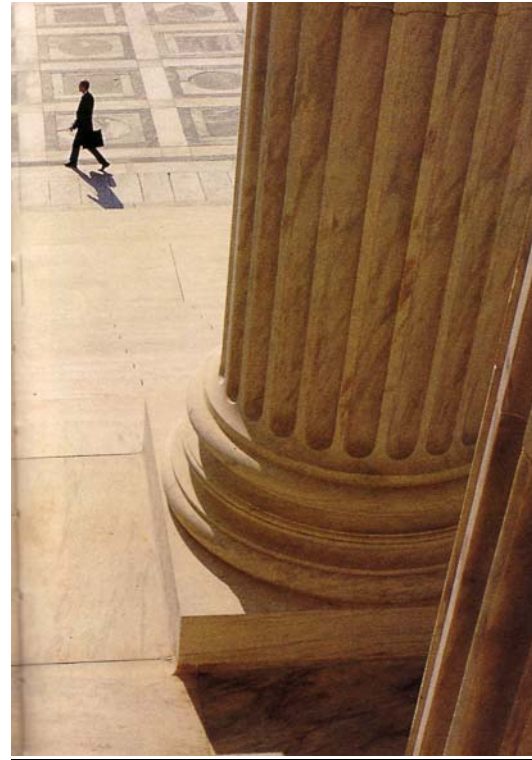


# The Role and Effectiveness of Jury Selection in Eliminating Jury Bias



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## The Role and Effectiveness of Jury Selection in Eliminating Jury Bias

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### A Scientific View

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*“All of the research studying the effectiveness of voir dire in eliminating jury bias now clearly indicates the necessity for extended voir dire in order for a court to insure that litigants will receive a fair trial before an unbiased jury.”*

*“That is the essence of science: ask an impertinent question and you are on the way to a pertinent answer.”*



Jacob Bronowski (1908-1974)  
(British Scientist, Author)

### I. The Role of Science in Understanding Courtroom Decision Making

Science is essentially a method of inquiry and an accumulation of information obtained through scientific research.<sup>1</sup> However, contrasted with other means of learning and knowing about the world, science has some special characteristics.

We live in a world of two realities: experiential reality (things we know as a function of our direct experience) and agreement reality (things we accept to be true because we have been told they are true and everyone else seems to agree). The problem is that there is often a conflict within our own perceptions of reality or a conflict between our perceptions of reality and those of other people. Science offers an approach that helps to clarify and reconcile experiential and agreement reality.<sup>2</sup>

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<sup>1</sup> Babbie, E. (1995) *The practice of social research*. New York: Wadsworth Publishing Company.

<sup>2</sup> *Id.*

Scientists have certain criteria that must be met before they will except the reality of something they haven't personally experienced. Principles or hypotheses about the world must have both logical and empirical support. In other words they must make sense and must be aligned with unbiased and methodical inquiry.<sup>3</sup>

Like most other fields of science, the scientific study of courtroom decision making plays the role of "assisted sense-making".<sup>4</sup>In other words, scientific research serves as a tool for understanding human behavior beyond our natural capacities for understanding. It helps us to extend our natural human abilities to observe, understand, and make judgments about social behavior.

In the natural course of events, scientists study the world as it is at the time the research is conducted. They test hypotheses and try to answer questions that are posed at the time the research is conducted. As we progress through time, the world changes and scientists study new hypotheses and new questions that have arisen. They build upon previous knowledge and are constantly testing to see if previous results remain true. For the most part, social scientific research that is more than ten years old is considered to be outdated unless the only prior research is older. Over a ten-year period scientific research methods tend to markedly improve and the world around us tends to change dramatically. Scientists will generally hold older research suspect until newer research is conducted.

## II. The History of Scientific Study of Courtroom Decision Making

Although social scientists and psychologists have long been concerned

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<sup>3</sup> Id.

<sup>4</sup> Mark, M. M. (1999) Social science evidence in the courtroom: Daubert and beyond? *Psychology, Public Policy, and Law*, 5(1), 175-193.

with the appropriate role of social science in democratic institutions and processes, the application of social science theory and research to courtroom decision making began in earnest during the 1950s.<sup>5</sup> Due to the dramatic changes in the fabric of American society as a result of the effects of World War II and the new market-driven economy, and changes in attitudes about the role of individuals in society, lawyers and psychologists began developing ways to apply scientific methods and knowledge to courtroom decision making.<sup>6</sup>

Major debates upon the proper role of science of in jury selection began in 1972 when the Berrigan Brothers and others were tried on charges of conspiracy to raid draft boards, blow up heating tunnels in Washington, D.C., and kidnap Secretary of State Henry Kissinger.<sup>7</sup> During the pendency of that case, a team of social scientists brought more sophisticated social science methods and technology to focus on questions relating to selecting a fair and impartial jury in a heated political environment.<sup>8</sup> Most commentators at that time doubted that the defendants could find a venue in the United States where they could receive a fair trial. Prosecutors chose Harrisburg, Pennsylvania as the venue due to the conservative nature of the population. In preparing their defense and during jury selection, the defendants utilized many prudent social scientific research techniques to develop a persuasive defense and to seat a fair and impartial jury.<sup>9</sup> The trial resulted in a 10-2 acquittal.

