllogistic reasoning are the recognized means for establishing cause and effect and determining consequences in a justiciable matter. Judgment of events and the choice of outcome are also directed by an appeal to certain preferred social values. In fact, some of these preferred values may be built into presumptions and procedural and substantive rules that are operative in the trial process. We shall devise a case to illustrate the trial persuasion process in its theoretical and formal appearance.

A. The Trial as a Formal and Rational Process

Leroy Soul stands trial charged with incitement to riot, resisting arrest and aggravated assault. It appears that Soul, a well-known Black leader, was giving a speech on a busy street corner in his district. Amidst a gathering crowd he harangued against the city government and made what appeared to be inflammatory remarks. These may have incited the audience to take action against oppressors on behalf of Black interests. Two attendant policemen, apparently fearing a riot, asked and then commanded Soul to move on. Soul refused. When the policemen sought to arrest him he became vitriolic and would not allow them to take him bodily from the scene. A short time later some of the crowd that had gathered to hear Leroy Soul were seen ransacking and pilfering from stores in the neighborhood in what seemed to be a systematic destructive venture.

According to the prescribed system of trial order and logic the prosecutor will accuse Soul of violating the law and then endeavour to prove the facts that establish his guilt. He will first present evidence, using

testimony from witnesses and demonstrative evidence to show a direct causal and consequential relationship between Soul's behavior, subsequent events, and the charges of which he is accused. The prosecutor will select witnesses who observed Soul's behavior and the behavior of the crowd. He will introduce witnesses who can testify as to the events that took place between Soul and the policemen. To buttress his case the prosecutor may also use evidence of personal habits, behavior and evidence of Soul's prior conviction for incitement to riot. He may seek to introduce these for the purpose of showing that Soul works according to a plan that is consistent with the intentions and behavior of which he is accused.

In making his legal argument for the conviction of Soul the prosecutor will also endeavour to demonstrate by analogy that the case he is presenting falls under a line of prior cases. In these the accused, under similar fact circumstances and with similar applicable law, have been found guilty of similar charges. He will endeavour to classify the relevant behavior and law in the case. The prosecutor may also include certain preferred social values in his argument. For instance, he may stress to the judge and jury, among other things, the importance of law and order in maintaining civilized conduct, the inviolacy of citizens' rights to their property and the social destructiveness of a criminal disposition.

To insure that logic and fairness govern in the trial process the prosecutor will be required to observe certain rules of evidence. He will not only have to abide by certain constitutional requirements, common law or statutory presumptions and rules that establish the burden of proof, but he must also assign a value as to what constitutes proof and determine the balance of rights, duties and powers between the individual and his government. Some examples may be noted. Cardinal in the Rules of Evidence is the proscription against hearsay. What a witness has heard from others, as distinguished from what he himself has observed, may not in the usual course of trial be offered in testimony. Such evidence is presumed to be unfair and lacking in credibility. A non-expert witness' opinion testimony is also barred by the rule that such an opinion may distort or misappropriate the observable facts. There are rules against cultivating emotional bias or social prejudice against the defendant and there are rules against willful character incrimination. Notable among the rules and presumptions operative in a criminal trial are those that hold the accused is presumed innocent until proven guilty, that the burden of proof falls on the prosecution, and that

there must be proof "beyond a reasonable doubt" to convict. The presumptions are, among other things, an expression of the civility of a society and its social and political preferences. They are also a focal or an additional means to insure an orderly process and to regularize the requirements of logical and sufficient proof during trial.

Defense counsel will seek to refute the prosecution's contentions, again by the ostensible use of logic and the resort to certain value preferences expressed in certain rules and presumptions. He will first claim that the prosecutor's premises relating to the intent and effect of Soul's behavior are inaccurate. He thus seeks to negate the syllogism that certain intention and behavior leading to certain consequences is proscribed; that the defendant engaged in such intention and behavior; and that the defendant is therefore guilty as charged. Defense counsel will seek to challenge the credibility of prosecution witnesses by showing, among other things, confusion, lack of certainty and faulty memory. He will also present his own witnesses and demonstrative evidence to disprove that any causal relationship exists between Soul's conduct and the subsequent riot. He will also seek to prove, in further factual refutation of the prosecution's charges, that Leroy Soul's political and legal rights were violated by the manhandling policemen and that he had justification in resisting them. Defense counsel will invoke analogous cases to show that there is no holding of guilt for behavior and circumstances similar to those in the present case.

