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## Attorneys at Law

### **A liberal lawyer before a conservative jury**

**By Dan W. Stevens**

With apologies to some of my lawyer friends in Louisiana and Texas, it has been my experience that most civil plaintiff's lawyers' as well criminal defense lawyers have a liberal bent to them. This creates a problem as 40% of the people in this country classify themselves as conservatives while only about 20% say they are liberal or progressive. The results are based on eight Gallup and USA Today/Gallup surveys conducted from January through June, 2010 encompassing more than 8,000 U.S. adults. This may be why Fox has the highest ratings for cable news. They have twice the base to start with.

TLC teaches us to connect with jurors and strive to create a tribe with the jury. But if jurors believe, either initially or later on, that we are "one of those goddamn liberals" we are in big trouble. This is a problem: we must be real, and we can't make ourselves into something we are not. How do we deal with this situation? How can we connect with people whom we don't understand and who don't understand us?

I am a middle-aged, upper-middle-class, white male, in the Midwest, who associates with similar animals. I find that most of my friends are conservative. I also believe that most of those conservatives are truly moral and care about people. I have a very conservative friend who is only moderately well off. He just inherited \$100,000 unexpectedly from an uncle. He donated the entire sum to sponsor the building of a fishing pier in Colorado for disadvantaged youth. Most liberal I know would not have been that generous. I also have two extremely conservative friends who hold multiple jobs and are raising 4 children. They make about \$200,000 a year but live a Spartan life-style, sharing bedrooms, doing without in a small house so that their kids can attend expensive private schools and colleges. They get upset in the grocery store when they see people using food stamps to purchase items they feel are outside their own budget.

What has always confused me as I wonder how a person can be moral, caring as well as conservative. One classic difference between fiscal Conservatives and Liberals is their respective views on entitlement programs. Conservatives have historically opposed virtually every "entitlement program" that has come down the road (Medicare, Social Security, Medicaid, "Obama Care," unemployment compensation). I always believed this demonstrated a total lack of caring for the unfortunate. How could decent, moral individuals believe in conservative principles?

The bases for many of our beliefs including conservatism are insecurities and fears that we all have. There is a justified fear that someday there will not be enough to go around. Some moral conservatives believe that if the few must support the many our society will collapse. Their belief is that when people receive without working then those who work must then work harder and longer. If we encourage people not to work by paying them, then more and more people will choose not to work increasing the

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burden on those who do. Fear isn't always rational and is based upon the unknown. Who can say this is not the path we are heading down? Some not so moral conservatives as well as some liberals base their beliefs solely on self-interest.

My biggest frustration over the years is how juries could come up with verdicts which were so contrary to what I viewed as justice. My belief has always been that it was conservatives on the jury who were responsible for what I perceived as unfair decisions. I have a real problem trying to figure out how conservatives think. Recently a trial lawyer friend of mind recommended a book written to address this dilemma. Jonathan Haidt wrote, The Righteous Mind in an attempt to reconcile conservative and liberal views. To address this question, he first describes the thinking process. Haidt writes that most of our real decision making is done instinctively, emotionally, subconsciously, and intuitively. He describes this as "the Elephant." Then, Haidt analogizes our logical, conscious, rational thinking process to the rider on the Elephant. The Elephant goes wherever it wants and the rider may be able to steer it, but only marginally. The rider's main job is to explain or rationalize the actions of the Elephant. Decision making for the Elephant, and the rest of the animal kingdom, is evolutionary, genetic and environmental. It is the rider -- the reasoning process -- that separates us from them.

