

THE LAW'S SILENT PREMISE

BY

ROBERT F. SHAW, JR.

**ALL I KNOW ABOUT MUSIC
IS THAT NOT MANY PEOPLE EVER REALLY HEAR IT.
AND EVEN THEN, ON THE RARE OCCASIONS
WHEN SOMETHING OPENS UP WITHIN,
AND THE MUSIC ENTERS, WHAT WE MAINLY HEAR,
OR HEAR CORROBORATED, ARE PERSONAL,
PRIVATE, VANISHING
EVOCATIONS.**

--James Baldwin

Sonny's Blues

INTRODUCTION

The criminal justice system has served as a pillar of strength in American Society. It establishes norms of conduct deemed acceptable, and offers the means by which unacceptable conduct can be deterred and punished. As a society, we look to “the law” for order, guidance and the administration of justice.

Interestingly enough, the closer one looks at the law the less certainty and stability one sees. The law’s appearance as a pillar of strength fades into the background of conflict ridden circumstances, judicial process, human values and human discretion, all of which are necessary to give the law life. For the mother whose child has been taken violently, for the defendant awaiting the voice of truth, the law has no living impact apart from determinations reached through our judicial process. It is the process, with all of its components and variety, which ultimately determines the law’s reach. Therefore, it is the process which is, in fact, the living law. The law’s effectiveness is the effectiveness of the process. The values which emanate from the law are the values expressed through the process.

In the United States this process consists, in large part, of the jury system. Twelve ordinary men and women from the community analyze the evidence presented, determine what facts exist, and apply the law to those facts. It is assumed that the jurors are impartial and without bias, so that the facts can be determined, the law applied, and justice administered without the interference of

personal idiosyncrasies. Yes, justice must be administered through application of the law to the facts as they are determined to exist, without the interference of personal bias and impartiality. This way, despite the complex and varied process that determines the law's reach, it is the law that speaks, not the individual, and justice is forthcoming. As Chief Justice Marshall suggested in 1803, our judicial system is one "of laws, not of men."¹ It is the law which provides for justice in our society. Or is it?

THE EMPIRICIST VIEW: A REPRESENTATION WITHOUT REALITY

The notion that our judicial system is one "of laws, not of men"--despite our very human jury system--depends on notions of human perception that have their origin in eighteenth century empiricist thought.² These notions, directly traceable to the ideas of leading empiricist thinkers such as John Locke, Jeremy Bentham, and John Stuart Mill, were utilized by legal professionals entrusted with delineating the nature of truth itself and refining the most effective techniques and procedures for attaining it.³ These empiricist notions are, to this very day, the foundation upon which Anglo-American evidence law and fact-finding procedures rest.⁴

According to empiricist thought, the external world of nature was a "neutral realm of bodies and forces exhibiting discoverable regularities or laws, a realm wholly independent of the internal mind."⁵ Accompanying this belief in a neutral, external reality was a theory of language and reference that assumed a direct and non-problematic correspondence between the external reality and categories of

thought.⁶ Thus, there could be an exact fit between language and the entities that make up the phenomenal world “because the meaning of words is fixed by the nature of the thing to which they refer”⁷--words were simply considered the name for objects in the world.⁸

Although the empiricists believed that the mind inhabits a realm discrete from matter, the mind was thought to have direct access to the world through the senses.⁹ To the empiricists, the external world was considered the sole source of knowledge and was believed to produce ideas in the mind through “impulse.”¹⁰ In the empiricists’ world, “truth” is objective, singular, and self-existent.¹¹ Accordingly, the adequacy of any judicial inquiry is the extent to which it accurately receives the true nature of reality.¹² Something is objectively true to the extent that “it is connected to or caused by an ‘object,’ something ‘out there’ detached from the observer.”¹³

The empiricist understanding of human perception, reality and truth have provided our American legal system with its understanding of “impartiality,” an understanding which has in turn helped define requirements for juror qualification and the rules governing jury selection.¹⁴ In accordance with the understanding of human perception and the nature of truth outlined above, jurors capable of arriving at truth must be free from, or able to set aside, subjective attributes which might influence their perception of the evidence they are tasked with assessing.¹⁵ “Impartiality” is understood as “detached objectivity” in which jurors “enter upon the trial with minds open to those impressions which the testimony and the law of

the case ought to make,” and leave behind subjective attributes which might color their perception of the evidence.¹⁶ Accordingly, our jury selection procedures, such as the peremptory challenge, enable litigants to exclude jurors if they suspect that the jurors’ life experience has provided a personal, partial vantage point from which they will observe and reason.¹⁷ According to the empiricist view, “complete effacement of the human observer is the qualification *sin qua non*”¹⁸ in the search for truth.

