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The American Jury on Trial: Psychological Perspectives (Book Review)

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Book Review

THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES *by Saul M. Kassin* and Lawrence S. Wrightsman.*** New York, N.Y.: Hemisphere Publishing Corp. (1988) xi, 232 pp. $39.50.

*Reviewed by Leo M. Romero****

Psychological research provides insights into human behavior that relate to the American system of adjudication. This research needs to be brought to the attention of legal scholars, judges, and practicing lawyers. The adversary system of adjudication in the United States includes the right to trial by jury in most cases, both civil and criminal.[1] Even though most legal disputes are settled before trial and some trials are tried to a judge without a jury, jury trials occur with sufficient frequency[2] to merit serious study of jury behavior. Furthermore, the jury trial represents the paradigm of litigation in the United States. The extensive rules of procedure and evidence established for jury trials reflect the importance of juries as triers of

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1. The right to trial by jury in criminal cases appears in Article III and the Sixth Amendment of the United States Constitution. The United States Supreme Court applied the right to trial by jury in criminal cases to the states as part of due process under the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 147-58 (1968). The Seventh Amendment preserves the right to trial by jury in federal civil cases, and virtually every state provides for jury trials in both criminal and civil cases. *See, e.g.*, CAL. CONST. art. I, § 16; MD. CONST. arts. XXI & XXIII.

2. *See* R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 3 (1980). In particular, this book cites data from the December 13, 1973 issue of *U.S. News and World Report* showing that in that year 150,000 jury trials were held and 2,000,000 citizens were called for jury duty. *Id.*

fact,[3] and the public generally associates trials with jury trials. The prominence of the jury trial in the adversary model of litigation and in the public's conception of our legal system requires analysis of how the jury functions.

The procedures used in jury trials rest on assumptions about jury behavior, some of which have been tested in empirical studies. The research has important implications for the jury trial. These implications will be of interest and importance not only to the legal profession but to members of the public in general, many of whom have served or will serve as jurors.

The American Jury on Trial: Psychological Perspectives[4] by Kassin and Wrightsman reviews the psychological research on both human behavior and jury behavior as it relates to the jury's role in the adversary system. The authors, professors of psychology, offer the insights of psychologists into the workings of the jury trial that should be of special interest to the legal profession. Kassin and Wrightsman, who are both familiar with the jury system by reason of their research, experiments, and experience as expert witnesses,[5] examine the accepted theories of the way the jury should function in the adversary system and the psychological assumptions that underlie these theories. They then review the psychological literature to see whether the empirical studies support or contradict the assumptions on which the jury trial is founded.

Kassin and Wrightsman identify four requirements for the proper functioning of the jury and then evaluate the trial by jury against these requirements. The jury must be (1) impartial; (2) able to understand the process, the evidence, and the instructions of law; (3) able to base its decision solely on the evidence presented at trial; and (4) able to deliberate meaningfully before returning a verdict.[6] The authors assert that various jury research methods permit an assessment of the jury's ability to function ideally.[7] They reject anec-

3. *See* S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 4-5 (1988) (describing the highly structured procedures governing pretrial, trial, and post-trial periods).

4. S. KASSIN & L. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES (1988).

5. The publisher's jacket for the book includes the following information about the authors. Professor Kassin was a National Institute of Mental Health Postdoctoral Research Fellow in the Psychology and Law Program at Stanford University, 1985-1986, and a U.S. Supreme Court Judicial Fellow, 1984-1985, serving as a research associate at the Federal Judicial Center. He has worked with trial lawyers as a jury consultant and expert witness. Professor Wrightsman directs the Kansas Jury Research Project, which has produced two books and over a dozen research articles. S. KASSIN & L. WRIGHTSMAN, *supra* note 4.

6. *Id.* at 6-12.

