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Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials[†]

LEIGH B. BIENEN*

INTRODUCTION

Lawyers and judges sometimes forget that being a juror is a human experience on a continuum with other human experiences. For many it is a rewarding experience, for some it is frustrating, and for others, perhaps, it is simply another experience, one that is a little different from the ordinary. Being on a jury is also, of course, a legal event, structured by rules and procedures, some of which are designed to distance all participants from what would be their spontaneous human responses. Lawyers and judges tend to be more concerned with the technical aspects of the experience than are jurors—people for whom it is probably a relatively short and isolated episode, unconnected to the rest of their lives. However, being a juror is an experience people remember long after the trial, and it may be an emotionally disturbing experience.

The more we learn about jurors, especially from jurors themselves, the more we see that the process of arriving at a collective judgment involves complicated interactions between emotions, experience, intelligence, and character for both individuals and the group, interactions that probably cannot and should not be disentangled. This is why we ask untrained jurors, rather than professional judges or lawyers, to make the most troublesome judgments—we want them to judge us first as individual human beings and then as members of the society we all live in. And they do.

The practice of counseling or debriefing jurors by trained mental health professionals is still in an experimental stage. Little research has been done, and documentation of cases is sporadic.¹ Counseling has been ordered for

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1. The data included here are from a smattering of news articles, mostly in local papers or specialized publications. The one law review note specifically on point primarily discusses a Carrollton, Kentucky, case, probably the first reported debriefing of jurors. Marjorie O. Dabbs, Note, *Jury Traumatization in High Profile Criminal Trials: A Case for Crisis Debriefing?*, 16 LAW & PSYCHOL. REV. 201 (1992). The debriefing was ordered by trial court judge Charles Satterwhite of the Fifteenth Judicial Circuit in Kentucky after a highly publicized six-week trial resulting from the worst alcohol-related traffic accident in U.S. history. An intoxicated driver of a pickup truck crashed into a church school bus and killed 27 persons, most of them students. *Id.* Judge Satterwhite reported that he got the idea of offering post-verdict counseling to jurors from an article he read during the trial about the

jurors in very few cases, probably less than two or three dozen.² The exact number is impossible to determine since no national or state agency has yet attempted to keep a centralized record of all cases in which juror debriefing has occurred.

If professional assistance or counseling for jurors after exceptionally disturbing or stressful trials becomes more widespread, the criminal justice system will necessarily address some of the following questions: What kinds of cases require debriefing?³ Under what authority do courts call for such

debriefing of families of crime victims. He decided that the jurors, who he could see were visibly shaken and emotionally distraught during the trial, would need similar assistance. On his own initiative, the judge contacted professionals who had conducted psychological debriefing in other crisis situations. *Id.* at 201-02.

2. Victoria Slind-Flor, *In Grisly Trials: Counties Begin to Help Jurors Cope Afterward*, NAT'L L.J., Jan. 20, 1992, at 3 (referring to four cases in which debriefing of jurors after a traumatic trial had occurred). The article did not refer to the Jeffrey Dahmer trial, as post-verdict counseling for the Dahmer jurors took place after that article was published. A subsequent article in the *Washington Post* reported that all jurors in the Dahmer case were offered counseling by mental health professionals after the trial. All twelve plus two alternates accepted. The jurors in the Dahmer trial addressed the sanity of the defendant, but did not consider guilt or innocence or the imposition of the death penalty. Kate D. Rauch, *After the Verdict: Healing Jurors Who Have Been Traumatized by Violent Testimony*, WASH. POST, Apr. 14, 1992, at 10. For further discussion of the Dahmer case, see Samuel R. Gross, *The Romance of Revenge*, 13 STUD. L. POL. SOC. (forthcoming 1993). See also Julie Emery & Sally Macdonald, *As Pawlyk Heads to Prison, Jurors Cope with Trial's Toll*, SEATTLE TIMES, Aug. 13, 1991, at C1; Julie Emery, *'Jurors Are Victims Too'—Those Who Decided Pawlyk's Fate Get Help to Cope with the Scars*, SEATTLE TIMES, Aug. 9, 1991, at A1 (noting that the Pawlyk case was reported to be the first case in Washington to provide juror debriefing). For details of the Carrollton debriefing, see Theodore B. Feldmann & Roger A. Bell, *Crisis Debriefing of a Jury After a Murder Trial*, 42 HOSP. & COMMUNITY PSYCHIATRY 79 (1991). The results of a follow-up study 18 months later is reported in Roger A. Bell & Theodore B. Feldmann, *Crisis Debriefing of Juries: A Follow-Up*, AM. J. PREVENTIVE PSYCHIATRY AND NEUROLOGY, Fall 1992, at 55. A subsequent paper reports the experience of jurors in three unusually stressful murder trials, one of which was the Jeffrey Dahmer trial in Milwaukee, Wisconsin. Roger A. Bell et al., *Stress in Jurors: A Challenge for the Legal and Mental Health Systems* (Spring 1992) (Invited Paper for the Journal of the American Board of Trial Advocates) (copy on file with the *Indiana Law Journal*). The judge in the Dahmer trial agreed to let Bell's team offer debriefing after they offered to train local professionals. The trial was less stressful than it might otherwise have been because the attorneys agreed not to offer graphic evidence. Nonetheless, the high-profile nature of the trial, the relentless media attention, the three weeks of sequestration, and the sheer number of murders made the trial emotionally difficult for jurors. The judge later commented, "They really struggled . . . [T]hey were separated from their families for three weeks; that was the meaningful stress." Rauch, *supra*, at 11. The Dahmer trial was the first in Wisconsin to offer jury debriefing. *Id.*

3. While the definition of an emotionally disturbing or stressful case is not precise, most judges recognize such cases when they confront them. The courtroom personnel, as well as the jurors, will be distressed by aspects of the case. There may be additional aggravating circumstances, such as the sequestering or shielding of jurors, or a great deal of distraction and attention from the media, or the possibility of threats to the jurors or judge. Most of the cases discussed in this Essay involved evidence introduced in criminal trials that was particularly disturbing to jurors, but a trial could produce stress and anxiety for other reasons. See TIMOTHY R. MURPHY ET AL., A MANUAL FOR MANAGING NOTORIOUS CASES (National Center for State Courts 1992).

counseling? What training and expertise should the people who provide such assistance have? How do trial court judges or administrators find expert assistance or arrange for the training of personnel in their jurisdiction? Is there any role for assistance to jurors during the deliberation process? Could the fact of post-verdict counseling have an effect upon the validity of a verdict? Who pays the costs for professional counseling of jurors? Is juror debriefing effective or necessary? Should debriefing be offered more routinely in the future?

This Essay includes information and commentary relevant to these questions. My own experience and observations are based upon research I have conducted on homicide and capital trials in New Jersey over the past decade;⁴ discussions with researchers conducting interviews with capital jurors in several states under the auspices of a National Science Foundation Project⁵ designed to study alternative models of juror decision making under different types of capital statutes;⁶ informal interviews with people who have been involved in providing post-verdict debriefing, developing therapeutic

4. From 1985-1991, I supervised the research and data collection for the Public Defender Homicide Study, an interview study of defense attorneys and others involved in homicide cases in New Jersey since the reimposition of capital punishment in the state. The results of this research are reported in Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988) [hereinafter *Prosecutorial Discretion*], and Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: Felony Murder Cases*, 54 ALBANY L. REV. 709 (1990). The research of the Public Defender Homicide Study was subsequently incorporated within the New Jersey Proportionality Review Project. For a history of the Proportionality Review Project in New Jersey, see *State v. Marshall*, 613 A.2d 1059 (N.J. 1992).