Haidt describes how the moral basis for the Elephant's decision making process separates Liberals from Conservatives. He defines moral people as those who subordinate their own personal interests to the greater good of society. Conservatives believe this morality stems from personally working hard, contributing through their hard work and asking little in return (small government?) People who work hard are the ones who pay to operate our government and keep this country running. Liberals see morality as using common resources to take care of the less fortunate. The moral people on both sides believe that they are subordinating their personal interest to the common good

Liberals have three moral bases for their decisions; caring/harm, fairness/cheating, and liberty/restraint. The liberal makes his or her moral choices using these three criteria. Haidt and others came to these conclusions through surveys using various stories containing a moral issue and asking their subjects to explain their opinions. He found that Conservatives believed in these same three moral cornerstones but also believed equally in three more. The additional three are loyalty/betrayal, authority/rebellion and sanctity/sacrilege (religion). While both sides believe in Liberty, the exact beliefs are a little different. The Liberal is more concerned about being restricted from pursuing individual interests, life styles and means of expression while the conservative is worried about the burdens of government regulations and restrictions.

By Haidt's reasoning, Liberals prefer to focus on the individual first and his or her own plight under the light of caring and fairness and society second. Conservatives see the self-sufficient individual as necessary for the continuation of our country and its institutions. The conservative icon Ayn Rand's fictional hero John Gault stated, "I swear by my life and my love of it that I will never live for the sake of another man, nor ask another man to live for mine." Conservatives I encounter act like "I've got mine,

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fuck you” by bitching about paying taxes for public schools when they homeschool their kids and that sort of thing. Conservative looks at how institutions as a whole (larger tribes) will be negatively impacted by helping out individuals instead of requiring individuals to be self sufficient. These institutions include the government, insurance companies, businesses, health care, the family, the Church and society in general. While there is still concern for the individual, institutions, society, church and government must take precedence over any individual situation. Unless we are all contributors and not takers we will all go to ruin. Conservative views on loyalty, authority and sanctity tie them deeply into their larger Tribes.

Conservatives are often very religious and patriotic. They have this deep sense of loyalty and respect for authority. The institution of the family and its connection to sanctity (religion) make Conservatives anti-abortion, anti-women’s rights and anti- homosexuality, feeling that the individual interest must be sacrificed for betterment of the tribe. It is hard for a liberal see things from a conservative point of view but if we don’t we will be ineffective in court. Haidt’s point is there are very moral, honest people on both sides but each villainizes the other. This would be similar to a government’s decision to enter war. There is always going to be collateral damage (loss of life and treasure) for the benefit of the greater good, peace and security. Conservatives argue that entitlement programs which may provide needed help in many individual cases, as a whole encourage sloth, laziness, irresponsibility and fraud. They drain public resources and unnecessarily burden the hard working. They put the country in debt. Conservatives see entitlements as harmful to the tribe as a whole.

An example of how Conservatives see the institutional big picture while liberals focus on the individual is the story of Casey Martin. Martin was an aspiring pro golfer disabled with a crippling condition that prevented him from walking although he could still swing the club. The PGA tour said he couldn’t participate unless he could walk the course. He sued under The American’s with Disabilities Act. Two institutional conservatives, Jack Nicklaus and Arnold Palmer took a stand against him, claiming that allowing Martin to have a cart would violate tradition, create chaos, was not good for “golf” and warned of the implications. Other golfers like Lee Trevino and Greg Norman (golf liberals) focused on the individual, Martin, and argued he should have a cart. Martin won. Despite the use of a cart, his career never took off. It should be noted that the institution of golf suffered no setback.

Being a liberal, I don’t share the moral underpinnings of Conservatism. I would not function well in a corporate setting requiring blind loyalty to the corporate group as well as deference to corporate authority. I suspect that many of my liberal friends feel the same way. Intuitive ideologies account for the thinking and thought processes of the Elephant. In law school we are taught to think and communicate with the logical rational rider. We are taught how to ignore the Elephant as an irrational, illogical, stupid beast. We learn contempt and disdain for the Elephant. Judges too have learned to try to ignore the Elephant and that is why many plaintiffs’ lawyers do not file jury demands, preferring to try a

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case to a rider who thinks more like they do. What we have been taught is how to become better rationalizers and explainers after the fact.

