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Robert R. Rose, Jr.

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Trial advocacy has traditionally been a difficult subject to teach and often young lawyers emerge from law school with little practical knowledge as to how to act in a trial setting. In this article, Justice Rose uses a fictional experience of a young woman lawyer as a vehicle to shed light on trial experiences such as jury selection, trial preparation and client counseling. It is the goal of this article to explore a few areas of law which are mainly unexplored by formal law school education.

THE GREATEST LAWYER IN THE WORLD (The Maturing of Janice Walker)

*Robert R. Rose, Jr.**

Is it possible to compose a law review article inspired by Thurber's Secret Life of Walter Mitty with underlying thesis variations?[1] Is it possible to influence the attorneys who read the article to not be content with being just an "average" lawyer? The article would speak to the latent professional beauty and ability possessed by even the most mediocre of us all. It would permit a young, frightened, small-town, Wyoming lawyer to rise to heights never before dreamed of by her or contemplated by even her closest friends—professional associates—or her family.

It would tell the story of the legal profession's massive untapped latent power and professional beauty that is, for the most part, unrecognized and hence undeveloped. It would hope to show young attorneys not just the way to

*Justice, Supreme Court of Wyoming; Faculty Member, National College of Criminal Defense Lawyers and Public Defenders; J.D., University of Wyoming, 1941; member of the Wyoming Bar and the American Bar Association.

1. Walter Mitty was always forced to return from his fantasies of greatness to the mundane, the real and the frightening. My heroine would travel in the opposite direction—from her starting place of "average"—"ordinary"—to the thrill of greatness.

greater competence, but its larger purpose would be to provide those new to the profession with the inspiration and some of the tools necessary to its achievement.

The article's ambitious goal would be to tell of a particular young lawyer's experience in maturing, and, in the process, teach in an area of the law mainly unexplored by the formal law school educators, and still unrecognized by nearly all young and most other lawyers. This article would, therefore, visit the psychodynamics of the courtroom as the trial process coughs up winning and losing litigants who, together with the lawyers, the judge and the jury, mostly do not know why they have won or lost.

THE VEHICLE

This result would be reached by drawing upon the fictional experience of a young-woman lawyer who has practiced only five years. She has an office just off the main street in a small Wyoming community where, in the summertime, the days are hot and dusty—where, in the winter, the days and nights are cold and windy—and her professional life is lonely and frightening. Her office is a store-front room where there is gold lettering in the window—"Janice Walker, Lawyer."

Janice Walker has been discouragingly average throughout her life. She, of course, has come to despise the adjective, "average," but she has really seemed to be as "average" intellectually as she is nondescript physically. Throughout her school career, Janice has competed at about the middle of the grading scale and has worked hard to keep from drowning in the lower half of the bracket. She thinks about mediocrity once in awhile. "Am I actually 'just average,'—'mediocre?' " she asks herself from time to time, "or maybe I find myself identified in this way because of the grading scheme that the 'establishment' has structured," she muses. When she plays with these thoughts she dares to hope that "mediocrity" and "average" do not *really* describe her—at least, she hopes, they will not *always* describe her.

Most of Janice's practice consists of drawing an occasional will, obtaining default divorces, and drawing simple

contracts for friends. Her office work is good, she briefs well, she is careful, her legal instincts are true, but she barely makes a living. She has done almost no criminal work.

Janice Walker's unrelenting enemy is fear. She is afraid of the law (that's why she works hard)—she is afraid of other lawyers (she has permitted herself to believe that they are all smarter than she is) and she has exaggerated apprehensions about her relationship with her clients. She is afraid of the courtroom because this is the arena in which she must compete with those whose skills are vastly greater than hers, but more particularly she is afraid of the courtroom because of the judges who inhabit it.

Her town is the county seat but the district judge does not live in her town. He usually comes there only once a month for one day, but when he is hearing contested cases he stays longer. Janice lives in mortal fear of these visits. They are essential to her livelihood but her fear of confronting the district judge is all-consuming. It seems to her that, in their relationship, his attitude is condescending as she explains to him about her papers. She senses that the judge is just putting up with her—that he already knows all of the things she is telling him, and she feels unimportant and foolish in his presence. He, in turn, does nothing to alleviate her apprehension. Janice would like to make small talk with him but she can't do it because she is afraid of him. She fantasizes sometimes as she leaves the courthouse for her office that she and the judge had just finished laughing uproariously at a slightly dirty joke that she had just told him—but her return to reality tells her that there was no such joke—she had shared no laughter or warmth with the judge and—she says to herself—"It never will be that way."

She does a lot of fantisizing and sometimes she wonders whether she does too much—but how much is too much? Janice does nothing to curtail her journeys into the fantastic, and she comforts herself with the thought that her dreams are all she has to inspire her and to mitigate her fear. Most of her fantasies have to do with being a lawyer. The dream she likes best is the one where she pretends that she is, indeed, a *good* lawyer—a *great* lawyer!

These experiments with her imagination bring her into a courtroom—*her* courtroom—where *her* judge presides (a man she respects but no longer fears). Her opponent is the only other trial lawyer in the town and he now has high regard for her and she is no longer afraid of him. The jury members sit there, stoic but friendly, with understanding looks upon their faces. She is quietly comfortable in the knowledge that they are relating to her and she to them.

She has chosen the jury well. She had a detailed background brochure on each member of the panel and has been able to meaningfully translate their responses in the choosing process. She has been comfortable with their body language during the trial. She likes the relationship she has developed with the jury and is confident of a favorable verdict. Janice sees and feels herself making a brilliant argument concerning theories of fact and law which will make legal history and which will—in justice—release her client from the grips of some unwarranted accusation.

When she returns from these trips, she is never depressed by reality. She is, instead, enthused and inspired and they seem to take care of her and make her want to work harder. For some reason, they make her law practice more friendly. She sometimes marvels at their therapeutic effect.

One morning when the judge was visiting her town, she sat in her office relieved in the thought that she did not have to face him this day. The phone rang, though, and it was Judge Franklin. "Come over and see me right away," he said. This was the first time he had ever called her and, as she walked the two blocks to the courthouse, her imagination ran wild and fear consumed her. Her fright centered upon the possibility that she had unknowingly committed some unforgivable professional sin, and, by the time she arrived at his chambers, she had worried herself into believing that she was on the threshold of disbarment.

"I have an assignment for you," the judge said. "A woman by the name of Marie Sanchez has been charged with murder. I suppose you have read about it. I am appointing you to defend her." She started to mutter about not being a

criminal lawyer. Thoughts came to her having to do with telling the judge that she was too inexperienced, that she had never tried a criminal jury case and that to appoint her would be to insure error on the ground of incompetent counsel. She said none of these things. Something kept her from saying them. Instead, she thanked the judge and, with the order of appointment in her hand, she walked out the door. She was frightened. In fact, she was shaking, but she was surprised to find, in some unaccountable way, her fear came to her more as a friend than an enemy.

Janice went back to her office to contemplate this terrifying, yet inevitable, predicament in which she found herself. She reflected upon the two weeks she had spent in the south at a criminal defense lawyer's continuing legal education seminar the previous summer.[2] This experience had excited and inspired her, but she had then doubted that it would prove to be of any real value. The seminar had to do with the psychological interplay among those who engage in the criminal jury-trial process. "Maybe I will have to lean on the seminar experiences now," she thought.

She remembered the Dean describing the business of criminal defense as an exercise in human relationship.[3] She thought about the lectures there—the experiments in opening statements, direct and cross-examination, voir dire, and final argument—with professional actors and actresses taking the parts of witnesses, and the other students serving as jurors. Images of the frightening critiques from fellow students and America's great trial lawyers who instructed at the college came vividly back to her.[4] She experienced a

2. I refer here, and generally throughout the article, to the National College of Criminal Defense Lawyers and Public Defenders, Bates College of Law, University of Houston, where I have had the privilege of being a faculty member.

3. I envision here the leadership and inspiration furnished by John E. Ackerman, Dean of the College, *supra*, and a graduate of the University of Wyoming Law School and a member of the Wyoming State Bar.

4. The faculty at the National College reads like Who's Who in the criminal trial lawyer world. The following are those who taught with the author in the two weeks commencing June 18 and ending June 30, 1978: Robert Bailey, Chicago, Illinois; Frank Bell, San Francisco, California; Cathy Bennett, Atlanta, Georgia; Barry Cohen, Tampa, Florida; G. Michael Cooper III, Chicago, Illinois; James Doherty, Chicago, Illinois; Julius L. Echeles, Chicago, Illinois; Millard C. Farmer, Atlanta, Georgia; Charles R. Garry, San Francisco, California; Albert J. Krieger, Miami, Florida; Ramond E. Laporte, Tampa, Florida; Terence McCarthy, Chicago, Illinois; Sheila Murphy, Chicago, Illinois; Joseph Oteri, Boston, Massachusetts; Stephen C. Rench, Denver, Colorado; Jay Schwartz (recently deceased), Racine, Wisconsin; James M. Shellow, Milwaukee, Wisconsin; Gerry L. Spence, Casper and Jackson, Wyoming; Santo Volpe, Chicago, Illinois; Arnold M. Weiner, Baltimore, Maryland; and Warren Williamson, San Diego, California.

momentary glow of reassurance when she recalled that she had come off pretty well on the TV playback the day she gave her final argument to class. As she sat frighteningly alone in her office that windy October day, she reflected upon the lessons which she had learned that summer.

BE YOURSELF

Each one of the nationally recognized trial attorneys who were there were emphatic with their admonition that the students should not—must not—cannot—copy the style and techniques of other more experienced trial lawyers. "We hope we can inspire you, but each of you must do your own thing—in your own way," one of the instructors had said to her class.

Another instructor[5] raised his voice as he admonished a student one day. "Quit trying to copy the personality of this lawyer or that lawyer," he said. "There is only one of them, and to become a mimic is to abandon your own personhood. If you will just look you will find that there is enough beauty and ability in each of you to permit you to become a great trial lawyer in your own right. I'll tell you where to look for these hidden qualities." His voice dropped and his Irish eyes sparkled—"Try finding your own humanness by looking for and learning to recognize and appreciate the worth of even the least among your fellowmen and, more particularly, learn to recognize the greatness possessed by him who is hurt and friendless and who depends upon you for survival. When you have learned to hear and respond to his cries for help, your own confidence and talents will become visible to your clients and your associates, but most importantly, they will become visible to you."

CLIENT INTERVIEW[6]

This cold, windy afternoon, Janice contemplated her visit to her defendant-client, Sanchez, who waited for her in a jail cell on the top floor of the courthouse. Janice wondered what Ms. Sanchez would think when she saw and talked to

5. Jim Doherty often admonished the students on this subject.
6. I am indebted greatly for the client-interview material, to Stephen C. Rench, attorney, Denver, Colorado, who also instructs at the National College of Criminal Defense Lawyers and Public Defenders at Houston. Steve Rench's outline on the client interview contains the following on the subject of client interview:

her court-appointed lawyer for the first time. How would she react when she learned that her lawyer was a young, inexperienced woman with no criminal-trial experience? Her mind again went back to the first day of the summer seminar when a pretty, young, woman attorney who was on the staff of the public defenders' office in one of the southern cities said to the instructor[7] that she didn't like going to the jail to interview defendants.