5. William J. Bowers, Capital Jury Project, Models of Decision Making Among Sentencing Jurors, NSF SES-9013252, (National Science Foundation Law and Social Science Program 1993). William J. Bowers of the College of Criminal Justice at Northeastern University in Boston is the principal investigator on the project. The project was begun in 1990 and, to date, project staff have interviewed jurors in 12 states: Virginia, Indiana, North Carolina, South Carolina, Texas, Tennessee, Kentucky, Georgia, Pennsylvania, Louisiana, California, and Florida.

6. In each state, 30 capital trials are identified, with a balance of life and death outcomes at the penalty phase. Interdisciplinary teams of lawyers, psychologists, and others identify jurors and request permission to interview them, often with the assistance of the trial court judge. In all states, the interviews are in-person interviews, using the same data collection instrument. A total of 135 capital jurors are interviewed in each state. Interviews with each juror last three or four hours. The comments from jurors quoted in this paper with the permission of the Capital Jury Project (CJP) are from two presentations: William J. Bowers et al., *In Their Own Words: How Capital Jurors Explain Their Life or Death Sentencing Decisions* (May 26, 1992) (Capital Jury Project Working Paper No. 6) [hereinafter CJP Working Paper No. 6] (copy on file with the *Indiana Law Journal*) and William J. Bowers et al., *In Their Own Words: How Capital Jurors Explain Their Life or Death Sentencing Decisions* (Nov. 7, 1992) (Capital Jury Project Working Paper No. 7) [hereinafter CJP Working Paper No. 7] (copy on file with the *Indiana Law Journal*). The papers by Marla Sandys, *infra* note 21, and Joseph Hoffman, *infra* note 25, are also part of this Project.

models, or conducting research in analogous situations;⁷ and discussions with judges and court administrators.⁸

I. THE PRESENT SITUATION

Members of the judiciary seem to be persuaded that post-verdict counseling could be helpful to jurors, but some judges are worried that the process could jeopardize verdicts or otherwise interfere with the criminal process or break down the traditional demarcations between actors in the criminal justice system. Judges who have had direct experience with the debriefing of jurors are more enthusiastic than those who have not.⁹ The impetus to call for counseling or some sort of professional assistance for jurors arises when judges see that jurors are visibly under stress or emotionally disturbed.¹⁰ In one case, the jurors independently contacted the judge after the verdict and requested assistance.¹¹ Many judges have paternal feelings towards jurors,

7. Telephone interview with Professor Roger A. Bell, Department of Psychiatry and Behavioral Sciences, University of Louisville School of Medicine, Louisville, Ky. (Dec. 11, 1992); telephone interview with Fred Lanceley, Special Operations and Research of the Federal Bureau of Investigation, FBI Academy, Quantico, Va. (Dec. 14, 1992); telephone interview with Cessie Alfonso, Litigation Specialist, Alfonso Associates, Jersey City, N.J., a forensic social worker specializing in mitigation investigation in death penalty cases (Dec. 28, 1992); telephone interview with Terence M. Keane, Ph.D., Director of the National Center for Post Traumatic Stress Disorder, Boston V.A. Medical Center, Boston, Mass. (Dec. 17, 1992).

8. Administrators of state supreme courts in several states have addressed the issue. It has also been discussed at the National Judicial College. If the practice continues, it is likely that some general guidelines will be set in the future. Several national institutions are interested in the issue. Telephone interview with G. Thomas Munsterman, Director, Center for Jury Studies, National Center for State Courts, Arlington, Va. (Dec. 15, 1992).

9. In Santa Clara County, California, for example, post-verdict counseling has been ordered five times; four of these were capital murder cases and the fifth case was a child sexual abuse case. One judge initially ordered the counseling in a two defendant/two victim capital murder trial that lasted five months and resulted in the imposition of a death sentence. The counselor was a mental health counselor who worked for the county and had experience with counseling family members and witnesses of a massacre in a school yard. The judge thought counseling was necessary because the jurors had been through an abnormal event that they could not discuss with others for the duration of the trial. The single group-counseling session, lasting about three hours, took place in the courthouse soon after the verdict. Counselors in the session told the jurors what they might expect in terms of a normal reaction to an abnormal event. If any jurors requested follow-up, it was made available to them. The jurors were very appreciative, even those who initially thought they did not need assistance. Telephone interview with Judge Hugh Mullin III, Superior Court, Santa Clara, Cal. (Dec. 16, 1992).

10. "We were forced to view evidence that nothing in your life prepares you for," said one juror. . . . The juror said she had vomited after several court sessions and experienced nightmares and unexplained crying." Katherine Bishop, *When a Jury Hears Details Too Gruesome to Bear*, N.Y. TIMES, Jan. 31, 1992, at B7.

11. Judge Jim Bates reported that the jurors who continued to be disturbed by the evidence in the Pawlyk case independently contacted him after the verdict and asked for his help. The judge himself had been feeling some of the same symptoms of post-traumatic stress, and he identified counselors and

and jurors often return respect to the judges.¹² Some judges express the view that being a juror in a traumatic or stressful case is a thankless task, and if they can make the experience less painful for jurors, then they have an obligation to do so. Some judges are so convinced of the efficacy of the process that they routinely order post-verdict debriefing in certain kinds of cases.¹³

When judges order post-verdict debriefing, they typically do so as a matter of individual discretion. One or two judicial administrative agencies have become involved in arranging post-verdict debriefing.¹⁴ Such counseling is likely to be ordered more routinely in the future, if only because the judges who have tried it believe it to have been effective and want to continue to offer it.¹⁵ The reasons why it will be ordered may have less to do with

set up a session for the jurors after sentencing. His office contacted all jurors, and they all attended. The judge and his law clerk also attended the debriefing session, which was conducted with the consent of both trial attorneys. Interview with Judge Jim Bates, King County Courthouse, Seattle, Wash. (Mar. 16, 1993) [hereinafter Bates Interview].

12. "I thought the judge . . . was very impressive [S]he explained thoroughly how things would not make sense to you and how eventually as it was summarized it would all start to fall into place." CJP Working Paper No. 6, *supra* note 6, at 1.

13. Judge Mullin commented that if the county had not had a mental health professional available on staff, he would have hired a therapist from private practice. After his positive experience, two additional judges in that county have ordered post-verdict counseling in other difficult cases. Judge Mullin felt the counseling was so effective that it should be offered to any juror who wants it in the appropriate case. Telephone interview with Judge Mullin, *supra* note 9.

14. The Administrative Office of the Courts in Kentucky hired Dr. Roger Bell, professor of psychiatry at the University of Louisville School of Medicine as a consultant and arranged for post-verdict counseling subsequent to its initial use in the Carrollton, Kentucky, school bus case. Telephone interview with Beverly M. Doyle, Kentucky Administrative Office of the Courts, Lexington, Ky. (Dec. 17, 1992). The Supreme Court of Wisconsin arranged for Dr. Bell to do a training session for their staff, and Dr. Bell met with the jury in the Jeffrey Dahmer case, although not in a formal post-verdict debriefing session. The Office of the Administrator of the Courts in Washington addressed the issue in its *1991 Report of the Courts of Washington*. Robert L. Harris & Charlene M. Hiss, *Helping Jurors Cope with Trauma: The Dodd Case*, in 1991 REPORT OF THE COURTS OF WASHINGTON ch. 1, at 13; see also MURPHY ET AL., *supra* note 3, at 79-81 (1991) (discussing briefly the Carrollton and *Dodd* cases and the possibility of post-verdict counseling for jurors generally).

