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Book Review [Jury Selection]

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BOOK REVIEW

JURY SELECTION, By V. Hale Starr and Mark McCormick, Massachusetts; Little, Brown and Company. 1985 plus current supplement. Pp. 742. Hard Cover. $90.00.

Reviewed by **Alan W. Scheflin***

The jury continues to be a source of fascination to some and aggravation to others. The jury system, that most unique aspect of Anglo-Saxon jurisprudence, never strays far from being controversial. When attorneys and justices from other lands visit American courts and talk with American lawyers, the topic foremost on their minds is the role of the jury.[1]

As we enter the 1990's, we may look back on the previous decade and notice that something fundamentally new has happened to our perception of juries. In the 1980's, juries came under a form of siege, but not from the ever-present critics seeking to abolish or sharply limit jury trials. No, this time the siege has been laid by advocates of the jury system.

A veritable army of specialists has surrounded juries. Most are lawyers, others are social scientists, statisticians, psychologists and even psychiatrists. For the first time in its centuries old existence, the jury has been placed under a microscope like an amoeba on a glass slide, where scientists hope to dissect, analyze, and psychoanalyze the organism.

The 1980's brought forth an unprecedented growth of

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1. I have had the pleasure of talking with Supreme Court justices, judges and lawyers from Europe, South America, Asia and Africa as they visited courts and law schools in the United States. The topic that has most piqued their interest is the jury system.

interest in jury selection,[2] jury persuasion,[3] jury deliberation[4] and jury performance.[5] The jury system may be beginning to feel like the shy guest of honor at a surprise party, "I'm highly flattered, but all this lavish attention is killing me." If the demise of the jury is imminent, as critics gleefully decree, it will come not from old enemies, but rather from new friends.

Such a development would be a travesty in the opinion of the authors of *Jury Selection*, with whom I heartily agree. I have had occasion elsewhere to express my support for the jury system[6] and the new wave of scientific jury selection techniques which form the heart of this book have not dampened my enthusiasm. The new techniques have, however, raised anew vital questions about the ethics of advocacy and the relationship between justice and jury decisions. *Jury Selection* is a valuable introduction to the new but increasingly well-established world of scientific jury selection. The great strength of this book is the manner in which it carefully and clearly walks the busy practicing attorney through the modern developments in jury advocacy.

Jury Selection is divided into five parts. Part I, entitled "The Law of Juries," contains three chapters, each of which explore historical, constitutional and contemporary issues. In these chapters are discussions of jury size, jury unanimity, jury trials in civil and criminal cases, random selection of potential jurors, administration of the jury system, the rise of scientific jury selection techniques and many other important topics. The writing is informative, but brisk. Topics are not given in-depth treatment as this material is a prelude to the book's significant contributions which come in later sections. Part I is effective in its purpose of introducing the reader to the modern debate about size, structure, and the role of

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2. B. COLSON, L. BLUE & J. SAGINAW, JURY SELECTION: SCIENCE & STRATEGY (1986).

3. D. VINSON, JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY (1986).

4. R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY (1983).

5. V. HANS & N. VIDMAR, JUDGING THE JURY (1986); J. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY (1987); S. KASSIN & L. WRIGHTMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES (1988); S. WISHMAN, ANATOMY OF A JURY (1986).

6. *See* Scheflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW AND CONTEMP. PROBS. 51 (1980); Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

juries.

With Part II the authors begin their extended discussion of the evolving principles of scientific jury selection techniques. These techniques are most effectively grouped, as the authors generally have done, into two major categories: Pretrial Preparation and In-Court Evaluation.[7] The first category is the subject of Part II.

What can an attorney do before trial to enhance effective jury selection? As Starr and McCormick observe, "There are times when the voir dire process provides insufficient information about jurors to allow wise and advantageous use of peremptory challenges or challenges for cause."[8] In such cases, pretrial preparation is essential. Starr and McCormick detail three separate forms of pretrial preparation: investigation, community attitude assessment, and trial simulation.

Pretrial investigation of jurors is legal, but only within certain limits. The twin concerns of invasion of a juror's privacy, and the possibility of jury tampering, mark the boundary lines. Even within the boundaries, however, lawyers must be sensitive to the fact that a potential juror who learns he or she has been the subject of an investigation will not feel kindly about that fact, nor will the judge. Although questioning friends, neighbors and co-workers of jurors may be lawful,[9] discretion must be carefully exercised.