The sanctity of a logical and fair trial process is presumed to be protected by rules of evidence such as those previously mentioned. The defendant may be protected against unfair bias or prejudice through evidentiary rules such as those that proscribe the introduction of evidence of personal character or those that compel introduction of confidential communication between an attorney and his client. The political presumption of innocence and the constitutional rule against self-incrimination are illustrations of procedure and regulation that move to guarantee a humane trial process stressing human dignity as a guiding value.

The adjudicators are also bound by rules and procedures that stress fair consideration and logical conclusion. The judge, in his instructions to the jury, will suggest the decision alternatives and the logical arrangement of facts required to arrive at a verdict. His legal holdings must also be implicitly supported by logical connection to existing law, using such processes as influence, deduction, classification and analogy. Evidence of bias, willfulness or incompetence in forming logi-

cal and fair decisions may serve to disqualify adjudicators and may lead to reversal of a judgment.

The design of trials should afford fair and just results. That is, such might be the outcome if human beings do indeed relate to a system according to the processes of formal logic. Common observation of trials affords the conclusion that persuasion is not simply a matter of logic applied to facts and rules and further guided by certain value emphasis. Persuasion is the art of influence, not the science of deduction. Therefore, as it functions in trial it is composed of 1) appeals to various kinds of emotion, 2) logical harnessing of selective or partial facts and rules to certain conclusions, 3) value emphasis to remind of duty, preference or responsibility, and 4) dramatic technique to heighten attention with regard to certain matters. The persuader will seek to use any or all of these means to achieve not so much a fair or logical result as a favorable one.

A practiced lawyer knows how to use a familiar system of rules, such as trial procedures, rules of evidence, legal presumptions and substantive law as variables rather than constants. In other words, he can shade, stress or even misuse these to fit the scheme of persuasion he adopts. He can play the entire situation—the issues, the rules and the parties to be persuaded—for the best effect and a partisan result. Let us observe what happens to the rules of evidence when they are utilized in the strategies of trial persuasion.

B. The Strategies of Trial Persuasion

In the case of Leroy Soul the prosecutor will seek to create or exploit feelings of dislike toward Soul. If he can generate this disposition or bias he can more easily "sell" the logic of guilt to the adjudicators. He gives them the means for justifying a guilty verdict by offering a choice of facts and law sufficient to uphold the decision. He can buttress his case and intensify the disposition to a finding against Soul by appealing to commonly held values. He can focus on values which uphold order, reject "badness" and recognize the sanctity of loyalty to a traditional political system. Having set the strategy of persuasion, with emotional appeal as the primary base, the prosecutor then considers techniques he can use to dramatize the "points" that will establish the bias and set of rationalizations that he seeks to cultivate. That is, he "plays" the system for best effect.

The prosecutor will seek to dramatize Leroy Soul's "badness" and his more ugly or threatening qualities. He may not be able to do this by

presenting direct character evidence since he is stymied by a rule generally prohibiting such evidence. However, other rules of evidence can better serve his purpose. For instance, it is generally true that a fact qualifies for admission if it meets only one condition even though it may be proscribed under a variety of other conditions. In other words, one cannot introduce a fact if it tends to be unfair, generally irrelevant or lacking in probity; on the other hand, one can introduce such a fact if it can be considered to be only slightly relevant. Leroy Soul's state of mind may be shown (under the "state of mind" exception to the rule against hearsay evidence) prior to his excited or inflammatory speech-making as evidence of his motive. Soul exclaimed to a fellow patron at a bar shortly before his speech that he was frustrated by the political system that suppressed his people and that he was going to destroy it. Furthermore, he "hated cops and would crucify any one of them that laid a hand on him." Soul's "state of mind" appears clear. Presented in evidence it is a link that can logically connect Soul's motive and intent to his incendiary speech and to the disruptive acts that followed. More important, so far as the process of persuasion is concerned, the prosecutor recognizes that Soul's spontaneous comments damn him as a trouble-maker, an undesirable and perhaps an incorrigible. This is a dramatic point that sets in motion a strong bias against Soul. It is a bias that forms in the feelings and thoughts of the adjudicators that may serve as a basis for seeking and needing to find Soul guilty.

