

The Jury Trial in Criminal Justice

The Jury Trial in Criminal Justice

Edited by
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Foreword by
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*This book is dedicated to my wife Hui-Yu L. Koski
And to my parents Arthur E. and Sue Rose Koski*

As soon as you find you can do something, do something else.

—Rudyard Kipling

CONTENTS

Foreword	XI
Editor's Preface	XIII
Acknowledgments	XXV
Chapter One The Declining Importance of the Jury Trial and the Plea Bargaining Problem	3
Introduction	
<i>Douglas D. Koski</i>	3
On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial	
<i>John H. Langbein</i>	6
Happy New Year—You're a Juror	
<i>Ivor Kraft</i>	11
Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA	
<i>Candace McCoy</i>	23
Juries: The Great American Myth	
<i>Gerry Spence</i>	30
Suggested Readings	38
Chapter Two The Defense Counsel: The Duty of Zealous Representation and the "Usurpation" Problem	43
Introduction	
<i>Douglas D. Koski</i>	44
Defending the Defenders	
<i>Alan M. Dershowitz</i>	47
The Practice of Law As a Confidence Game	
<i>Abraham S. Blumberg</i>	59

But How Can You Sleep Nights? <i>Lisa J. McIntyre</i>	70
Address to Prisoners in Cook County Jail, 1902 <i>Clarence Darrow</i>	83
Suggested Readings	92
Chapter Three The Prosecutor: The Duty to Seek Justice and the Abuse of Discretion Problem	95
Introduction <i>Douglas D. Koski</i>	95
The Decision to Prosecute <i>George F. Cole</i>	99
The Prosecutor's Domain <i>William F. McDonald</i>	110
A Moral Standard for the Prosecutor's Exercise of the Charging Discretion <i>Bennett L. Gershman</i>	123
Prosecutors As Crime Creators: The Case of Prenatal Drug Use <i>Karen J. Maschke</i>	137
Suggested Readings	145
Chapter Four The Victim: The Nature of Victimization and the "Victim Legitimacy" Problem	149
Introduction: The Social Framework of Victimization <i>Douglas D. Koski</i>	150
The Ideal Victim <i>Nils Christie</i>	154
Placebo Justice: Victim Recommendations and Offender Sentences in Sexual Assault Cases <i>Anthony Walsh</i>	161
The Victim-Offender Relationship in Convicted Homicide Cases: 1960–1984 <i>John D. Hewitt</i>	168
Repeat Victimization among Adolescents and Young Adults <i>Janet L. Lauritsen & Kenna F. Davis Quinet</i>	177

The Criminal Among Us <i>Willie James Jennings</i>	183
The Vilification of the Crime Problem <i>Frank J. Weed</i>	186
Suggested Readings	197
Chapter Five Jury Selection and the “Biased Juror Problem”	203
Introduction <i>Douglas D. Koski</i>	203
The Socialization of Jurors: The Voir Dire As a Rite of Passage <i>Robert W. Balch, Curt Taylor Griffiths, Edwin L. Hall & L. Thomas Winfree</i>	206
Juror Honesty during the Voir Dire <i>Richard Seltzer, Mark A. Venuti & Grace M. Lopes</i>	214
Social Psychology in Court <i>Michael J. Saks & Reid Hastie</i>	221
Scientific Jury Selection: What Social Scientists Know and Do Not Know <i>Shari Seidman Diamond</i>	232
Jury Selection: A Social Scientific Analysis <i>Douglas D. Koski</i>	242
Suggested Readings	260
Chapter Six The Story Model of Jury Decision-making and the “Jury Nullification Problem”	269
Introduction: Jury Decision-making and Its Assessment <i>Douglas D. Koski</i>	269
Memory for Pragmatic Implications from Courtroom Testimony <i>Richard J. Harris, R. Ross Teske & Martha J. Ginns</i>	277
Storytelling in the Courtroom <i>W. Lance Bennett & Martha S. Feldman</i>	282
The Story Model for Juror Decision Making <i>Nancy Pennington & Reid Hastie</i>	292
Some Steps between Attitudes and Verdicts <i>Phoebe C. Ellsworth</i>	301

Effects of Jurors' Identification with the Victim Depends on Likelihood of Victimization <i>Martin F. Kaplan & Lynn E. Miller</i>	316
Jury Nullification in the United States of America: A Brief History and 21st Century Conception <i>Douglas D. Koski & Hui-Yu Lee</i>	322
Suggested Readings	333
Index	337

FOREWORD

The jury trial is one of the most visible, contentious, and misunderstood of the various components of our criminal justice system. It is fraught with ironies. Although it gives a major role to citizens themselves in deciding whether the government's evidence supports a finding of guilt in the case of a person charged with committing a crime, the public is not infrequently critical of the decisions made by these ordinary citizens called upon to be the representatives of the community. In such cases, the public is in an important sense being critical of itself and its own role in these cases. Yet attracting such criticism is one of the very functions of the jury: to act as a lightning rod which draws public disapproval away from the law and the judges, and dissipates it through a temporary and anonymous body of citizens back into the community from which they came. If a key to the effectiveness of the jury is that it is drawn, democratically, from all of us, that effectiveness is impaired by the many citizens who prefer to avoid the obligation to serve as jurors. Yet, after such service, they typically say that it was the most significant experience of their lives as citizens of a democracy, far more meaningful to them than voting in elections.