"Why?" asked the lawyer.

The woman hesitated and then blurted out, "I can't stand them. The jails smell, the prisoners are dirty, I can't believe them, I don't like to talk to them, they lie, and I find it impossible either to develop any sympathy for them or rapport with them."

As he stood up and walked to where the young lady sat, the criminal lawyer who was instructing that day said, "Let me tell you how that comes off for me." He sat down on the arm of the chair next to her. After looking into her eyes for a few moments, the instructor placed his hand on the back of hers. Janice saw the young woman take her hand away. When the instructor asked her why she did that, she said, "I don't know—I don't know what you are doing or what I am supposed to be doing." "Are you a little bit afraid of me?" the older lawyer asked. "Yes," she responded.

"Does it surprise you to know that I, too, am afraid right now?" Without waiting for her to answer, he continued, "The reason that *I* am afraid is that I really have something that I want to say to you, but I wonder if we will be able to communicate. I reach out in an effort to establish a

A. Being a trial lawyer is a great profession but only if we get beyond the point of just carrying out the mechanics. It becomes an art when it is based on "people" sense.

B. The client interview is just part of the relationship between attorney and client in which the attorney does gain necessary information, but more importantly, gains the confidence of the client through use of "people" psychology.

C. The client *cannot be fooled* by words. He will instinctively know the feelings of the attorney. Therefore the attorney must *have* (not just say it) feelings of relating to the client and his problems, of wanting to find a way to win, and if that is impossible, still to do the very best possible for the client. Concern for the client must be real.

D. The greatest problem to be solved is that of gaining the *confidence of the client.*

7. The author shared an encounter with one of the students which vaguely resembles the largely fictional client interview material recounted here.

trusting relationship with you but you withdraw from me. Yet I know that if I am to teach—and you are to learn—you and I must first be able to trust one another."

The old trial lawyer seemed to become a little emotional. The girl looked at him intently. Janice recalled their eyes locked and he did not say anything for a few moments. Finally he said quietly—"I can't remember your name."

"Marilyn," she answered.

"Marilyn, let me point out some things to you that you may not be aware of."

Janice, thinking back on that day, remembered that his voice was soft when he said:

"You have been in this class only fifteen minutes. In the course of that short period of time, you have repudiated me and you have expressed an attitude of rejection toward your clients. I see you here today, Marilyn, as a well-dressed—attractive—sort of angry—aloof—indignant young lady. Your arms and legs are crossed, you are shrinking from me as we talk. You recoiled when I touched you hand, you are having trouble looking at me. You are withdrawing at this moment, even as I try to meaningfully communicate with you. This all leaves me to wonder whether you have the ability to care about human beings on anything more than just an academic basis.

"Let's visualize together your entering the jail to meet your client for the first time. You have been appointed to defend a black man who is charged with the rape of a white woman. I think I am safe in assuming that you are repulsed with this condition of things at the very outset! You walk into the conference room where your client sits."

Janice recaptured the image of the instructor speaking softly and compassionately, and she remembered being aware that the class attention was fixed upon the scenario.

The lawyer said, "Let's stop worrying now about *your* reaction to these surroundings for a moment, and let's look at you through the client's eyes as he sits there in the

presence of his lawyer whom he is meeting for the first time. Remember, at this particular moment, the most important person in this man's life is his attorney. He is in trouble and his lawyer is now his only hope. The defendant wants to see her—look at her—and get a sense about her. Naturally, he hopes she will be competent and will have the ability to show him a way out of his predicament." Janice vividly recalled that the old lawyer quietly seemed to burn his words upon all of them. "Young lady," he began, "a *competent* lawyer is not the only thing this man is searching for. Even though this new client may not be able to say it, even to himself, his highest hope is that his lawyer will be someone who cares—who will understand—who will believe in him as a fellow member of the human race—who—no matter what he has done—will think about him as a person who is at least worthy of his lawyer's compassion. Marilyn, what does he see as you confront him in these cruel surroundings?

"He sees a beautiful, young, white woman, wearing a look of cold discomfort and disgust. He wants to put out his hand to shake yours and, when you are close enough, he starts to do it. You pretend not to see this, but he knows you did, and your rejection of him is just as real as was your rejection of me a few moments ago. You have given him no indication which would let him know that you care for him or about him. In response, he becomes defensive and, since he feels no warmth or compassion from you, he, therefore, feels no affinity toward you, and he now stands alone in the darkness of his disillusionment.

"Marilyn, here, then, is the client you said you did not like to interview at the jail. He may now be lost to you, and irreparable damage to the attorney-client relationship may have already been done. It may be that you and your client may never be able to communicate on any meaningful basis again. Here is the defendant who bothers you so much—whom you say lies to you, who will not cooperate with you—and who will not and cannot communicate with you. Your job of representing him has now been made almost impossible and you will probably fail in your efforts at defending him.

"It is likely that you will fail, Marilyn, because you refuse to trust and understand the human element that is the key to success in the criminal defense trial arena. You will just have to come to know that you are in a profession where caring for human beings is an absolutely essential ingredient. You will not succeed as a criminal defense trial lawyer if you cannot care for and love your fellowman and be willing to join the most humble in his battle for liberty and freedom."

"I did it, and I'm glad I did it." Those words were ringing in her ears as Janice left the courthouse after talking to Marie Sanchez. "I would do it again," she had said. "I went and got the gun—found him in the bar where he was talking to the bartender. There was one other person there, and I told him, 'If you don't want to see the son of a bitch killed you had better clear.' I was wild with fear, anger, humiliation and outrage! He had just raped me. He was laughing and I thought he was probably telling the bartender about it. I recall screaming—'take this, you son of a bitch'! I shot him and killed him for what he did to me. I did it, and I'm glad I did it. I would do it again."

Janice had not tried to learn very much about Marie Sanchez in their first meeting. She took no notes and she did not ask about her background. She just wanted to see her and let her know that she was willing to represent her. Most of all, she wanted Marie to know that, no matter what else, she had been assigned a lawyer who cared about her.

Her client seemed to relax early in their meeting. Janice had explained that she did not have experience commensurate with the magnitude of the difficulty in which Ms. Sanchez found herself and marveled that this somehow did not seem to mean too much to her. Marie just wanted to talk to someone who would listen and understand. She said that she was glad that Janice was representing her because she could tell that she would care and would help her as much as she could. Janice took Marie's hand and held it in both of hers for a long moment.

Janice remembered how this had happened. She had thought that she wanted to hold this woman as she wept and told her vengeful story, but she was afraid to do it. "What am I afraid of?" she asked herself. "*Rejection*," came the answer from inside her.

"But if she is going to reject my touching, it means that she does not feel that she can trust me," she said to herself.

Even before Ms. Sanchez was through talking, Janice reached over to take her hand. "Do you want me to represent you, Marie?" "Yes," came the soft answer, and Janice held Marie's hand warmly before turning to leave the jail.

FEAR AND THE CRIMINAL DEFENSE

It was in desperation and dejection that Janice left her first meeting with her client. She liked her but was afraid of her, afraid for her and afraid for herself. For the first time in her life, she felt the terrifying responsibility that goes with the defense of another human being whose very life is placed in a lawyer's hands for protection and safekeeping. The defense of insanity crossed her mind as Janice walked to her office, but Marie impressed her as being presently sane,[8] and she doubted that examination would reveal her to have been insane at the time of the homicide. She had been angry, terrorized, outraged and violated, but, as a woman, Janice sensed these to be the natural reactions to rape and not the response of the insane. Unless these violent attitudes constituted a mental condition, which would excuse her under the mandate of the statute, Janice knew that all the ingredients of first-degree murder were there.[9] Marie had told Janice that after the rape she had gone to get her gun—followed the man to the bar in a fit of hatred, revenge and outrage and had killed him, apparently, with premeditated malice and in cold blood.

What could the defense be?

For a moment, Janice was grateful for the State Bar requirements having to do with continuing legal education and

8. WYO. STAT. § 7-11-302 (1977).
9. WYO. STAT. § 6-4-101 (1977).

again reflected upon the past summer's seminar. She remembered that when she had been first exposed to the facts of the famous cases in which the trial-lawyer instructors had been involved, she had considered all of them indefensible. Yet, when the details of their experiences were related, it seemed that the veteran attorneys had always been able to help their client—no matter how desperate the circumstances. But, what was there to be done for Marie? Plead her guilty? "That would certainly solve my problem," she said to herself, and was at once ashamed for having entertained the thought before exploring every avenue of inquiry into the law and the facts. But she was afraid and she knew that she was going to have to take care of her own fear before she could help Marie. Janice remembered that the instructors at the seminar seemed to have the ability to put their fear to work for them.

It surprised her when they represented to the young lawyers that they were in constant fear as they pursued their practice.[10] Fear, they said, was the criminal defense lawyer's constant companion. She remembered one of them[11] talking about fear and the part it played in the life of the trial lawyer. As this lawyer spoke, he had come off to Janice as a man without fear of judge, jury, adversary or, for that matter, anything else. Yet she recalled him saying, "It is in abject fear that I spend every waking hour of my professional life. I am afraid of judges—juries—other lawyers—my clients—and myself."

She had wondered how that could be true as she looked at this powerful, apparently confident and innovative man who taught the class this day. He stood before them at the height of his career and his talents—bathed in one success after the other. "How could he possibly be afraid?" she wondered.

"And you never get over it," he was saying. "When you are young, you are afraid because you don't know anything about courts, judges and juries, and even though you have

10. J. J. (Joe) Hickey—former Governor of Wyoming, United States Senator, Tenth Circuit Appellate Court Judge, and able Wyoming trial lawyer, told the author many times that he would be subject to complete nausea every morning of a jury trial.
11. I am greatly in debt to my former law partner, Gerry Spence of Casper and Jackson, Wyoming, for his writings and our many discussions about fear and its utilization in the dynamics of the jury-trial process.

learned the law in school you have not been given the tools necessary for survival in the pit of the trial arena. You are taught nothing about human relations, the space where lawsuits are won and lost." She recalled that she winced when he said, "Lawsuits are not won on the law or the facts. They are won by the lawyer who, while utilizing the law and the facts as his incidental tools, can most convincingly relate to his clients, witnesses, other lawyers, the judge and the jury."

This had frightened her. She had been taught that the key to successful litigation lay, simply, in a thorough presentation of the law and facts, after which, she assumed, the chips of justice would neatly fall into place. She had never taken a course in human relations and, until now, had never contemplated the psychodramatic forces which assert themselves in the trial of a lawsuit.

The instructor went on—"At first, and when you are new to the law, you have no experience against which to test your decisions. You are, therefore, almost incapable of making decisions or believing in them once they are made. The result is that your fears come through to haunt and hurt you. The judges—other lawyers—and your juries—misinterpret your fear as incompetence—or lack of preparation—and your fright, in your early years, therefore, becomes your mortal enemy."

The instructor went on to say that in the more mature stages of the trial lawyer's career, fear can become an offensive weapon as lethal as any in his arsenal. He emphasized, however, that fear is forever a part of the advocate's life. "The issue always is," he said, "whether your fear controls you or whether you are capable of controlling your fear.