15. According to Harris and Hiss:

Preparing staff and jurors for the stress of such testimony [concerning the sexual abuse and murder of three young children in a capital case] and the constant media pressure was one of my major concerns. The National Judicial College's course on managing death penalty cases had pointed out the need for dealing with jurors' stress, and this was one of the first cases in Washington where extensive stress-management techniques were put to the test. . . . In the *Dodd* case, we offered all the jurors and alternates the opportunity to return on the Monday following the verdict and gave them the opportunity to express their feelings with a psychiatric services crisis worker from the Southwest Washington Hospital. This was vital since they had listened to some very ugly evidence in a short period of time and were not allowed to talk about it until they began deliberation. Every juror came to the session. . . . In all, the techniques we used were successful in

measurable therapeutic results than with the emotional dynamics of the criminal justice process: judges see jurors in their courtrooms crying or visibly upset.¹⁶ Some judges have expressed the view that jurors are generally undercompensated for their services or badly treated,¹⁷ and perhaps these sentiments make judges welcome the opportunity to offer support and some recompense to jurors. When the judge decides to order counseling, it is administratively easy to arrange, especially if it has already been done once in that trial jurisdiction. Some judges request debriefing only after consulting with trial counsel and hearing no objections from them.¹⁸

Behavioral evidence and the statements of jurors themselves¹⁹ suggest that many jurors are disturbed by the experience of serving on a jury,²⁰ especially in capital cases.²¹ Jurors welcome the opportunity to talk about their experiences, whether in the context of a court-sponsored debriefing or counseling session or in other post-verdict interviews.²² And if the scattered

minimizing jurors' trauma and helping them deal with the long-term impact of the horrors they saw and heard.

Harris & Hiss, *supra* note 14, ch. 1, at 13.

16. See Dabbs, *supra* note 1, at 201 (quoting Judge Satterwhite).

17. The state of Washington surveyed 830 jurors in 16 counties to determine reasons for the low turnout for jury service. Interference with work, loss of income, and meager pay for jurors were frequently cited as problems. In response to this information, Washington State raised the minimum fee for jurors. Gil Austin, *Studies and Legislation Change Washington Jury Practices*, 1991 REPORT OF THE COURTS OF WASHINGTON, *supra* note 14, ch. 1, at 11.

18. Before ordering a debriefing session with the jurors in the Pawlyk trial, Judge Jim Bates consulted both trial counsel and was assured that they had no objections to the debriefing. Bates Interview, *supra* note 11.

19. In the words of one observer:

I found myself close to tears during the victim's testimony, hearing of her life, her activities as a crack addict, forced to examine, with the other jurors, her slightly disfigured left eyelid—the claim of the prosecution being that the woman had suffered permanent damage as a result of the beating. And what irony—the woman had her right arm in a sling, and a badly bruised face, from what was apparently a very recent beating, unrelated to the case being tried.

Joyce Carol Oates, *I, The Juror*, 5 WITNESS 9, 16 (1991).

20. "Many jurors suffered intense psychological symptoms during the trial. There were gastrointestinal sensations of nausea, uneasy stomach, and stomach in a knot, and cardiovascular symptoms of intense palpitation and faintness. Shakiness, headaches, trembling, feelings of nervousness, fatigue, anxiety, weight change and sleeplessness were common." Stanley M. Kaplan, *Death, So Say We All*, PSYCHOL. TODAY, July 1985, at 48, 51.

21. See, e.g., Marla Sandys, *The Life or Death Decisions of Capital Jurors: Preliminary Findings from Kentucky* (Nov. 22, 1991) (paper presented at the Annual Meeting of the American Society of Criminology, San Francisco, Cal.) (copy on file with the *Indiana Law Journal*). "A majority of the respondents found the experience of serving on a capital case emotionally upsetting (62%, N = 18), and 22% (N = 6) of the jurors experienced difficulties sleeping after the trial." *Id.* at 4.

22. Members of the Capital Jury Project research team are often surprised that the jurors are not only willing but eager to talk to them. Some of the interviews with jurors last far longer than the three hours allotted. Many jurors report that this is the first time that someone has been interested in listening

reports from jurors are that post-verdict debriefing is a help or comfort, and the expense is minimal, why shouldn't it be offered more widely?

Mental health professionals who do crisis debriefing with emergency medical teams and participants in disasters have adapted the methodology and theoretical framework for such counseling to the situation of jurors in stressful trials. Murder cases, especially cases where there are graphic visualizations of gruesome evidence, extreme bodily disfigurement, torture, and cases where the murder victim or sexual abuse victim is a child are most predictably disturbing to jurors. Lawyers who have interviewed capital jurors in several different jurisdictions report preliminary findings that suggest that jurors are profoundly affected, and sometimes remain disturbed, by the experience of being a juror even years after the event. The majority of jurors welcomed the opportunity to talk to anyone, whether or not professionally trained, about the experience.²³

to them. *See, e.g., Emery, supra* note 2.

Two months after delivering their verdicts, jurors who convicted cult leader Yahweh Ben Yahweh and six disciples of conspiracy are still grappling with emotions stirred by the graphic testimony and grisly photos of mutilated bodies. [One victim was decapitated with a machete. Others were shot or stabbed to death and had their ears or other body parts cut off. According to testimony, sect members brought back the severed ears as proof of their deeds.] "Once in a while, looking at the picture would make me sick to my stomach. Other times, it didn't bother me at all," said jury forewoman Elissa Miller. "The hardest part for me was that I would go through it in the day time, and I couldn't release it when I went home," said juror Eula Holland. . . . The Yahweh jurors devised their own ways of dealing with the stress. "We would laugh," Holland said. "That would help us." . . . Holland relied on her faith in God to pull her through the trial, and prayed with her pastor when it was over. "I felt so much better after that. Then I began to talk to people. As I talked, I began to let go," Holland said. In federal court, jury counseling is "a matter under discussion," said Chief District Judge Norman Roettger, who presided over the Yahweh trial.

Yahweh Jurors Grapple with Grisly Evidence, UPI, July 20, 1992, available in LEXIS, Nexis Library, UPI File. The quoted comments from jurors here and in other newspaper reports are consistent with the more detailed and systematic findings of the CJP.

23. Emery, *supra* note 2, reported that:

Haunted by images of brutal murder, a former juror is getting psychological counseling to cope with the aftermath of the trial of convicted murderer William Pawlyk.

Several other jurors who heard and saw weeks of evidence of the gruesome killings of TV personality Larry Sturholm and emergency-room nurse Debra Sweiger also are coping with lingering stress. Others say they're not traumatized, but will remember the trial for the rest of their lives. . . .

Jurors felt tremendous compassion for Pawlyk, who fatally knifed his victims at Sweiger's home near Issaquah. "We all thought that, given the wrong circumstances, that could be us," Ferris said.

Juror Melissa Barran, a public-affairs manager for GTE Northwestern, said the jury empathized with the victims. "One of the most emotional pieces of evidence about Sweiger that touched me was the note she wrote in her dying minutes to her 5-year-old daughter, Jenny," Barran said. "It said, 'I love you, Mother.'"

