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WHAT JURIES KNOW: A TRIAL JUDGE'S PERSPECTIVE

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I. INTRODUCTION

The American jury system has survived considerable criticisms from the news media and some legal scholars. Perhaps the genius of the system's survival is its metamorphic properties. Juries are chosen from the citizenry, thus, many juries can be selected simultaneously and yet, be composed of different citizens. This metamorphic property permits juries to be constituted, perform a service, and then disappear into the citizenry landscape. Thus, while the jury system and the verdicts of some juries are the target of media criticism, the citizenry is seldom touched by the criticism. In spite of media criticism, the majority of the citizenry has a healthy reverence for the jury system[1] even though the citizenry might express distrust from

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1. *See* American Bar Association, *Perceptions of the United States Justice Systems* (visited May 30, 1999) <http://www.abanet.org/media/perception/ perception.html>. The American Bar Association (ABA) recently concluded a survey of 1,000 respondents across the country that touched on the citizenry's attitudes about the jury system and what they know about the justice system. The respondents' answers reflected that: (a) court decisions should not reflect the majority of public opinion; (b) 78% believe that the jury system is the most fair way to determine the guilt or not of an accused; (c) 89% had participated in court proceedings; (d) 57% said that serving on a jury was an extremely or very important source of their knowledge about the justice system; and (e) as among the courts, Congress, and the media, the courts enjoyed the strongest public confidence while

time-to-time for the judgment of a particular jury. However, the occasional expression of distrust in the individual jury verdict has not soured the citizenry on the ideals of the jury system.[2] The juror knows that the alternative to the jury system is a judge, who for all practicable purposes, is the government.

The view held by media and some legal scholars that judges will do a better job than juries is not established in any study.[3] Moreover, that view is not shared by the citizenry. In fact, the opposite appears to be true.[4] Time and again, when given the opportunity to present their case to a judge, the parties choose a jury. Thus, the paradox arises that the citizen who fosters negative impressions of the jury system is the same citizen who constitutes the jury pool from which the maligned jury is chosen.[5]

This paper focuses on what a juror learns during jury service and knows after he completes that service. It seeks to identify those intangible yet, ennoble precepts that the jury service experience was intended to teach. Precepts such as courage, confidence, truth, and the proper relationship between the citizen and government are taught and experienced. With these precepts, the juror is better prepared to be a good citizen.

Prior to jury service, jurors generally display one of two attitudes about jury service—indifference or hostility. Juror indifference appears to be a result of media bias and the view that their decision will not make a difference. A sense of absurdity in the justice system shows in the juror's response to the summons, that calls the juror to service, and to the questions that are asked during *voir dire*. A few jurors display a sense of disdain for jury service. Whether this display arises from the perception that the jury lacks control of the process, or that the system is out of control, is not clear. What is clear is that a small segment of the citizenry looks upon jury service as a distraction, perhaps from their more important daily concerns.

Before focusing on what juries learn and know after they complete jury service, reflections on the experience of the British citizenry, that impacted the development of the American jury system, is appropriate. The paper then confronts the media attack that has

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the media received a strong confidence vote of 8%. *See id.*

2. *See id.*

3. *See* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 898 (1998).

4. *See* American Bar Association, *supra* note 1.

5. *See* Michael J. Saks, *The Paradoxical Views of the American Public about Juries*, 48 DEPAUL L. REV. 221, 224 (1998).

impacted the jury pool. Finally, the paper addresses the precepts that the citizenry should learn from the jury service experience.

II. THE BEGINNING OF JURY TRIALS

Trial by jury may have had its beginnings in Anglo-Saxon society as early as 725 A.D.[6] The first recorded application by Morgan of Gla-Morgan, a Welsh king, finds its roots in "the Apostolic Law."[7] From these scant beginnings, we raced forward to 1215, "when King John was forced at the point of a sword to agree to the Magna Carta."[8] The Magna Carta pronounced four concepts that found residence in the United States Constitution. First, people could impose their individual will and sovereign power upon the government.[9] Second, the will of the people regarding fundamental rights should be reduced to a written document.[10] Third, the written document in America (the Constitution) is superior to the legislative and executive branches of government.[11] And fourth, because a single document could not state all rights thought to be fundamental, the document itself was not a limitation of rights.[12] This is so because these rights existed prior to the formation of government and were not created by government. Other rights not enumerated, were retained by the people.[13]

Although the jury trial was implemented in England around 1267,[14] the system did not insure a fair or impartial trial by jurors. In spite of the Magna Carta and its precepts that a jury should be free to determine the fate of the accused, laws were enacted with the specific intent and effect to side-step the fundamental rights of the citizenry. Thus, juries were controlled by the government, and wayward juries suffered the consequences.[15] The experience of the British citizens manifested itself in the United States Declaration of Independence[16]