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7. Although several models exist, the basic procedure for scientific jury selection consists of a three-step process. The first step involves obtaining demographic and interview-derived data to ascertain behavioral profiles of the venue site of the trial. Attitude surveys, demographic statistics, voting patterns, political and religious affiliations, occupations, national origins and other significant information is compiled to construct a picture of the potential jury population of that community. Profiles of juror characteristics are then developed and rated by desirability. From these figures voir dire questions are fashioned to reveal hidden biases or attitudes.

The second phase is in-court observation of the voir dire. Body movements, verbal and nonverbal responses, patterns of dress and speech, attentiveness, suggestibility, deference to authority, ease of communication, and other information is compiled on each potential juror and matched with any third party information available about each person. The third step involves the tabulation of this information into a decision about each prospective juror. As the jury panel begins to fill up, different characteristics for the remaining jurors may be sought. Jurors are measured not only against how they might vote for the [client], but also against how they will interact with each other. *See also* Scheflin, Book Review, 17 SANTA CLARA L. REV. 247, 251-52 (1977).

8. V. STARR & M. MCCORMICK, JURY SELECTION 89 (1985) (hereinafter JURY SELECTION).

9. "Since *Sinclair v. United States* 279 U.S. 749, 49 S. Ct. 471, 73 L. Ed. 938

Starr and McCormick describe a variety of ways a pretrial investigation may be conducted and they provide useful forms for compiling the data received.

Community attitude assessments are less ethically or legally questionable methods for obtaining significant information about potential jurors. Four distinct methods are described: polls, surveys, community attitude studies, and psychological interviews. All methods help establish base-rate data from which Ideal Juror Profiles may be developed.

A further use of this information is in the construction of voir dire questions. To the extent that attitudes, beliefs, values, and opinions can be correlated with the crucial issues in the case, a lawyer may be able to ask seemingly innocuous questions on voir dire yet obtain vital information about that juror's predispositions.

Part II closes with one of the newest techniques—Trial Simulation. According to the authors:

> A trial simulation is an attempt to stage an upcoming trial in miniature. The major issues of a trial are capsulized to discover the reactions of prospective jurors to evidence and arguments that could be offered during the course of the trial. The issues included in the simulation can be modified to suit the needs of the attorneys . . . Trial simulation can also be beneficial in the following ways: (1) determining the most desirable trial strategy, (2) measuring the effectiveness of opening and closing statements, (3) measuring the effectiveness of expert witnesses, (4) determining the value of various kinds of demonstrative evidence, (5) assessing the effectiveness of an attorney in the courtroom, (6) providing valuable data for evaluating the desirability of an out-of-court settlement, and (7) determining a profile of desirable and undesirable jurors.[10]

A simulated trial, prior to the actual trial, has become almost commonplace in civil cases where vast sums of money are at stake. It constitutes an expansion of the use of focus groups,[11] widely employed by candidates and advertisers be-

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(1929), the courts have held that, while pretrial investigations aimed at discovering information about the jury are legal, any direct contact with the potential juror or the juror's family is prohibited." JURY SELECTION, *supra* note 8, at 90.

10. JURY SELECTION, *supra* note 8, at 175.

11. *See* Varinsky, *Try Out Your Case on a Focus Group*, CALIF. LAW., Mar. 1988,

fore their utilization by lawyers.[12] Dress rehearsals are mandatory for many other types of performances. It makes perfect sense that they will find their place in law.

Part III contains three chapters devoted solely to voir dire. The information provided is rich in detail and particularly attentive to the subtle nuances involved when lawyers must ask intimate questions to strangers. In addition to the many helpful suggestions provided, the authors have included many sample introductory remarks designed to make potential jurors feel more at ease. Starr and McCormick also address the added burden on lawyers created by the abolition of the right of attorneys to conduct their own voir dire.

Several sections in Part III focus on the often-neglected art of tailoring the lawyer's language to the level of the audience and the tougher issue of determining the depth of voir dire questioning. The chapters are filled with useful illustrations and sample questions. Appendices provide hundreds of additional sample questions.

Part IV is perhaps the most controversial portion of *Jury Selection*. Its topic is Nonverbal Communication. For many lawyers, this material may seem too "soft." Even if you share this view, however, Starr and McCormick's discussion is invaluable in helping lawyers increase their perceptiveness to nonverbal messages. To help illuminate their points, the authors have provided dozens of photographs of people along with detailed commentary about the nonverbal communication shown in the photos. The authors further observe how the nonverbal material may be a key to understanding the more hidden attitudes and opinions of the persons depicted.

The information contained in Part IV will be the hardest to assimilate. Over time, however, it might prove to be the most valuable. As our knowledge of the importance of nonverbal communication increases, lawyers may find they have more to go on than just "hunch" or "vibes."