What are the specific problems liberals have with juries? Lawsuits look much like entitlement programs, someone getting money for nothing. A criminal defense lawyer looks like public enemy number one, trying to free the guilty. From the conservative standpoint, lawsuits promote chaos. Lawsuits cost institutions money. The money paid to plaintiffs comes out of everybody's pockets. It raises insurance rates. It establishes a dangerous precedent. It restricts business. We can't just give everybody money. People get hurt all the time. The tribe shouldn't have to pay for it. Individuals must sacrifice for the betterment of the group. People need to take personal responsibility for what happens to them. Shit happens. The unfortunate can't keep coming to the tribe to bail them out due to their own bad luck. We must preserve the group as a whole. The continuation of business as usual is necessary for the survival of the group. Lawsuits encourage bad behavior. Money discourages people from working. Jury awards hurt the tribe as a whole. And: "I don't want someone else to get money because I just don't like that ... because I don't have money, or because I'm afraid of losing the money I have somehow, or just because I don't like the idea of someone getting money.

Freeing criminals also hurts the tribe. We need order, security, and protection. Putting people in jail makes us safe. Convictions keep criminals off the street. Enforcing the law creates respect for authority. It prevents chaos. We need to be loyal to our big tribe, our community and do what is right for it. Police officers in their uniforms represent authority, security and protection. We owe loyalty to them. The DA represents us as a tribe and we owe loyalty to him or her to help protect us. Our religion teaches us that there is evil in the world and we must do our part to help stamp it out. The conservative elephant knows all of this. Those that are different from us are a threat to our tribe.

Probably the biggest mistake most of us make is that we use arguments that we ourselves find persuasive. Why would we make an argument that we didn't believe in. The problem with this approach is that unless there are those on a jury who think just like us, our pleas will fall on deaf ears. People tune out those who do not agree with their Elephant. A liberal plaintiff's lawyer will typically focus on the unfairness of the situation and why a jury should care about his client. To a liberal juror this is persuasive but a conservative, who may still care, will see important institutional considerations and will not be persuaded. Accidents happen all the time and people shouldn't get money just because of accidents. A liberal criminal defense lawyer may focus on her client's redeeming characteristics and attribute the crime to the victim. The DA reminds the jury that we have rules for a reason and if people want to be safe, criminals must be convicted and punished. The defense lawyer focuses on the individual and the State on the big picture.

I recently tried the same civil case twice due to the court granting the defense a second trial. It was a case against a real estate broker who convinced the plaintiffs to borrow money and purchase property that they couldn't afford resulting in them going bankrupt. In both trials the same lawyers called the

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exact same witnesses, used the same evidence and made the same arguments. In the first trial my client received an award of 500k and the second zero. As I later discovered, the second jury had an ultra conservative, female veterinarian (foreperson) who swayed the panel. I made the same arguments in the second trial, that had appealed to the first moderate jury (the duty of the defendant and my clients financial ruin) I made few institutional conservative arguments. The foreperson wasn't persuaded.

In a criminal case that I defended a young man was charged with reckless use of a weapon. His family lived out in the country. Late at night a man who had a grudge against the family drove into the gravel driveway spinning his tires and shouting obscenities. When he came back a second time the young man, without waking his parents, grabbed a shot gun and went outside, blasting away at the driver, shooting out one his tires and causing an accident. Fortunately I had a bunch of conservative, white male, NRA types on the jury. They walked out of the courtroom to deliberate and almost as quickly walked back in with a not guilty verdict. Neither the DA nor myself even had time to pack our briefcases.

Here are some ideas on how liberal lawyers can deal with a conservative jury.

Find out if there are hardcore conservatives on the jury by asking them in *voire dire* such as what radio stations or news programs they listen to. Is it PBS, MSNBC or Fox? Do they regularly listen to Limbaugh, O'Reilly, Beck or Hannity. Are they politically active? What are their thoughts on Tort Reform.

Anticipate who the leaders may be. These are usually the talkative or out-spoken types. Young people who are excited about the process may be persuasive. People under 30 today seem a little more liberal. Jurors who want to be on the jury and take their job very seriously are also jurors to be concerned about. You won't be able to eliminate all Conservatives but you may get more centrist ones you can talk to or at least ones who won't have much influence.