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6. *See* WILLIAM R. PABST, JURY MANUAL: A GUIDE FOR PROSPECTIVE JURORS 1 (1985).
7. *See id.* Apostolic Law is based on the Biblical account of Christ and the twelve apostles as applied in their decision making process. *See id.* (citing WILLIAM FORSYTHE, HISTORY OF TRIAL BY JURY 46 (1878)).
8. *Id.* at 3.
9. *See id.* at 4 (citing THORNE ET AL., THE GREAT CHARTER 58 (1965)).
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.* at 5.
15. *See id.* (citing FORSYTHE, *supra* note 7, at 151); *see also* GODFREY D. LEHMAN, WE THE JURY . . . THE IMPACT OF JURORS ON OUR BASIC FREEDOMS 35–72 (1997).
16. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("that they are

and resonated in the United States Constitution.[17] The right to a trial by jury, free from government control, became one of the most basic and fundamental rights of an American citizen. This constitutional guarantee expresses not only a general distrust for judges (the Crown) but, more importantly, seeks to maintain freedom and liberty in the hands of the citizens who will always know the measure of freedom and liberty desired. In fact, this republic was established on the principle that the citizenry of America is the guardian of the Constitution. And, to the extent that the people are willing to live up to its principles, the liberty and freedom that flow from the Constitution remain inviolate. As such, "[w]e cannot rest our hopes for liberty in constitutions."[18] Judge Learned Hand admonished, "[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can ever do much to help it. While it lies there it needs no constitution, no law, no court to save it."[19]

One man's efforts are credited as being the centerpiece for many of the principles stated in our Constitution. Among those principles is the tenet that juries must be free to exercise judgment without fear of reprisal. The story is that of Edward Bushell. Eighty-two years before the signing of the Declaration of Independence, a man named Edward Bushell established the path that this country followed in determining, in part, the content of the federal Constitution. According to Lehman, Bushell was born outside London in 1621 into a poor family.[20] After attaining adulthood, Bushell found that he could be the subject of an impressment.[21] In that day, jurors were randomly seized from the streets of London and forced to perform jury service.[22]

After being impressed into service, Bushell found himself in a

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endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and . . . .").

17. Three sections of the Constitution express the unimpeachable right to a trial by jury, free from government interference:

"The trial of all crimes, except in cases of impeachment, shall be by jury . . . ." U.S. CONST. art. III, § 2, cl. 4.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

"In suits at common law, . . . the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

18. LEHMAN, *supra* note 15, at 36.

19. *Id.*

20. *See id.*

21. *See id.* at 37. During the late 17th century, jurors were randomly chosen from the streets of London by "armed" bailiffs.

22. *See id.*

trial that centered on the preachings of William Penn and William Mead.[23] According to the indictment against them, the two, along with others, had congregated for the purpose of preaching Quakerism, a religion that had been outlawed by the Parliament through the Conventicle Act.[24] Indeed, the defendants were on trial for exercising the freedoms of religion, speech and assembly.[25] The length of the trial, over ten days, was not attributed to the length of time it took to present the evidence. Instead, the trial's length had to do with the length of time that the jury deliberated before a verdict was received.

At the conclusion of the evidence, the judge instructed the jury to retire, deliberate and return a verdict against William Penn for disrupting the King's peace.[26] The jury quickly agreed upon a verdict finding William Penn "[g]uilty of speaking on Gracechurch Street."[27] The judges,[28] angered by the verdict, sent the jury back to continue deliberations in accordance with the court's instructions.[29] Time and again, the jury returned to the courtroom to announce the identical verdict.[30] After several days of this exercise, the jurors, who were disheveled, unbathed, and unable to properly relieve themselves, began attracting flies and a crowd of loyal supporters.[31] Nevertheless, the judges continued to refuse them water, food, and sanitary conveniences.[32]

On each occasion called, the jury announced the same verdict. On the final call ten days later, the jury announced a general verdict, which in effect was the exercise of a power superior to that of the judges.[33] A general verdict had to be accepted by the court even

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23. *See id.* at 38.

24. *See id.* The Conventicle Acts under Charles II (1664 & 1670) prohibited meetings of five or more persons for worship other than according to the forms of the Church of England. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 582 (2d ed. 1957).

25. William Penn had earlier been imprisoned for writing and distributing a lengthy pamphlet that was entitled *The Sandy Foundations Shaken—or Those Doctrines of God Subsisting in Three Distinct and Separate Persons; the Impossibility of God's Pardoning Persons by an Imputative Refused from the Authority of Scriptures, Testimonies, and Right Reason, Etc.* *See* LEHMAN, *supra* note 15, at 37.

