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Legal ethics: The change that is coming

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Judicial Retention: Removing the target starts at home

By David A. Domina and Carol E. Domina

Judicial retention elections were special concerns for trial lawyers during the November 2012 elections. ***Voir Dire*** devoted its Summer 2012 issue to the subject.

Interviews and speeches by former judges of the Iowa Supreme Court told poignant stories about the risks of doing the right thing when it is not popular. All active lawyers know that devotion to the judge's oath, and to the lawyer's oath, requires each of us to step, with deliberation, into harm's way from time to time. No lawyer's life and no judge's service are complete without a call to unpopular service, and an affirmative response.

The elections have passed. Some time for reflection has passed, too. Now, perhaps it is responsible to suggest that a more fundamental problem plagues America than popular misunderstanding about the impartial judge's role in government by rule of law. This problem is under appreciated within our own ranks; we lament attacks on judges, but fail to focus on root causes.

We suggest that the major fault lies with our own doing as judges and lawyers. Perhaps now is the hour to find ourselves "eating the bitter bread of banishment." [1]

Starting at the Beginning

As an organization devoted to the Seventh Amendment's preservation and promotion, the Seventh Amendment is ABOTA's gospel. It cannot be read too often. The Seventh Amendment contains two clauses. The first is regularly recalled: it guarantees trial by jury in civil cases where the amount at issue exceeds $20. The second clause is at least as important, and much less often addressed. Clause two of Seventh Amendment contains this stern admonition:

> "…***no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."*** [2]

"No fact tried by a jury." These words leave little to interpret. But, we have strayed. Our courts regularly re-examine jury verdicts; our court rules provide for it. We go to great lengths to avoid trial, too. By getting off the narrow path of this admonition, perhaps we strayed into the danger zone that led us to too few jurors, and too few satisfying experiences where citizens decide the disputes of citizens and feel good about the process. Children and extended family of would-be jurors are deprived of countless conversations that form lifelong favorable impressions of the courts. Simply, courts lose disciples by not using juries. And they lose apostles by second guessing jury verdicts.

The common law did not permit

general review of jury verdicts.[3] Juries had *de facto* nullification powers. In our own country, even legal issues were argued before, and to the jury so jurors heard the same legal arguments as the judge.[4]

Consider the Articles of Impeachment against Justice Samuel Chase when the United States was 15 years of age. Eight Articles accused Chase of misconduct for refusing to excuse a jury venire panelist in one case, refusing to allow the jury to hear testimony from a witness in another, and effectively overruling the jury in another.

The final impeachment article against Chase closed with the accusation that Chase:

> …did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury and of the good people of Maryland, against the Government of the United States, by delivering opinions … highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan.[5]

The jury was sacrosanct when our nation was born. Now it has all but vanished. The politicians insisted that judges avoid the "low purpose of an electioneering partisan" when America was young; now judges face pressures to be politicians with electioneering concerns no different from others. The change may be directly linked to the vanishing jury.

Views of Government Are Formed in Childhood

How is this decline in jurors linked to the problem of judicial retention? The answer lies in *why* people think *what* they think about justice, morality and the courts.

Social science honed theories of moral development, including development of ways to judge morality, or propriety of actions and the roles of institutions in those actions. American psychologist Lawrence Kohlberg's widely revered explanation of six stages of moral development[6] describes the process through which values are formed. Kohlberg's work led UC-Berkley researcher Howard Kirschenbaum to conclude that values form in early childhood and can only be modified later by *(a)* a conscious decision to change, *(b)* acting repeatedly on the changed value, and *(c)* acting on the new value in the face of opposition.[7]

Protection of the judiciary's independence cannot be entrusted to achievement of mass changes in values "in the face of opposition." Recruiting disciples for the judiciary's independent role must begin when values are being formed, not when they must be changed "in the face of opposition" to achieve the goal.

Core issues about moral development focus on these questions: "What is the origin of moral concepts in a child? To what extent does a child's development indicate typical or regular change? What causes development and changes in moral concepts?" [8]

Jean Piaget's theories, expanded by Kohlberg's work, supply answers that are widely accepted.[9] Piaget thought children moved from amorality to a stage of development involving respect for sacred rules. He thought children lacked the ability between ages three and eight to fully differentiate moral rules from physical laws. Piaget believed the child see rules as absolute. In addition, the young child perceives parents and other adults as all-knowing, perfect and sacred.