"When you have survived your early struggles with the fear of inadequacy," he explained, "fear then expresses itself in other ways. Having survived fear's early manifestations of defeat and manipulation, you will then, hopefully, learn to cope with the type of fear that is associated with success. When you are successful, judges, lawyers, your friends, and your enemies, will seem to expend their greatest efforts in their contests with you. Your techniques—your ethics—your

very purpose will come under the strictest surveillance—or will seem to—and whether this critical scrutiny is real or exists only through your paranoia—it will be real to you—and you will be afraid."

"But how do you cope with the fears that he described?" Janice had asked herself, and then she remembered what he had said.

"You must learn to put your fear to work for you. Fear can, in fact, be the lawyer's greatest ally. If I am young, inexperienced, conscientious—*but afraid*—I have the choice of either giving in to my fear or allowing it to motivate me in a way which brings me to court with more innovation, imagination, and better preparation than my opponent. As I move along through my professional life, I learn to use my fear and make it work for me in still other and more effective ways. I am now able to recognize it—identify it—accept it—realize that it is a part of all of us—and then I finally arrive at that beautiful day when I have enough character to admit —not only to myself but to others—that I am, in fact, afraid. I am no longer ashamed of being afraid. Once I have become courageous enough to do this, I no longer have to pretend to my client, judges, juries or adversaries that I am not afraid. I am now able to honestly and without shame share my fear with my opponent—the judge—and even the jurors, and I ask them to help me cope with it."

She remembered him saying that he had often, in final argument or opening statement, admitted to the jury that he was afraid—afraid of his own inadequacy—afraid of the competence and experience of his opponent—afraid of his huge responsibility—afraid of the massive and overpowering machinery of the state's investigatory and prosecutorial resources— afraid of the power of the judge—afraid that he himself will unwittingly do something that the jury will not like and for which his client will be penalized—afraid that he does not possess the power or the talent to present his client's story to them as the client deserves to have it told. Janice remembered him saying that when trying a criminal jury case, he asks the jury to help work with his fear problems and, in return, he identifies and offers to understand

and share its fears and concerns. In this exchange, he said he develops a caring relationship with the jury. He tells the jury he understands the nature of the responsibility that it has undertaken, which consists of taking care of the accused. He understands this well, he says, because this burden has been his for so long and he knows how heavy it is to carry. He assures his jurors that he is fully aware that the responsibility that he hands to them is frightening and awesome.

The trial lawyer told Janice's class that through this process of exposing his own fear and identifying the jurors for them, he develops rapport with his juries which translates into a valuable common bond of understanding, and in this way he makes jurors his caring allies. He has now impressed upon them the existence of their common problems and responsibilities, which, he undertakes to cause them to agree, they must work to solve and discharge together.

THEORY OF THE DEFENSE[12]

Since Janice had no library and the county's law library was inadequate for effective legal research, she spent most of her weekends that late fall and winter at the Law School Library in Laramie. She would leave her town about four o'clock on Friday afternoon, arriving in Laramie late in the evening, spending all of Saturday and most of Sunday in researching the possibilities for the defense of Marie Sanchez. Sometimes she would have dinner and long conversations with Jay Miller, a Law School friend who practiced with a prestigious firm of lawyers in Laramie. Jay did no criminal work, but their conversations about the Sanchez case were long and, for Janice, rewarding. Jay was patient as he served as a sounding board for Janice's thoughts and theories.

Marie had explained to Janice that she realized that it was not right to take the life of another human being under any circumstances, but she repeated over and over again that she could not help doing what she did. She said one day

12. With respect to the defense of insanity and related defenses, I am impressed with the work of Charles Garry of San Francisco, who broke much of the ground in the field of diminished responsibility and impaired consciousness. *See,* People v. Gorshen, 51 Cal.2d 716, 336 P.2d 492 (1959). *See also,* GARRY AND GOLDBERG, STREET FIGHTER IN THE COURTROOM 36-48 (1977).

to Janice in the jail: "If you ask if I knew it was wrong to kill him—I will have to say yes, but I will also tell them that my insult was so great that I could not help doing what I did."

Janice's research revealed that, prior to 1975, the Wyoming Supreme Court had, in three cases,[13] at least inferentially, adopted the M'Naghten test of insanity.[14] Later, in *Reilly v. State,*[15] the court mentioned that the M'Naghten test, in light of *State v. Riggle,*[16] and *Flanders v. State,*[17] had apparently been expanded to include the irresistible-impulse or uncontrollable-act concept.[18]

But that was past history. The legislature had, in the session of 1975, sought to establish another standard for testing criminal insanity, now expressed in Wyoming Statute, Section 7-11-304(a).

> A person is not responsible for criminal conduct if at the time of the criminal conduct, as a result of mental illness or deficiency, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.[19]

13. Flanders v. State, 24 Wyo. 81, 156 P. 39, *reh. denied,* 156 P. 1121 (1916). *See also,* State v. Pressler, 16 Wyo. 214, 92 P. 806, 809 (1907); and State v. Riggle, 76 Wyo. 1, 298 P.2d 349, *reh. denied,* 300 P.2d 567, *cert. denied,* 352 U.S. 981 (1957).
14. [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. M'Naghten's Case, 10 Clark & Fin. 200, 210, 8 Eng.Rep. 718, 722 (1843).
15. Reilly v. State, 496 P.2d 899, *reh. denied,* 498 P.2d 1236 (Wyo. 1972).
16. State v. Riggle, *supra* note 13.
17. Flanders v. State, *supra* note 13.
18. *See,* Reilly v. State, *supra* note 15, the court said:
> Although we refer to Wyoming as having adopted the M'Naghten Rule, in at least two cases a modification has been suggested by this court, State v. Riggle, 76 Wyo. 1, 298 P.2d 349, 367, rehearing denied, 76 Wyo. 1, 300 P.2d 567, certiorari denied, 352 U.S. 981, 77 S.Ct. 384, 1 L.Ed.2d 366; Flanders v. State, 24 Wyo. 81, 156 P.39, 44, rehearing denied, 156 P. 1121, by the inclusion of the so-called "irresistible impulse" or "uncontrollable act" test. This case was further tried upon that theory and the jury was instructed upon the "irresistible impulse" test.

The court, in citing *Flanders,* may have had reference to the court's paraphrase of the jury instruction containing the M'Naghten and irresistible-impulse test, and concluded, "That, in substance, we believe to be the rule of law in such cases." *See,* Comment, *Competency to Stand Trial and the Insanity Defense in Wyoming—Some Problems,* 10 LAND & WATER L. REV. 229, 241-242 (1975).

19. WYO. STAT. § 7-11-304(a) (1977) is almost the same as Section 4.01 of THE AMERICAN LAW INSTITUTE'S MODEL PENAL CODE, which provides:
> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

According to the California Supreme Court, in People v. Drew, ___ Cal.3d, 149 Cal.Rptr. 275, 583 P.2d 1318, 1324 (1978), the A.L.I. test has won widespread acceptance, having been adopted by every Federal Circuit, except the First Circuit, and by fifteen states.

The statutes further provided in the definitions section:

> 'Mental deficiency' means a defect attributable to mental retardation, brain damage and learning disabilities.[20]

Janice wondered whether or not the insanity defense was available for Marie. It seemed to her that there might be a question as to whether Marie was suffering from a "mental illness," as contemplated by the statute. Surely, she was not afflicted by a "mental deficiency" under the definitions section. If she did not have a "mental illness," then the new insanity statute could not help her.

The legislature must have had a reason to enunciate a new statutory test, Janice thought. What was it? What was there about M'Naghten that moved the legislature to readdress the problem? Her research told her that M'Naghten had long been a thorn in the side of the criminal defense bar, in that it failed to address the volitional capacity of a defendant, especially as it related to the defendant's ability to control his behavior even if he understood his actions. This last was of great interest. Marie knew the difference between right and wrong when she killed the man who had raped her—but she said she was incapable of controlling her behavior. Was it not, then, possible that Marie knew her conduct was wrong, but that she had, nevertheless, acted as a result of a mental disease?

Janice's research told her that the new Wyoming insanity statute, inasmuch as it could be considered to be an adoption of the A.L.I. test, had substantial advantages over M'Naghten. The test adds a volitional element, the ability to conform to legal requirements, that is not to be found in M'Naghten. It avoids the all-or-nothing language of M'Naghten and permits a verdict based upon "substantial capacity."[21] The A.L.I. test is broad enough to permit the psychiatrist to set before the trier-of-fact a complete picture of the defendant's mental impairments. It is flexible enough to adopt the future changes in psychiatric theory and diagnosis. By referring to the defendant's capacity to "ap-

20. WYO. STAT. § 7-11-301(a)(iii) (1977).
21. People v. Drew, *supra* note 19, at 1325.

preciate" the wrongfulness of his conduct, the test makes room for the proposition that mere verbal knowledge of right and wrong does not prove sanity.[22] Lastly, by establishing a broad test of responsibility, the test may make way for the rationalization of the law of diminished capacity.[23]

In a series of decisions dating from *People v. Wells*[24] and *People v. Gorshen,*[25] the theory of diminished capacity or diminished responsibility was developed to cope with the inadequacies of M'Naghten. Janice found that diminished responsiblity is not a complete defense as is insanity, but she discovered that, under this theory, the defendant is permitted to introduce evidence of mental incapacity to negate specific intent, premeditation, malice or other subjective elements of the charged crime. She found no cases where the Wyoming Supreme Court had passed upon the availability of this defense.[26] By reason of the court's holding in *People v. Cantrell,*[27] Janice was intrigued with the possibility that the concept of irresistible impulse might be utilized to prove diminished capacity. She recalled that the court, in *Reilly v. State,*[28] had discussed the Wyoming cases which hold "irresistible impulse" or "uncontrollable act" to be available to the criminal defendant in Wyoming and she wondered where this concept might fit into a plan for developing the theory of Marie's case.

Janice continued to be afraid that Marie might not be diagnosed as having a "mental illness"[29] as would support a defense of insanity. What did the statute mean by "mental illness"? Did "illness" mean *any* such abnormal mental condition which substantially affected the capacity of the defendant to either appreciate the wrongfulness of her conduct or to conform the conduct to the requirements of the law or, under the statute, did "mental illness" mean illness only in the context utilized in common medical parlance? Had the

22. *Id.*
23. *Id.*
24. People v. Wells, 33 Cal.2d 330, 202 P.2d 53 (1949).
25. People v. Gorshen, *supra* note 12.
26. In Peterson v. State, ___ P.2d ___ (Wyo. decided October 13, 1978), the Wyoming Supreme Court comments on the defense but does not find it necessary to decide its availability to criminal defendants in Wyoming.
27. People v. Cantrell, 98 Cal.Rptr. 13, *vacated,* 8 Cal.3d 672, 105 Cal.Rptr. 792, 504 P.2d 1256 (1973).
28. Reilly v. State, *supra* note 15.
29. WYO. STAT. § 7-11-304(b) (1977).

term taken on a definitive legal definition within the law of insanity?[30] She searched and found the law to be in a state of hopeless technical medico-legal confusion. In some instances, she found "mental disease" and "mental illness" to be used interchangeably in the medical texts and in the cases considering the law of insanity.[31]

One Sunday afternoon, over cokes and coffee, Janice expressed her underlying concern to her friend, Jay. "I am afraid that the examining psychiatrist might not find that Marie has a 'mental illness' which caused her to be unable to conform to the requirement of the law. Then, what do I do?