26. *See id.* at 47.

27. *Id.* at 49.

28. *See id.* at 38. Ten judges were seated which included Sir Samuel Starling who served as the presiding judge.

29. *See id.* at 50.

30. *See id.* at 50–60.

31. *See id.* at 54–55.

32. *See id.* at 50–54. While the judges refused the jurors food, their supporters were generous in clandestine efforts to help get food and water into the jury room.

33. *See id.* at 61.

though it nullified the Conventicle Acts.[34] During one of the many exchanges that occurred between the court and Bushell, regarding the jury's disobedience to the court's instructions, one of the judges, stated to Bushell: "You are a factious fellow. I'll take a course with you. . . .To which Bushell responded: Sir Thomas, I have done according to my conscience as every juror here has done."[35]

III. THE AMERICAN JURY EXPERIENCE

The fact that a jury could factor conscience into its verdict has always been a part of the jury's deliberative process. It nevertheless, caused a stir then, as it does now. Yet, recent reports by the media might give the impression that juries exercising their conscience, as a part of the deliberative scheme, is heresy. "The power of juries to judge the law was not controversial during the Colonial era or in the decades following the Revolution."[36] During those periods, a jury was seen in its *endowed* role of limiting legislative power[37] through the expression of certain unalienable rights. Theophilus Parson, while speaking as a member of the Massachusetts Constitutional Convention, and who later became Chief Justice of the Massachusetts Supreme Court, stated:

> But Sir, the people have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.[38]

American juries are truly the check and balance against government tyranny. They wield more power than judges or Congress in that the citizenry from which the jury is drawn is author and keeper of the Constitution. However, when juries act as the creator of government instead of the created, they cause a stir in the media.[39] This stir is

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34. *See id.*
35. *Id.* at 55 (internal quotations marks omitted).
36. Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL'Y 7, 13 (1997).
37. *See id.* at 13 n.32.
38. *Id.*
39. The verdict in the State of California v. O. J. Simpson, No. BA 097211, 1995 WL 21768 (Cal. Super. Ct. LA. County, January 18, 1995) was one such instance. There the

merely sensationalism aimed at dismantling jury independence. This fact is proven by the truth that the number of instances that a jury has exercised independence is inconsequential when compared to the innumerable instances where a jury verdict mirrors the thinking of the public, or a judge.[40]

IV. DISTRUST FOR JURY VERDICTS IS MEDIA SPONSORED

The news media and a few legal scholars have championed that the jury is incapable of deciding complex cases. Generally, the reference is to civil cases where large sums of money are involved. Thus, any sense of distrust for the jury system is thrust upon the public. Studies show that the public's distrust of the jury system finds its origin in news media accounts of a few cases.[41] An opinion survey analyzed by Professor Michael Saks of the University of Iowa College of Law, confirms the effect that the news media has on citizens who make up the jury pool in this country.[42] Civil juries in particular, he determines in another report, are viewed in a negative light.[43] The perception that the public is overly litigious and that jury awards are too large is passed to the public by media hype.[44] Thus, citizens who think that juries are out of control because of media reports of large monetary awards are the same citizens from which other juries are selected.[45] Saks calls this phenomenon "paradoxical" because the same citizens who make up the survey pool also constitute the jury pool.[46] As a result, citizens, when summoned to serve as jurors, often express a detachment or ambivalence to jury duty.

Media assault on the jury system is not a recent phenomenon. The view that the jury is ill-equipped to adjudicate complicated civil cases can be traced back at least 50 years. In an article that appeared in the Los Angeles Times Syndicate in 1950, Art Buchwald wrote that a well-known lawyer told him:

[M]ost jurors can deal with personal injury and liability cases.

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media reported that the decision of the jury was along racial lines. Assuming that the jury exercised conscience, it can be said only that justice was done, even if the jury was in error on the law and facts.

40. Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 53 (1997).

41. *See* Vidmar, *supra* note 3, at 849.

42. *See* Saks, *supra* note 5, at 240.

43. *See* Saks, *supra* note 40, at 53.

44. *See* Vidmar, *supra* note 3, at 849.

45. *See* Saks, *supra* note 5, at 224.

46. *See id.* at 240.