This attitude leads the child to view rules as sacred and unchangeable. An overheard conversation about the quality of courts or the value of citizen participation can, and often does, form lifelong impressions. These innocently overheard comments of adults form the attitudes carried by children all their lives.[10]

After this, comes the child's development of a sense of "justice" in which morality takes on logical aspects and is not simply sacred and immutable. Piaget thought that in child development, "the rule of justice is a sort of immanent condition of social relationships or a law governing their equilibrium."[11] Piaget theorized that the sense of justice … "*requires nothing more for its development than mutual respect and solidarity which holds among children themselves*" [12].

Piaget concluded that an autonomous morality of justice develops in children of about age eight to ten and replaces an early childhood view morality based on unquestioning respect for adult authority. He expected autonomous morality of justice to develop in all children, "*unless development is fixated by unusual coerciveness of parents or cultures or by deprivation of experiences of peer cooperation.*" [13]

What does this Mean?

Two things seem clear from the lessons of child psychology. First, children mimic lifelong the views of government as it relates to morality, which they learn from their parents and other significant adult figures. Second, hearing about satisfactory interaction with government on a moral level is of formative and defining importance in framing a child's long-term view of institutions like courts and the church, both of which are closely

Participation is Key

No one denies that the civil jury is vanishing. ABOTA's efforts to teach the value of trial by jury and the Seventh Amendment are laudable, but feeble when compared to the omniscience of arbitration clauses in day-to-day contracts. They are also feeble when compared to the massive rise in case-ending motion practice before trial[14], and the expanded propensity of judges to nullify verdicts.

Presumably, the aspiration to the trial bench, includes for most aspirants a vision of presiding, in the center seat, over sophisticated trials where skilled lawyers and intelligent witnesses match evidence so a jury can decide the case. Yet, once robed, trial judges make decisions, again and again, to dispose of cases without trial. When they do conduct trials, they are more and more inclined to second guess the jury.

The National Center for State Courts reports that "approximately 15% of the adult American population is summoned to jury service each year in state and federal courts. An estimated 8-10 million citizens report for jury service annually…." [15]

In 2007, Massachusetts disclosed a study of its jury utilization systems ending with recommendations that "the Massachusetts court system should take steps to overcome the limitations of its institutional fragmentation and develop a culture of shared accountability for jury utilization." [16]

Annually, state courts conduct an estimated 148,558 jury trials. About 5,940 jury trials are conducted in federal court.[17] They break down as follows: 47% are felony cases; 19% are misdemeanor cases: 31% are civil cases. There are approximately 50,000 civil jury trials per year in the United States; so, less than 5% of the US adult population is summoned to civil jury service annually.[18] Jury trial rates vary dramatically nationally. Alabama is the low ebb at 15 per 100,000 of population. Alaska is highest. There the rate is 177 per 100,000.

Virtually all courts report jury venire dissatisfaction. They are forced to wait, treated with less dignity than expected, or otherwise disregarded. Id.[19]

The decline in civil jury trials is dramatic. Iowa, which was the center of Voir Dire's Summer 2012 issue on judicial retention, serves as a useful example.

In 1990, and again 20 years later in 2010, Iowa's population was almost exactly 1% of the total U.S. population. In 1990, Iowa used 12-person juries and conducted 700 trials. The United States, in 1990, generally used 12 jurors in federal court, and the federal court system conducted 4,783 trials.

A bit of math discloses that in federal court in 1990, 56,396 jurors served nationwide. In the Iowa state court system, 8,400 jurors served. On a federal basis, this represented 22.78 federal jurors per 100,000 people. In Iowa, it was 333.33 persons per 100,000.

In a community of 25,000 people, in 1990, 5.69 persons would have served as federal jurors and 83.33 would have served as state court jurors.

But, by 2010, the scene was dramatically changed. In federal court, total civil juries numbered 2,251 and average jury size was eight. In Iowa, there were 196 civil jury trials in 2010 and the statutory jury size was eight.