7. The authors describe the following research methods: (1) examining existing court records; (2) interviewing jurors, judges, and lawyers who participated in actual trials; (3) conducting experiments with simulated trials and mock juries; and (4) using

dotes and war stories as sources of valid information about jury behavior, although they do use them for illustrative purposes.[8]

Kassin and Wrightsman recommend certain modifications that reflect psychological insights into jury behavior. They see the jury system as a valuable part of the American system of adjudication[9] and defend it against some of the criticisms leveled against it.[10] The book, however, is not an apologia for the jury system. It finds fault with certain trial procedures that impair the proper functioning of the jury and recommends changes that will improve jury decisionmaking.[11]

The authors first examine the effect of pretrial bias on the ability of a juror to be impartial. They review jury studies that explore the relationship between jury decisions and individual juror characteristics and attitudes. The empirical research shows that jury decisions are driven more by the evidence than by the individual characteristics or attitudes of the jury members. Contrary to trial lawyers' assumptions about the influence of a juror's religion, occupation, or socio-economic level,[12] the studies show that personality traits generally do not predict juror behavior.[13]

Juror attitudes on specific issues, however, do provide a better guide to juror behavior but only in cases in which those issues are prominent. For example, Kassin and Wrightsman note that a juror's attitude toward the death penalty will often indicate whether that juror will more likely vote for conviction or acquittal in a criminal case. Juries whose members have no qualms about the imposition of the death penalty are more likely to convict than juries without jurors willing to impose the death penalty.[14] Thus, apart from cases that involve emotionally charged issues, such as death penalty prosecutions, empirical research shows that jury decisions reflect the strength of the evidence more than the individual characteristics of jury members.

The authors question how effectively the legal system screens citizens for jury service.[15] Specifically, they question the value of voir dire examination to detect bias on the part of jurors. They find that voir dire examination of prospective jurors does not often fulfill its job of securing an impartial jury because lawyers openly subvert the

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shadow juries to listen to real trials and then deliberate and return a verdict. *Id.* at 14-19.

8. *See id.* at 14.

9. *Id.* at 208.

10. *See, e.g., id.* at 123-27 (defending the position that jurors are competent to handle even complex civil cases).

11. The final chapter summarizes the major problems the authors see with jury trials as they are conducted and includes the modifications they recommend to improve the functioning of the jury system. *Id.* at 208-15.

12. *See, e.g.,* P. BERGMAN, TRIAL ADVOCACY 363-64 (1979); K. HEGLUND, TRIAL AND PRACTICE SKILLS 86-87 (1978); J. JEANS, TRIAL ADVOCACY 167-77 (1975) (quoting Clarence Darrow in a 1936 article in *Esquire*); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 30-32 (2d ed. 1988).

13. S. KASSIN & L. WRIGHTSMAN, *supra* note 4, at 29, 31-35.

14. *Id.* at 39.

15. *Id.* at 49.

process by using voir dire to create bias rather than to discover it. The authors doubt that voir dire effectively discovers juror bias because the attorneys do most of the talking. According to one study the authors cite, only forty-one percent of all statements made during voir dire of jurors were made by prospective jurors, and sixty-three percent of the lawyers' questions asked for yes or no answers.[16] When judges take control of voir dire, they avoid the danger of counsel attempting to influence the jury but at the cost of superficial questioning that produces quicker jury selection. Although the empirical studies do not permit the authors to evaluate the comparative effectiveness of counsel-conducted or judge-conducted voir dire in producing an impartial jury, they make suggestions for improving the jury selection process that minimize the role of attorneys. Kassin and Wrightsman recommend that judges be trained in interviewing skills in order to increase their ability to detect juror bias when conducting voir dire. They also suggest that a portion of voir dire be conducted through written questionnaires.[17]

On a more critical note, the authors place too much of the blame on attorneys for the problems they see with the jury selection process. One of the studies cited suggests that voir dire by attorneys was effective in some cases in challenging jurors who would return a verdict different from the verdict returned by the actual jury.[18] The authors also admit that studies and surveys show great differences among lawyers in the skill of selecting jurors.[19] By recommending that attorney voir dire be replaced with judge questioning and written questions, Kassin and Wrightsman overlook the value of competent and trained lawyers in ensuring impartial juries. Proper training of lawyers in examining prospective jurors and of judges in supervising attorney voir dire would preserve the value of the adversarial detection of bias and would make parties more accepting of jury decisions.[20]

Kassin and Wrightsman devote four chapters to the evaluation of the jury's ability to understand, assess, and process the information needed for reliable decisions reflected in verdicts.[21] The authors cite several research studies showing that the jury possesses these

16. *See id.* at 51-52 (citing Balch, Griffiths, Hall & Winfree, *The Socialization of Jurors: The Voir Dire as a Rite of Passage*, 4 J. CRIM. JUST. 271, 271-83 (1976)).

17. *Id.* at 209-10.

18. Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 506-08 (1978).

19. S. KASSIN & L. WRIGHTSMAN, *supra* note 4, at 56 (citing G. BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 20 (1977) and Zeisel & Diamond, *supra* note 18, at 517-18).