"She tells me that she could not keep from killing this man. In other words, Jay, she was powerless to obey the law. Isn't there somewhere in medicine and the law where her problem can be considered in its true perspective and where she can be taken care of?"

In looking for the alternative to an insanity defense, Janice became more and more impressed with the California cases having to do with diminished capacity or diminished responsibility, and her research again turned to this alternative. She knew the law to be that her client could not be found guilty of murder in the first degree unless the state could ultimately prove Marie sane.[32] Only a sane person can kill "purposely and with premeditated malice."[33] She knew it to be settled that, without ultimately being proven sane, Marie could not be found guilty of the lesser-included offense of second-degree murder. Only a sane person can kill " purposely and maliciously."[34]

"I am worried about her as a person, Jay," Janice was saying as they had breakfast that Sunday morning. "Let's assume that I work hard and am fortunate enough to get this case to a jury upon a psychiatrist's testimony. Which course is the best for Marie? Is it better that the jury find her insane, given the possibility that she might be committed to the state mental hospital for an indeterminate length

30. *See*, 4.101, of the new Wyoming Pattern Jury Instructions on this subject, entitled Mental Illness or Deficiency as a Defense.
31. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 26-28 (1972).
32. Sanchez v. State, 567 P.2d 270, 278 (Wyo. 1977).
33. WYO. STAT. § 6-4-101 (1977).
34. WYO. STAT. § 6-4-104 (1977).

of time?[35] Maybe she would be there longer than she would be in prison should she be found guilty of second-degree murder. If, on the other hand, she were to be found guilty of homicide under a diminished-capacity plea, she might go to jail or prison for a shorter period of time, but she might not receive treatment at all when, perhaps, she needs it."[36]

Janice noticed, however, that the result of a judgment of not guilty by reason of mental illness was not an automatic commitment to the Wyoming State Hospital. The trial court would have the options of a discharge from custody,[37] an order of release subject to supervision and treatment,[38] or an order of commitment.[39] She knew that, no matter what verdict was reached at trial, she would have to be prepared to pursue various alternative dispositions of her client.[40]

Janice was still troubled about the theory of Marie's defense and was troubled with Jay's response. He said that she shouldn't worry about such things—"Just get her off with the best deal you can, Janice—and let someone else worry about what to do with her." Then he added, "You may not have to concern yourself about that problem anyway. There is no way you can get a jury to give her anything but first-degree murder—you had better start bargaining with the county attorney for the best deal you can get." Then he asked, "How would you like to hear the clerk read a verdict finding your client guilty of first-degree murder, thus subjecting her to a possible death penalty,[41] after you had turned down an offer to accept a plea of second degree, Janice?"

She hadn't answered, but the thought was like a blow to her stomach. She had never let herself think about that, but "*God,* the possibility is really there and if it happened, how could I live with it?" she said to herself.

35. WYO. STAT. § 7-11-306 (1977).
36. The court said, in People v. Drew, *supra* note 19, at 1324:
> A successful diminished capacity defense, on the other hand, results either in the release of the defendant or his confinement as an ordinary criminal for a lesser term. Because the diminished capacity defense thus fails to identify the mentally disturbed defendant, it may result in the defendant not receiving the care appropriate to his condition. Such a defendant, who may still suffer from his mental disturbance, may serve his term, be released and thus permitted to become a danger to the public.
37. WYO. STAT. § 7-11-306(b) (1977).
38. WYO. STAT. § 7-11-306(c) (1977).
39. WYO. STAT. § 7-11-306(d) (1977).
40. Janice recalled and reread an article she had seen on sentencing. Higgins, *Sentencing: The Problem of Individuation,* TRIAL 42 (April 1978).
41. WYO. STAT. § 6-4-102 (1977).

"Oh, I don't know, Jay—I'm going to keep working on it. I am afraid—I feel inadequate—and I really don't know where I am going yet, but I just have to keep trying. Maybe something somewhere will tell me what to do. I'll hear and recognize the voice when it speaks to me because it will be mine and it will be coming from deep inside someone who is trying hard—who is in good faith—who has spent a lot of hard years trying to learn her trade—and who, more than anything in this world, wants to help her client. When it tells me what to do—as it will—*I'm going to hear it—believe it*—and *do it!*"

They left together and as they parted Janice felt better for having come face-to-face with the fright and near panic that confronts every trial lawyer when he finally lets himself face the fact that his mistakes in judgment could mean the loss of his client's life freedom.

As she sat in her office reading over her notes that she had taken during the weekend at the University Law Library, Janice became more and more concerned about the possibility that the judge might not give an instruction under the insanity statute. "What if he were to say," Janice asked herself, "that there was no evidence of 'mental illness' and that, therefore, she was not entitled to an insanity instruction?"[42] What if her psychiatrist were to say that while he did not consider the condition of Marie's mind to amount to an "illness," as he would define the term, since she could tell the difference between right and wrong at the time when the crime was committed, she was, nonetheless, possessed of an abnormal mental condition which absolutely prevented her from "conforming her conduct to the requirements of the law"—in other words, that even though she knew it was wrong, she could not help doing what she did? "Then, where would I be?" she said under her breath. "I would have been denied the defense of insanity because of insufficient evidence to support the insanity instruction since I could not prove mental illness and, without something else upon which to rely, Marie's case would be hopeless."

Janice again turned her attention to the defense of diminished capacity or—as some courts have referred to

42. Goodman v. State, 573 P.2d 400, 409 (Wyo. 1977).

it—diminished responsibility. She found that the defense was aimed at producing evidence of an abnormal mental condition which, while not sufficient to establish legal insanity, would negate the requisite state of mind for the offense and thus lead to a conviction of a lesser crime.[43]

After months of study, Janice realized that she must urge two separate theories for her client's defense. The first must be insanity, which must be pursued in the hope that the court would find that the condition of her client's mind was such that, under the evidence, and according to the case law, Marie's inability to conform her conduct to the law could be considered a "mental illness." The second, she concluded, must be diminished responsibility or capacity.[44] She would hope, by this latter defense, to convince the jury that Marie did not have the capacity to formulate the purpose and premeditated malice required for conviction of first-degree murder, and was incapable of forming the purpose and malice required for conviction of second-degree murder. If she were successful in this effort, the jury could only find her guilty of manslaughter.[45]

JURY SELECTION

Throughout the winter, as Janice was driving back and forth from Laramie, she had a lot of time to think about her upcoming trial. She had, of course, never tried a jury case and the questions that came to her about what to do in response to the various situations that were certain to arise sprang from the deepest recesses of her imagination. At times she became over-whelmed and desperate. She thought about the direct and cross-examination of her psychiatrist, about voir dire, final argument, and how she would prepare her client and other witnesses for court. She worried about the preparation of instructions and the briefing of the dif-

43. BRAKEL & ROCK, THE MENTALLY DISABLED AND THE LAW 393 (1971).
44. Janice found the recently published Wyoming Pattern Jury Instructions—Criminal were of great assistance in this respect. Instruction 4.103 provides:

> A finding that defendant was mentally responsible for his acts is not equivalent to a finding that he acted with the specific intent necessary for the crime charged. Even if you find from the evidence in the case beyond a reasonable doubt that the accused was mentally responsible for his acts at the time of the alleged offense, it is still your duty to consider all the evidence in the case which may aid in determining whether he acted with the necessary specific intent.

45. WYO. STAT. § 6-4-107 (1977).

ficult points for the court's information, and the preparation and marking of her exhibits. One Sunday afternoon, she thought searchingly about how she would select her jury and soon realized that she had no notion at all about what she should be looking for in a prospective juror. "I wouldn't know a good juror from a bad one," she said to herself.

One day Janice drove to a neighboring town to observe at the trial in a murder case. She was amazed when the two older attorneys who represented the state and the defendant selected the jury in about two hours' time. She heard the questions asked, the answers given, and all of the panel members seemed alike to her. They all said that if chosen, they would be fair and impartial, and that they were not biased or prejudiced for or against the state or the defendant.[46] They all appeared to be good, honest citizens without any apparent predispositions, and Janice said to herself, "I don't see any difference in any of them. How would I know which to keep and which to challenge?" It seemed that, like her, these lawyers did not have any very profound notions about how to choose a jury either. "They have been doing this all their lives," she said half aloud, "and here they are taking less than two hours to select their jury in a first-degree murder case. Can they really tell what those people are thinking and where they are coming from?"

She, of course, knew that the purpose of voir dire examination was to discover bias or prejudice in a prospective juror,[47] and was familiar with the Wyoming Rules of Criminal Procedure which authorized the attorney to examine on voir dire under the supervision and control of the court,[48] all for the purpose of ferreting out such bias as might be lurking in the psyche of a juror. She was also acquainted with the provisions in the Uniform Rules of District Court of Wyoming dealing with voir dire of a jury.[49] "What is the real purpose of voir dire,"[50] she muttered, "and how can a lawyer ever work with the restrictions of these rules?"

46. It has been noted that the traditional question, " 'Are you biased or prejudiced for or against any party to this litigation?' serves not to uncover the unsuitable juror, but to hide him; not to discover prejudice, but to simply insult the juror." Spence, *The Dynamics of Identification in Jury Selection or How You Lost Your Last Case Without Even Knowing It* 89, 96 (unpublished work prepared for the National College of Criminal Defense Lawyers and Public Defenders) [hereinafter cited as Spence].
47. Lopez v. State, 544 P.2d 855, 860 (Wyo. 1976).
48. WYO. R. CRIM. P. 25(a).
49. UNIFORM RULES OF DISTRICT COURTS OF WYOMING No. 17.
50. *Voir Dire* has three main purposes: (1) to obtain information from jurors; (2) to

She asked herself, "What question do you have to ask in order to *really* get into a prospective juror's head so that you can know what he or she is thinking and feeling? How far will the court let me go in the search for this information?" The realization that she knew nothing about jury selection started to panic her. The responsibility that goes with protecting a fellow human being's life in a murder case was beginning to close in on Janice and she was having trouble with the pressure. In an effort to get some sense of what the selection process was all about, she fell to reading every article on the subject that she could get her hands on.

Janice's research revealed, among other things, that it is well known, in a criminal trial, that somewhere between sixty and eighty percent of the panel has a predisposition toward the prosecution when voir dire begins.[51] This means that the jury presumes guilt, and believes that the defendant has the burden of proof, that the defendant should testify, and that law enforcement officers are truthful.[52] She was to learn that she must develop a theory of the case before efficient jury-selection can commence. Having done this, voir dire can be beneficially patterned and structured according to the revelations of the preliminary hearing and discovery.[53]

Janice read on and on, but she was not getting a good notion about what she could do, should do, or how to go about it. In response to the prosecutor's objections, she could hear the judge ruling that her questions were outside the scope of proper voir dire examination, and as she looked down the tunnel of her confusion she could find no light to guide her. "I have to do something about it," she said to herself. "I can't just give up on this. I am not going to try the life of Marie Sanchez to people who are hostile strangers to the defense and friends of the prosecution without having some clue as to how I can cope with and mitigate these predispositions."

educate jurors with respect to the defendant's case; and (3) to establish a meaningful relationship between the jurors, the attorney, and his client. Bennett, *Psychological Methods of Jury Selection in the Typical Criminal Case,* CRIMINAL DEFENSE 11 (1977). [Hereinafter cited as Bennett.]