This means that by 2010, in a community of 25,000 people, 1.46 persons served as federal jurors, and in an Iowa community of this size, 12.65 persons served as state court jurors. These figures represent a decline of a total from 89 adults who served as jurors annually in a community of 25,000, down to a combined total of 14 persons so serving 20 years later.[20] For readers who do math, 14/89 = 15.7%. This means that in terms not adjusting for population growth, 5 of 6 civil jurors vanished in 20 years! The population increased from 248 million in 1990 to 308 million in 2010.[21] This nearly 25%h increase means that as a fraction of the total population, 1 juror served in 2010 for every 8 who served on a civil jury in 1990.

Assume each juror who served talked to 6 people extensively about jury service. The multiplier is (89 x 6) 534 as of 1990, and only 14 x 6) 84 as of 2010. Multiply for the entire population. Then add 60 million new Americans who have not had exposure to anything good about the courts. No wonder judges are struggling in retention elections: no one knows what they do or sees them do it!

Judging has ceased to be participatory and an act of citizenship shared by lay people. It has become a gray, closed room process of complex procedures and rules that allow lay persons to think the purpose is to lock out the public.

The bloom is off the rose.[22]

related to "right" and "wrong" and "justice".

As the lessons of the psychologists apply to us, this is the lesson to be learned. If children hear parents tell stories of satisfying jury service and interaction with the legal system, they tend to see the system, and its judges favorably. If all they hear is about someone never getting to court, or using smoke-filled arbitration rooms or mediation conferences for brokered outcomes instead of pronouncements or renditions of judgments, they do not form favorable impressions.

Fewer jurors who have good experiences means fewer testimonials for the judiciary, and this results in fewer and fewer advocates for the judicial system and the judges who populate its courtrooms.

When judges tinker with jury verdicts or buy into trial avoidance, they rack up numbers of future citizens who do not see the judiciary as valuable because they have not experienced its value either directly or vicariously.

The number of homes in which jury service was discussed favorably by persons who actually served on a jury diminished from 89 homes to 14 homes in each community of 25,000 jurors, on average nationwide, unadjusted by a 25% population increase. In other words, about 1/8th as many families talked about a parent's involvement in jury service before children or grandchildren, and about 1/8th had an opportunity to report on the jury system, and involvement in the court system, to children and young persons in their formative years, as 20 years ago.

Is this important to the formation of attitudes toward the civil jury system? I think so, but it is not the entire story. Even federal criminal juries are disappearing. In December 2012 the National Press, led by a front-page story in the ***Wall Street Journal*** on Sept. 23, 2012, reported on the rapid expanse of plea bargaining to dispose of criminal cases. The article disclosed the vanishing *criminal* jury.

Trial Alternatives

The problem is not just rapid growth of arbitration and arbitration clauses, though this is bad. There is more. Every trial lawyer is keenly aware that summary judgment, and dismissal motions based on recent changes in pleadings rules, dramatically escalate the plaintiff's burden and diminish prospects for confrontation before a jury. Though the language of pleadings rules [23] have not changed, judicial interpretations have, and more and more, judges decide whether a case is plausible, ignoring the fact their own view of plausibility might not comport with that of the jury.[24]

There is no doubt that post-trial motions fare far better as invitations for judges to second-guess juries than was true previously.[25] The popular press now understands that matters are changing. ***Bloomberg*** noted there were 26 distinct $1 billion jury verdicts between 1980 and 2010. Virtually all were thrown out.[26] This is a small demographic, but one of interest to the author whose billion dollar verdict was thrown out.[27]

Juries are usually attacked by persons who claim they are unpredictable and outcomes are uncertain. Wait a minute! This is the precise reason juries exist.

Every good trial lawyer knows that one duty of the jury system is to provide uncertainty. Uncertainty engenders settlements, compromise, and produces the sharpest, crispest, and best trials, with the greatest opportunity to yield a just outcome.

So why are jury trials declining? Why are judges telling lawyers their cases cannot go to trial or taking away verdicts if they do? Why is summary judgment rampant?