THE CONTEXTUALIST VIEW: A REALITY WITHOUT REPRESENTATION

Our judicial system’s silent premise concerning the nature of human perception has been attacked by all of the intellectual disciplines that once supported it.¹⁹ These disciplines have raised doubts about the unproblematic accessibility of the external world and the unproblematic relation between the external reality and the representations by which it is understood.²⁰ “The mental mirrors onto which reality is reflected have come to be seen as social artifacts, a product of their time and place.[T]he mind has come to be seen not as a mirror reflecting exact images of reality, but as a lens through which external reality is refracted.”²¹

These disciplines now favor the contextualist view of human perception in which

observation cannot serve as the bedrock for knowledge, as the empiricists believed, because human beings lack the kind of direct access to the

phenominal world that an epistemology based on experience requires. All experience is mediated by preexisting knowledge structures, constellations of assumptions, interests, and purposes that filter and organize perception as it occurs. And because the minds that take the world in are a product of their time and place, their representations of reality are likewise socially conditioned and partial to some degree. Models of the world are never simply prints of a fully formed external reality. Rather, representations of reality are shaped by the values and purposes of their human creators. How the world appears will to some degree be a product of the categories that inform perception.²²

We may assume that something other than us exists, but we know it only within the contours of a purely social and historical--a human--apparatus.... Though one can change interpretive frameworks or move back and forth between frameworks, it is not possible to shed or look beyond one or another culturally specific interpretive matrix. Reality cannot have a form that is its own, much less one that is knowable, because form, like language, is an entirely human creation. Thus, whatever form we attach to reality belongs to us, not to it. As a result, an “appeal to the facts” cannot resolve competing truth claims.²³

Although the intellectual disciplines of our time have discredited the empiricist view of human perception, the contextualist understanding of human perception has barely had any impact on our thinking about facts in a judicial context. The prevailing attitude in a judicial context is still that the “law is what needs to be interpreted” and that “facts are merely true or false.”²⁴ Our judicial systems definition of impartiality continues to adhere to the empiricist view of human perception, and in accordance with this, the rules in our judicial system reflect it as well.

REALITY IN THE COURTROOM

Interestingly enough, the empiricist understanding of human perception is not adhered to by litigants or reflected in their manner of courtroom functioning. It is a common and widespread belief among trial lawyers that a case is won or

lost at the jury selection stage; not because an impartial panel is an essential requirement for a fair and accurate trial, but because the correct slant of partiality is thought to be essential.²⁵ Our current jury selection procedures, such as the peremptory challenge (existing for purposes of achieving “impartiality”) are utilized by litigants to exclude varied life experience on the jury panel.²⁶ During *voire dire*, attorneys do everything they can to identify and seat jurors who hold beliefs that will lead them to accept and prefer the attorney’s version of events.²⁷ Indeed, excessive amounts of money are spent and an entire industry of jury consultation has developed to provide the most efficient and effective means of doing so.²⁸ Implicit in this, then, is the recognition that the personal, and necessarily partial, experiences of jurors is essential to establishing “truth.” The forthcoming freedom or death of the defendant in a capital case, therefore, has everything to do with who sits in judgment of him. Justice under the law, therefore, has as much or more to do with persuasion than proof. The truth is that “the facts never speak for themselves. There is no transcendent perspective, no God’s eye point of view from which the world appears as it really is.”²⁹

Acknowledging that juror’s perception of evidence is mediated by personal knowledge structures, assumptions, and interests that filter and co-create the evidence as it is perceived, has startling consequences for our judicial system. This is especially true in light of the well established and accepted understanding that jurors do much more than simply determine the contour of facts in a given case. Much more than determining the facts at issue, jurors provide quasi-legal standards such as “reasonableness.”³⁰ In addition, jurors are often asked to

determine whether the defendant had the requisite “intent” to commit the crime. The fact that such determinations are in dispute and require resolution is itself evidence that the physical events at issue in trial are themselves inadequate indicators in making such determinations. By definition, the juror’s determination of intent and what is “reasonable” must rest on her own foundation--a foundation of personal life experience which has no presence as “evidence” in the courtroom. The juror must search the depths of her own understanding of people and events--an understanding inseparable from the one who has acquired it. Thus, the administration of justice, the law, necessarily consists of factors such as wealth, education, age and race which contribute to juror identity.