In effect, the prosecutor may determine that he has a more effective case against Soul if he forges biases and emotional resentments against the defendant rather than trying to stress the logical tightness (clear cause and effect) between Soul's behavior and subsequent events. He may add dramatic points by introducing Soul's prior criminal record to show that he had a clear and deliberate plan to foment disturbances and that Soul was convicted on another occasion for deliberately encouraging his fellow Blacks to take up arms and shoot offending policemen. This may not only show Soul's propensity for the crime, but that similarities between the kind and manner of speech for which he is presently indicted and those for which he had previously been convicted are altogether striking. The logical connection is there and, more important from the prosecutor's tactical viewpoint, it is evidence which dramatizes Soul's character and qualifies as an "exception" to the rule against character evidence. He may be perceived as vicious and despicable and may be regarded as a threat to

everyone's peace and security. Conscious and sub-conscious fear and feelings of threat are generated in the adjudicators and warrant that Soul somehow be convicted. The slimmest logical support will then justify such a result.

Another type of "dramatic point" the prosecutor may utilize to fortify feelings of bias and a desire to convict may be found in the demonstrative evidence. Soul's supporters had distributed to the assembled crowd thin plastic clubs, in the shape of bowling tenpins, just before Soul gave his speech. Each club had "Show This; Back Leroy Soul" on it. The prosecutor will introduce these in evidence to show that they were intended as weapons and were in fact used to smash windows in the subsequent pillaging. The introduction of the imprinted thin plastic club in the context of other inflammatory evidence about Soul helps to reinforce feelings of revulsion and resentment. In effect, the demonstrative evidence with some logical connection to the matters under indictment serves mostly as a symbol to remind adjudicators of the horrors of one Leroy Soul. By now he is being pictured as a menace of immense proportions to society and even a less rational justification may be needed for a determination of his guilt.

Soul's defense counsel may present factual evidence offering effective logical contrast to that generated by the prosecution. Soul's speech may be shown to have contained conciliatory, cautioning or chastening passages. Unrelated events intervening between Soul's speech and the subsequent pillaging may be shown to have offered a strong incitement to riot. For instance, a Black child may have been accidentally struck down by a police car in the community. Selective testimony may show that Soul's resistance to arrest was really resistance to being arbitrarily manhandled by the police. There is sufficient ambiguity in the logical outcome of the "fact plus rule equals decision" relationship, perhaps because of the highly selective presentations of evidence by both sides, that judgment may be dominated by the attitudes and biases that the attorneys can effectively muster or exploit.

Defense counsel, in his persuasion strategy, may seek to appeal to the element of fairness and to the traditions of a legal system that protect individual rights. In effect, he makes a strong value appeal that has deep emotional roots. He also seeks to exploit sentiment favoring the underdog and those who have had to endure privation and discrimination. He will seek to identify Leroy Soul more as a victim than a perpetrator, and thereby benefit from the premise that there is more

solicitude toward victims. Further, in a counteroffensive move calculated to vitiate certain emotional dispositions in the adjudicators and replace them with other biases, defense counsel will seek to show that various prosecution witnesses are sly or devious, dishonest, grossly prejudiced and rancorous. These are all characteristics that may incite revulsive feeling toward the prosecution and effectively cancel the probative value of testimony offered in its behalf.

Defense counsel may cite with emphasis, even with dramatic fury, the defendant's constitutional right to freedom of speech. He may cite judicial opinion having impeccable credentials to the effect that exhortations such as those of Leroy Soul are no more than an exercise of free speech. Counsel may incite feelings of patriotism and cultivate resentment toward injustice so that Soul is more nearly experienced as the offended party. Testimony may be introduced to suggest and, if possible, to stress the point of brutality in the police toward Soul. This incites resentment toward the bully, a resentment that may find favor in those who tend to regard authority as excessive. Counsel may seek to impeach prosecution witnesses by ostensibly discrediting perceptual accuracy but actually implying bias in the way a witness has viewed events. By introducing prior statements or behavior of a witness to show an inconsistency, he may by innuendo cultivate the feeling that the witness is cunning and devious. If he can do this with a sufficient number of witnesses he may be able to reinforce the suggestion and feeling that the prosecution and its witnesses are conspiratorial against Soul. Soul can, indeed, be shown as a victim who is being "railroaded", suffering an injustice as would arouse fear and resentment in most of us.