And why are lawyers investing so much effort to avoid trial by jury, when there is, ultimately, no other reason for lawyers to exist than to serve as advocates on behalf of persons who need advocacy before an objective fact-finder?

Passing the Test Starts At Home

Partisanship leveled against the branch of government that is designed to be impervious to politics, are bitter tests but the test recurs, and each time, it must be passed. Can the time between tests be lengthened, so the number of tests to pass is reduced? Yes. But not without fundamental introspection.

May I suggest a place to start the introspection? Lawyer reader, Judge reader: start at home, and by thinking about home.

Each of us sees the world from a perspective learned from others. In general terms, we believe one of two things: *(a)* business is inherently good and what is good for it is good for people, or *(b)* people are inherently good and—when encouraged to do so or rewarded for it—will and do help one another. This sharing produces a better society.

Stating *(b)* differently, one view is that people are inherently good and greatly influenced by what they need and what they want. They react to need and want with predictable behaviors. These behaviors appear in consumer choices and impact the economy. If we allow the market to be free, and keep the law out of it, people will make their own choices, and ultimately they will be good ones.

The United Nations World Health Organization adopts view (b) and calls it "Learning for Sustainability." It is used to break

poverty cycles, teach environmental concerns, and inculcate tolerance and thirst for peace.[28]

Perhaps judicial adoption of view *(b)* and a step or two away from view *(a)* can put some bloom back on the rose.

Compromising to Co-Exist: Judicial Coalescence

I subscribe to one of the two prevalent philosophies of our secular view of government. Yet, I recognize several flaws with each. These views and their central flaws may be seen as: *(1)*, the liberal view, which at its extreme can tend to spawn big government, socialization that dumbs down inquiry, and diminishes incentive; and *(2)* the conservative view, which at its extreme can default control to 1% or less of the population and give rise to institutional rewards for greed, self-centeredness, and manipulation of elections for selfish gains.

The law's role is to mesh these two views, not to make one predominant. It is to check each and achieve centrality. Lawmaking alone is not to accomplish this objective. The courts are called to the task, too. A one-sided political system inevitably makes the judiciary unpopular. This is by design as both a check and a balance. What our system does not balance is inordinate concentrations of wealth and, therefore, inordinate abilities to manipulate markets, including messaging systems at election times.

There is no room in the current system of political talk for the importance of a brave and committed judiciary. Such a message is not consistent with the goals of those spending money on political questions. In fact, it tends to oppose their objective… by design.

Far too often, lawyers and their organizations seek political objectives. We spring to judicial defense too sparingly, too inconsistently, too late — and with too little understanding. We miss the chance to teach the value of the courts in the one way designed into the doctrine of separation of powers—by involving nonlawyers and nonjurists in the process as jurors.

When we miss this chance, we miss the opportunity to touch off hundreds of conversations overheard by thousands of young ears yearning for formative words about the value and importance of fair judges and fair juries, and good, honest lawyers. When we miss these chances, child by child, we miss them forever. This is the greatest threat of all of the alarming diminution of trial by jury.

The "rule of law" is a rule of process, not results. The legal process, not case outcomes, makes the rule of law "the foundation of equitable State relations and the basis upon which just and fair societies were built." A declaration of the UN General Assembly recognized this shortly before our country's 2012 elections.[29]

The "rule of law" can only be a process with rules of presentation, not rules of outcome determination. The process can be taught. The courts and lawyers cannot be good at early childhood development though its methods are well known.[30] But we can involve parents, grandparents, aunts, and uncles, as jurors. That we have fallen off in this work is our great failing.

We have narrowed our own pool of disciples and lost our own corps of citizen apostles. Here, the law itself, and its practitioners, got off track; judges and lawyers missed the mark. As a result, a threat to judicial independence and the rule of law is plainly present. Our system has too few citizen advocates and it is creating even fewer for the advocacy needed tomorrow.

Participation is Key. It Must Start at Home

People cannot respect what they do not understand. Our citizens cannot appreciate the price of freedom unless we regularly pay it.

Many trial lawyers aspire to appearances before juries because of a formative event as a youth. Often, that event involved a jury trial. Discussions at a dinner table about a parent's jury duty might provide the spark. A trip to the local courthouse for an observation in a civics or government class might make the difference. Even a scrape with the law, requiring exposure to the court system, might do it.