> But you have to have an MBA from Harvard, a law degree from Stanford and an accounting diploma from the Wharton School to be able to follow the complicated suits that ordinary citizens are required to adjudicate these days.[47]

Then Buchwald pondered, "[h]ow can the average jury understand the issues in a multi-billion dollar corporation lawsuit?"[48] He went on in the article to cite reported indiscretions by an unidentified jury, and attributes the conduct to *most* juries and to the jurors lack of intelligence.[49]

Broad-brush painting of the jury by the media, who are often influenced by "a well-known trial lawyer," is the type of misinformation that places the citizenry in the paradox. On the one hand, a juror shares in the public's scorned view of the jury, and on the other hand he is a member of the jury pool upon which he heaps the scorn. The confusion that occurs may explain juror indifference and hostility to jury service.

V. JUSTICE = FACT + LAW + CONSCIENCE

In spite of media criticism of the jury system, the citizenry who make up the jury pool consider the jury system their first choice.[50] Gerry Spence is credited with telling the story of a woman named Maude who was on trial for pistol-whipping a man named Benny.[51] It appears that Benny had sewn up the mouth of one of Maude's horses.[52] The judge in the case instructed the jury that a person could not take the law into his own hands.[53] Nevertheless, the jury acquitted Maude because as the jury foreman stated, "[t]he judge trusted us to do justice"[54] in spite of the legal instructions that may have dictated otherwise. Thus, a jury verdict is more than facts and law; it includes moral and ethical conscience.

The inclusion of conscience by the jury in Maude's case is simply a reminder that the justice system must be flexible enough to permit acts of mercy by a jury where the facts dictate morally and ethically

47. Art Buchwald, *Inside the Jury Room*, 7 LITIG. 44, 44 (1980) (displaying a reprint of an article from the Los Angeles Times Syndicate in 1980).
48. *Id.* at 44.
49. *See id.*
50. *See* American Bar Association, *supra* note 1 and accompanying text.
51. *See* STEPHEN J. ADLER, THE JURY—TRIAL AND ERROR IN THE AMERICAN COURTROOM 3 (1994).
52. *See id.*
53. *See id.*
54. *Id.*

that mercy is appropriate. It also teaches that justice sometimes requires a finding that the actions of the accused were justified, even though the actions were contrary to law.

The inclusion of conscience by a jury in its deliberations teaches us that juries are more powerful than the government. In the *Dean of St. Asaph's* case, the court stated:

> To be sure . . . if the jury choose, they may acquit the defendant by a general verdict of not guilty, although . . . [w]hen they do so, they take the trial of the law, as well as of fact, upon themselves . . . [n]ot bound by form or coercion, but by moral obligation, by their duty, and their oaths. They have the power to act otherwise, if they choose to set those considerations at defiance . . . ."[55]

American jurisprudence embraced the idea that the unfettered power exercised by the jury was fundamental to a free society—free from government control. The first chief justice of the United States Supreme Court understood this when he stated:

> It may not be amiss, here, Gentlemen to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge both . . . it is . . . within your power of decision.[56]

VI. JUDGING CHARACTER IS AN EXAMPLE OF THE EXERCISE OF CONSCIENCE

While it is true that the character of a defendant as a "law-abiding citizen" is a fact question and is to be determined by the jury, the consideration of character is an example of a factor that could override undisputed facts. Where character is raised by the evidence in a case, the jury is instructed:

> Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, you should consider such evidence along with all the other evidence in the case.
>
> Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you

55. The King v. Shipley (Dean of St. Asaph), 99 Eng. Rep. 774, 785 (K.B. 1784).
56. Georgia v. Brailsford, 3 U.S. 1, 4 (1794).

> may think it improbable that a person of good character in respect to those traits would commit such a crime.
>
> You will always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.[57]

Therefore, even where the facts are compelling, the character instruction permits a jury to virtually ignore compelling facts and render a verdict based on its determination that it is unlikely that a person of such character would commit such a crime.[58]

VII. JURY DUTY TRANSFORMS JURORS' VIEWS

Jury duty transforms the juror's thinking about the jury system.[59] The confusion that the media has created in the minds of the juror between citizen as critic and citizen as juror, is bridged through jury service. At the conclusion of jury service, jurors have learned four ennobles that serve to resolve the juror paradox.

First, the juror learns that the proposition that a jury's role is simply to apply the law to the facts is a misconception, and if blindly applied, is a relinquishment of those unalienable rights described in the Declaration of Independence.[60] This misconception, that is fostered on the citizenry, finds its root in the democratization of this republic.[61] As the government becomes more democratized in nature, it is assumed by politicians that the citizenry has given license to limit the citizen's freedom and liberty in instances where the "greater good" is claimed.

This misconception also finds support in the corporate community because of "so-called" economic concerns surrounding the size of jury awards. Those who support the misconception also seek to reduce the role of the jury in civil cases. Similar restrictions on

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57. FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS 20 (1997).