C. Limitations on Truth and Fairness in the Trial Process

In the strategy of persuasion, the rules of evidence at trial operate on tracks at two levels. Ostensibly, the "upper" level composes a system to determine truth by emphasizing logical connections between presented facts, selected rules and a consequent rational decision. The more potent level of operation, however, is the "lower" or perhaps even subconscious level. Here, there is a system of influencing and emotional impact utilized to establish favor first and most of all. Attitudes and feelings are systematically manipulated and elements are dramatized so as to incite loyalty to certain values and to create or exploit emotional dispositions that are the "real" basis of decision. In the final analysis a trial decision is a result of the effective exploita-

tion of rational and especially emotional denominators of experience. Because emotional components are formally proscribed, they are not sytematically included or evaluated in the method and result of the trial process. In the spirit of Machiavellian diplomacy they are operationally effective, and even decisive, but formally prohibited.

An implicit thesis one may offer in defense of the adversary method is that a fair result occurs when, to use Macaulay's apt description, "two men argue, as unfairly as possible, on opposite sides." A shakedown of arguments distills only the truth, and it is the truth relating to the subject of argument that is ultimately persuasive. Truth and fairness are joined to produce the best of all possible results. It is the process that guarantees the quality of the result. It is suggested that trial procedure and the rules of evidence offer and represent a narrow and incomplete construction of the process of persuasion. They contribute to and are used to achieve unfair results. It may be suggested further that the "shakedown" method of polemically presenting evidence does not provide sufficient indication or assurance of truth.

Attorneys, seeking a partisan outcome sanctioned by the adversary process, understandably seek and present fact and rule evidence that best fits their case. The choice of evidence is highly selective and limited to what is viable and effective in a courtroom. It is not all of the available and mustered evidence that is regarded as essential, favorable or usable and subject to review. Furthermore, the availability of evidence may depend on research skills and facility. The result may be the presentation of sketchy or only the most obvious evidence while the omissions contain much that is or should be critical to a case. The concern is not only that truth may only be approximate because the data on which it is based is incomplete. It is also that apparent truth may be a distortion because the selection and presentation of data is so much a matter of bias.

The attorney for Leroy Soul may know that Soul has fears about homosexuality. As Soul reported the matter to him in confidential communication, Soul was fearful he was being homosexually attacked when the policemen approached to contain, to hold and possibly arrest him. He panicked and struck at his would-be attackers. This might be relevant information used as a defense, or perhaps in mitigation of the charge of aggravated assault and resisting arrest. However, defense counsel also knows that there may be such a strong prejudice against homosexuals or those tending homosexuality that the party so affected

has a heavier burden of persuasion. Instead of homosexual fear being an explanation for conduct it becomes the emotional basis for indictment of the defendant. Defense counsel may choose not to offer evidence relevant to the truth of matters and issues in the case.

The prosecuting attorney may know through a police informer that Soul is a member of a political group which actively meets for the purpose of political revolution. This evidence could be highly relevant to Soul's motives and conduct relating to the principal issue of incitement to riot with which he is charged. However, police and prosecution may decide that they do not wish to "blow the cover" of their undercover agent at this time. They would prefer to risk an adverse decision resulting from the incompleteness of the evidence. Furthermore, the prosecuting attorney may decide that he does not want to use an informer as a witness because the informer makes a "bad" witness. That is, defense counsel may be able to succeed in turning bias against the informer and the party he represents because of the underhanded character of the informer's methods. Further, the informer may make a bad impression because of his poor articulation, confusion in response to intense examination and generally "suspicious" appearance. Therefore the attorney may decide not to use the informer's unique testimony, leaving an unnoticeable but nonetheless existent gap in the evidence.

Bias in the selection of evidence may be no more an obstacle to the ascertainment of truth than is the lack of resources or the lack of skill to acquire and develop the evidence. An attorney may not wish to spend money or perhaps hire an investigator to discover more of the facts pertaining to a case. He may rely on evidence presented or made readily available to him. He may not muster the potent legal argument that the case affords because he does not give the time to adequately search and analyze less familiar legal rules and decisions that could be crucial. In effect, evidence and argument become more a matter of opportunity than inquiry, and truth suffers.