II. THE EXPERIENCE OF BEING A JUROR

The analogy between the courtroom and the theatre is especially apt for jurors, who are particularly in the position of being an audience and are often unwilling observers of things they would prefer not to see or hear. The experience is also similar to a theatrical experience because it is uniquely bounded in time and space. A juror enters a courtroom and gives control over what is happening inside the courtroom to others. And, as in the theatre, events are re-created for the juror, and the juror is asked to make a judgment. One important difference, however, is that the actors in actual courtroom dramas are not trying to please or to gratify their audience.

Jurors are witnesses of a special kind, charged by the rest of society to decide upon punishment. Unlike legislators who make an abstract judgment about punishment, or about who should live or die, and unlike voters or persons responding to a poll, capital jurors are asked to decide upon life or death for a particular person who is sitting right in front of them. Jurors in capital cases, and jurors who actually choose the death penalty, may feel the burdens of this responsibility especially keenly.²⁴ This is an entirely different experience from being asked the abstract question of whether or not you are in favor of capital punishment.²⁵

Jurors may experience feelings of identification with and compassion for the defendant.²⁶ Or they may be frightened or estranged from the defendant.²⁷

Id. These jurors were debriefed by John Ganz and Doug Wheeler, who wrote and helped produce a 15-minute video under the auspices of the Washington Victims Service. Ganz is a mental-health counselor. Wheeler is a school administrator and specialist in victim assistance. *Id.* A subsequent article reported that this was the first time such debriefing had been offered in the state of Washington. Emery & Macdonald, *supra* note 2. John Ganz had counseled the survivors and relatives of the victims in the Jeffrey Dahmer case. Telephone interview with Judge Jim Bates, King County Superior Court, Seattle, Wash. (Dec. 17, 1992).

24. Kaplan, *supra* note 20, at 48-53.

Juror Soderstrom said she had started the trial thinking it would be "sort of exciting," but never dreamed it would have a lasting impact on her life. She had advice to other jurors who might be assigned to such a nerve-shattering trial. "People should not look at it as an exciting adventure, but as something to be taken very seriously."

Emery & Macdonald, *supra* note 2, at C1.

25. As one juror said:

I remember going into that phase of the trial praying an awful lot for guidance, [to] tell me what to do, because I remember not feeling sure if I could do it. I remember in jury selection they asked my opinions on the death penalty, and I said, if you asked me that any other time, I would have told you how adamantly and strongly I believe in it, but sitting across the room [and] looking somebody straight in the face and knowing that it's gonna be my decision, you know, it's not quite so easy

Joseph Hoffman, A Tale of Two Jurors 8 (Nov. 22, 1991) (paper presented at the Annual Meeting of the American Criminology Society, San Francisco, Cal.) (copy on file with the *Indiana Law Journal*).

26. The jurors in the *Pawlyk* murder trial, in which a great deal of gruesome evidence was introduced, nonetheless felt a link to Pawlyk, a Boeing computer services manager and former naval officer. One of the jurors commented, "He definitely was a good man who did a bad thing . . . He was

Jurors evaluate the behavior of their fellow human beings and ask what they would have done in a similar circumstance. As in the theatre, they do this as a collective experience. Jurors are asked not only to make troublesome judgments, but also to come to a consensus with others on difficult moral questions. The shared nature of the juror's experience is one of its unique features. And jurors are not always happy with the collective nature of the enterprise:

Yeah, the one thing I think that really bothered me the most [was] when it got right down to the nitty gritty of the whole thing. When the judge was going to sequester everybody . . . all of a sudden all of those who were holding out changed their minds because they didn't want to be sequestered. And that has bugged me since the time it . . . happened . . . I told my husband about it . . . I said, '[M]y God . . . can you just imagine if it was you[] or I on trial like that and because they were going to hold the jury over, they decided to change their mind and you[re] guilty?' That's scary. That's what scared the pants off of me right there.²⁸

Another juror stated:

I was astonished by the ferocity of my fellow jurors' attack on the victim's testimony, which was not only pitiless but derisive, contemptuous. Men led the attack immediately, before we were even seated around the table . . . but women joined in, too. Hours of earnest testimony were discounted by a wave of the hand, a 'gut-level' opinion; inconsistencies in testimony were

the kind of guy I could have been sitting across from at a Chamber of Commerce meeting." Emery, *supra* note 2, at A1. After the verdict was announced, one juror wondered if she could look at Pawlyk as she left the courtroom. "He looked right at me and nodded his head," she said. "I interpreted that affirming glance as saying, 'You did all you can do.' That made him a person." *Id.*

"Jury foreman William Royston said that although all the jurors found the trial emotionally charged, the women jurors seemed more overwhelmed than the men by what they had heard and seen." Emery & Macdonald, *supra* note 2, at C1. "I think what happened could have happened to any one of us. . . . He [Pawlyk] seemed like a normal person before this happened. The rest of us would have picked up our bags and gone away in his position, but he just didn't . . ." *Id.* Judge Jim Bates mentioned that he also had problems with sleeplessness after the trial. "The fact that Pawlyk was someone like you or I, with whom you could identify, made the case especially difficult." Bates Interview, *supra* note 11.

27. One juror described the defendant as follows:

He had a cold look to him, you know he'd glance over at us and whatever he was looking at it looked like that he could look right through it. It was frightening to look at him. He had this tattoo-like thing on his face with a cross and a blade or something like that. I assumed that it was something demonic.

CJP Working Paper No. 6, *supra* note 6, at 3. Another juror said:

I felt that . . . from his actions, and his appearance, that he attempted . . . to more or less idolize Charles Manson. . . . He would stare, . . . and I would find myself staring back at him for two minutes at a time. And . . . I refused to let him stare me down and he refused it, and I got to thinking he might hypnotize me when he'd do that . . . seemed to me like he wanted to be remembered as a tough cookie or something.

Id.

28. CJP Working Paper No. 7, *supra* note 6, at 5.

interpreted as evidence of falsehood even as the jurors themselves misremembered facts . . . [T]hey reacted swiftly, and they reacted without subtlety or ambiguity, and they reacted in near-unanimity in rejecting the prosecution's charge against the defendant. They simply did not take it, nor the world from which it sprang, seriously. . . . What most distressed me was the assumption, so unexamined as to be chilling, on the part of the white jurors, that they belonged to a world, if not to a species, wholly distinct from the blacks of Trenton's underclass whom they were empowered to judge.²⁹

Sometimes, however, the solidarity and collegiality of the group experience will be what jurors remember most positively.

It was a really good group of people. . . . [W]hen it was over, we all walked out to the parking lot together and we stood there in a circle for quite a while just talking and especially the foreman of the jury said "just remember—eleven other people decided this with you."³⁰

It is a strange social circumstance. For an isolated period in their lives, jurors live together and share the intimate aspects of daily life. Most important, in terms of the effect of the experience upon them, they are not allowed to discuss what happens in the jury room with anyone else. The isolation imposed upon jurors makes what they must bear more difficult.³¹ For a short time, jurors are members of a cabal.³²

When jurors speak about what they remember about the experience of being on a jury, they mention the close interaction with people who would not ordinarily be their friends or associates. And this becomes an important

29. Oates, *supra* note 19, at 18-19.

30. CJP Working Paper No. 6, *supra* note 6, at 13 (jurors discussing the imposition of the death penalty).

31. One newspaper gave the following account:

Juror Marcia Ferris [in the Pawlyk trial] said she may have had less of what she calls "hangover" from the case than some. But during the trial she experienced sleeplessness, a sense of fear and what she calls "a tremendous sense of isolation."