Trial lawyers do not become trial lawyers without exposure to the magic of presenting a dispute to strangers entrusted to resolve it.

So, as jury trials vanish, support for the system vanishes. And not just for trial by jury, but also for judges and the judiciary.

As citizen interaction, through jury service, goes away because summary judgment and other dispositive motions have exploded, fewer and fewer people aspire to trial presentation or to any interaction involving a judge. "Judging" becomes misunderstood and underappreciated. Then, judges become political pawns.

What is the Solution?

The solution is not to wag our fingers at parents and tell them to do better with their children. And it is not to focus on teenagers whose moral values are largely formed even if prematurely expressed.

Lobbyists will not do it. Neither will talks to the Kiwanis Club.

Quite the contrary. More citizens must interact with the courts. More Americans must be called upon to make decisions in courtrooms as jurors, participate in the process, and respect themselves along with the jurist. This will produce conversations at home between parents. Those conversations will influence children, and their repetitions will spread out to classrooms and ripple from schools, to gathering places across society. In fact, they will show up in the ballot booth, and even the courtroom!

It is hard to imagine how an un-witnessed ruling on a motion for summary judgment can help mold a positive view of the judiciary. It produces, at best, a brief cynical comment at a dinner table by the party who wins and, at worst, protracted frustration and disappointment for the party who loses. We must do better.

Judges must not be afraid to impanel juries. The phrase "genuine issue of material fact" does not mean "I'll let your case go to trial if I think it should win." Summary judgment should be rare, not rampant. Juries should be larger, not smaller. Jurors should not be made to wait. Lawyers who settle cases the morning of trial should pay penalties for their delays. No juror should ever be summoned to a courthouse to be greeted by a settled case.

Judges must invest energy in welcoming the jury, embracing its presence, and congratulating themselves on the opportunity to work directly with citizen decision makers. The jury process should be embraced.

Judges must make it *possible* to embrace the jury and the system by entertaining fewer, not more, motions *in limine*. Only *real* issues should be decided in advance of trial. The jury should be trusted to be discriminating, not scorned as inherently incompetent.

Ultimately, the judiciary exists only at the will of the people. Darkening judicial doors to citizen scrutiny is a sure bet for eliminating concern for judicial resources, consideration for judicial needs, and care for judicial interests.

Protecting the independence of the judiciary requires that more and more persons appreciate, at a greater and greater level, the rewards of citizen-judge partnerships in deciding disputes through the time-honored and well-proven system of trial by jury.

Much of the distress over judicial elections is the product of the third branch of government's growing failure to involve citizens in its work as decision makers.

The price for this mistake is high. Judicial independence, and perhaps the rule of law, hangs in the balance. Neither will survive if citizen participation in government becomes restricted to lobbying for results.

People must be invested in the process to appreciate the process. The judiciary's core purpose is to provide a place and a technique for decision-making by strangers to a controversy.

Conclusion

In autocracies, judges alone fulfill the judicial function. In democracies, juries must do so. The form of government to which we pay lip service is built on the shoulders of jurors and the foresight of people to appreciate that continuity depends on citizen involvement.

More lighted courtrooms, with filled jury boxes, fewer summary judgments, and only the rarest of orders to vacate jury verdicts, are all foundational cornerstones to the continuity of democratic life. More motions overruled and fewer verdicts tinkered with… these are the things judges themselves can help to achieve. Lawyers need to make unabashed arguments that encourage a look at the long view of what we do.

Let us not turn our temptations as lawyers or judges just to political pacts for our judicial retention solutions. Let us walk into the courtroom, turn on the lights, and conduct *voir dire.* ■

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[1] Wm Shakespeare, Richard II, Act III, s 1.

[2] *US Const* Amend VII, Cl 2.

[3] Admittedly, scholarly evidence on this point is scant. See, .Robert G Johnston, J*ury Subornation Through Judicial Control*, 43 Duke Univ Rev Law & Contemporary Problems 25 (1980).