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at 47; Hall, *When Their Case Was in Trouble Mecham's Attorneys Got Varinsky*, S.F. Banner Daily Journal, June 22, 1988. I have had the pleasure of attending focus groups conducted by Mr. Varinsky. The experience has left me absolutely persuaded that the feedback provided to the attorneys is a vital source of information to effective planning of trial strategy.

12. Simulated trials have, in turn, spawned an even newer idea—the use of "shadow juries." *See* Krongaus, *Serving Time on a Corporate 'Shadow' Jury*, The Recorder, Sept. 23, 1986.

Part V contains but a single chapter entitled "Jury Selection in the Courtroom." It focuses attention on the interaction of persons selected to be jurors. The chapter is designed to show how the information presented throughout the book can be used to actually select a jury. The reader is taken step by step through the actual selection and deliberation process of a jury. Dozens of photographs are used to allow the reader to make his or her own judgments and get feedback on how selection and deliberation actually occurred. It is one of the most stimulating chapters I have read on jury selection.

Had the authors desired, a Part VI might have been added to cover post-trial interviews with jurors.[13]

Jury Selection fulfills its goal of providing a banquet of fascinating information and useful guidance about juries. One omission, however, concerns me. Many readers may come away from this book with the view that justice has been sacrificed on the altar of covert juror manipulation. The techniques described by Starr and McCormick have raised serious moral objections which the authors do not address. For example, Professor Amitai Etzioni, Chairman of the Department of Sociology at Columbia University, considers scientific jury selection to be techniques of "jury rigging."[14] Lori B. Andrews has referred to them as techniques of "mind control"[15] and Marty Olmstead has written about "The Customized Jury."[16]

The new science of jury selection makes many lawyers uneasy, even those who generally approve of, and utilize, its teachings. Some attention must be paid to critics of the methods *Jury Selection* endorses.

Morton Hunt, in a provocative article on the new methods of jury selection,[17] highlights a moral problem with these techniques:

> The implications of this new use of behavioral research are significant: Jurors are not viewed as free moral

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13. *See* Varinsky & Nomikos, *Post-Verdict Juror Interviews: The Key to Understanding Jury Decision-Making*, TRIAL, Feb. 1990, at 64.

14. Etzioni, *Creating An Imbalance*, TRIAL, Nov./Dec., at 28.

15. Andrews, *Mind Control in the Courtroom*, PSYCHOLOGY TODAY Mar. 1982, at 66.

16. Olmstead, *The Customized Jury*, PSA MAGAZINE, Dec. 1983.

17. Hunt, *Putting Juries on the Couch*, N.Y. Times, Nov. 28, 1982, (Magazine), at 70.

> agents, able to assess impartially where the truth lies, but as organisms whose emotional and mental processes are determined by "predictor variables," such as social status, education, age, sex, personality traits, ethnic origins and religion. Lawyers, of course, have always tried to guess how these factors would influence jurors, but if the behavioral-science approach is valid, it raises questions about our most cherished beliefs concerning the freedom of choice, the nature of reasoning and the quality of justice dispensed by jury trials.

Hunt returns to this concern at the end of his article: "If we come to perceive jurors not as independent moral agents but as creatures whose behavior, determined by social and psychological forces, is more or less predictable, we undercut the fundamental belief in the rationality and responsibility that justifies the process of trial by jury.[18]

Hunt, like others who have made similar points, ignores the implications of his position. While it might be morally troubling to think of ourselves as "captives of our own histories,"[19] why does he stop with the jury? Is not the judge also a captive of his or her own history? Indeed, should we eliminate electoral voting for the same reasons?

Hunt's concern also fails to consider the set of checks and balances that make the adversary system so unique. While the lawyer for the plaintiff might be evaluating his charts and graphs, interviews and computer analyses, attitude surveys, demographic data and psychological profiles, the lawyer for the defendant is busily running through the same information for her client. As long as each attorney is doing a proper job, as the adversary system and ethical codes mandate,[20] neither side will be able to "rig," "customize," or "mind control" the jury.[21]

In the final analysis, we may put the issue this way: If you had to hire a lawyer to represent you, would you want that person to be conversant with the skills scientific jury

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18. *Id.* at 88.

19. *Id.*

20. Some attorney proponents of scientific jury selection believe that failure to utilize these techniques on behalf of a client may constitute malpractice.

21. Another objection to the new scientific methods that *Jury Selection* might profitably have addressed is the fact that these methods are expensive and therefore may not be as available to the poor as they are to the rich.

selection methods provide, or would you prefer that only the lawyer arrayed against you have this knowledge? For those of you who would choose the former, *Jury Selection* is highly recommended.