Don't ignore a liberal's main concerns about fairness and caring but remember Conservatives only see these as 30% or 40% of the case unless there are catastrophic injuries. Caring issues involve pain, suffering, wage loss, and disability.

Fairness relates to a lack of just compensation. We tend to overdo these aspects of our cases. They make our client the issue, not the defendant. Instead try to find reasons why the result you want is good for society as a whole. How does our argument fit with accepted Christian religious principles? What are the benefits to Society, the public (institutions) from the verdict you want?

Arguments in a personal injury case that may appeal to "big picture" Conservatives include:

- a) Someone has to bear the expenses of this accident. They don't just disappear. The rule should be that the person causing the accident should be responsible. (Authority)
- b) Holding people accountable for accidents encourages responsibility. (Authority)

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- c) Enforcing the rules such as traffic laws maintains order, predictability and avoids chaos. (Authority)
- d) By requiring the party at fault to accept responsibility for their actions it takes the burden to cover the loss off society as a whole. (Authority)
- e) The Bible, particularly the Old Testament requires that people be financially responsible if they cause monetary loss to another. (Sanctity)
- f) Our entire system breaks down if people aren't held accountable for their actions. (Authority)
- g) Our system of justice is what separates us from third world countries where people can injure each other without accountability. (Loyalty)
- h) The defendant in the long run will feel better about himself if he knows the person he injured is compensated for the loss he caused. (Sanctity)
- i) Rules and laws were created for a reason. If they aren't enforced, they might as well be erased from the books. (Authority)
- j) When someone is injured we as neighbors need to work together as a group to help each other from time to time. (Sanctity)
- k) By helping someone out, in a one-time situation, we help them continue as a productive and contributing member of society. (Loyalty)
- l) By holding the defendant accountable we eliminate the plaintiff from relying on charity which should go to others who suffer. (Sanctity)
- m) By holding the liable person responsible it eliminates the need for additional rules, laws and regulations on the rest of us. We must hold the wrong doer accountable or we make life more complicated for the rest of us. (Liberty)
- n) It is because people get away with poor conduct that the rest of us have to spend time and resources trying to protect ourselves, where as if we enforced the rules people would act better. (Liberty)
- o) Punish the bad people or we all get punished. (Liberty)

In a criminal defense case the conservative juror again is persuaded by larger institutional arguments such as:

- a) When the police don't do their job we are all at risk. (Liberty)
- b) The government has too much authority and power and has the potential to misuse it. (Authority)
- c) The system works when the prosecutor is required to do his job. (Authority)
- d) Putting excess people in prison is a cost that we all bear but shouldn't. (Authority)
- e) Making the police and prosecutor do their jobs insures innocent people don't go to jail. (Authority)
- f) Government is subject to corruption and abuse. (Authority)
- g) Government intrudes into peoples personal lives. (Liberty)

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- h) Government is the enemy. (Authority)
- i) If they can go after the defendant they can go after all of us. (Authority)
- j) The government lies to the people. (Authority)
- k) Police abuse their power. (Authority)
- l) We have more to fear from the government than we do from a few individuals. (Liberty)
- m) There are too many laws. (Liberty)
- n) Government is too big and intrudes on peoples personal lives. (Authority)
- o) Following the rules of proof beyond a reasonable doubt insure that the system will function and innocent people won't be convicted. (Authority)

It is hard to appeal to the Conservative values of Loyalty and Sanctity in a criminal case. Their loyalty is to institutions and not individuals like the defendant. Also their religion holds people accountable for their misdeeds.

The key to dealing with Conservatives on the jury is to make big picture arguments as to why we will all be better off if our client prevails. It is too easy for liberals to focus on the individuals involved and not see potential Societal implications that are of concern to Conservatives. We can't ignore issue about caring and fairness but we must keep them in perspective. These arguments need to be backed up by evidence and testimony and not merely brought up in closing arguments. Keep them in mind while developing your case.