20. *See* S. LANDSMAN, *supra* note 3, at 3 (discussing the value of neutrality in the decisionmaking process).

21. S. KASSIN & L. WRIGHTSMAN, *supra* note 4, at chs. 4-7.

capabilities but that certain trial procedures make its functioning more difficult.[22] For example, they refer to research indicating that jurors would better understand the applicable law if the instructions were given to the jury before the evidence is presented and if the instructions were written for comprehension.[23] In addition, the authors cite studies concluding that juries could better assess the credibility of witnesses if their attention were directed to body language rather than facial expressions.[24] Moreover, the authors note research indicating that juries could better evaluate the reliability of eyewitness identification testimony if they were informed of the limitations of eyewitness identifications.[25]

Based on these studies, the authors recommend certain changes in the way that trials are conducted. They suggest that information about the need to scrutinize identification testimony be brought to the attention of the jury by the judge through instructions or by testimony of psychological experts about perception, memory, and eyewitness testimony studies. They conclude that the courts can do more to aid jurors in reaching reliable decisions.[26]

Because the authors also see the ability of jurors to suspend judgment until all of the evidence is presented as contributing to reliable decisions, they suggest ways to help jurors keep an open mind during the trial.[27] In the adversarial presentation of evidence, one side presents its evidence before the other. The authors describe the psychological phenomenon of the "primacy effect," the tendency to make snap judgments based on information presented early in the trial. Kassin and Wrightsman assert that once jurors form a first impression, they often discount or reject facts that challenge their views,[28] and they may fill in missing details in their trial memories in ways that favor their initial decision.[29] To mitigate the primacy effect in jury trials, Kassin and Wrightsman recommend periodic reminders to the jury to keep an open mind. The judge could periodically so instruct them[30] or permit counsel to make interim summations during the course of the trial.[31] The authors state that

22. *Id.* at 213.
23. *Id.* at 145-46.
24. *Id.* at 70.
25. *Id.* at 80-84.
26. *Id.* at 210-14.
27. *Id.* at 136.
28. *Id.* at 134 (citing N. ANDERSON, FOUNDATIONS OF INFORMATION INTEGRATION THEORY 179-81 (1981)).
29. *Id.* at 135 (citing Loftus, *Reconstructing Memory: The Incredible Eyewitness,* PSYCHOLOGY TODAY, Dec. 1974, at 117-19).
30. This type of instruction would probably minimize the juror's tendency to form rigid first impressions, according to a study by Luchins, *Primacy-Recency in Impression Formation,* in THE ORDER OF PRESENTATION IN PERSUASION 33-61 (C. Hovland ed. 1957).
31. A report and evaluation of the use of interim summations in the Westmoreland libel trial against CBS appears in Arthurs, *Mini-Summation Lauded in Libel Case,* Legal Times, Feb. 25, 1985, at 1. A federal judge permitted attorneys for both sides to make interim summations over the course of a five-month trial. Each side could interrupt the presentation of evidence for interim summations. A total of two hours was allotted per side, and the summations ran from two to five minutes on average. Both sides reported that they liked the opportunity to halt the presentation of evidence at various times in

such reminders minimize the primacy effect and encourage the jury to suspend judgment until they have heard all of the evidence.[32] These recommendations deserve consideration by judges and lawyers, especially in longer trials. Periodic instructions or interim summations do not require much time, and juries might more accurately decide cases if they can suspend judgment until both adversaries have presented their cases.

In connection with an assessment of the jury's ability to understand and process information, Kassin and Wrightsman address the issue of jury competence in complex civil cases.[33] They evaluate the arguments against the use of juries in complex litigation and find that the criticism of the competence of juries to decide complex cases rests upon certain assumptions that are without empirical support. The critics make three assumptions according to the authors: (1) some cases are too complex for lay juries; (2) juries in complex cases often include few jurors with the education or professional experience necessary to understand the case; and (3) judges would be more competent to decide such cases.[34] Kassin and Wrightsman claim that no experiments have either tested the information-processing performance of jurors in complex civil cases or compared the competence of judge and jury in deciding such cases.[35] The authors rely on Kalven and Zeisel's classic study of the jury[36] and on a survey of judges and lawyers who participated in complex trials over a three-year period[37] to show the absence of any problems with juror competence. The respondents in the survey uniformly agreed that the juries did a good job, and the majority thought the jury had reached the correct decision. The authors conclude that those who criticize the use of the jury in complex cases have failed to show that jurors cannot correctly decide such cases or that judges would be more competent as triers of fact.[38]

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the trial in order to clarify certain points. The defendant's lawyer especially appreciated the advantage of keeping the "jurors' minds open" during the several months that the plaintiff presented its case. *Id.* at 1. He indicated that "[t]he ability of the plaintiff to condition the jury during the first several months is critical. Interim summations gives the defense an opportunity to counter that." *Id.* at 6.