The concept of impartiality which our justice system now adheres to does not allow for the inclusion of varying perspectives and representation of varying life experiences. As mentioned above, impartiality is now understood as being free from, or having the ability to put aside, personal subjective qualities that might color one’s view of the evidence. This concept of impartiality in our system fails to take account of a shocking truth:

[B]ecause all perception is dependent on the interpretive apparatus of the juror, ‘truth’ is invariably relative to a community that shares the same conventions of interpretation. No perspective can claim priority on the basis of privileged access to the ‘truth.’ The only ground on which to say any point of view can assert priority is on the basis that it commands the greatest agreement.”³¹

In this light, the empiricist view of human perception which posits an external reality that is knowable by a mind free of partiality, and the rules of jury

selection which provide for the exclusion of “partial” (and supposedly “biased”) perspectives, is troubling indeed.

WHAT THE CONTEXTUALIST VIEW TEACHES: WHERE WE ARE & WHERE WE SHOULD GO

The contextualist view teaches that bias should not be equated with perspective in our justice system. Rather than defining impartiality in the negative, impartiality should be conceived of as necessarily including varying partial perspectives. Rather than believing that only those who know close to nothing about the issues implicated in a case can be impartial, our system should recognize that those who know absolutely nothing about the issues are equally susceptible to an inability to judge--equally partial in their vantage point.³² Our system should recognize that we risk bias by having a total absence of the experience or knowledge that is relevant to the issues and evidence; that sufficient knowledge of a witness’s world is required if the witness’s statements are to be understood in context;³³ that the ability to truly judge and decide the fate of a human being requires some degree of commonality. One must know enough to judge.³⁴ In recognizing this, our system should embrace the notion of “diffused impartiality,”³⁵ in which a spectrum of life experience is valued and considered essential in any collaborative effort to establish “truth.”

This necessarily requires that our judicial system and the rules which govern it reflect a sharp distinction between prejudice and prior knowledge, and resist any tendency to equate them.³⁶ Prejudice should be understood as pre-

judging--drawing conclusions without examining. It should be understood as an inability to examine due to very extreme vantage points which have the effect of drowning out assessment of the evidence. Prior knowledge, understanding, or experience should be viewed as necessary in composing a panel of jurors that will render an impartial and intelligent verdict. Thus, it should be recognized that absolute neutrality is not the reference point from which to determine impartiality; that to assess the circumstances at issue, complete ignorance will prejudice a defendant because an absence of any experiential basis from which to judge is itself prejudicial. Acknowledging the contextualist view of human perception teaches us a very important truth: whatever our life experience, we all judge from some personal basis and see within the shadow of our life experience. Because the evidence must be weighed in relation to one's own conceptual frameworks and not an independent self existing, accessible, external reality, the juror's vantage point is the key factor in establishing "truth." Perhaps our judicial system is, after all, one of laws and men.

Because ours is, in fact, a system of laws, men and women--because justice has its source in the hearts and minds of the twelve members of the jury panel--adherence to the empiricist notion of impartiality has perpetuated the exclusion of varying life experiences. As a result, we hear a perpetual outcry that what is considered a just process to some is injustice for others; that "truth" for some is exclusion for others; that democracy for some still reeks of oppression for others.

History echoes this outcry all too clearly. The voices of women were excluded from the jury panel in some form as late as 1961. In that year, the Supreme Court upheld as “rational” jury selection procedures excluding women who did not affirmatively indicate a desire to serve. Justice Harlan, noting the “enlightened emancipation of women from the restrictions and protections of bygone years,” wrote that “woman is still regarded as the center of home and family life. We cannot say it is impermissible for a state...to conclude that a woman should be relieved...unless she herself determines that such service is consistent with her own special responsibilities.”³⁷

Since 1935 when gerrymandering, reapportionment and confusing election schemes used to exclude African-Americans were no longer viable, the peremptory challenge has been utilized as the primary means of excluding the African-American experience from the jury box.³⁸ It was only ten years ago that the United States Supreme Court truly addressed the use of preemptory challenges to exclude jurors based on race.³⁹ In doing so, Justice Thurgood Marshall pointed out that in 1974, of 15 cases in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of the black jurors.⁴⁰ In 53 cases involving criminal defendants in the Eastern District of Louisiana between 1972-74, federal prosecutors used 68.9% of their peremptory challenges against black jurors--black jurors in the Eastern District of Louisiana made up less than one quarter of the venire.⁴¹ And in 13 criminal trials involving black defendants between 1970-1971 in Spartansburg County, South Carolina, prosecutors peremptorily challenged 82% of black jurors.⁴²

Despite the Supreme Court's attempts to deal with the discriminatory use of the peremptory challenge, its discriminatory use continues unabated.⁴³ In fact, exclusion of the African-American experience at the hands of the peremptory challenge has been so pronounced that Justice Thurgood Marshall called for its total elimination.⁴⁴ These are just a few of the many examples our history offers.