51. *Id.*
52. *Id.*
53. All of the evidence, as well as the characteristics of the defendant, witnesses and the attorneys should be considered. Bennett, *supra* note 50, at 12.

Suddenly one day Janice remembered the offer of her instructors at the Seminar when they said that whenever the students needed help or advice in their professional efforts, they should feel free to call and ask for it. "The Criminal Defense Bar will gladly come to your aid if only you will call for help," one of the attorneys had said. "I am going to do it," she thought to herself. "I'll call Jim Jones[54] and explain that I desperately need his assistance. The most he can do is to tell me he can't or won't help me."

"I'll do better than that," said the voice on the telephone when she said that she was desperate for some advice on voir dire examination. "I will call Jane Doe, who is one of the Country's leading experts on jury selection, and we'll put together a conference call and maybe the three of us can help you with your problem."

The operator put through the call on the appointed day and Janice recorded it with the consent of both Jane and Jim.

"I am flattered that you called," she heard Ms. Doe say, in answer to Jim's statement that Janice was on the line and needed some help with her jury.

JANE: "The first thing I'd like to mention, Janice, is that the jury-selection process is a time for educating your jury—acquainting them with you and your client, and it is a time to obtain information about the jurors so you will really know how and what they are thinking in terms of bias or lack of it. It is the time for making twelve friends whom you can trust and feel comfortable with out of twelve total strangers. You are going on a long and important trip together, don't forget."

JIM: "Right here, Jane, I'd like to suggest something to Janice about courtroom dynamics and point out how important the jury-choosing process is in that regard. Janice,

54. Jim Jones and Jane Doe are fictitious professional criminal lawyers, and the conference call is the fruit of the author's imagination. The subject matter comes out of reflections upon conversations and writings with and by Gerry Spence, attorney, Casper and Jackson, Wyoming; Cathy Bennett, juristic psychologist, Atlanta, Georgia; Albert J. Krieger, attorney, New York, New York and Miami, Florida; James M. Shellow, attorney, Milwaukee, Wisconsin; and Jay Schwartz, Racine, Wisconsin.

try to think about the courtroom as a stage. You are an actor—the other actors are the other attorneys, the judge, the witnesses, the defendant, and the jury is the audience you must capture.

"When the curtain goes up, the heavy is the judge. The second in the pecking order in terms of power is the prosecutor—you are third and your client is last. When the play starts, you and your client will be seen by the audience as merely supporting actors.

"During the course of the trial, you and the defendant will have to continually work your way closer to the center of power until, hopefully, you will become the power-symbol. This transformation is necessary because it is important that you and the defendant become believable, trustworthy and humanized in the eyes of the jury at the earliest possible time. You must learn to play this power game in the courtroom because the jury tends to gravitate in the direction of power and away from weakness."

JANE: "I have some thoughts about how this can be done, Janice. It is important to the courtroom struggle that the defendant's attorney establish an honest, non-phoney, caring relationship with the jury. Not only must the jurors be made to understand that defense counsel only expects them to answer honestly in response to his or her questions, but the jurors must also know that the defense counsel understands the jury's pressures and responsibilities and intends to respond to them cooperatively. In the course of establishing this relationship, some of the power shifts from the prosecutor and the judge and moves in the direction of the defendant."

JANICE: "How do you go about acquiring this power-image, Jane? What do you *mechanically* do that permits you to assume a position ever closer to the starring role?"

JIM: "Let me mention a few things, Janice. First, it is to be assumed that you will be frightened and this will tend to hurt you because the jury will interpret fear as weakness and it rejects weakness. This is so because the jury itself is afraid and is in need of guidance and strength. At the outset,

the judge represents this strength. You can mitigate your fear by doing a lot of very necessary things. For example, you must first of all be able to admit your fear and your inexperience. The jury relates to this admission because the jury members themselves would like to be able to find someone to whom they can confess their own fright. Then you must further overcome the negative effect of your fear and inexperience with a display of intense belief in and a caring for your case and your client. Impress the judge and jury with this at every opportunity. This creates an empathy with the judge. He likes this kind of dedication and caring. Don't forget he appointed you and he is charged with overseeing a "fair trial" for the defendant. He is a little worried about you and he wants to see you assert yourself. As this relationship develops between you and the judge, the jury will move closer to you."

JANE: "I would mention to Janice here, Jim, that her attitude with the judge should be calculated to come off as one of respect, but there are times when it is absolutely imperative that she make some pretty emphatic demands upon His Honor."

JIM: "You have in mind her protecting the right to thoroughly inquire into the background of her jurors so that she can find the jury most acceptable to her?"

JANE: "Yes, that, but also the judge-symbol must be dealt with. He is the authority figure and jurors see the judge as powerful, nonbiased and fair, and want to appear acceptable to him. He becomes a magnet toward which the juror gravitates. In the gravitation process, they seek to emulate him so the power-symbol will approve of them."

JANICE: "How can this hurt the defendant, Jane?"

JANE: "The judge does not always understand this attitude on the part of the juror. When, for example, he starts to inquire by asking the jurors pat questions about whether or not they are prejudiced or biased and can fairly try the defendant, jurors will always answer, 'yes.' They think there is something the matter with being biased and having prejudice because the juror hears the all-powerful,

nonbiased judge asking the question. He or she doesn't want to seem to be in conflict with the authority figure so the juror will say that he or she can consider the facts and the law fairly and impartially and without bias or prejudice and will, thus, be able to assure the defendant a fair trial.[55] Therefore, when the judge starts to take over the voir dire, you have a structured situation which mitigates against the defendant and one which inevitably results in a judge-lawyer confrontation."

JANICE: "But what can you do about it?"

JIM: "You have to stop it. You have to explain to the judge that this course is not conducive to a fair and accurate revelation of bias and prejudice in the juror. You have to emphatically explain that the jurors are answering affirmatively because they think the judge wants to hear these answers —not because this is the way they really feel.

"This brings to my mind an extremely important thing that courts and lawyers do not seem to be able to handle very well. Defense counsel must make jurors understand that it is all right to be biased and have prejudice concerning various things in our lives and that this is the way we all are. The question is whether, once the juror's bias and prejudices are admitted, he or she can, nonetheless, identify with the defendant, or whether the juror's prejudices are so deep that he or she will be unable to fairly cope with them in the deliberating process."

JANE: "This is very important, Janice. Sometimes when I am representing, for example, a black man, I tell the jury that I have some prejudice against Blacks. I explain that I grew up in a social structure where we were taught that black people are, for one reason or the other, not as good as Whites. Then I go on to explain that I still have some of that deep inside me and that I can't get rid of all of it, no matter how hard I try, even though, intellectually, I know I am wrong. I then go on to say that even though I harbor these prejudices, I am, nevertheless, able to handle them in a way which permits me to represent this black client of mine with all the pride, dedication and devotion that is in my be-

55. Bennett, *supra* note 50, at 13.

ing. Then I look at them and ask if they can understand how I can do this. I pause and point to individual jurors and make them answer me. This helps identify the ones who are having a race problem, and then I explain: 'I can do this because I have come to know my client as a human being, not as a black man—I have come to know his wife—his children—his hopes for them and for himself, and I have come to know him as a caring, loving, tender man. I do not see his color any more. I see his personhood now and he is no longer black to me.'

"Jurors are helped by this self-disclosure process, Janice. What happens is that they are first made to see that all human beings have bias and prejudice and that there is nothing bad about being that way. Second, they learn that it is possible to be biased and to cope with it in a way which permits the juror to remain qualified to participate in the trial process. It is just a way of helping the juror find out where he is with his problem."

JIM: "Yes, and a juror will be grateful to the defense counsel for sorting this out for him."

JANICE: "I hear what you say—but having inquired, how will I really know which juror is good and which is bad? How will I know what he or she is really saying? How can I hear them accurately?"

JANE: "Just a minute before we get to that—let me go back to the power-dynamic concept. Voir dire exchange is analogous to becoming acquainted with a stranger whom you really want to know before making any commitments. It consists of a process of seeking out twelve people whom you can trust and with whom you feel comfortable. You would want to know as much about the stranger as you could possibly find out. You would undertake to find it out in a way which is most conducive to free and comfortable communication. You would want him to tell you where he has lived and what his business and employment background is. You would want to know about his family, his church, his community activities and his military background. You would be interested in the clubs he belongs to and his sports

habits, what books does he read, who are his friends, and what common concern do they have that attracts them to one another, and so forth."

JANICE: "I know that, but what do I do with this information when I get it? How do I sift it through me so I can tell whether or not a juror will identify with the defense rather than the state?"

JIM: "You must try to engage your prospective jurors in a friendly visit, Janice. It is essential in the selection process that you develop an empathy which leads them to want to disclose what is inside. You present yourself in a way which permits them to trust you, and if they trust you they will talk to you. If you have been candid about your own apprehension—if you make them aware that you know how hard it is to expose a person's innermost feelings about private and personal matters in the hostile atmosphere of the courtroom, then you will be better able to develop this empathy that I have spoken about."

JANE: "You have to seem to them to be a friend who seeks to help them discharge their duty. You have to touch the button that makes the juror want to talk to you, and when he talks you must listen. You must appear to want to not only get the information which is necessary to the representation of your client, but you must appear to want to help the jurors through the difficulty of their efforts to give you the answers that you need."

JIM: "If you can create this kind of gut-level trust with the jury, you will have done more than simply obtain answers to your questions. You will have reached a plateau of understanding which will permit you to know whether you are willing to take the risk with your prospective jurors. Furthermore, you will have moved closer to becoming the central power figure so far as the jury is concerned."

JANE: "Sure. In times of stress, we all move toward those who have been friends, who care for us, and whom we believe will protect us when we are in need of protection. We are animals, and animals huddle together when they are frightened."

JANICE: "I understand better the attitude that I should try to assume and the relationship that I should hope to attain. How, then, will I read their answers when they give them?"

JIM: "Let me open up this subject, Jane. I have read an article recently that expresses a fresh, new approach to jury voir dire examination. The author suggests that the trial lawyer should seek to find the juror who, together with the defendant, identifies the prosecutor as a common enemy.[56] The article speaks of the dynamics of identification. In other words, when the trial is over and you have won or lost—you ask, 'Why did the jury identify with your client and you (or not, as the case may be) rather than the other side'? The author suggests that a jury will act as it does depending upon its identification of the enemy which is common to one side or the other."

JANE: "I understand the common-enemy theory to say, Jim, that, for example, in a civil personal-injury case, the jury might all be ditch-diggers who would be expected to be sympathetic to an injured plaintiff. However, if the plaintiff had been injured as a result of a fall due to a defect in the defendant's rental property, then the ditch-digger jury would not be sympathetic to the plaintiff if it were further revealed that they, too, were owners of apartment houses."

JIM: "Right—because, in that case, the common enemy is not the landlord-defendant as you would expect it to be with a labor-person jury, but, because the jury is landlord oriented, the common enemy, with whom the jury identifies with the defendant, is the plaintiff who represents a class of people who pose a threat to property owners."

JANE: "What does that example say to you, Janice?"

JANICE: "It tells me that there is a lot of danger in classifying jurors according to obvious categories."