"We lived together so intimately and in such an emotional atmosphere for 4 1/2 weeks," said Ferris, a legal assistant for The Boeing Co. "Then it's over in a flurry of video cameras and press coverage. Suddenly you're separated from the only people who understand what [you've] been through."

At first, friends and colleagues were intensely curious and wanted to hear about the case—but only for about 24 hours, Ferris said.

"Then no one wants to hear about it," she said, "and suddenly they wonder why you can't let go."

Emery, *supra* note 2, at A1.

32. In a recent high-profile sexual assault trial, jurors reported that they played cards together regularly, celebrated their birthdays together, and generally formed a close bond for the duration of the trial. "In the end, when the anger and shouting of deliberations came, the sense of family served them well." Robert Hanley, *Sense of Family Helped Jury in Sex-Assault Case*, N.Y. TIMES, Mar. 18, 1993, at B7.

dimension of the experience of being a juror. Not only are jurors asked to make fearsome judgments, but they are asked to make those judgments collectively with people they do not know, people who often would not otherwise be their friends or companions.

In state capital trials in the jurisdiction with which I am most familiar, New Jersey, the people who serve on juries are people who do not work in offices or people whose employers are required to pay them while on jury duty. Consequently, certain groups are overrepresented: the retired, employees of state or federal government, employees of a few large organizations and corporations, the self-employed, people in the arts, older women, and people with marginal jobs. And each individual locality has its own character. Juries in Newark or Trenton are different from juries in suburban or rural county seats.

In state criminal trials, another aspect of the experience is noteworthy—the physical conditions in which juries are asked to do their job are often unpleasant or even dangerous. Jurors are asked to go to places where they would not chose to go, to park their car somewhere where they would not ordinarily park, and they may even be required to stay with strangers in a motel under guard. The rooms and buildings are frequently dirty and are almost uniformly ugly. Although there may be an air of excitement, the atmosphere is not pleasant. Especially in urban jurisdictions, the crowded character of the courthouses and the omnipresence and physical proximity of many angry and frustrated people, some of whom are obviously prisoners, is both disturbing and frightening to many who are accustomed to a more controlled suburban environment.

The message given to prospective middle-class jurors who come to urban jurisdictions for jury service is that you do not want to be here and you do not belong here. It is not surprising that there is a class bias in the sample of people who end up as jurors in state criminal trials. High-income earners—for example, people who are managers in private corporations, bond traders, successful actors or directors, or undersecretaries of the Department of State—don't sit on juries. They find a way to get out of it. The system facilitates that.³³

33. As one juror reported:

I learned that, of the 599 citizens of Mercer County who had been summoned for jury duty that week, 500 had managed to exempt themselves. This in itself was certainly deflating; yet more deflating was it to be warned, by one of the assembly room overseers (they were all women, with a look of being prison matrons in disguise as office workers), that, should any of us leave the courthouse without authorization, an officer from the Mercer County Sheriff's Department was empowered to follow after us and arrest us

III. THE RESPONSIBILITY OF BEING A JUROR

Jurors are often faulted for not understanding their task.³⁴ The life and death judgments that capital jurors are asked to make are rarely simple decisions involving the application of an easily understood or straightforward principle. Jurors must make judgments that go to fundamental assessments of human worth and how to punish the most reprehensible human behavior.

[Whether or not the defendant testified] came into play more than you would think, I think actually a great deal because he . . . just never really gave a darn. You know, even a couple of the folks said . . . that they weren't really for [the death penalty, but] they said he just showed no remorse, doesn't care, he's not sitting up begging for his life or anything. And I think that if he would've taken the stand and begged . . . people would've maybe changed . . .³⁵

These decisions are not difficult because the instructions are overly technical or beyond the comprehension of the uneducated or the inarticulate. They are difficult for other reasons.

I think the single most important factor was probably to make sure that he didn't get back out on the street. . . . I couldn't help but think[] what[] if he got out and murdered some other poor little girl. I would feel I was responsible for turning him back loose when I could possibly help do something about it, and I felt that this was my duty as a citizen to stand up and do the right thing, to not be afraid to make a decision right or wrong. One way or the other, to do the best I know how to do and I think that's a citizen's responsibility.³⁶

[W]e were split on the decision of punishment. There were a few of us [who] wanted the death sentence, and there were those who wouldn't go along with the death sentence . . . because they didn't feel it was their right to take someone's life. . . . which I, . . . in a way go along with . . . I

. . . I approached [an] administrator, a woman of my approximate age, to ask why the system was so punitive, and so inefficient; and the woman stared at me with a hurt, swimming look, and said, "I'm sorry you find it so!" "But don't *you* find it so?" I asked reasonably, indicating the dreary room of glassy-eyed men and women, and the woman said angrily, "The way it used to be done, two hundred people were here for two solid weeks—and *that was that*."

Oates, *supra* note 19, at 11-12 (emphasis in original). "Jury managers in Washington courts have been troubled for several years by the low number of citizens who respond to a jury summons. As a rule of thumb, jury managers expect only a third of those summoned to actually appear and be willing to serve as jurors." Austin, *supra* note 17, at 11.

34. *Communicating with Juries, Panel One: Judge-Jury Communications: Improving Communications and Understanding Bias, The Annenberg Washington Program Conference, April 10, 1992*, 68 IND. L.J. 1037, 1037 (1993) (statement of Steven Adler).

35. CJP Working Paper No. 6, *supra* note 6, at 4.

36. *Id.* at 5.

thought, here I am sitting here saying that this kid should have his life snuffed out. [I]t starts weighing on your mind.³⁷

If we as a society knew what to do about Jeffrey Dahmer or the drunken driver who hit a church bus and killed twenty-seven, we wouldn't need jurors. The legal system as a whole, and the jury system in particular, is designed to diffuse this responsibility throughout society. When jurors are asked to make judgments in difficult cases, they are performing a duty for the rest of the society.³⁸ We ask the jury to decide as a group because that relieves the rest of us as individuals from the responsibility.

Jurors in criminal cases are asked to perform a crucial social function: to ostracize a person from society or to authorize the state to kill a person.³⁹ Jurors in capital cases are asked to take moral responsibility for the most serious punishments, a responsibility that makes most individuals uncomfortable. Jurors generally express discomfort with the responsibility of imposing the death sentence.

Well, just the thought [that] the responsibility for this young man's life was in my hands [bothered me—] the entire community depended on me to make the right decision for them and for me and for him.⁴⁰

Many jurors mention their religion and report that they resorted to prayer in the jury room.⁴¹

[W]e had jury members that were crying . . . I remember before we even started on that day holding hands around the room and praying and asking God to give us wisdom on what to do.⁴²

And the apportionment of blame is not always simple.

37. CJP Working Paper No. 7, *supra* note 6, at 6.

38. Kaplan notes:

The jurors faced a dilemma: They had the responsibility of condemning the defendant to death if the evidence of guilt was clear, but at the same time they sympathized with this unfortunate young man who had experienced so wretched a childhood. . . . "I was doing the right thing, but it was a horrible thing to do."

Kaplan, *supra* note 20, at 52.

39. This can be a very difficult decision.

By voting in favor of the death penalty, Mr. E was, at some level, killing a friend. The word "killing" may seem an exaggeration, but several jurors used the term. Mrs. F, who considered whether she did the right thing, said she had done "a lot of soul searching." Her father, a minister, had taught her, "You don't kill somebody."