The erroneous understanding of impartiality that pervades our justice system and the exclusion it perpetuates has consequences which are reflected in our society at large. In 1991 riots swept through South Central Los Angeles, the community's chant of "no justice, no peace" rang throughout the nation. Just weeks ago, riots in Florida blazed for the second time in 18 years because a white officer shot and killed a black man. Presently the United States Senate is investigating charges that the CIA smuggled drugs into the black community. The African-American community is adamant that the charges are true and continues protesting the investigation as partial--even as it unfolds. The white community is far more skeptical. The O.J. Simpson verdict was perceived as correct by the vast majority of black Americans, but was perceived as incorrect by a majority of white Americans. These are just a few of many examples.

CONCLUSION

Recognizing the nature of human perception and courtroom "truth" reveals much about the division and divisiveness in our country. It tells us that the strength in our legal system, as in our society, must include diversity and not

partial neutrality. It tells us that perhaps our legal system should not venture so far as to claim human life when the only “truths” we can be sure of achieving are those that our life experiences allow us to agree on. And it tells us that we must listen, and in doing so, recognize that differing vantage points and the truths which arise therefrom have their own validity--that agreement among a majority as to what is common is not invalidation of what is not. And ultimately, it reveals that in addressing the social issues of our time we must remember that the apparent line we walk between what is true for us personally, and what is true for all, is ultimately a line forever indistinguishable from our own heart and mind. Perhaps here, in recognizing our perception’s unresolvable isolation, we will find what is truly common among us all and our true strength.

-
- ¹ *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (Marshall, C.J.)
- ² Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 411 (1995).
- ³ Cammack, *supra* note 2, at 411; Barbara J. Shapiro, “*To a Moral Certainty*”: *Theories of Knowledge & Anglo American Juries 1600-1850*, 38 HASTINGS L. J. 153 (1986).
- ⁴ Cammack, *supra* note 2, at 411; John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 2 (1983).
- ⁵ *Id.* at 412-13
- ⁶ *Id.* at 412.
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Id.* at 412-13.
- ¹⁰ *Id.* at 413-14.
- ¹¹ *Id.* at 414.
- ¹² *Id.*
- ¹³ *Id.*; see Richard A. Posner, *The Problems of Jurisprudence* 7 (1990).
- ¹⁴ *Id.* at 410.
- ¹⁵ *Id.* at 415-16.
- ¹⁶ *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No.14,692(g)) (Marshall, C.J.)
- ¹⁷ See *Batson v. Kentucky*, 476 U.S. 79 (1986); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); Honorable George Bundy Smith, *Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 HOW. L.J. 1571 (1984); Frederick L. Brown, Frank T. McGuire, and Mary S. Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 206-09 (1978).
- ¹⁸ Cammack, *supra* note 2, at 415.
- ¹⁹ See *id.* at 415.
- ²⁰ *Id.*
- ²¹ *Id.* at 416.
- ²² *Id.* at 416-17.
- ²³ *Id.* at 420.
- ²⁴ *Id.* at 422 (quoting Kim Lane Scheppelle, *Facing Facts in Legal Interpretation*, 30 REPRESENTATIONS 42 (1990)).
- ²⁵ See *id.* at 424-27; Judith H. Germano, *Preserving Peremptories: A Practitioner’s Perogative*, 10 St. John’s J. Legal Comment 431, 437 (1995).
- ²⁶ Ogletree, *supra* note 17; Judith H. Germano, *supra* note 25, at 437; Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369 (1992).
- ²⁷ Cammack, *supra* note 2, at 25-27.
- ²⁸ Broderick, *supra* note 26, at 413.
- ²⁹ Cammack, *supra* note 2, at 422.
- ³⁰ *Id.* at 427-28.
- ³¹ Cammack, *supra* note 2, at 420-21.
- ³² Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1205 (1992).
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *J.E.B., Petitioner v. Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1424 (1994).
- ³⁶ See Minow, *supra*, note 32, at 1214 for a discussion about prejudice versus prior knowledge.
- ³⁷ Geoffrey R. Stone et al, *Constitutional Law*, 677 (1991).
- ³⁸ Douglas L. Colbert, *Challenging the Challenge: The Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 79-83 (1990).

³⁹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁴⁰ See *Batson*, 476 U.S. at 103 (Marshall, J. concurring)(citing statistics from *United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975)).

⁴¹ *Id.* (citing statistics from *United States v. McDaniels*, 379 F. Supp. 1243 (E.D. La. 1974)).

⁴² *Id.* (citing statistics from *McKinney v. Walker*, 394 F. Supp. 1015, 1017-18 (D.S.C. 1974)).

⁴³ See *Ogletree*, *supra* note 17; *Broderick*, *supra* note 26.

⁴⁴ *Id.* at 103.