The limitation on truth is not only a function of limited inquiry and advocacy. The adjudicator's digestion of evidence requires that he be offered continuity of information and argument relatively free from distraction, deliberate distortion or dismemberment. He also requires concentration free from the disturbing and distortive influence of excessive time span, frequent interruptions and dramatic interferences. Assembling, analyzing and deciding are systematic psychological processes in which the individual exercises a mental and emotional dis-

cipline and direction. He consciously and unconsciously searches for the intellectual consistencies and emotional harmonies that help him to identify and then compare various experiences and interpretations. He does not think in a fragmented way but in terms of composition and unity. He should not feel explosively or excitedly in terms of some stimulus but should be aided to identify and assimilate emotional implications without being jarred into a narrow position or reaction. There is a limit to what he can absorb instantly and what he can retain and organize in his mind. He must be able to experiment with combinations of logic and feeling and fact and theory to find the best "fit" for a decision. This is both a rational and an emotional process. He needs assistance in the form of systematic blocks of information and groupings of facts and theory so that he can more effectively identify, analyze and organize data and arrive at conclusions. In other words, even though he may not be emotionally biased or previously persuaded toward certain decisions, the adjudicator needs a system of data presentation and analysis that helps him to make thorough and reliable rational and emotional determinations and judgments.

The psychological character and the practical operations of the adversary procedure in trials are such that the adjudicator is 1) presented with fragments of data interrupted by less relevant fragments or contradictions that do not help him to get a clear picture of a piece of data even as a postulate, 2) jolted by dramatic revelations or pounding procedures that interrupt rather than facilitate his processes of reasoning and feeling, 3) distracted by various rules as to how and what he is to consider (rules that are accentuated, ignored, contested and challenged so that he is not aided in the process of continuity and consistency in making his observations and judgments), and 4) victimized by exaggeration, distortion and manipulation in the adversarial procedure so that he perhaps should concentrate more on not being deceived than on accepting and studying the facts and issues before him.

We may then conclude that rules of evidence and trial procedures, in practice, produce a cacophony rather than a symphony of sounds, thoughts and conclusions. It is likely (and little wonder) that many and perhaps most trial decisions are more arbitrary than we choose to realize. They may be the product of various distortions, and subtle dishonesties. The designated procedure, uncomprehending as it is in regard to the process of persuasion and the true mode of human decision-making, encourages and produces this result. Rabelais' satire about judicial processes may not be far off the mark. We may recall

that Judge Bridlegoose was asked, "How do you determine the obscurity of arguments offered by the litigants?" Judge Bridlegoose replied, "When there are many bags on either end of the table, I use my small dice, just as you do, gentlemen, in accordance with the law . . . ."[2] There are those who take their cue from history and regard our juridical system as a marvel of human construction. Today, we can and should do better.

III. Issues, Events and Circumstances in Litigation

Issues, events and circumstances form a third dimension of the equation for persuasion. They constitute a kind of discrete influence that carries persuasion in some particular direction. They attach to the dispositions of the adjudicator and they affect the efforts directly made to influence him.

A. Personal and Social Bias, and "Instant" Persuasion

One kind of issue, event or circumstance is that about which the adjudicator may have some special and personal sensitivity. This is not to say that he has a biased interest in the usual sense. This would be the case if a judge were to sit in judgment of his son or of a corporation that he partly owns. A case may involve indictment for a sex crime. This may convey a very personal meaning and feeling for an adjudicator who has strong sexual fears or conflicts. His preoccupations and perhaps his prior persuasion on the matter would not occur if he were instead sitting in judgment on an accident case, a bankruptcy matter or another case. An adjudicator may be faced with a case of fraudulent stock transaction. If he himself is a heavy trader in the stock market he, knowingly or not, has a special sensitivity or personal disposition in the case cultivated by the nature of the issue he is to decide.

On the other hand, the issue, event or circumstance under judgment may not have personal meaning that may critically affect the persuasion possibilities in the case. It is the social importance, the political pressure or the community emotional climate that may influence the possibilities of persuasion. A criminal conspiracy case, reflecting the operation of crime that threatens and excites a community, by its nature creates leanings, dispositions or biases in the adjudicator. Minimally, he is or may be affected as a citizen. The trial outcome of a Communist may be a foregone conclusion in times when such an un-

[2] Rabelais, *On Judge Bridlegoose and Lord John the Loony*, in 1 The World of Law 600, 604 (E. London ed. 1960).

popular minority is deemed a dire threat to political survival. A party may be faced with a charge of reckless driving and gross negligence in an accident case involving bodily injury to the plaintiff. He may not fare well in the struggle for persuasion in an emotional climate where a child has just recently been killed by a hit-and-run driver.