Kaplan, *supra* note 20, at 52.

40. CJP Working Paper No. 6, *supra* note 6, at 16.

41. In a recent New Jersey case, two jurors were removed because they conducted prayer sessions. Hanley, *supra* note 32, at B7.

42. CJP Working Paper No. 6, *supra* note 6, at 13.

[I] think about the fact that it was . . . a child basically who did it. . . . I guess that the biggest thing is that . . . his mother never came to the trial at all and that really just ticked me off. His father is every kind of pervert you could think of [a] beater, abuser, molester, homosexual, you name it. His father and mother . . . should have been on trial, not him. That's kind of my impression. Because they're as much to blame for his situation as he is.⁴³

For some jurors, the task of coming to a decision is made more difficult because they are asked to act justly in a system that they perceive as being unjust.⁴⁴

Another startling development, for those of us new to courtroom procedure, was the mechanical rejection of certain jurors on the basis of skin pigmentation. Overt racial prejudice has become so anachronistic, we like to think, or, in any case, associated with marginal renegade behavior, [that] it is both shocking and puzzling to encounter it in a public place; still more, in the churchy atmosphere of a courtroom. Since the defendant to be tried was black, however, the prosecuting attorney exercised his right of peremptory challenge to reject as many persons of color as possible. Here was the most crude, the most brainless, racial discrimination in action, entirely countenanced by law⁴⁵

Some commentators have suggested that jurors are ill-equipped to do their jobs, poorly educated, or simply too stupid to understand instructions.⁴⁶ My observation is that jurors in the penalty phase of a capital trial understand the basic human transaction: before them is someone who has committed a horrifying crime that is essentially incomprehensible to everyone else in the courtroom, a crime potentially deserving of society's most severe criminal sanction, and their task is to make a decision about what to do with that person now. Rare are the cases that reach the penalty phase of a capital trial in which there is doubt about guilt or the nature of the crime. Murders that reach the penalty phase of a capital trial are typically highly aggravated.⁴⁷

Preliminary results from the NSF Capital Jury Project suggest that penalty-phase jurors *do* frequently misunderstand the technical instructions—for

43. *Id.* at 3-4.

44. *See* Oates, *supra* note 19, at 14.

45. *Id.*

46. *Communicating with Juries, Panel Two: Innovations for Improving Courtroom Communications and Views from Appellate Courts, The Annenberg Washington Program Conference, April 10, 1992*, 68 IND. L.J. 1061, 1069 (1993) [hereinafter *Panel Two*] (statement of Justice James D. Heiple).

47. In New Jersey, when jurors in penalty phase cases are asked to decide whether or not to impose the death penalty, they decline to do so in roughly two-thirds of the cases, in spite of the overwhelming support for capital punishment in the abstract shown in the polls. For a discussion of the frequency of the imposition of the death penalty in New Jersey, see *State v. Marshall*, 613 A.2d 1059, 1100-01 (N.J. 1992).

example, those concerning statutory aggravating and mitigating circumstances:⁴⁸ these instructions *are* complicated, intricate, and contradictory. Jurors may believe the aggravators are mitigating, and they may not understand other important technicalities. The jurors are understandably confused.

We were given a booklet, see, with questions, that would help us in our decision and we went all through it. And then when it [came] down to the end, you weighed your mitigating and aggravating. According to the answers we came up with by the papers, we were supposed to give the death penalty. See, we were given a questionnaire, and when we answered all the questions, then it told us whether it was mitigating or aggravating. The mitigating is against him, right? This is where I'm confused then because the papers that we were given when you answered all the questions down at the bottom it says if you answered so many yes then that should be one sentence and if you had any answers yes for death then that should be death sentence, and all our answers were for the death.⁴⁹

Some jurors have said that they were unaware that when the guilt phase was over they would have to decide the penalty phase. Other jurors in the NSF Capital Jury Project have stated that they believed their decision was only a recommendation, not a final decision, even though the instructions and the law that they were given were directly to the contrary.⁵⁰

In the penalty phase of a capital trial, jurors are in the unenviable position of having to decide whether to take another's life or to act mercifully—an awe-inspiring responsibility. My observation is that, while they may be confused about the technicalities, postal workers, the unemployed, the retired, the self-employed, and those others who end up actually serving on a capital jury clearly understand this responsibility.

I think that's the most pressure—Vietnam was a piece of cake compared to that. When you're sitting there and you know that you're holding a man's life—you know it's one thing to be in a combat situation and know that that's the enemy. But to sit there and look at another human being and know that you and eleven other people have the . . . responsibility of life and death.⁵¹

This juror's comments reflect the emotional pressure and disturbance that accompanies the making of such an agonizing decision, trauma that post-verdict counseling could alleviate. Some worry, though, that if jurors know,

48. Another recent study of jurors in death penalty cases in Cook County, Illinois, found that as many as 75% of the jurors misunderstood parts of the death penalty instructions. The study was conducted by Hans Zeisel, a pioneer in jury research and a former University of Chicago law professor. Arthur S. Hayes, *Jurors' Grasp of Instructions May Stir Appeal*, WALL ST. J., July 16, 1992, at B21.

49. CJP Working Paper No. 6, *supra* note 6, at 7-8.

50. *E.g., id.* at 9 ("[W]e were . . . to recommend a sentence . . . [O]ur decision would weigh heavily, but would not necessarily be final.")

51. *Id.* at 14.

before deliberations begin, of the availability of post-verdict counseling, that knowledge could lessen their sense of individual responsibility for the decision and allow them to make the decision to impose the death penalty more easily.⁵² The goal of debriefing should be to reduce the level of trauma individual jurors feel without decreasing the level of responsibility jurors exercise in choosing the maximum penalty that society imposes.

IV. IF COUNSELING IS NECESSARY, WHAT FORM OF COUNSELING IS APPROPRIATE?

The symptoms that jurors suffer in emotionally disturbing trials include post-traumatic guilt and other symptoms familiar to those who work in the area of post-traumatic stress. The situation of these jurors is similar to that of service providers and witnesses in violent, high-stress situations: police officers, people who negotiate with hostages or work with kidnapping victims and their families, and some emergency and disaster workers. These are people, like jurors, who are not themselves the victims of crime or disaster, yet they are placed in a position where they are forced to observe and confront another person's pain, suffering, or death. The general rubric for counseling in such situations is post-traumatic stress counseling.⁵³ The term "debriefing" is preferred by some because it does not carry the connotation of treatment.⁵⁴ These sessions are not therapy.

The behaviors exhibited by jurors in these trials are similar to the behaviors exhibited by others in situations of post-traumatic stress: namely, those affected have a disturbance in sleeping or eating patterns and have recurring flashbacks to the images for a year or longer.

52. Rauch reports:

Greg Paraskou, senior trial lawyer for the Santa Clara public defenders' office and the defense attorney on one of the trials using juror debriefing, said . . . if jurors know they are going to receive counselling at trial, it might "remove from them some of the sense of responsibility, especially when delivering the death penalty." . . . Two other concerns were expressed by Lois Heaney, a trial consultant with the Oakland, Calif., office of the jury project If jurors perceive debriefing as an offering from the state, she asked, could that "increase their affinity with the prosecution and therefore increase anti-defendant bias?" Could jurors view debriefing as "the judge essentially telegraphing to jurors, you have a tough decision, there's a lot of evidence against this defendant?"

Rauch, *supra* note 2, at 12.