32. S. KASSIN & L. WRIGHTSMAN, *supra* note 4, at 137 (claiming that psychological studies support the notion that periodic reminders mitigate the primacy effect) (citing Anderson & Hubert, *Effects of Concomitant Verbal Recall on Order Effects in Personality Impression Formation*, 2 J. VERBAL LEARNING & VERBAL BEHAV. 379, 391 (1963)).

33. *See generally* Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981) (providing a thorough discussion of this issue).

34. S. KASSIN & L. WRIGHTSMAN, *supra* note 4, at 125.

35. *Id.* at 126.

36. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 149-59 (1966). This study found virtually no difference between the frequency of disagreement between judge and jury when the case was easy or difficult. *Id.*

37. The Federal Judicial Center interviewed 68 judges and lawyers who participated in 7 jury trials lasting from 2 to 30 months.

38. S. KASSIN & L. WRIGHTSMAN, *supra* note 4, at 108-11.

Because the jury trial has such a prominent role in the adversary system and because of its constitutional status, we should be careful before abandoning trial by jury in an undefined class of cases said to be complex and, therefore, beyond the competence of jurors. Further research seems warranted to evaluate jury competence in different types of cases and to assess the role of lawyers in complicating or simplifying cases for juries and judges.

The authors additionally examine the extent to which juries can base decisions solely on admissible evidence and resist using information that is stricken from the record after they have heard it. They refer to empirical studies that support the conventional wisdom of trial lawyers that juries cannot ignore stricken evidence that is relevant to the case.[39] Indeed, juries are more likely to consider such evidence if admonished by the court not to consider it than they are if no specific instruction is given. These studies confirm the suspicion of attorneys that curative instructions often increase the harm of the stricken evidence. Other studies cited by Kassin and Wrightsman suggest that trial lawyers should guard against the presentation of inadmissible information in statements by opposing counsel. Jury research indicates that juries tend to forget the source of the information that they remember and shows that juries are often unable to recall accurately whether the source of information came from a witness or one of the attorneys in the opening statement or closing argument.[40] In particular, one study the authors present revealed that juries treated the statements made by counsel in opening statement *as fact* even though no evidence was introduced to support the attorney's assertion. The same study showed, however, that jurors tended to place no weight on the attorney's unsupported statement if the opposing counsel brought the failure of proof to the attention of the jury.[41]

Last, Kassin and Wrightsman describe the deliberation process and examine the effect of the procedural rules that control jury deliberations. They use the social psychology of group influence as a framework for evaluating the dynamics of jury deliberations.[42] They find the empirical evidence inconclusive with respect to criticisms that jury sequestration, instructions to break deadlocked juries, and jury size (six-person versus twelve-person) improperly affect the quality of jury decisions.[43] Several studies, however, reveal substantial differences in deliberations when majority rather than unani-

39. *See id.* at 108-09.
40. *Id.* at 106.
41. *Id.*
42. *See id.* at 175.
43. No empirical evidence exists on the impact of sequestration on jury decisions. *See id.* at 190. "There are no studies comparing deadlocked juries blasted with the dynamite charge to those left to their own devices. Nor are there studies of how juries deliberate before versus after receiving this kind of instruction." *Id.* at 194. The authors recognize that smaller juries have fewer minority jurors, but the rates of conviction and acquittal do not seem to be affected by the size of the jury. *See id.* at 198. In addition, they cite research showing that six-person juries include a greater percentage of juror participation than twelve-person juries. *See id.* at 199.

mous verdicts are permitted. Juries that take a preliminary vote shortly after the commencement of deliberations tend to spend less time reviewing evidence and less time in arriving at a verdict than they do when voting is deferred to a later time. These studies lead the authors to suggest that unanimity be required for verdicts and that jurors be instructed on how to proceed in their deliberations in order to maximize the value of group deliberations.[44]

The authors' first suggestion, requiring unanimous verdicts, places a high value on a deliberation process that takes into account the views of the minority. A unanimity requirement means that the majority must persuade the minority rather than dismiss their views by voting them down. Although more deadlocked juries might result from a unanimity requirement, the value of quality deliberations in producing accurate decisions should outweigh the cost of retrials in some cases.

