

# Attorney for the Defense

**The laughing man and the poor man are best in the jury, as they understand life's values**

**by CLARENCE DARROW**

• ARTICLE •

EDITOR'S NOTE: *Clarence Darrow will have passed his seventy-ninth birthday by the time this achieves print. Active practice is definitely over for the lawyer who never, in more than fifty years at the bar, appeared on the side of the prosecution, who never, in scores of capital cases, had a client executed. We gave him a fairly pedestrian assignment, asking him to write a piece giving a few pointers on jury-picking. It was greater luck than we merited to receive in return this winged answer to profounder questions than we had the wit to ask. For here is no less a thing than a golden epitome of all the wisdom that has accrued to an ever-youthful spirit in the late evening of a well spent life. Far more than a mere footnote to the tricks of his trade, it is a philosophic summation of the practical answers to any present day Pilate who might jesting ask "What is Justice?" It is an answer wise though witty, compassionate though cynical, the answer of the man who said of the great Governor Altgeld what might equally well be said of himself: "Even admirers have seldom understood the real character of this great human man. It was not a callous heart that so often led him to brave the most violent and malicious hate: it was not a callous heart, it was a devoted soul . . . that spoke for the poor, the oppressed, the captive and the weak."*

**T**HE audience that storms the box-office of the theater to gain entrance to a sensational show is small and sleepy compared with the throng that crashes the court house door when something concerning real life and death is to be laid bare to the public.

Everyone knows that the best portrayals of life are tame and sickly when matched with the realities. For this reason, the sophisticated Romans were wont to gather at the Colosseum to feast their eyes and other senses on fountains of real blood and await breathlessly the final thrust. The court room is a modern arena in which the greatest thrills follow closely on each other. If the combat concerns human life it presents an atmosphere and setting not unlike those cruel and bloody scenes of ancient Rome. The judge wears the same flowing robe with all of the dignity and superiority he can command. This sets him apart from his fellowmen and is designed to awe and intimidate and to impress the audience with seeming wisdom oftener than with kindness and compassion.

One cannot help wondering what happens to the pomp and pretense of the wearer while the cloak is in the wash, or while changing into a maturer, more monarchical mantle, as his bench becomes a throne, or when he strolls along the street in file with the "plain clothes" people.

When court opens, the bailiff intones some voodoo singsong words in ominous voice that carries fear and respect at the opening of the rite. The court room is full of staring men and women shut within closed doors, guarded by officials wearing uniforms to confound the simple inside the sacred precinct. This dispels all hope of mercy to the unlettered, the poor and help-

less, who scarcely dare express themselves above a whisper in any such forbidding place.

The stage, the arena, the court, are alike in that each has its audience thirsting to drink deeply of the passing show. Those playing the parts vie for success and use whatever skill and talent they possess. An actor may fumble his lines, but a lawyer needs to be letter-perfect, at least, he has to use his wits, and he may forget himself, and often does, but never for a moment can he lose sight of his client.

Small wonder that ambitious, imaginative youths crowd the profession of law. Here, they feel, they, themselves, will find the opportunity to play a real part in the comedies as well as the tragedies of life. Everyone, no matter how small his chance may be, tries to hold the center of some stage where the multitude will scan his every move. To most lads it seems as though the courts were organized to furnish them a chance to bask in the public eye. In this field the adventure of life will never pall, but prove interesting, exciting and changeful to the end. Not only will he have the destinies of men to protect and preserve, but his own standing and success to create.

Chancery cases are not especially interesting nor exciting, however. These are supposed to be heard by a judge. He listens long enough to feel satisfied that the case promises to consume considerable time and work and interfere with many hours of leisure, so he refers it to a "Master in Chancery," a lawyer-friend of his own appointment, who is paid by fees that come directly from the litigants; the Master in Chancery employs a court reporter who takes the evidence in shorthand while the Master may take a nap in an adjoining office. After the clients' resources are exhausted by the court reporters and Masters in Chancery, the documents are locked up in a safe to await the blowing of Gabriel's horn.