53. I am indebted to Terence M. Keane, Ph.D., director of the National Center for Post Traumatic Stress Disorder, Boston V.A. Medical Center; Dr. Roger Bell, Department of Psychiatry, University of Louisville School of Medicine; and Fred Lanceley of Special Operations and Research of the Federal Bureau of Investigation, for their thoughtful and patient responses to my questions.

54. See Emery, *supra* note 2, at A1.

I mean we were upset to the point that even after we had left the courtroom [after] giving our punishment decision and [had gone] back to [the judge's] office . . . we were still standing there crying and I felt like—I felt a strong need to talk to somebody about it, you know. One of the men on the jury, he had to go talk to his pastor. It affected him so much. . . . I think that probably everyone of us at that point needed somebody to . . . just listen to us And then since then, you know, . . . I hardly go—I bet I don't go a whole week without thinking [about it].⁵⁵

Debriefing teams who regularly work with law enforcement officers and emergency medical teams report they observe similar reactions.⁵⁶

But I do want to say it's still very emotional and hard for me to deal with personally and it will probably be a while before I can go on in my life without—after having done this. . . . It disturbed my sleep. When it was completely over with, my medical doctor . . . put me on sleeping pills for a while. I dreamed. I had nightmares. . . . I felt like my boss at my job did not understand why I was on jury duty. I think it was the beginning of my losing my job at the end of the year because I was out of the classroom so long. . . . [I]t's been nine months since the case and I'm still dealing with emotions about this case.⁵⁷

It was—the evidence that we had to look at—was, I mean it's been kind of a nightmare. We didn't see the pictures of the girl's body until we got to the punishment stage . . . I guess to show us how gory it had been. That—it's been kind of a nightmare thing. The fact that we couldn't talk about it and yet we were allowed to go home. It might have been better if we had been sequestered together. It probably upset my husband more than it did me because he could see when I'd come home I would just be absolutely drained. . . . It was hard. When you've got a daughter that age . . . we could not discuss it at all, as much as I wanted to. It would have helped to have the whole jury come together again.⁵⁸

55. CJP Working Paper No. 6, *supra* note 6, at 14 (juror describing decision to impose the death sentence).

56. One article reported:

In general . . . the debriefers have only a single meeting with those suffering from critical incident stress

The sessions usually start with a detailed discussion of the particular incident. The person being debriefed is then asked about his or her feelings after the incident

"It normalizes the experience," Mr. Crimando [a New Jersey emergency room psychologist] said. "We reassure them that these are normal responses that happen to normal people in such situations."

Karla Dauler, *When Officers Kill in the Line of Duty*, N.Y. TIMES, Jan. 17, 1993, (New Jersey section) at 1, 9.

57. CJP Working Paper No. 6, *supra* note 6, at 15.

58. *Id.* at 16-17.

The form of counseling offered to jurors by professionals is within the category of critical incident stress debriefing.⁵⁹ Training for such debriefing would typically be in the discipline of clinical psychology, although other mental health professionals can and do offer such treatment as well.

Cases where there is extreme bodily injury or disfigurement, or harm to children, and cases in which the juror identifies with the victims or identifies their children with the victims seem to be the most disturbing. In a number of the interviews, jurors mentioned their children and identified a feeling of helplessness in not being able to protect their children.⁶⁰ Child sexual abuse cases, in addition to murder cases, are especially traumatic.

While the exposure of jurors is less immediate than the exposure of emergency medical personnel or police in similar situations, repeated exposure to graphic visual images can be very disturbing. Some jurors reach the point where they cannot function in their jobs.

[T]hen after the trial, the first day that I went back to work, somebody came up and said, "Hi, how are you doing[?]," and I just cut loose crying. And I cried for an hour solid. And my boss was in the office that day, on a routine visit, and that poor man didn't know what to do. He kept saying, "She's gonna have to go and get some help." He thought I was having a nervous breakdown.⁶¹

The treatment is to identify the impact of the stressful event, while sharing reactions with others who have had the same or a similar experience. The counseling consists of telling jurors how other people have been affected by similar experiences; for example, by having sleep disturbances or frightening dreams. There may be sexual dysfunction or the loss of sexual interest, and other feelings associated with depression.

The advantage of offering the counseling to the group of jurors as a whole immediately after the trial is that jurors who may be minimizing or dismissing

59. Two general kinds of debriefing are used: educational debriefing informs participants about the psychological and behavioral reactions of others in similar situations, and psychological debriefing allows for the ventilation of feelings about the events and the discussion of signs of stress response. Post-verdict debriefings typically include both the educational and the psychological components. See, e.g., Chris Dunning, *Mental Health Sequelae in Disaster Workers: Prevention and Intervention*, 19 INT'L J. MENTAL HEALTH 91 (1990).

60. Specifically, one juror stated:

And it upset me that he was allowed to have pen and paper and write down all the questions—that he knew that I have a nine year old daughter at home. I think that was scary to me, that the defendants are allowed, while they're questioning the juries, to write Because you have to tell them your name and address and everything, and that kind of hit home.

CJP Working Paper No. 6, *supra* note 6, at 14.

61. Hoffman, *supra* note 25, at 10.

the experience can be incorporated. The counseling can be preventive, as well as curative. Those jurors who do not initially experience any disturbance may find the disturbance surfaces later, and they will have been educated to anticipate the response and not be frightened by it. If a juror has a disturbing dream some weeks or months later, the debriefed juror will recognize the dream as a predictable and normal reaction to the stressful situation.

Counseling can be effective for a brief period of time shortly after the experience, perhaps with the opportunity to reconvene a month or two later to discuss their subsequent reactions and other people's reactions to their experience. The judge should not be present, at least in the opinion of some, both because the judge is usually desensitized to this kind of stress and because the judge is an authority figure.⁶² If a juror continues to be disturbed after this minimal intervention, the juror should seek individual therapy with a trained professional.

There will be some jurors who have a special vulnerability, psychologically, emotionally, or physically.⁶³ If a juror for a child sexual abuse case had been sexually abused as a child and had repressed the abuse, that juror might find herself having flashbacks or disturbing memories triggered by the evidence presented at trial. If a juror for a murder case has recently lost a loved one and the circumstances of the murder involve a victim who shares some characteristics with the loved one, this may make the events described in the trial especially difficult for that juror.⁶⁴ And some people are simply more sensitive and will be more likely to be disturbed than others.

62. The Carrollton case debriefing session included the judge, the bailiff, and the court reporter, in addition to the jurors. This is unusual, however. MURPHY ET AL., *supra* note 3, at 80. In the debriefing of the Pawlyk jurors, the judge's law clerk and the judge also attended the debriefing session. Bates Interview, *supra* note 11.

63. Memories of past trauma can be triggered by the evidence:

For some, the trial reactivated memories of earlier traumatic experiences. Mr. E, for example, had served in Okinawa during World War II, where he had seen mutilated bodies of fallen buddies. . . . "The position that girl was lying in, her throat cut," reawakened long repressed memories of war.

Kaplan, *supra* note 20, at 53.

64. The stress and trauma of the case continue well after the case is over:

Juror Barbara Snodgrass, a senior drafter for the Port of Seattle, remembered going back to work after the [Pawlyk] trial and hearing someone say, "Oh, you're back." Her response was "No, I'm not!"

"I just felt overwhelmed with grief," Snodgrass said. "There was a real sense of loss—a sense that we (jurors) had done a good job, but that it didn't seem to answer the problem."

