

HOW TO MOTIVATE THE JURY

July 2015

By Kari L. Jones

“The conscience of the community.” Why is this phrase important to the practice of law? It is important, because it is our jury pool and therefore it is the measuring stick with which we must measure our cases. Whether it is in the civil or criminal context, whether you are the plaintiff or the defendant, we are asking the jury to make the right decision. “The conscience of the community” is more than a phrase, it is a tool that we can all use to empower the jury to make the decision we need them to make.

So why should this phrase be important to us? It is important to this firm because we try cases. The use of this phrase should be used as a theme in your case, interwoven in every move you make in trial preparation and should be told as part of your story at trial. This phrase has two meanings: (1) we are telling the jury that they represent the community (2) we empower them to make a decision that will positively impact the community. For those in this firm that specialize in criminal defense, it is asking the jury to make a decision that sends a message to the community that we will not let the state of Colorado unjustly convict innocent people. For those in this firm that specialize in civil work, whether the plaintiff or the defendant, we must ask the jury to make the right decision for the community and tell them how their decision will impact the community. For example, it is asking the jury to make a decision that sends the message that this community does not tolerate dangerous driving and if you injure someone, you must pay for it.

What Does This Phrase Really Mean?

I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse **the conscience of the community** over its injustice, is in reality expressing the highest respect for the law.

Martin Luther King, Jr., *Letter from Birmingham Jail, April 16, 1963* (from The Martin Luther King, Jr. Research and Education Institute at Stanford) [emphasis added]

“The conscience of the community” is a phrase with undeniable rhetorical power, as demonstrated in Dr. King’s famous quote. Conceptually, however, the phrase lacks fixed meaning. After all, conscience is always individual, while community, by definition, never is. Like “the favorite color of the community”, the phrase casts myriad personal preferences into a monolithic form, leaving unstated the criteria by which some individuals’ preferences are incorporated while others are marginalized or averaged out of existence. Members of human communities simply do not experience simultaneous pangs of guilt or remorse as though sharing some sort of science-fiction “hive mind” conscience. Accordingly, “conscience of the community” must be recognized as the useful legal fiction that it is, alongside “the reasonable man” and corporate personhood. It is a device of language, and – as with most devices – what really matters is how it is used.

Sometimes, the phrase is merely rhetorical shorthand. In Dr. King's quote above, for example, the phrase seems to mean the individual consciences of all or most of the individual members of the community, and the inexactness of the phrase is compensated for by the eloquence of its expression. Other times, however, tension between the ideas of conscience and community can pose a more substantive challenge to the fair administration of justice. Jury nullification, for example, in which jurors set aside the laws of their community to render a verdict according their individual consciences, is always reliably controversial precisely because it so unavoidably implicates this tension between individual conscience and community norms.

How, then, should a lawyer understand and use a concept as fraught and inexact as "community conscience"? In what ways can the phrase be used and its rhetorical power harnessed to serve the case? In what ways might it be misused and become a liability to the case? And if it does become a problem, how might the problem be fixed?

How Does the Law Use the "Conscience of the Community"?

Our laws give an explicit role to the idea of "conscience of the community" in several kinds of cases. Jurors are asked to act as the conscience of their community in the sentencing stage for capital crimes. Jurors are instructed to assess criminal obscenity in light of the conscience of the community. Conscience of the community has long played a role in assessing the sort of extreme and outrageous conduct that gives rise to an emotional distress claim; indeed, many lawyers may recall the basic Restatement of Tort's somewhat comical requirement that describing egregious conduct to the average community member should cause that listener to shout "Outrageous!" – the outcry, presumably, of an aggrieved conscience. These invocations of the community's conscience are used to justify reference to social norms where jurors are asked to resolve questions abstract enough to cause any juror to second-guess his individual judgment: like at what point a murder becomes so heinous that it deserves execution, or at what point free speech becomes so offensive that it becomes unprotected obscenity, or at what point conduct becomes sufficiently outrageous to justify its victims' damages for emotional pain.

Given the permissible uses already present in the law, and given the absence of any specific prohibition on the words "conscience of the community", it is reasonable to conclude that an attorney should be permitted to invoke the conscience of the community in tort cases generally. This conclusion, however, must be accompanied by the caveat mentioned earlier: what matters most is how the device is used. The foregoing examples of its acceptable use all employ the term to ask jurors to reference ordinary social norms as guidance for their judgment. It is also evidently acceptable to use the device to ask jurors to maturely consider sensitive subjects and make difficult and consequential decisions. Jurors play an especially important role in a trial. Whether in the civil or criminal context, jurors make difficult decisions that have a profound impact on the parties' lives. Juries are the voice of reason, conscience, and community, and we trust them to make difficult decisions touching upon life and death. Put simply, a lawyer should be able to use "the conscience of the community" to encourage the jury to perform its proper role of making hard decisions on

behalf of the community from which they are drawn. We should be using asking the jury to make decisions in our cases as the conscience of the community. This is a tool that we should be using in our cases because it gets results. At the end of the day, we need to educate the juries and trust that they will make the right decision.

¹ *Restat. 2nd of Torts*, §46, Comment (d): "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"