The Berrigan case with its surrounding publicity, spawned interest in a whole new field of applied research involving social science and jury selection.

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<sup>5</sup> Hans, V. P. & Vidmar, N. (1982) Jury selection. In *The psychology of the courtroom*. San Diego: Academic Press.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Schulman, J., Shaver, P., Colman, R., Emrich, B., & Christie, R. (1973, May). Recipe for a jury. *Psychology Today*, pp.37-83.

Likewise, an intense public debate took place about the role of social science in the courtroom. Although there seemed to be no disagreement that science offered many methods to help a party develop their persuasive arguments, there was intense disagreement about the role of social science in jury selection.<sup>10</sup> Among social scientists, the point of controversy centered around whether scientific means are sufficient in identifying jurors who would likely be re-disposed against one party or the other.<sup>11</sup>

However, even the early critics of scientific jury selection techniques acknowledged that juror characteristics do influence the decisions they make even though the “evidence” most determines the outcome trial.<sup>12</sup> They further acknowledged that if the evidence is “close”, then jury selection could make difference.<sup>13</sup> Their criticisms focused upon the lack of sophistication in the scientific research methods used at that time, although they agreed that more sophisticated scientific research methods might produce more reliable results.<sup>14</sup>

The intense interest of scientists in jury selection was motivated by a growing body of scientific knowledge that a person’s perceptions color their attitudes and decisions and by a strong fear among lawyers and psychologists that the jury selection procedures in most courts were not sufficient to eliminate inappropriate bias

among jurors.<sup>15</sup> For example, the *Broeder* study in 1965 determined that many jurors realized that they held inappropriate biases that influenced their decision, but these biases were not disclosed before the trial.

### III. Psychological Influences That Can Inappropriately Bias Jury Decision Making

For the most part, until the 1980s, courts only allowed attorneys to question potential jurors about their demographics and general values and beliefs, and occasionally about their life experiences. Rarely were attorneys allowed to ask about a juror’s attitudes about specific issues in the case. These questions were deemed to be too “invasive”. Consequently, most of the scientific research which inquired about the existence and implications of jury bias found only occasional relationships between a juror’s demographics or personality traits and their verdicts.<sup>16</sup> Research indicated that certain demographic characteristics, personality traits, and a few general values and beliefs often indicated inappropriate influences over jurors that colored their perceptions of evidence.

As trial advocates began to request more case specific inquiries among potential jurors, trial courts began to allow more expansive questioning. As a result, trial courts and lawyers discovered that jurors were willing to reveal attitudes and life experiences relating directly to specific issues in the case that clearly indicated inappropriate bias and prejudice. Consequently, social scientists who had been studying jury decision making began

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<sup>10</sup> Hans, V. P. & Vidmar, N., (1982), *Id.*, Saks, M. J. (1976) The limits of scientific jury selection: ethical and empirical. *Jurimetrics Journal*, 17, 3-22; Berman, J. & Sales, B. D. (1977) A critical of the systematic approach to jury selection. *Criminal Justice and Behavior*, 4(3), 219-239;

<sup>11</sup> Moran, G. & Comfort, J. C. (1982) Scientific juror selection: Sex as a moderator of demographic and personality predictors of impaneled felony juror behavior. *Journal of Personality and Social Psychology*, 43, 1052-1063.