JIM: "Right. Just because businessmen are on the jury in a suit against another businessman, it does not necessarily follow that such a jury will not give the working-

56. Spence, *supra* note 46, at 92.

man-plaintiff a verdict. This is so because deeper inquiry might reveal that the businessman-defendant's drinking and driving was the enemy common to the businessmen-jury and the plaintiff, while the laboring-man-plaintiff was not—in this case—the common enemy of the business-oriented jury and defendant."

JANE: "That's the point exactly—look for the common enemy."

JANICE: "How does this translate to a criminal trial?"

JIM: "I don't see how that makes much difference. The principle remains the same."

JANE: "Before you leave this thought, I would like to observe that this common-enemy theory that you talk about, Jim, is really nothing more than the old search to find out where a person really comes from way down deep inside. In other words, it might be remembered that no matter what the juror's label might be, the question remains—what are the prevalent personality characteristics which, when associated with the facts of the case at hand, will be the most likely to condition the work product of the juror, which is, of course, his or her vote on the verdict. The trick is to be able to dig deeply enough to expose these personality sets and then be able to identify them and read them."

JIM: "Right, because if you can't get them out and make them recognizable for you and then know what they mean, then the concept of identification with the common enemy becomes meaningless."

JANE: "Yes. In other words, the bottom line is the ability to finally tell if what you are looking at is—for you—good or bad. Is the preconditioned personality that you have exposed in a juror one which naturally identifies with your client's interest or not?"

JIM: "That sounds easy, but it is the hardest task of all."

JANE: "Janice, it takes a lot of thought. One tool that will help you do this is the development of a detailed background brochure on every panel member. This enables you to do much of the decision-making before the jury selection begins."

JANICE: "Show me the kinds of things you actually do when you are selecting the jury and tell me why you do it."

JIM: "You asked about how the common-enemy concept translates to the criminal trial. Before we go to the specific things we do, let me say this:

"In a criminal case[57] involving a crime against property, the burden of the state is often considerably lessened because to the juror, robbers and thieves are the common enemy. But in crimes of passion such as murder or rape, the identification of the common enemy becomes more complex. A juror who was predictably a state's juror in the property case may be utterly defense-minded when a different set of human values or experiences are involved. The defendant who has killed his unfaithful wife may find the little businessman perfectly acceptable to him, depending, for example, on whether or not unfaithful wives are the common enemy of that juror. The accused rapist may be guilty before the trial commences if, for example, the little businessman's wife in a slip-and-fall case sees the sexually aggressive male as her common enemy. In the drunk-driving case, the common enemy is the drunk driver, even to the juror who may himself be a drunk (but who "never, himself, drives while drunk!") And so it goes . . . and so it also becomes apparent that the attorney's first job in jury selection is to identify the probable common enemy of each prospective juror in his particular case."

JANICE: "I think I am getting the feel of the 'common-enemy' theory and I think it is helping me."

JANE: "Good—let's talk about specifics. Let's give Janice an example, Jim."

57. This material is taken directly from Spence, *supra* note 46, at 93.

JIM: "All right. In a case I tried where a Mexican-American was charged with homicide and the defense was insanity at the time of the commission of the crime, there was a Mexican cement finisher on the panel with five children who claimed difficulty in understanding English, but his answers indicated otherwise. I didn't want him on my jury. He would try to prove he was White. He was living in a White community, working with Whites; he saw himself as White. I only want Chicanos who feel Chicano, Blacks who feel Black. Otherwise they will do violence to their own to prove their whiteness."[58]

JANE: "When it is my turn, I introduce my associates and then my client as Mr. or Mrs. If my client is a man, I always refer to him as Sir. If I were representing Marie, Janice, I would say, 'Now, Marie Sanchez is our client—she is the defendant. She is a human being just like the rest of us and I want you to know her.' Marie knows that this is her signal to stand. I say, 'Thank you, Ms. Sanchez'. That shows our client as an equal. She is a human being. We respect her and want her to be paid the respect that one human must pay to his brother and sister whenever called upon to sit in judgment of their life's fate."

JIM: "Just here, Jane—I would tell the jury that our client killed the man who raped her. I would want the jury to feel that for the first time with *me*."

JANE: "That's right, Jim. Janice, let the jury hear *you* say the shocking things—don't wait for the prosecution to spring them. That infers you are trying to play hide-and-seek, and jurors don't like lawyers who play games with them. Tell it like it is—don't play keep-away."

JIM: "When you start your voir dire you want to establish your empathy and caring as soon as possible. You might say something like this:

"Ladies and gentlemen of the jury, I am going to take some risks here and ask you some questions that may cause you to dislike me, and I don't want you to dislike me. I want you all to like me. I know that is impossible, but I would like

58. Spence, *What Really Goes On In A Jury Trial?* (unpublished work).

it anyway. I need to know you as well as I know my best friend, but I have a very short time to get to know you. So don't be upset with me when I ask questions of you. And if there is something you should tell me that would embarrass you, you always have the right to raise your hand and say, 'Ms. Walker, I would like to say this in the court's chambers.' We can walk back there together and nobody will hear it except the lawyers and the judge."

JANE: "I ask them if they will agree with me that we all have a right to rely on the concept of law and order."

JANICE: "Why would the defense attorney want to ask that?"

JANE: "So the jury will know that my client's defense depends upon the law to save him from injustice. I want to get under the protective wing of the law just as early as possible. I want them to know that law-and-order is not just for the protection of the state—it is also for my client's protection."

JIM: "By the way, Janice, there was an exchange about insanity in a Wyoming case which should be of interest to you.[59] The attorney in that case engaged in the following scenario with his jurors:

" 'Q. Is there anybody who feels that people escape the law too often by pleading insanity?

" 'A. Well, I think that happens a lot.

" 'A. (Another juror) I agree.

" 'Q. All right. Who else feels that way?

" 'A. It's about the easiest way out of these things.

" 'Q. All right, well, thank you for bringing me back to reality, where I should be. But you think that sometimes people escape the law by pleading insanity?

" 'A. Sometimes.

" 'Q. Does anybody else feel that way?

59. State v. Esquibel, No. 2988 (This case was filed in Sweetwater County and tried in Natrona County in 1973). Excerpts taken from Spence, *What Really Goes On In A Jury Trial?* (unpublished work).

" 'A. Yes. Isn't there something they have to do before they get sent to a hospital? Don't you have to prove it?

" 'Q. I am glad to have the chance to discuss that with you, because Mr. Esquibel's plea is "not guilty by reason of insanity at the time of the commission of the act." Anyone who pleads insanity must be sent to the state hospital, where he is examined by the staff there, and the report is sent back. Now I want to know whether any of you, as you sit here, suspect my client is trying to escape by claiming insanity? Have any of you reached that conclusion?' "

"The attorney noted to me that there was no response and added that he had put his finger on the real problem in insanity cases because the frightening truth is that jurors do not believe defendants who plead insanity."[60]

JANE: "He is right about that, too. This puts the sanity defense in the anomalous position where, even though the state must prove the defendant sane, the prosecution is aided in this task by a presumption that the defendant *is* sane, and also by the belief of most people that the plea is raised—not in truth, but as a vehicle to avoid punishment."

JANICE: "It makes one ask what good constitutional guarantees are if the people themselves refuse to believe in them and apply them."

JANE: "It does, indeed, and it emphasizes the necessity for judges to permit open and searching voir dire by defense counsel so that prejudices which guarantee the defendant an *unfair* trial rather than a fair trial may be searched out and exposed."

JIM: "Maybe we have put too much into this conversation, Jane. We could go on and on. I am wondering, Janice, if we have been of any help?"

JANICE: "You will never know how much."

60. Conversation with G. L. Spence at his ranch in Fremont County, Wyoming (August, 1978).

JANE: "What have we said to you, Janice, that you can use?"

JANICE: "All of it, but mostly I feel good down deep inside about it. I know what I am going to do now."

JIM: "What do you mean?"

JANICE: "Here is what you have told me—I have to find out everything I possibly can about every member on the panel before voir dire—that is the first thing. And then—when I examine that jury, I am going to just talk to them as I would someone I have just met and want to learn to know for purposes of making a friend. I am going to not be afraid to share my fears with them and I will invite them to share theirs with me. I will not be pushy, but I will let them know that we just have to expose ourselves to each other in a very short period of time so that we can decide whether we are going to take this trip together. I will show them that I am real—my client is human and believable and that I have total belief in her, in her defense, and in the system under which she is being tried.

"I am going to talk to those jurors on a gut level in a way which will cause them to want to talk to me and share with me the things that are inside of them the deepest. When they talk, I am going to listen. When I am through, we will know each other and I will know whether or not they identify with my client in recognizing the state's position as the common enemy. I will be able to pick a jury with whom I am comfortable.

"I want to thank you both, Jane and Jim."

JANE: "I like what you have said, Janice."

JIM: "I do, too, Janice. You have the sense of what we were trying to say and I can tell it is going to work for you and your client."

They hung up their phones and Janice sat for a long time to enjoy the good feeling that lawyers have when they have used their imagination to do something valuable—for themselves and for their client.

READY FOR TRIAL

In the months before the trial, Janice completed her discovery under the rules[61] and did a background inquiry of every person who had been called up for jury duty. She had inquired of every possible available source in her effort to obtain information about the jury panel members, including church records, county records and library records. She had talked with all who were willing to chat with her about the panel members. Janice came to know their political and church affiliation—who their friends were, what service clubs they belonged to and whether or not they were members of the local country club. In many instances, she was able to discover what kind of books they read.

She had reviewed in the minutest detail every piece of evidence and knew what every witness either could or would testify to. In particular, she knew what Dr. Jones, her psychiatrist, would say because she had submitted Marie to extensive psychiatric examination and had spent hours with him herself in order to familiarize herself with the doctor's psychiatric diagnosis and its legal ramifications. Janice was comfortable with the hope that the anticipated psychiatric testimony would provide the best possible defense for Marie.

The day before the trial, Janice played back the tape she made of a part of her last interview with Dr. Jones:

DOCTOR: "I suppose I have some bad news for you, Ms. Walker."

JANICE: "I want to know exactly what you have found. There can be no hold-back. I cannot represent Marie unless I can accurately formulate her defense based upon reliable medical evidence."

DOCTOR: "Yes. Well, I know you have pleaded her insane at the time of the commission of the crime."

JANICE: "Dr. Smith of the State Hospital has found her to be sane, you know that?"

61. WYO. R. CRIM. P. 17, 18. *See also*, WYO. STAT. § 7-11-304(d) (1977).

DOCTOR: "Yes—and it may be that I agree with Dr. Smith, depending upon what standard we are talking about. I do not believe that, according to the test which asks whether she knew the difference between right and wrong at the time when she killed her assailant, she can be regarded as insane."

JANICE: "I presume that means she did not have a 'mental deficiency or illness' which deprived her of the capacity to appreciate the wrongfulness of her conduct? You see, I am using the language of our statute when I ask you that question."

DOCTOR: "Yes, I understand. I interpret that question to restate what I have just said. In other words, was anything affecting her mind which had the effect of depriving her of her ability to distinguish right from wrong?"

JANICE: "Yes."

DOCTOR: "She was not so affected then, and is not so affected now. But, Ms. Walker, I found your client's behavior to be significantly interesting and, I might say, unusual."