On one weekend, she recalled, "I wandered around the house crying." Snodgrass still sees Pawlyk's face and thinks about his children. "Other things about my life were brought to the surface," she said. "Who and what I am and what my life means."

Being on the jury was a visceral, immediate thing, Snodgrass said. "After it was all over, I looked at what I do and [saw] it isn't anywhere near as important."

Emery, *supra* note 2, at A1.

Counselors have suggested that people who are instrumentally oriented—people who take control of their circumstances—tend to be able to process disturbing events more successfully. Jurors are in a particularly passive situation. They are trapped in the trial: they must watch and observe. If jurors are able to process disturbing information more successfully by taking control of the situation, then that would argue for incorporating procedures such as allowing jurors to take notes, ask questions, have possession of charges, and do other things that would give them more of a sense of control over the stressful situation.⁶⁵

V. WHO PAYS FOR POST-VERDICT COUNSELING?

To date, the individual trial courts and the administrative office of the courts in at least one jurisdiction have been the governmental agencies that have paid for post-verdict counseling for jurors, and the expenses have generally been minimal. In Kentucky, the Administrative Office of the Courts has placed on retainer two experts who were involved in the first post-verdict counseling cases in Kentucky. In Wisconsin, there has been at least one instance where the Wisconsin Supreme Court called for training for its own personnel. In most state criminal trials, the judge calls for the counselling and presumably pays for it out of the regular administrative budget for trial costs.

Certainly it would not be appropriate for any of the adversaries to pay for such counseling. If the individual trial court did not pay for it, then the appropriate agency would be the central agency for court administration in the judicial system. It is worth noting that when courts call upon crisis workers who are already employed by the county or state, the actual costs may be nil. Most post-verdict debriefing involves a single half-day group session with a professional.⁶⁶

If the service is to be offered to trial courts from the central administrative agency, important questions arise. What will be the threshold for determining who is eligible to receive such a benefit? Jurors in what sort of cases qualify? In any murder case? Only in cases that receive a great deal of publicity? One commentator suggested that jurors in high-profile cases such as the recent trial of John Gotti in New York should have counseling available to them because

65. Cf. *Panel Two*, *supra* note 47, at 1062, 1063 (statement of Judge B. Michael Dann).

66. Persons who conduct debriefings are not always professionals with specialized clinical training. They may be social service workers or others who have been training on the job, or just persons who have taken the initiative to educate themselves when they saw a need for these services. WASHINGTON VICTIM SERVICES, JURORS ARE VICTIMS TOO! (copy on file with the *Indiana Law Journal*).

they are under a great deal of stress due to the identity of the defendant.⁶⁷ In that case and some others, jurors have been personally threatened, another cause of stress and emotional hardship to jurors. The most likely pattern for the immediate future is that post-verdict debriefing will continue to be provided upon the initiative and request of the trial court judge, as the judge sees fit. The trial court will pay for it out of its administrative budget. Or, there may be no cost.⁶⁸

VI. IS THERE A ROLE FOR COUNSELING JURORS BEFORE THE VERDICT?

A court's approach to counseling might be different in cases where the stress and anxiety of jurors is caused by threats to their personal safety, instead of by the nature of the evidence itself. Jurors in a John Gotti-type trial might legitimately be offered support during trial in order to cope with their anxiety. Such counseling would not relate to the evidence in the case and thus need not interfere with the jurors' abilities to return an impartial verdict, although a juror's fear might influence a verdict. Presumably some jurors do consult their individual therapists during a trial for general stress management, if they are not sequestered. And presumably these jurors simply agree not to discuss the details of the case with their therapist.

The verdict rendered by jurors who need counseling because of the nature of the evidence itself, on the other hand, might be influenced by professional counseling if the counseling addresses the emotionally disturbing nature of the evidence prior to the verdict. Counseling during trial might improperly interfere with the juror's impartiality or render the juror unable to make a moral judgment representing the community's outrage over the crime. Counseling designed to desensitize the juror to the gruesome nature of the evidence, or the horror of the crime itself, would blunt the natural and spontaneous emotional reactions that are integral to the juror's role. It is the reaction of revulsion and disgust that represents the sentiment of the lay community. Any counseling that blocked that ordinary, human response would interfere with the juror functioning as the conscience of the community.

In the penalty phase of a capital trial, jurors are asked to determine matters such as the "atrocious, heinous or cruel" nature of the murder. In order to make such a moral judgment, the juror must first experience the visceral

67. Roger A. Bell & Theodore B. Feldmann, *Managing Stress in the Jury Box*, *NEWSDAY*, Jan. 22, 1992, at 74.

68. Judge Jim Bates reported that there was no charge for the debriefing in the Pawlyk case. Bates Interview, *supra* note 11.

response, which is the source of the emotional stress. Jurors may be asked to assess the impact of the loss of a loved one upon the victim's family. Weighing the evidence relevant to such issues requires the consideration of painful and distressing facts. In a capital trial, at least, any intervention by professionals prior to the verdict would interfere with jurors coming to their own moral conclusions about what they have been shown. After a juror has rendered a verdict, it may be appropriate to offer counseling to alleviate the pain caused by the process of arriving at that verdict. Any blunting of the jurors' appropriately horrified responses prior to the reaching of a verdict, however, would interfere with the jurors' duties and abilities to be the moral representatives of the community.

CONCLUSION

Many people report being disturbed by the experience of being a juror. The evidence in especially gruesome cases haunts them, as does the lingering responsibility of judgment. Jurors also become frustrated and angry at the criminal justice system. Jurors in a number of highly stressful or emotionally disturbing cases have appreciated the availability of post-verdict counseling. In all likelihood, the availability of such counseling will continue to be ordered, mostly on an ad hoc basis. Given what we know so far, perhaps the appropriate question is: Is there any reason why post-verdict debriefing should not be offered to jurors?

Due to the informal and discretionary way in which post-verdict debriefing is now customarily ordered by trial court judges, it is impossible at the present time to precisely identify and analyze all the cases in which debriefing has been offered or received. There is no centralized record keeping at the state or national level.

Once judges order post-verdict counseling, they are likely to ask for it again. It will be easy for the judges to do so because they will have identified a person or team within their own jurisdiction capable of providing such debriefing. When judges order a debriefing session with local personnel for all jurors immediately after trial, the expenditures are minimal and can be easily absorbed into the ordinary trial costs. It is useful to do the debriefing when the jurors are still considering themselves as a group and when the disturbing evidence is fresh in their minds.

The professionals who provide debriefing generally agree that a modified version of crisis debriefing, adapted from existing techniques for treating critical incident stress, is the appropriate model for post-verdict intervention with jurors. Professional counselors suggest that jurors who need follow-up or who remain extremely disturbed should seek additional help. No one

associated with trial courts suggests that counseling prior to the verdict is appropriate, although jurors may certainly be disturbed during trial and deliberations and may seek individual therapy.

To date there is little evidence that post-verdict debriefing could or would disturb a verdict. The sessions are confidential, and they typically include only the jurors and the counselors. Judges have been understandably concerned that post-verdict discussions about deliberations that include nonjurors could disturb verdicts, but the confidentiality rules concerning communications with professional counselors have been and should continue to be sufficient to protect both the privacy of jurors and the integrity of verdicts.

As to the question of whether juror debriefing should be recommended more frequently in the future, we need to hear more from the jurors themselves. Perhaps the lesson from what we know so far is that when jurors tell what they think and feel about what they do, we learn much that is important and interesting, and not just about the advisability of post-verdict debriefing.