Means do exist in trials to counter the bias or "instant persuasion" created by exceptional issues, events or circumstances. The means reflect a doctrine of "hear no evil, see no evil, think no evil". Jurors are physically isolated so that they appear to be exposed to and influenced by proper proceedings in the court room and nothing more. Attorneys, recognizing the threat of "instant persuasion", seek a change of venue or time for the threat to abate. Most feeble and silly of all the vitiating techniques are the ones in the courtroom that admonish jurors not to hear and consider what they have already heard and considered. An element of obvious prejudice may be skillfully or inadvertently introduced into a proceeding. A judge may exclaim, "Strike that remark as prejudicial!" after the jurors have figuratively fallen out of their seats from the impact of the disclosure. Subscribing to the thesis that some bias may be eradicable once it is conveyed, and that it can no longer be merely a quantum in judgment, a decision of mistrial in a matter may be carried.

B. The Experience of Intellectual Complexity, Confusion and Ignorance

Bias, or "instant persuasion", is one kind of impact resulting from the character of issues, events and circumstances to be judged. Another is confusion resulting from ignorance, and this may be concealed or denied. Worse, it may be deemed corrected by the inherent analytical and equitable character of a trial proceeding that may seem to reduce issues and facts to their simple essentials. Let us cite an example, and explain. A case in issue involves medical malpractice or a question of engineering competency and responsibility. The factual issues, especially, are of an esoteric nature. Practices and their underlying theories, and standards of performance, are sufficiently known only to those trained in the field. The legal issues are unexceptional but fact determination by a lay judge or jury is bound to be a difficult matter. Undaunted, the processes of law treat the matter as ordinary and within its true competence. It is as if jurisdiction over all matters of justice and ultimately over all conflicts compels some common juridical means of decision. That there is or should be legal jurisdiction

because a question of justice is involved is scarcely ever doubted. Certainly no doubt as to legal jurisdiction is offered in non-ecclesiastical matters. The contemplation furthest from a lawyer's or judge's mind would be a lack of jurisdiction on the ground of a lack of juridical competence to decide the issues!

Instead, attorneys for disputants become medical or engineering actors. They lift words and concepts from a strange discipline without a full or adequate understanding of theoretical issues, fact reliability and questions of standard. They present evidence and advocate solutions from such truncated data as if there were no further or complicated problem in understanding. They enjoin expert opinion to give testimony and seek to frame this testimony so as to give simple casual accounts of complex matters and simple judgments where simple "yes or no" decisions are a travesty and grossly inappropriate to the problem. The problem is fitted to the legal mold in the same manner that Procrustes fitted his victims to a bed.

It is the opinion of the adjudicator that is ultimately sought upon all (including complex) matters. He may know or understand even less about esoteric matters than the courtroom actors who have familiarized themselves with some relevant phrases and concepts in a strange discipline. He is truly confused because he must decide weighty matters about which he is truly ignorant and about which he cannot learn in a fortnight. Nonetheless, the processes of justice grind on. They are made to seem rational because they comport with the forms of a simple syllogistic mode that is a supposed guarantor of truth and justice. The adjudicator may try to understand and give some semblance of a rational decision. However, he will likely suffer through his confusion and may land on a decision based on some extraneous elements or combination of elements such as the personality of the advocate, the need and despair of a litigant, the comprehensibility of some terms that he can put into his equation for decision, and the behavior of witnesses. More likely, if he is a judge rather than a juror, he may follow the arguments and learn the phrases and concepts offered in evidence by the attorneys. With this as representation of the real issues and problems he can use this limited language and his understanding to forge a simple answer to a complex problem.