JANICE: "What do you mean?"

DOCTOR: "Of course, you know that she contends that even though she knew she should not have killed her assailant, she could not help doing what she did?"

JANICE: "Yes. Explain the significance of that to me, if you will."

DOCTOR: "I don't know how you will regard it as a lawyer, but as a psychiatrist I think it is of great importance."

JANICE: "How, Doctor."

DOCTOR: "In the first place, I am convinced she is telling the truth about this. I am absolutely positive that it was not within her power to keep from killing that man. I believe her when she tells me she was raped, and I believe her when she tells me that she could not control her behavior afterward."

JANICE: "You are saying, then, that even though she had the cognitive capacity, she was emotionally unstable?"

DOCTOR: "And her emotional instability became, for her, just as much a mental disease, deficiency or disorder, as would have been the case if we were to have found that she had such a mental disorder as did prevent her from knowing the difference between right and wrong."

JANICE: "The result is the same, isn't it, Doctor? I mean—she would have killed him if she could not tell the difference between right and wrong, and she would have killed him if she had known that difference but could not control her emotional being with respect to her actions toward him?"

DOCTOR: "That's right. She would have killed in either case."

JANICE: "Maybe the news you give me, Doctor Jones, is not as bad as you think."

On the morning of the trial, before going to court, Janice was in her office with Jay, who had agreed to sit through the trial with her for advice and counsel.

"How do you feel, Janice?" he asked, as they waited with their books, brief cases and cardboard boxes of briefs and exhibits stacked in the middle of the floor.

"Good," she answered. "I feel good."

"I am afraid for us, Janice. Can we do this? Are you really lawyer enough to take on this thing?"

"I am afraid, too, Jay. I am afraid in a way that sort of helps me, though. I have examined myself deeply and I am convinced—for the very first time in my life—that I am OK."

"What do you mean?"

"I am prepared in the law and the facts. I have the tools necessary to do the total job. By that I mean—the instructions are prepared with a good index and with detailed

authority and citations on all of the copies so the judge will be able to handle the instruction session easily and with minimum confusion. This will not only help him but it will also help me. Every difficult point of law is briefed so that when the more complicated and uncommon legal questions arise, I will be able to approach the Bench with a short brief of the point for His Honor, and a copy for the county attorney. The exhibits are marked, and I think imaginatively done, so that the jury will have good visual pictures through demonstrative evidence. My trial notebooks are complete down to the last detail, with indexes and cross-indexes to make them usable. The examination and cross-examination of every witness is outlined and I have thoroughly rehearsed the way the examinations will be conducted. I understand what I have to do, Jay, and I am going to do it."

"I know all of those things, but how can you know that you are OK way down deep, Janice? How do you know you can really get it done? How do you know you won't freeze under the pressure and the responsibility and that you won't be able to even remember your name? Do you really think you are up to it?"

"I guess we won't have any real proof of that until it's over, Jay, but let me tell you about me for just a minute. You see, I have never excelled at anything in my life, but I am about to excel now. I am, because I feel good about me. I now see myself as a person who did not panic when given this job and who will not panic as I undertake to finish it. I am comfortable in the knowledge that the technical things have been accomplished, but, most of all, Jay, I am OK as a human being because, through this experience, I now understand what the bottom-line purpose for the criminal defense lawyer is. It is the caring for your troubled fellowman with a willingness to give from the depths of your soul for him—a willingness to commit totally to people who are in trouble and to make available to them the benefit of every right the law conceives for them, and every ethical advantage a good adversary counsel can muster in their behalf. I am ready today, Jay, to fulfill this function."

As they loaded their car with boxes, books, charts, medical diagrams and brief cases, Jay looked at and saw Janice a little differently than she had ever appeared to him before.

HOW DID THE TRIAL COME OUT?

Everybody wants to know how the trial came out. That's a little hard to answer. You see, criminal jury trials are different things for every one who participates, so a verdict will mean different things to different players, depending upon their investment in the trial process. Marie's trial did not come out the same for the judge, for example, as it did for Marie herself, and the trial came out differently for the jurors than it did for the lawyers.

The prosecuting attorney was running for office the next November and he thought that his whole professional and political future was riding on the outcome of the trial. Of course, it wasn't, but he thought it was. He received a surprise that made him very nervous because he had regarded the Sanchez file as an open-and-shut first-degree murder case, but he had not counted on Janice being as much competition as she turned out to be. He could not have anticipated that Janice would or could invest so much in the defense of Marie Sanchez as to have the effect of drastically changing the entire complexion and outcome of the trial.

The trial came out differently for the jurors, too. They were all new to the courtroom drama when they were called for jury duty so—going in—they had not consciously expected to invest as much of themselves in the jury process as they discovered it was necessary for them to do. They had promised to be fair and unbiased, but they were not aware of how much a "fair trial" takes out of a juror. When it dawned upon them that they were involved in an actual struggle for the very life of a human being, and it was going to be their decision to make with respect to how her life was to be disposed of, the total common responsibility awesomely descended heavily upon all of them at almost the same time. All at once, the jury became one individual functioning thing separate and apart from those who composed it and some-

thing which was hardly recognizable to even the members themselves. So, because of the heavy impact of moral duty that had instantaneously enveloped them, and the investment they had to make in order to ultimately discharge it, the trial experience was different for them than any of the other participants, including the judge.

The trial did not come out for the judge as he thought it would, nor did it come out for him in the same way it did for the other actors. In the first place, Judge Franklin did not really anticipate a three week trial. He had never been in a trial of that length in his life—as a lawyer or a judge. In fact, he had been heard to say to other judges and the lawyers that there had never been, nor would there ever be, a criminal case filed in his district that would take three weeks to try. This one did, though, and he was surprised to find himself settling in with pride and quiet enthusiasm to the hugeness of his task as he witnessed his appointed lawyer trying this murder case and growing in stature and character before his very (sometimes misty) eyes. As he watched Janice go ably about her work, some long-forgotten and exciting juices started to bubble around inside the old gentleman and he found himself flashing back to the earlier days of his practice as he undertook to invest deeply in the criminal trial of Marie Sanchez. So, when the verdict came in, it naturally affected him differently than it did—let's say Janice and Marie.

Then, there were Janice and Marie—how did the trial come out for them? A lot of things have to go into formulating the answer to that. Let's look at the impact that all of the actors had upon the psychodrama of the trial proceeding, in an effort to see more clearly how the trial came out for Janice and Marie and why it came out that way.

THE JUDGE

Judge Franklin, without conscious awareness, exercised courtroom influence which created an atmosphere friendly and comfortable to the defense of Marie Sanchez. When asked about the trial by one of his colleagues at the judicial conference, this is the way he explained it:

"It was an inspiration to see Janice Walker bloom in the courtroom before my very eyes," he related to his friend. "She didn't seem to be the same person that I had known and—for that matter—I guess she really wasn't. She came to court as well prepared as any lawyer who has ever tried a case before me. Her handling of the jury was inquisitive and firm and unyielding, but polite and cooperative. She was respectful but she did not shrink or cower from my rulings or me. Whenever she took me on, she did it with resolution but without antagonism. She had briefed the hard questions and was usually right. I finally found myself being so enthused with her total preparation, dedication and the process of her maturing that I had trouble retaining my impartiality."

The judge's friend asked, "Do you think your impressions were transmitted in a way so that the trial process was affected or even its outcome?"

Judge Franklin answered, "I am now coming to realize—after all these years—that when human beings gather together in a courtroom, every utterance and movement of each one makes to formulate the attitudes and reactions and responses of the others, both as individuals and as a group. In this context, I assume that my pleasure at seeing this young lady become a trial lawyer, no matter how well concealed, had a positive impact upon me, the ripple effect of which was felt, in varying ways, by all those who participated in the trial happening.

"I suppose it would be argued by those who are knowledgeable in the psychodrama of the criminal jury trial that this sort of favorable impact which Janice was making upon the judge had the effect of enhancing the power image of Janice and her client, while detracting from the strength of the prosecution to an approximately equivalent degree.

"As I say, I am now of the opinion that every impact upon the atmosphere of the trial has its effect upon the ultimate outcome. In this context, Janice's handling of her case, as it favorably impressed me, must have, in some degree, found its way to the formulation of the jury verdict."

The judge's friend said, "But do you think any of this had any influence on your rulings? Wouldn't they have been the same whether or not Ms. Janice Walker had been doing this great piece of trial work?"

"I don't know," Judge Franklin said, "but let me tell you one incident that kind of makes me wonder.

"I had always thought that our new insanity statute[62] precluded any further consideration of the diminished-capacity defense. In other words, I thought that the inability by reason of mental disease or defect to conform one's conduct to the law was the same as saying that the defendant—for any reason—had a diminished capacity to commit the crime charged."

"Isn't that the way you ruled at the instruction session?" asked the judge's friend.

Judge Franklin said, "No."

"What was your theory?" came the response.

"Janice convinced me that she was entitled to urge both theories and, under concepts announced in *Goodman v. State,*[63] I was obliged to instruct on both. Her argument was that the insanity statute only contemplates a defense for one who can prove a diseased mind or a mind which suffers defect and, since it is a complete defense, the jury is obliged to find the defendant guilty or not guilty. Diminished capacity, she argued, not being a complete defense to the crime charged, can only have the effect of precluding proof of the elements of the crime charged. In other words, it is her position that diminished capacity is a clarifying instruction on the evidence, the effect of which is to tell a jury that since the state must prove the elements of the crime beyond a reasonable doubt, it will not have discharged its burden absent proof of the defendant's capacity to formulate—for example—the malice and premeditation required to establish murder in the first or second degree.

62. WYO. STAT. § 7-11-304 (1977).
63. Goodman v. State, *supra* note 42.

"In addition to this, she argued that juries will have trouble deciding that a defendant such as Marie Sanchez has a "disease" of the mind because we are not used to contemplating disease in the context of an emotional disorder. It was her position, for these reasons—and I agreed—that she should have the instruction.[64]

"I suppose, therefore, that since the jury came in with manslaughter, you would have to conclude that her persuasiveness and preparation, having had a major effect on this ruling, had, therefore, a direct effect on the outcome of the case."

The judge's friend said to Judge Franklin that he could see that the judge had, himself, had a valuable experience in the witnessing of the maturing of Janice Walker.

"One of the richest experiences of my professional life," was the way Judge Franklin described it as their conversation ended.

THE JURY

In order to decide how the trial came out for Marie and Janice, we must know more about why the jury did what it did. There were, of course, many forces which impressed themselves upon the jury deliberations. At the outset, the jury had to work with the fact that a man had been killed and that Marie had killed him. The questions for them were, "Was she sane or insane, and was her capacity to control her emotional being so diminished as to prevent her from formulating the malice and premeditation necessary to the commission of the crime of murder in the first or second degree?" In attacking the problem framed within these parameters, some interesting considerations permeated the jury deliberations.

In the early discussions, Janice and Marie may have been rescued from a first-degree verdict by one woman who spoke with feeling to her jurors in this way:

64. The preceding textual discussion is not intended to represent the author's conclusions as to the state of the law with regard to diminished capacity and the insanity defense. This material is included for the purposes of illustration only. There is considerable confusion as to the viability of diminished capacity in light of the adoption of the A.L.I. test for insanity. *See* Peterson v. State, *supra* note 26; People v. Drew, *supra* note 19; and People v. Wetmore, ___ Cal.3d ___, 149 Cal.Rptr. 265, 583 P.2d 1308 (1978).