Though it is widely assumed that jurors are placed under a spell cast by lawyers who are masters of manipulation, the trial process actually filters out the most manipulative and effective of psychological methods of influence—many of which are in common use throughout society, but not in courts, where the trial process is refined into the most information bound of all public decision-making forums. Jurors are almost entirely excluded from a role in sentencing—the one major exception being when the choice of sentence is between life and death. Then juries are considered indispensable. The jury in criminal trials is one of the most deeply rooted and highly valued of our constitutional rights, and yet the jury trial is becoming an endangered specie.

These are but a few of criminal jury trial's many ironies.

The Jury Trial in Criminal Justice offers an exploration of some of the most troubling of the issues of the jury trial in the criminal justice process. Among these are the gradual disappearance of juries and the dominance of plea bargaining, the morally complex role of defense counsel, the high and still rising

powers of discretion by prosecutors, victims in the criminal justice process, and doubts about the jurors themselves.

The exploration into these questions is guided partly by Douglas Koski's introductions to each major issue and then by the collection of readings he has authored or edited to illuminate each topic. Being a sociologist as well as an attorney, Dr. Koski has tried more than 150 criminal jury trials to verdict. So he sees the jury trial from the perspective of a researcher and scholar as well as that of trial lawyer. And he has produced a book that is theoretical at the same time that it reflects down-to-earth daily practice. Among the writings in the collection are works that provide both classic views and fresh perspectives. Some are by incisive scholars, others by iconoclastic practitioners. All are informed and insightful. Readers of *The Jury Trial in Criminal Justice* will gain an understanding of the jury and the criminal justice process that will take them far beyond the erroneous assumptions and clichés that permeate our popular culture.

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EDITOR'S PREFACE

An Overview of the Criminal Trial Process*

A question was asked of you jurors by the prosecutors as to whether you believed in “legal freedom.” For God’s sake, tell me what is “legal freedom.” It is as tricky a catch-phrase as has ever been used to enslave men. The men who were roasted to death by the Spanish Inquisition had “legal freedom.” That is, they had all the freedom that the law gave them. The old men and the old women of America who were hung for witchcraft enjoyed “legal freedom.” No man who ever knew the meaning of that word “freedom” ever attached to it the word “legal.” Men in the past who had their tongues pulled out, who were pierced with red-hot irons, who were boiled in oil, who were tied to stakes, who were bent on the rack and tortured until they died, who had every limb torn from them, who had their nails pulled out and splinters run into their flesh, all were enjoying “legal freedom.”

—Clarence Darrow

I will fight for the right to live in freedom.

—Sir Paul McCartney

* Copyright 2003 by Douglas D. Koski and the National Center for the Advanced Study of Social Forces, NCASSF@AOL.COM. Note, throughout this book reference is made to various authors and their works; proper scholarly citations are given among the “Suggested Readings” at the end of each chapter. References for the PREFACE are included with those for CHAPTER 1.

Jury trials are an excellent illustration of that to which Professor James Short, past president of the American Society of Criminology has referred as the “level of explanation” problem.

At their most basic, they can be characterized simplistically and as largely symbolic. While they receive by far the most attention of all activities in the criminal courts, this attention is largely undeserved because so few of the cases brought to court by police and prosecutors are actually tried.

They serve no real, lasting and important function in most courthouses other than the amusement of courthouse personnel—an occasional break in the hum of daily courthouse work. If you need us, you know where to find us—in the passages and corridors and back-stair lawyers’ lounges and poker rooms for which the grand courtrooms serve as cover. If trials serve any function whatever, it is representational: give us your weakest, poorest, most publicly resented and shoddily represented, guiltiest; and most downtrodden, craziest, blackest and unsympathetic defendant, and we will give him a jury trial. After that, we will give him a sentence that will set Pontius Pilate rolling in his grave.

On the next level, trials reveal something more important about the criminal justice system. Some of the more serious cases, out of proportion to their number, go to trial. They serve a pedagogical, teaching-learning function: should any of you middle-manager types consider becoming weirdly enigmatic and viciously pedophilic, think again because here in America, we will uncloak you, jacket-and-tie you and gleefully convict you, too.

Trials do however, “set the rules” for a greater number of persons. Police learn who they are and are not to arrest, prosecutors learn when and when not to bring charges, and the law-abiding middle class are deterred even further from any criminal activity they may have considered (if only briefly during adolescence), and derive the added benefit of using someone else’s arrest and prosecution as an object lesson for their children.