[4] The first Chief Justice of the U S, John Jay wrote: "It is presumed, that juries are the best judges of facts; it is, on the other hand, presumed that courts are the best judges of law. But still both objects are within your power of decision... you [juries] have a right to take it upon yourselves to judge of both, and to determine the law as well as the fact in controversy". State of Georgia v. Brailsford, 3 U.S. 1, 4 (1794).

[5] The Articles of Impeachment against Samuel Chase may be read at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=875&chapter=64008&layout=html&Itemid=27. Vice President Aaron Burr presided. Against President Jefferson's express wishes, Chase was acquitted on all charges. Four years later, Jefferson had Burr, then a former Vice-President, arrested for treason. Burr was also acquitted.

[6] Kohlberg, Lawrence, "The Claim to Moral Adequacy of a Highest Stage of Moral Judgment". 70 *Journal of Philosophy* 630–646 (1973). This work built on Kohlberg's PhD dissertation, which was, itself, held in high regard. Kohlberg, Lawrence, "The Development of Modes of Thinking and Choices in Years 10 to 16". *Ph. D. Dissertation, University of Chicago* (1958).

[7] Kirschenbaum, H, *Advanced Values Clarification* (Univ Assoc, LaJolla CA 1977).

[8] Piaget, Jean, *The Moral Judgment of the Child.* Glencoe, 111. Free Press (in French 1948). (Paperback 1965).

[9] http://www.encyclopedia.com/topic/Moral_development.aspx

[10] Fn 17.

[11] *Id* at p 196.

[12] *Id* at p 195.

[13] Summary of Piaget's theory. http://www.encyclopedia.com/topic/Moral_development.aspx

[14] *Lawyers Weekly*, Massachusetts, June 11, 2007, *http://www.masslawyersweekly.com/news0611.cfm*, accessed 06/11/07

[15] NCSC Jury Management, www.ncsc.org/services-and-experts/areas-of-expertise/jury-management.aspx.

[16] Assessment of jury utilization in the Massachusetts trial courts, final report June 22, 2007 (NCSC Court Services Division) available at www.ncsc-jurystudies.org/What-We-Do/~/media/Microsites/Files/CJS/What%20We%20Do/Assessment%20of%20Juror%20Utilization%20in%20the%20Massachusetts%20Trial%20Courts.ashx.

[17] www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/sos_exec_sum.ashx.

[18] *Id.*

[19] www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx.

[20] The source for this data is the Federal Judicial Centers reports on state courts, and Iowa data from the National Center for State Courts. The calculations, reducing the numbers to a community of 25,000, are the author's deductions from this data. The number of federal jurors is estimated at eight. Iowa's law changed between 1990 and 2010 to reduce the number of civil jurors from twelve to eight.

[21] http://www.census.gov/prod/2011pubs/12statab/pop.pdf

[22] Consider Shakespeare's metaphor in its full presentation at *Twelfth Night* Act 2, Sc 4.

[23] For example, *F R Civ P* 12(b)(6) has not changed appreciably in 40 years.

[24] *Ashcroft v. Iqbal*, 556 U.S. 662(2009); *Bell Atlantic v. Twombly*, 550 U.S. 544(2007).

[25] Gregory, Robert J, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, http://www.law.fsu.edu/journals/lawreview/frames/233/gregfram.html (1966)

[26] www.bloomberg.com/apps/news?sid=a3pNSz7zXQTk&pid=newsarchive

[27] In my case, the jury deliberated for a week after a month of trial. During trial jurors asked econometric questions cast in terms of math and statistics. The multipage verdict bears the jury's decisional math in a calculation carried five figures to the right of the decimal point. On review the court decided there was insufficient evidence. One of the jurors corresponded with me twice annually for four years, until her death, about her bitterness at disregard for her jury's work.

[28] UNESCO 2005-2014, *Education for Sustainable Development Good Practice in Early Childhood (N4 2012) available at http://unesdoc.unesco.org/images/0021/002174/217413e.pdf*

[29] United Nations General Assembly, Plenary Meetings, 67th General Assembly (Sept 24, 2012) http://www.un.org/News/Press/docs/2012/ga11290.doc.htm

[30] Evans et al., *Childrearing Practices: Creating Program Where Traditions & Modern Practice Meet*. (1994).