If it is a real case, criminal or civil, it usually is tried by a jury with the assistance and direction of the judge. In that event, every moment counts, and neither the lawyers nor the audience, or even the court, goes to sleep. If it is a criminal case, or even a civil one, it is not the law alone or the facts themselves that determine the result. Always the element of luck and chance looms large. A jury of twelve men is watching not only the evidence but the attitude of each lawyer, and the parties involved, in all their moves. Every step is fraught with doubt, if not mystery.

Selecting a jury is of the utmost importance. So far as possible, the lawyer should know both sides of the case. If the client

is a landlord, a banker, or a manufacturer, or one of that type, then jurors sympathetic to that class will be wanted in the box; a man who looks neat, and trim and smug. He will be sure to guard your interests as he would his own. His entire environment has taught him that all real values are measured in cash, and he knows no other worth. Every knowing lawyer seeks for a jury of the same sort of men as his client; men who will be able to imagine themselves in the same situation and realize what verdict the client wants.

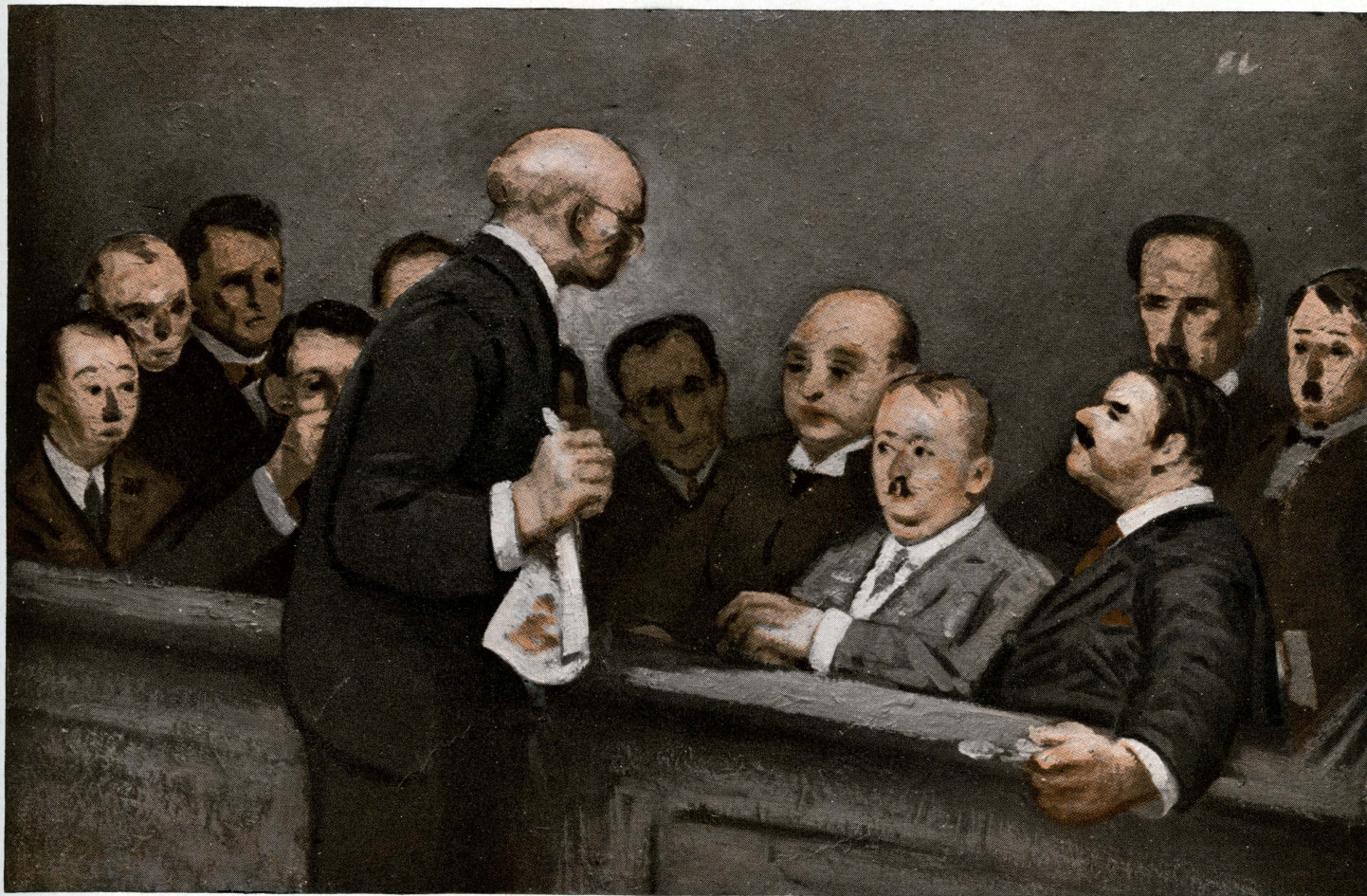
Lawyers are just as carefully concerned about the likes and dislikes, the opinions and fads of judges as of jurors. All property rights are much safer in the hands of courts than of jurors. Every lawyer who represents the poor avoids a trial by the court.