"I must emphatically say that the totality of what went on in the courtroom this last three weeks tells me that to bring in a first-degree murder verdict would not be the right thing for us to do. It is hard for me to verbalize why, but I have in mind these kinds of things:

"There was never a time," said the juror, "when I felt that the defense counsel was being anything but absolutely honest with us and totally sincere in her belief that her client was innocent within the framework of the law of insanity."

Another juror said, "Yes, I agree, but her own psychiatrist said she knew she was doing wrong when she pursued the man and killed him." The first juror went on—"That is so, but in the course of the whole trial it came through to me—just from the atmosphere in the courtroom—the rulings of the judge—the confidence of Ms. Walker—the nervousness and sometimes irrelevant and irritable conduct of the prosecutor, and, I suppose, to a large extent, because of the knowledgeable and, I think, truthful testimony of the psychiatrist—it came through that this woman should not be found guilty of first-degree murder."

It was at this point that a man said, "Marie Sanchez killed that man in cold blood—she tracked him down and shot him, knowing this was wrong and unlawful. She is guilty of first-degree murder and I will stay here forever before I vote for any other verdict."

With this, the stage for the struggle of the jurors' minds was set. The arguments raged for three days. At no time, however, did the majority of the jurors vote for first-degree murder. The factors which mitigated against such a vote were these:

One juror said, "For me, on a sort of brick-by-brick basis, a high wall was constructed during these three weeks, which seems to preclude our climbing over to reach a position where first-degree murder would be a proper verdict. It's hard to say what it was. I have in mind some flashbacks that may help—I remember when we were interrogated—I remember that careful, earnest searching but polite inquiry

conducted by Ms. Walker. She was young, she was inexperienced—but she was truthful and I believed her then—I trusted her then—and I still trust her.

"She pursued a straight course throughout the trial. I could always see where she was trying to go and I never believed she was trying to in any way mislead me. And, then, there was the judge. He was fair and impartial, but I kept trying to read him. I could not see any signs from him—his utterances or his demeanor—which said to me that the court would be very happy if this woman were found guilty of murder." The man who wanted to find the defendant guilty of first-degree murder said, "How can you formulate a judgment based on those considerations? You can't guess what the judge would like or dislike."

The first juror continued, "That's true. But in doing this we all have to reach down inside of us and call on our human experiences. Somewhere down inside me, I am feeling that first-degree would be wrong. The impact of the whole trial is what is telling me that. Every participant's contribution and all of the evidence having been fed into me, that's how it is coming out."

"But," said still another juror, "how can you justify that sort of rationale when we have been told to base our verdict on the law of the instructions as applied to the facts?"

"Once I have the signals coming in this strong, I can justify it all right," the first woman said. "All I have to do is look to the psychiatrist's testimony where he said that while Ms. Sanchez knew the difference between right and wrong she could not control herself."

Another juror spoke. "But, look at the statute on insanity as it is set out in this instruction. It looks like her ability to control her actions must have come about as a result of a disease of the mind before she can be excused. I don't think emotional instability can come from a diseased mind."

The jurors argued about that, but whenever the arguments over legal technicalities became locked, someone would always seem to want to back away and remember how

every one in the courtroom came off to them. How was the scene set? How did the actors play out their roles? These inquiries would always center around whether it would be fair or unfair, right or wrong, to do this or that, always tested by whether their actions would be consistent with what went on in the courtroom among the participants in the drama. The tenor of the discussion would seem to nurture such remarks as, "Well, I never did believe him." "I thought he was testifying as honestly as he could." "The judge didn't seem to be relating to that witness." "This lawyer made me feel good. I was comfortable when she was examining the witness." "Sometimes I couldn't tell what he was getting at. Once in awhile I had the feeling that he was trying to mislead me—that he was trying to hold back something."

If the whole deliberating process could have been taped and played back, it would have been revealing to find how much of the verdict was fashioned by these kinds of impressions. While it would not have been possible to tell exactly how much of an impact such considerations made, a listener certainly would have been forced to conclude that the way in which the jury related to the lawyers, the defendant, the witnesses and the judge on a human level played a major role in the decision-making process.

Eleven jurors came to the conclusion, after two-and-one-half days of deliberation that the defendant could not be found guilty of first or second-degree murder. They settled, then, on the lesser-included offense of manslaughter, with one juror continuing to hold out for first-degree murder. The eleven members generally felt that Marie should not be permitted to go free under the insanity statute, many of them being concerned about whether she would be hospitalized or not. They believed, therefore, that since first and second-degree murder was inappropriate, manslaughter was the only crime which could apply under the instructions.

With this established, it appeared that the jury would hang. The judge gave the Allen Instruction,[65] but the jury re-

65. For Allen Instruction considerations, *see* Hoskins v. State, 555 P.2d 342, 344 (Wyo. 1976); Elmer v. State, 463 P.2d 14, 20-23 (Wyo. 1969); Nicholson v. State, 24 Wyo. 347, 157 P. 1013, 1015-1016 (1916); and Allen v. United States, 164 U.S., 164 U.S. 492, 501-502 (1896).

mained locked. The eleven could not sway the one man, and the judge said that he could see no other way but to discharge the jury and declare a mistrial.

MARIE AND JANICE

With the threatened hung jury, the trial took a curious turn for Marie and Janice. During the jury deliberations, Janice had stayed very close to the courthouse. She was nervous, anxious, frightened, and at times elated and then despondent. She did not know what to think it meant when the jury was out this long. Some would say it was favorable to the state—some would say it was favorable for the defendant.

She thought about her immediate problem in a way that brought her to the conclusion that her work was not finished. She was still confronted with solving a people problem. In an effort to determine what was happening, she took up a sort of constant vigil on a bench at the head of the stairs where she could see the jurors come and go to breakfast, lunch and supper. She saw most of them laughing and talking together. They seemed to be relating to each other well. Included in this group were four or five jurors who Janice was as confident as she could be were on her side. Their eye contact throughout the trial had been excellent at all times. Their body language had been such as to tell Janice that they were open to her and they tended to reject the prosecution. There were smiles on the faces of these people when they arrived in the mornings of the trial and, as Janice watched them come and go to and from their deliberations, the smiles were still there and they were relaxed. Except for one man, the countenances of the other jurors were soft and receptive as Janice observed their coming and going to and from the jury room.

There was one man who always seemed to Janice to be hanging back away from the others. His expression was grim and set. He was not communicating with the others, nor were they relating to him. She had never had any good waves of communication from this man during the trial. He would not look at her as she spoke to the jury. He swung his chair to face sideways whenever she tried to attract his at-

tention. His arms were folded and his legs were crossed when she was examining a witness or addressing the jury. She looked back to her brochure and what she saw verified that this man was probably the juror who was out of step with the others. His background told her that he was strong enough to hang the jury all by himself.

The prosecuting attorney had gone to his office in the adjoining town when the jury retired. He had not observed the comings and goings of the jury during its deliberations.

The judge told both Janice and the prosecutor at four in the afternoon of the third day of jury deliberations that he was going to call the jury in and excuse them. The prosecutor commenced to argue that the county couldn't afford another three-weeks' trial. He asked if Janice would plead to second-degree, which Janice refused to do after consultation with Marie. Just as the judge was about to send the bailiff for the jury, the prosecutor said:

"I have read a criminal case recently where the parties stipulated to take a criminal jury verdict from less than the entire panel when there was a hung jury like there seems to be here. I think I will offer to do this rather than go through the expense of another time-consuming trial."

"Is that a firm offer to stipulate to that effect?" asked Judge Franklin.

"It is," said the prosecutor.

"Will you so stipulate, Janice?" asked the judge.

"May I ask, Your Honor, if I do, would the court be inclined to approve the stipulation?"

"I believe I would in these circumstances, but I want both counsel to consider this very carefully before we actually do it. I don't think it has ever been done before in Wyoming in these circumstances.[66] Janice, you consult with your client and we will meet here in an hour. You, of course, understand the risk for your client and you is frightening.

66. The product of a hung jury was utilized in this way by Judge Paul T. Liamos, Jr., in the case of State v. Hancock, tried in Sundance, Wyoming in 1978.

You have a hung jury now and you are under no obligation whatever to enter into this stipulation."

Janice and Marie talked together for a long time. Janice has since looked back upon this conversation as one of the most satisfying experiences of her professional life. Marie said that it was up to Janice and if she chose to take an eleven-person verdict, she would never look back no matter what the result. "Nobody in my lifetime has given me the love and caring that you have shown in these past three weeks," she said to Janice. "My whole life has been changed for the better through my touching you. I will be eternally grateful to you—no matter what happens."

"Marie," Janice had said, "those are the kindest words that have ever been spoken to me. I am grateful now and will be forever grateful for our friendship. I must tell you, though, that we are taking the greatest possible gamble. We are actually gambling with your life. It is inhuman to ask anyone to have to make this kind of decision. I can't do it—you will have to. But let me tell you what I feel—not what I know—what I feel.

"Marie," Janice said softly, "I have been watching this jury come and go for three days. All but one of them believe in us. I can feel it. I *almost* know it. As human beings, they simply couldn't act the way they do as they come visiting and laughing through the halls of the courthouse if they were going to take the life of another human being. There is one man, Marie, who acts as though he could—and would—only one."

Then Janice looked at Marie and said, "You just have to trust me, Marie. We have come so far together—we have both tried so hard. I don't have the experience which lets me read them, but something is telling me that this is the way it is. I think that's the way it is, Marie." Her voice broke as she looked away.

"Take the verdict, my friend. I trust you," came the whispered response from Marie Sanchez.

Before the bailiff brought the jury to the courtroom, Janice sat at the counsel table with Marie in fear and unbearable anticipation. The door opened and as the jurors filed in they looked at Janice and smiled—all but one. She remembered saying to Marie, "Look at them—eleven of them have the most beautiful faces in the world. They won't hurt us."

Marie Sanchez, charged with first-degree murder, after three days of jury deliberation, was found guilty of manslaughter and was later sentenced by the judge to two to three years in the penitentiary. The sentence, however, was suspended and Marie was placed on probation with the condition that she submit to psychiatric examination and treatment.[67]

Janice and Jay were talking at supper after the sentencing when Jay observed, "When the jury came in that night, it must have been the high point of your life, Janice. You were probably higher than you will ever be again."

"You would think that would be true, but it really isn't Jay. There was even a better one."

"How could there be?" he asked.

"You had gone out in the hall, Jay, but after the verdict when Marie and I were sitting at the counsel table still sobbing with joy, and when everyone else had gone, Judge Franklin came back into the courtroom and came over to the table. We stood up when we saw him, and he looked at Marie and said, 'Ms. Sanchez, I wanted to tell you something that I am sure you already know.' And, then he said, 'In my judgment you had the advantage in this case of being represented by a very able trial lawyer.' " Then he turned and left the courtroom.

"How did that make you feel, Janice?"

"For a moment—one great, brief, beautiful moment—I was the greatest lawyer in the world."

67. WYO. STAT. § 7-13-301 (1977) and WYO. R. CRIM. P. 33(e).