The authors' recommendation that judges instruct juries on how to proceed in their deliberations seems reasonable. The time needed to instruct the jury would be minimal, and the authors do not suggest that jury deliberations be monitored to ensure compliance with these instructions. This recommendation, therefore, does not intrude on the independence and confidentiality of jury deliberations, while giving the jury some guidance about how to proceed.

Conclusion

The American Jury on Trial: Psychological Perspectives provides a scholarly analysis of both the legal and psychological aspects of the jury trial. The authors demonstrate a good understanding of trial procedure, though their discussion of "relevancy" reflects a misunderstanding of the rules of evidence governing the admissibility of character evidence.[45] Their legal research includes references to important Supreme Court decisions, law review articles, and trial advocacy books that will be helpful to the practitioner. The book is also current, and therefore includes many references to recent jury trials providing examples of jury behavior.

The legal profession should seriously consider the psychological perspectives on the operation of the jury in the adversary system. This book offers a readable source of empirical studies concerning the jury.[46] The authors describe in understandable terms relevant

44. *Id.* at 214-15.

45. The authors provide the following example of "relevant" evidence: "Thus if an individual is sued for causing an automobile collision by driving negligently, that person's accident record is relevant because it sheds light on his or her predisposition for negligence." *Id.* at 107. This example ignores Rule 404 of the Federal Rules of Evidence that makes predisposition evidence inadmissible to show conduct in civil cases.

46. Other books discussing generally the jury trial and empirical studies include: R.

psychological and jury research and explain the significance of the research results. Although the empirical studies included in this book are available from other sources, lawyers will find this book a helpful reference on jury behavior because many of the studies are not easily accessible to attorneys.[47] For the reader who wants to explore some of the research studies in greater depth, the book includes references to the technical journals and other sources in which the empirical studies appear.

The American Jury on Trial: Psychological Perspectives shows the legal profession that jury trials are not solely the concern of lawyers and judges. Other academic disciplines can offer insights into the operation of legal institutions such as the jury trial. The legal profession should be willing to reevaluate its institutions, procedures, and doctrines in light of this advancing knowledge. Whether or not we agree with the recommendations made by Kassin and Wrightsman, legal scholars, judges, and lawyers should seriously consider the implications of the psychological and empirical research this book presents. Our rules of evidence generally accept scientific or other specialized knowledge as proof of facts in litigation;[48] we should likewise be receptive to empirical evidence in evaluating our own rules and procedure.

HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY (1983); H. KALVEN & H. ZEISEL, *supra* note 36; THE PSYCHOLOGY OF THE COURTROOM (N. Kerr & R. Bray eds. 1982); R. SIMON, *supra* note 2.

47. Trial advocacy books, evidence treatises, and casebooks rarely include the psychological research relevant to legal doctrines, rules, or institutions. Books on trial advocacy, for example, rarely support their conclusions about jury behavior with citations to empirical studies. *See, e.g.*, P. BERGMAN, TRIAL ADVOCACY IN A NUTSHELL (1979); K. HEGLUND, TRIAL AND PRACTICE SKILLS IN A NUTSHELL (1978); J. JEANS, TRIAL ADVOCACY (1975); R. KEETON, TRIAL TACTICS AND METHODS (2d ed. 1973); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES (2d ed. 1988). Psychological developments pertinent to the legal profession most often have appeared in law review articles. *See, e.g.*, Cleary, *Evidence as a Problem in Communicating*, 5 VAND. L. REV. 277 (1952); Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1984); Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1; Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147. For one of the few law books bringing the results of social research to bear on the legal process, see W. LOH, SOCIAL RESEARCH IN THE JUDICIAL PROCESS (1984). Evidence treatises and casebooks likewise present little or no empirical studies. Those that do, cite law review articles that include social research. *See, e.g.*, G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE (1978); MCCORMICK ON EVIDENCE (E. Cleary 3d ed. 1984). For an evidence coursebook that brings some empirical research to the study of evidence, see R. CARLSON, E. IMWINKELRIED & E. KIONKA, MATERIALS FOR THE STUDY OF EVIDENCE at vii, 8, 14, 374 (2d ed. 1986).

48. *See* FED. R. EVID. 702 (stating that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto.").