Choosing jurors is always a delicate task. The more a lawyer knows of life, human nature, psychology, and the reactions of the human emotions, the better he is equipped for the subtle selection of his so-called "twelve men, good and true." In this undertaking, everything pertaining to the prospective juror needs to be questioned and weighed; his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads, and many more matters that combine to make a man; all of these qualities and experiences have left their effect on ideas, beliefs and fancies that inhabit his mind. Understanding of all this cannot be obtained too bluntly. It usually requires finesse, subtlety and guesswork. Involved in it all is the juror's method of speech, the kind of clothes he wears, the style of haircut, and, above all, his business associates, residence and origin.

To the ordinary observer, a man is just a man. To the student of life and human beings, every pose and movement is a part of the personality and the man. There is no sure rule by which one can gauge any person. A man may seem to be of a certain mold, but, a wife, a friend, or an enemy, entering into his life, may change his most vital views, desires and attitudes, so that he will hardly recognize himself as the man he once seemed to be.

It is obvious that if a litigant discovered one of his dearest friends in the jury panel he could make a close guess as to how certain facts, surrounding circumstances, and suppositions, would affect his mind and action; but as he has no such acquaintance with the stranger before him, he must weigh the prospective juror's words, manner of speech and, in fact, hastily and cautiously "size him up" as best he can. The litigants





OIL PAINTING BY ERIC LUNDGREN

and their lawyers are supposed to want justice, but, in reality, there is no such thing as justice, either in or out of court. In fact, the word cannot be defined. So, for lack of proof, let us assume that the word "justice" has a meaning, and that the common idea of the definition is correct, without even seeking to find out what is the common meaning. Then, how do we reach justice through the courts? The lawyer's idea of justice is a verdict for his client, and really this is the sole end for which he aims.

In spite of the power that the courts exercise over the verdict of a jury, still the finding of the twelve men is very important, sometimes conclusive. It goes without saying that lawyers always do their utmost to get men on the jury who are apt to decide in favor of their clients. It is not the experience of jurors, neither is it their brain power, that is the potent influence in their decisions. A skillful lawyer does not tire himself hunting for learning or intelligence in the box; if he knows much about man and his making, he knows that all beings act from emotions and instincts, and that reason is not a motive factor. If deliberation counts for anything, it is to retard decision. The nature of the man himself is the element that determines the juror's bias for or against his fellowman. Assuming that a juror is not a half-wit, his intellect can always furnish fairly good reasons for following his instincts and emotions. Many irrelevant issues in choosing jurors are not so silly as they seem. Matters that appar-

ently have nothing to do with the discussion of a case often are of the greatest significance.

In the last analysis, most jury trials are contests between the rich and poor. If the case concerns money, it is apt to be a case of damages for injuries of some sort claimed to have been inflicted by some one. These cases are usually defended by insurance companies, railroads, or factories. If a criminal case, it is practically always the poor who are on trial.