<sup>12</sup> Saks, M. (1976), *Ibid.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

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<sup>15</sup> Broeder, D. W. (1965) Voir dire examinations: an empirical study. *Southern California Law Review*, 38, 503-528; Moran, G. & Comfort, J. C. (1982) Scientific juror selection: Sex as a moderator of demographic and personality predictors of impaneled felony juror behavior. *Journal of Personality and Social Psychology*, 43, 1052-1063

<sup>16</sup> Penrod, S. D. (1990) Predictors of jury decision making in criminal and civil cases: a field experiment. *Forensic Reports*, 3, 261-277.

to discover significant relationships between jurors attitudes about specific issues in the case and their verdicts.<sup>17</sup>

Recently advanced scientific research techniques has even disclosed that there are often significant relationships between a juror's pretrial attitudes, their evaluation of the evidence, and their verdicts.<sup>18</sup> In addition, we have now been able to study the effects that a biased juror may have on other jurors during jury deliberations.<sup>19</sup>

### Factors Which Might Indicate Juror Bias

Factor	Strength of Relationship to Verdict Found By Scientific Research
1. Case Relevant Attitudes	Significant Relationships – Often Predictive
2. Case Relevant Life Experiences	Significant Relationships – Often Predictive

17 Boyll, J., R. (1991). Psychological, cognitive, personality and interpersonal factors in jury verdicts. *Law & Psychology Review*, 15, 163-184; Chadee, D. (1996) Race, trial evidence and jury decision making. *Caribbean Journal of Criminology & Social Psychology*, 1(1), 59-86

Moran, G., Cutler, B. L., & De Lisa, A. (1994) Attitudes toward tort reform, scientific jury selection, and juror bias: Verdict inclination in criminal and civil trials. *Law & Psychology Review*, 18, 309-328;

<sup>18</sup> Goodman, J. Loftus, E. F., & Greene, E. (1990) Matters of money: voir dire in civil cases, *Forensic Reports*, 3(3), 303-329; Poulson, R. L., Brondino, M. J., Brown, H., & Braithwaite, R. L. (1998) Relations among mock jurors' attitudes, trial evidence, and their selections of an insanity defense verdict: A path analytic approach. *Psychological Reports*, 82(1), 3-16; Rotenberg, K. J., Hewlett, M. G., & Siegwart, C. M. (1998) Principled moral reasoning and self-monitoring as predictors of jury functioning. *Basic & Applied social Psychology*, 20(2), 167-173.

<sup>19</sup> Graziano, S. J., Painter, A. T., & Tanaka, J. S. (1990) Individual differences in information processing strategies and their role in juror decision making and selection. *Forensic Reports*, 3(3), 279-301.

3. Personality Traits	Few to Moderate Relationships
4. General Values & Beliefs	Few to Moderate Relationships
5. Demographics	Few Relationships

### IV. Methods of Revealing Inappropriate Biases Under the Rules

Research and experience in the courtroom indicate that inquiry about a juror's case relevant attitudes and life experiences offers the best opportunity to reveal inappropriate bias.<sup>20</sup> Scientific researchers often suggest the principle that predictors should match criteria in terms of specificity.<sup>21</sup> In the context of jury selection it makes little sense to try to measure a juror's bias about specific issues in the case by asking the juror only about his or her demographics.

Research also indicates that due to the social pressures which exist among potential jurors during jury selection, jurors are more apt to reveal their true feelings and attitudes when they are encouraged to do so by the trial court and attorneys and when the trial court does not make statements which inadvertently discourage juror self-revelations.<sup>22</sup>

Although a juror's demographics, personality, and general values may suggest the existence of a bias, it is very difficult to identify a relationship between them in the courtroom. At best, these characteristics may suggest the need for

<sup>20</sup> Vinson, D. E. (1993) *Jury persuasion: psychological strategies & trial techniques*. Englewood Cliffs, NJ: Prentice Hall Law & Business

<sup>21</sup> Schneider, R. J., Hough, L. M., & Dunnette, M. D. (1996) Broad-sided by broad traits: How to sink science in five dimensions or less. *Journal of Organizational Behavior*, 17(6), 639-655.

<sup>22</sup> Middendorf, K. & Luginbuh, J. (1995) The value of a nondirective voir dire style in jury selection. *Criminal Justice & Behavior*, 22(2), 129-151.

further inquiry about the juror's case-specific attitudes or case relevant life experiences.

All of the research in the effectiveness of voir dire in eliminating jury bias, now clearly indicates the necessity for extended voir dire in order for a court to insure that litigants will receive a fair trial before an unbiased jury.<sup>23</sup> The court and trial attorneys must inquire about jurors' case relevant attitudes and life experiences, in addition to other characteristics that might influence a juror's decision outside the evidence.

### About the Authors

Dr. Richard Waites is a board certified civil trial lawyer and is the chief trial psychologist and CEO for Advocacy Sciences, Inc. and **The Advocates**, the nation's leading trial and advocacy consulting firm.

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<sup>23</sup> Moran, G., Cutler, B. L., & Loftus, E. F. (1990) *Forensic Reports*, 3(3), 331-348.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, ***Courtroom Psychology and Trial Advocacy***, published by American Lawyer Media.

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