58. *See* United States v. Callahan, 588 F.2d 1078, 1085 (5th Cir. 1979) (finding that good character evidence may give rise to a resonable doubt). However, it is generally not error to refuse this instruction. *See* United States v. Baytank, 934 F.2d 599, 614 (5th Cir. 1991).

59. *See* Conrad, *supra* note 36, at 48. In his introduction, Conrad quotes Josh Billings: "The trouble with people is not that they don't know but that they know so much that ain't so." *Id.* at 7.

60. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

61. *See* Erick J. Haynie, *Populism, Free Speech, and The Rule of Law: The "Fully Informed" Jury Movement and Its Implications*, 88 J. CRIM. L. & CRIMINOLOGY 343, 344 (1997). He describes the Fully Informed Jury Association (FIJA) as one of the greatest and least noticed groups who pose a threat to constitutional order and the criminal justice system by advocating jury nullification. *See id.*

jurors have been contemplated in criminal cases. However, part of the deliberative process is to determine the moral "rightness" of the result reached. Thus, conscience enters into the deliberative equation as a check or balance against the law's dictate. Therefore, it is no surprise to a jury that it may reach its verdict based on facts, law and conscience, and by exercising unalienable rights.

Second, jurors learn the lesson of courage. Even with questions concerning personal safety, jurors retire to the jury room to deliberate with the view to reach a just verdict. After the jurors reach a decision, they make a public presentation of the verdict. When the jurors are released from jury duty, a polling of the jurors presents a picture of courage, the type of courage that was called for in the epic *Moby Dick*.[62] In Melville's *Moby Dick*, the chief mate of the *Pequod*, in addressing his crew before going out to fish says: "I will have no man in my boat . . . who is not afraid of a whale."[63] Jurors learn that the whale is not the parties in the suit or the presiding judge, but their own fears. And, each juror must summons the courage to do justice, in spite of their fears.

A third lesson learned by jurors is confidence in their verdict, based on shared responsibility, knowledge, and wisdom. In today's culture, jurors bring a high level of problem solving experience into the jury room. A jury panel of twelve persons, more often than not, is composed of persons with an average of fourteen years of formal education and a lifetime of practical experience.[64] The panel includes professionals, business men and women, instructors, and a number of quasi-professional persons. Thus, the jury's ability to take its problem solving skills into the jury room and incorporate them into the deliberative process, debunks the media's notion that jurors are incapable of handling complex civil cases.

Also, a juror's confidence in his individual decision is buoyed by the shared responsibility, knowledge, and wisdom of the body. In this regard, the strength of the jury's verdict does not depend upon the law or a point of view, but the collective and common effort of a free and independent citizenry, acting individually and collectively to discharge their duty, as judges of the facts and law. The sharing of responsibility, knowledge, and wisdom, adds assurance that earnest, honest, and intelligent deliberation has occurred.

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62. HERMAN MELVILLE, MOBY DICK (Luther S. Mansfield & Howard P. Vincent eds., Hendricks House 1952).

63. *Id.* at 112.

64. *See* American Bar Association, *supra* note 1 and accompanying text.

Finally, jurors learn that any view of the justice system derived from media hype, is just that—hype. During the *voir dire* process, questions concerning a venire's view of the administration of justice arise. The response, infrequently, is that there are too many lawsuits being filed, the suits are frivolous, and that juries award too much money. Seldom is the panel member able to state a specific case from which this perception arises. Therefore, at the root of the panel member's concern is the fear that he will be asked to render a verdict that conflicts with community standards or media expectations. Another writer has described this phenomenon of desensitizing the jury pool as the product of the Seinfeld Syndrome.[65] According to Vesper, this syndrome manifests itself mainly in younger jurors—the "members of Generation X."[66] Their malady, he concludes, is their indifference to the plight of all plaintiffs, except those who have been horrifically injured.[67] To these jurors, he writes "money solves nothing,"[68] and therefore, Generation X's verdict reflects small, or no monetary awards.

VIII. CONCLUSION

Efforts to limit jury independence through legislation or media propaganda must fail. While the citizenry, legal scholars, the courts and the media have a stake in the competency of juries, the educational process cannot have as its intended aim to puzzle and frighten the jury pool. Eighty-nine percent participation in the justice system by the citizenry evidences that a more intelligent jury pool is developing. The philosophy, "juries sé, judges know," is still constitutional.

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65. *See* Thomas J. Vesper, *Seinfeld Syndrome: The Indifference of Otherwise Nice Jurors*, 34 TRIAL 39, 39 (1998).
66. *Id.*
67. *See id.*
68. *Id.*