The most important point to learn is whether the prospective juror is humane. This must be discovered in more or less devious ways. As soon as "the court" sees what you want, he almost always blocks the game. Next to this, in having more or less bearing on the question, is the nationality, politics, and religion, of the person examined for the jury. If you do not discover this, all your plans may go awry. Whether you are handling a damage suit, or your client is charged with the violation of law, his attorney will try to get the same sort of juror.

Let us assume that we represent one of "the underdogs" because of injuries received, or, because of an indictment brought by what the prosecutors name themselves, "the state." Then what sort of men will we seek? An Irishman is called into the box for examination. There is no reason for asking about his religion; he is Irish; that is enough. We may not agree with his religion, but it matters not; his feelings go deeper than any religion. You should be aware that he is

emotional, kindly and sympathetic. If he is chosen as a juror, his imagination will place him in the dock; really, he is trying himself. You would be guilty of malpractice if you got rid of him, except for the strongest reasons.

An Englishman is not so good as an Irishman, but still, he has come through a long tradition of individual rights, and is not afraid to stand alone; in fact, he is never sure that he is right unless the great majority is against him. The German is not so keen about individual rights except where they concern his own way of life; liberty is not a theory, it is a way of living. Still, he wants to do what is right, and he is not afraid. He has not been among us long, his ways are fixed by his race, his habits are still in the making. We need inquire no further. If he is a Catholic, then he loves music and art; he must be emotional, and will want to help you; give him a chance.

If a Presbyterian enters the jury box and carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave; he knows right from wrong, although he seldom finds anything right. He believes in John Calvin and eternal punishment. Get rid of him with the fewest possible words before he contaminates the others; unless you and your clients are Presbyterians you probably are a bad lot, and even though you may be a Presbyterian, your client most likely is guilty.

If possible, the Baptists are more hopeless than the Presbyterians. They, too, are

*Continued on page 211*



# Attorney for the Defense

Continued from page 37

apt to think that the real home of all outsiders is Sheol, and you do not want them on the jury, and the sooner they leave the better.

The Methodists are worth considering; they are nearer the soil. Their religious emotions can be transmuted into love and charity. They are not half bad, even though they will not take a drink, they really do not need it so much as some of their competitors for the seat next to the throne. If chance sets you down between a Methodist and a Baptist, you will move toward the Methodist to keep warm.

Beware of the Lutherans, especially the Scandinavians; they are almost always sure to convict. Either a Lutheran or Scandinavian is unsafe, but if both-in-one, plead your client guilty and go down the docket. He learns about sinning and punishing from the preacher, and dares not doubt. A person who disobeys must be sent to Hell; he has God's word for that.

As to Unitarians, Universalists, Congregationalists, Jews and other agnostics, don't ask them too many questions; keep them anyhow; especially Jews and agnostics. It is best to inspect a Unitarian, or a Universalist, or a Congregationalist, with some care, for they may be prohibitionists; but never the Jews and the real agnostics! And, do not, please, accept a prohibitionist: he is too solemn and holy and dyspeptic. He knows your client would not have been indicted unless he were a drinking man, and any one who drinks is guilty of something, probably much worse than he is charged with, although it is not set out in the indictment. Neither would he have employed *you* as his lawyer had he not been guilty.

I have never experimented much with Christian Scientists; they are too serious for me. Somehow, solemn people seem to think that pleasure is wicked. Only the gloomy and dyspeptic can be trusted to convict. Shakespeare knew: "Yond' Cassius has a lean and hungry look; he thinks too much; such men are dangerous." You may defy all the rest of the rules if you can get a man who laughs. Few things in this world are of enough importance to warrant considering them seriously. So, by all means, choose a man who laughs. A juror who laughs hates to find anyone guilty.

Never take a wealthy man on a jury. He will convict, unless the defendant is accused of violating the anti-trust law, selling worthless stocks or bonds, or something of that kind. Next to the Board of Trade, for him, the Penitentiary is the most important of all public buildings. These imposing structures stand for Capitalism. Civilization could not possibly exist without them. Don't take a man because he is a "good" man; this means nothing. You

should find out what he is good for. Neither should a man be accepted because he is a bad sort. There are too many ways of being good or bad. If you are defending, you want imaginative individuals. You are not interested in the morals of the juror. If a man is instinctively kind and sympathetic, take him.