The peculiar qualities of issues, events and circumstances need to be dealt with in terms of their impact on persuasion. In some instances there may be no appeal from their prejudicial impact, even though we would choose to regard every and any issue as subject to a fair process

of judgment. In times of hysteria or continuing emergency certain fairs and biases may prevail somewhat universally in adjudicators as well as in other members of the body public. In some instances, notably in the case of confusion based on ignorance, the protections of fair and knowledgeable judgment may lie in defining competence to hear matters more carefully. Some matters can only be meaningfully understood and decided by adjudicators trained and sensitive to issues that are special, complex and esoteric. In most instances, the best guarantee that issues, events and circumstances will not have an inordinate influence on persuasion lies in the mental and emotional insights and competences of the adjudicators. Realistically, an adjudicator may not be able to exclude or eradicate a prejudicial influence. One cannot seal off a person sufficiently from his environment, his experience and his capacity for awareness to exclude intrusive observations. Neither can one bar an effect on thought and feeling because the experiencing person has been admonished not to think or feel about it. These are magical solutions based on primitive thinking or primitive conceptions of man's mental and emotional operations. An adjudicator can seek to control the impact of experience, and to assess it properly, and allocate to it reasonable value by developing consciousness of mental and emotional processes—his own as well as that of others. The best guarantee of fair and knowledgeable decision lies not in the mechanical protections of "Objection allowed!" or "Strike that statement!" but in the power and confidence of "Know thyself!"

Persuasion, then, remains the touchstone of juridical process. The viability and effectiveness of juridical process depends upon a proper regard of the persuasive process and how it works. If the emphases and tactics built into juridical operations do not truly comprehend the character and phenomena of persuasion correctly or adequately, truth and justice are more likely traduced than served in the processes of law. We may find we honor our juridical system of law and justice merely because we feel we must have it—not because it serves us so well.

IV. A General Statement of Alternative to the Adversary Process

While seeking to comprehend the characteristics of persuasion as a mental and emotional process in the individual human being, we may ask: how do we endeavour to improve the juridical process so that it better responds to human and juridical capacity and therefore can better serve human and juridical need? Our analyses may afford some sug-

gestions. First, the process of juridical decision (outcome determination) can be no better than the capacity and skills of adjudicators. The capabilities, training and selection of adjudicators define the limits of judging capability. An adjudicator must understand the operation of mental and emotional processes in human beings. He must know his own reasoning tendencies and methods of problem-solving, his emotional dispositions, sensitivities and blocks, and the kind and degree of bias and value emphasis that characterize him. These are the filtering agents through which he experiences, analyzes and judges. He needs sufficient knowledge of mental and emotional processes so that he can estimate these characteristics and note their operation in others as well. These are the skills and insights that are critical to the experience of persuasion and the process of judging.

Clearly, then, those who analyze and judge the conduct of others (including attorneys and judges) must begin their education with instruction and practice in understanding normal and some abnormal intellective and emotive (psychological) processes. This serves both as an educative and a screening device, since not all persons are able or likely to be adept on a personal level to become analysts and judges of behavior. The psychological qualification is no less important than the mental qualification for effective jurisprudence.

We must also recognize that jurors are neither trained nor qualified for practice in law. It is our political heritage, not intellectual or moral necessity, that deems them important to our juridical system. As we have suggested earlier, their presence and participation does not assure a cross-sectional representation or more knowledgeable view of issues. The latter is more likely to be derived from a clear mind, adequately trained in self-knowledge, and able to develop and evaluate a variety of issues and perspectives representatively. If jurors are a necessity to the juridical system in our society then minimally they should meet requirements of mental and emotional competence that insure their ability to probe for the truth and arrive at fair, representative judgment. One safeguard that may be developed for the juridical process is the systematic and periodic analysis and review of the competence and qualification of both professional and lay adjudicators. Review, requalification and reeducation may be essential to the continuance of a vital, knowledgeable and fair judging process.

Given adjudicators with adequate qualifications to analyze and judge, the juridical system next requires a better means for judging. The adversary method implies that the process of persuasion and decision fol-

lows patterns of syllogistic reasoning. This is not only incorrect but misleading. It encourages partisanship of a kind and to a degree that only obscures and distorts issues. The dimensions of practice deception must then be analyzed before the issues can be faced fairly or else (and this is likely the case) the juridical system produces a contrived result reflecting the effects of dramatic technique, emotional sensitization, limited reason and arbitrary or naive decision.

An effective process of persuasion is geared to an assembly of various facts and theories in some orderly arrangement. This enables the facts and theories to be carefully considered, juxtaposed, examined and tested, and ultimately fitted so as to produce the most thoughtful result. This is a sober process and not one that should be harnessed to the emotional and intellectual pyrotechnics of the traditional trial court proceeding. The need is for sophisticated and relatively complete facts and theories that must be closely examined and arranged by knowledgeable and impartial fact-finders. There are numerous models for this procedure in, for example, the system of court referees, the presidential fact-finding commission, the legislative investigations committee, and pre-sentencing investigators. The fact-finders are properly an arm of the judicial office, providing the substance on which the adjudicator uses his judging skills. To preserve political traditions and rights they may be augmented by fact-finders of the parties who may, if they choose, offer their own constructions of facts and theories.