Then, too, there are the women. These are now in the jury box. A new broom sweeps clean. It leaves no speck on the floor or under the bed, or in the darkest corners of life. To these new jurors, the welfare of the state depends on the verdict. It will be so for many years to come. The chances are that it would not have made the slightest difference to the state if all cases had been decided the other way. It might, however, make a vast difference to the unfortunates facing cruel, narrow-minded jurors who pass judgment on their fellowmen. To the defendants it might have meant the fate of life rather than death.

But, what is one life more or less in the general spawning? It may float away on the tide, or drop to the depths of oblivion, broken, crushed and dead. The great sea is full of embryo lives ready to take the places of those who have gone before. One more unfortunate lives and dies as the endless stream flows on, and little it matters to the wise judges who coldly pronounce long strings of words in droning cadence; the victims are removed, they come and go and the judges keep on chanting senseless phrases laden with doom upon the bowed heads of those before them. The judge is as unconcerned about the actual meaning of it all as the souging wind rustling the leaves of a tree just outside the court house door.

Women still take their new privilege seriously. They are all puffed up with the importance of the part they feel they play, and are sure they represent a great step forward in the world. They believe that the sex is co-operating in a great cause. Like the rest of us, they do not know which way is forward and which is backward, or whether either one is any way at all. Luckily, as I feel, my services were almost over when women invaded the jury box.

A few years ago I became interested in a man charged with selling some brand of intoxicant in a denatured land that needed cheering. I do not know whether he sold it or not. I forgot to ask him. I viewed the case with mixed feelings of pity and contempt, for, as Omar philosophized, "I wonder often what the vintners buy one-half so precious as the stuff they sell?" When I arrived on the scene, the court room looked ominous with women jurors. I managed to get rid of all but two, while the dismissed women lingered around in the big room waiting for the vic-

Continued on page 212



# Attorney for the Defense

*Continued from pages 37-211*

tory, wearing solemn faces and white ribbons. The jury disagreed. In the second trial there were four women who would not budge from their seats, or their verdict. Once more I went back to the case with distrust and apprehension. The number of women in the jury box had grown to six. All of them were unprejudiced. They said so. But everyone connected with the case was growing tired and skeptical, so we concluded to call it a draw. This was my last experience with women jurors. I formed a fixed opinion that they were absolutely dependable, but I did not want them.

Whether a jury is a good one or a bad one depends on the point of view. I have always been an attorney for the defense. I can think of nothing, not even war, that has brought so much misery to the human race as prisons. And all of it is so futile!

I once spent a winter on the shores of the Mediterranean Sea. In front of my windows, four fishermen were often wearily trudging back and forth, and slowly dragging a long net across the sand. When it was safely landed, a few small, flopping fish disclosed the results of their labors. These were scattered dying on the beach, while the really worth while fishes were left in the sea, which somehow reminded me of our courts and juries, and other aims and efforts of optimistic men and their idle undertakings, and disheartening results.

Judges and jurors are like the rest of humans. Now and then some outstanding figures will roll up their sleeves, as it were, and vigorously set to work to reform the courts and get an efficient administration of justice. This will be ably seconded by the newspapers, lashing courts and jurors, past, present and prospective, into a spasm of virtue that brings down the innocent and guilty together, assuming always that there are innocent and guilty. Then, for a time, every defendant is convicted; and soon the campaign reaches the courts; after ruining a few lives and reputations, the frenzy is over, and life goes on smoothly and tranquilly as before.

When I was a boy in the country, one of the standard occupations was whittling. It became as mechanical as breathing. Since then I have decided that this is as good a way to live as any other. Life depends on the automatic taking in and letting out of breath, but in no way is it lengthened or made happier by deep thinking or wise acting. The one big word that stands over courts and other human activities is **FUTILITY**.

The courts may be unavailing, lawyers stupid, and both as dry as dust, but the combination makes for something interesting and exciting, and it opens avenues

that seem to lead somewhere. Liberty, lives, fortunes, often are at stake, and appeal for assistance and mercy rend the air for those who care to hear. In an effort to help, often a casual remark may determine a seemingly vital situation, when perhaps the remark, of all the palaver, was the least important one breathed forth. In all questions men are frequently influenced by some statement which, spoken at the eventful time, determines fate. The most unforeseen, accidental meetings sometimes result in seemingly new and strangely fateful family lines. In fact, all that occurs in life is an endless sequence of events resulting from the wildest chance.

Amongst the twelve in a jury box, are all degrees of alertness, all sorts of ideas, and a variety of emotions; and the lawyers, too, are important factors in the outcome. They are closely observed by the jurors. They are liked, or disliked. Mayhap because of what they say, or how they speak, or pronounce their words, or part their hair. It may be that a lawyer is disliked because he talks too little, or too much; more often the latter. But a lawyer of subtlety should know when to stop, and when to go on, and how far to go. As a rule, he must not seem to be above the juror, nor below him. He must not too obviously strive for effect. He often meets baffling situations not easily explained. Sometimes it is better for him to talk of something else. Explanations must not be too fantastic, or ridiculous. It does no harm to admit the difficulty of the situation, to acknowledge that this circumstance or that seems against him. Many facts point to guilt, but in another light these facts may appear harmless.

Lawyers are apt to interpret deeds and motives as they wish them to appear. As a matter of fact, most actions are subject to various inferences, sometimes quite improbable, but nonetheless true. Identifications show common examples of mistakes. Many men are in prison and some are sent to death through mistaken identifications. One needs but recall the countless errors he, himself, has made. How many have met some person whom they believed to be an old-time friend, and have found themselves greeting a total stranger? This is a common mistake made in restaurants and other public places. Many identifications in court are made from having seen a person but once, and under conditions not critical. Many are made from descriptions and photographs, and urged on by detectives, lawyers, and others vitally interested in the results. From all of this it is easy to see that many are convicted who are guiltless of crime. In situations of strong agitation, acquittals are rare, and sentences made long and barbarous and inhuman.



**May, 1936**

The judge is, of course, an important part of the machinery and administration of the court. Like carpenters, and lawyers, bricklayers, and saloon-keepers, they are not all alike. No two of them have the same fitness for their positions. No two have the same education; no two have the same natural understanding of themselves and their fellowman, or are gifted with the same discernment and balance. Not that judges are lacking in knowledge of law. The ordinary rules for the administration of law are rather simple and not difficult to follow. But judges should be students of life, even more than of law. Biology and psychology, which form the basis of understanding human conduct, should be taken into account. Without a fair knowledge of the mechanism of man, and the motives and urges that govern his life, it is idle to venture to fathom a situation; but, with some knowledge, officers and the public can be most useful in preserving and protecting those who most need such help. The life of almost any unfortunate, if rightly understood, can be readjusted to some plan of order and system, instead of left to drift on to ruin, the victim of ignorance, hatred and chance.

If the physician so completely ignored natural causes as the lawyers and judges, the treatment of disease would be relegated to witchcraft and magic, and the dungeon and rack would once more hold high carnival in driving

devils out of the sick and afflicted. Many of the incurable victims of crime are like those who once were incurable victims of disease; they are the product of vicious and incompetent soothsayers who control their destinies. Every human being, whether parent, teacher, physician, or prosecutor, should make the comfort and happiness of their dependents their first concern. Now and then some learned courts take a big view of life, but scarcely do they make an impression until some public brainstorm drives them back in their treatment of crime to the methods of sorcery and conjury.

No scientific attitude toward crime can be adopted until lawyers, like physicians and scientists, recognize that cause and effect determine the conduct of men.

When lawyers and courts, and laymen, accept the scientific theory which the physicians forced upon the world long years ago, then men will examine each so-called delinquency until they discover its cause, and then learn how to remove the cause. This requires sympathy, humanity, love of one's fellowman, and a strong faith in the power of knowledge and experience to conquer the maladies of men. The Forum of the lawyers may then grow smaller, the court house may lose its spell, but the world will profit a thousandfold by a kindlier and more understanding relation toward all humankind. ††