A preferred principle of admissibility in evidence should be that any and all evidence be admitted for consideration, subject to the reasonable requirements of time, space and other such practical matters. The true safeguards of adequate consideration evidence and fair persuasion exist in the tested qualifications of the adjudicators. They do not exist in the proscription or pre-arrangement of certain choices of fact and judgment on the theory that fairness or relevance affecting persuasion are involved. Review of an entire case would be available, possibly on request or perhaps as a standard procedure. This acts principally as a check on the reliability of juridical operations.

Let us reflect on some of the implications of the suggested change in trial procedure. Visibility means, or should mean, that the true issues, means of decision, and decision are exposed to view. The visibility of our juridical processes is considered to encourage thought and offer some assurance that truth and justice prevail. The dramatization is important and serves the purpose of communication about law and justice. But this also involves fair, complete and skillful reporting in com-

munications media. It is not a matter that requires the offering of high drama through the medium of a bombastic adversary procedure.

Practical and economic feasibility is another matter concerning the method and extent to which issues should be heard. In its current condition, the juridical process is expensive, time-consuming, wasteful, uncertain and fails to meet even minimum standards of accountability. A disciplined and thorough fact-finding procedure geared to clear, consistent and knowledgeable judging procedures offers less complication and more economy in the use of time, energy and other resources. The adversary procedure as a practical matter cannot and does not meet this standard. If this bare statement based on common observation and simple judgment is not convincing, studies of feasibility may be made to compare current juridical and other decision making procedures on such variables as time requirements, expense, range of issue consideration, character of judgment and other relevant criteria.

Attorneys, who are a substantial, powerful and important group in society, may feel threatened by the prospect of technological unemployment if the adversary procedure is discarded. In truth, the adversary procedure and highly competitive trials are no more than a symbol of the lawyer's function and importance in society. He should be better trained to fill sophisticated fact-finding, issue-determining and policy-making roles. The thrust of legal education should be more in concert with attempts to solve the real problems and legal needs in society, rather than to feed an obsolescent and decrepit system of legal and judicial decision-making.

We may lastly note and consider the impact of issues, events and circumstances on a revised juridical process that is more consonant with the facets of human persuasion. The special or esoteric intelligence and knowledge associated with some issues creates the need for knowledgeable response from adjudicators. This suggests the need for adjudicators with special skills and qualifications in designated matters. The combination of special issues and general legal consideration may require a panel of representative adjudicators, adjudicators specially trained to comprehend and cope with both the exercises of law and justice and the uniqueness of the discipline from which particular issues emerge.

The limits of persuasion in some events and circumstances also should be noted. There may be instances where a truly fair consideration of the issues is not possible. A political decision may be required whether to jeopardize the integrity and reputation of the juridical pro-

cess by involving it in circumstances where the possibility of fair or substantial decision is in issue. Somewhat related is the idea that, from a policy and practical point of view, some issues should not be raised to the level of juridical determination. Some personal, social, family and business matters are perhaps best remanded to agencies of the institutions or private communities involved for required resolution. This suggests the preferred (even the required) alternatives of counseling, arbitration, decision in convention or other appropriate means rather than litigation as the appropriate form of solution. Criteria concerning when and when not to litigate, or permit litigation, must be developed.

A general framework for an improved juridical process and its operation has been suggested. It is more in keeping with, and more accurately reflective of, human capacities and dispositions in persuasion. It seeks to recognize that persuasion is the essence of the juridical process. Persuasion is also a psychological process reflecting mental and emotional capacities, sensitivities and dispositions. A sketch leaves much to completion, and this is no more than a sketch. However, should we regard this exercise as politically naive and practically unfeasible, we may be spurred on by the oft-repeated observation of a distinguised and universally respected jurist, Learned Hand: "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death."[3]

[3] J. FRANK, COURTS ON TRIAL 40 (1949). Judge Frank was a critical analyst of the trial process. *See* J. FRANK, LAW AND THE MODERN MIND (1949).