Defense lawyers can also utilize the most recent television conviction and sentence as leverage against their clients: “This is what a jury can do to you. Be lucky I am able to get you probation.”

These actions and decisions, in both a theoretical-academic sense and in their most practical, stem from expectations about what a jury might do in the event a matter actually “goes to a jury.”

* * *

Many people, when they think of a “jury trial,” think the first step is the selection of the jury. Even more think that the trial begins with the lawyers’ opening statements, because the jury selection process, known as the *voir dire*, cannot be televised. And while criminal justice textbooks often refer to the po-

lice and prosecutors as the “gatekeepers” of the criminal courts, neither they nor anyone else who works in or near a courthouse makes the decision whether a given case will reach a courtroom. In lawyer jargon, the most “proximate cause” of a jury trial is the *victim*, a fact that—especially in weak cases—juries may hesitate to overlook.

This is because before there can be a trial, there must—“victimless” crimes aside—be a victim, and a victim willing to assume, as Erving Goffman may have put it, that “presentational self.” When we hear, “The peacekeeping function of the police,” this is an oblique yet accurate reference to the role the police usually play. Most crime is minor, most victims and offenders know one another and in many cases, the most discretionary (and confusing) feature of the police function is to determine who the victim is. Just as important, the responding officers must determine whether at some later point, the victim of choice will clean up well enough to convincingly play the part.

The array of disheveled actors present at “the crime scene” by the time the police arrive usually constitutes the pool from which the police may choose victim(s) and offender(s). Most often, no arrest is made at all but a dispute settled—or at least settled for now.

If an arrest is made, a variety of proceedings must happen before a jury is chosen or an opening statement is made. The most important of these is the preliminary hearing (or, in a small percentage of cases, a grand jury determination). The preliminary hearing is a sort of mini-trial at which the victim’s testimony is often necessary and for which the victim may or may not appear. If the victim does appear, a judge must make a finding whether (1) a crime was committed according to the statutory provision under which the defendant is charged; and (2) the defendant was the person who committed it.

If a judge so determines, the defendant is said to be “bound over” for trial, he or she is arraigned—given an opportunity to hear the formal charges and enter a plea, usually a plea of “not guilty” pending trial or disposition without trial—and bail is set or continued. Since the defendant is usually penniless and thus legally indigent, a public defender or other assigned counsel is appointed.

If the victim fails to appear at the preliminary hearing, the defendant gets an immediate “walk,” and the case becomes one of thousands each year that will have suffered “case attrition” or “mortality.”

If this defendant is among the few that want a trial in favor of “bargain justice” (a plea bargain), the case is set for trial, and the next step will be the selection of jurors. This selection process begins with a pool of people called the *venire* who are chosen from sources such as the phone book, voter registration lists, department of motor vehicle lists and the like.

In-court selection from this pool centers on the ability, according to the self-report of the prospective jurors, to “remain fair and impartial” throughout the trial—a judgment almost impossibly prophetic, since the panel of possible jurors has yet to hear a word about “pattern burn marks and spiral fractures” or alternatively, the “beating the police put on the defendant.”

Questioning may be by the judge, the trial lawyers or both. Each side has a limited number of “*peremptory* challenges (or strikes),” which may be used to rid the panel of persons for any reason other than race, gender or other suspect classification. Both the prosecution and defense have an unlimited number of “challenges (or strikes) *for cause*,” which are exercised when a prospective juror admits—or is goaded into admitting—bias, bigotry or partiality.

At the start of the trial proper, each attorney may make an opening statement. The prosecutor then presents evidence, primarily through the testimony of witnesses and documentary or other evidence or exhibits; the defense attorney may cross-examine the state’s witnesses. After the prosecution has presented its case, the defendant may or may not offer one in defense. The defendant has the absolute right not to testify, but if he does, the state may question him about prior convictions and in some cases, “bad acts” that did not result in a conviction. Because criminal defendants generally make poor witnesses and sometimes use jargon difficult for middle Americans to understand, they often do not testify regardless of any record of conviction; and rarely do they offer character witnesses because if they do, the prosecutor can offer evidence of *any* act(s) tending to demonstrate bad character—which are often numerous and substantial.

Throughout this process, the attorneys may make motions and object to questions or to the introduction of other evidence, and the judge rules on these matters. The evidentiary portion of the trial is over, and the attorneys for each side give closing arguments.

After the closing arguments, the judge instructs the jury on the legal rules (“the law”) pertinent to their verdict. These are called “judicial” or more properly, “jury instructions,” and the jury then “retires” to discuss the case—or any other matter relevant or irrelevant to it—and to reach a verdict, which in most states must be unanimous and by twelve persons. The verdict is announced; about half the time, this verdict is “guilty” and a series of almost universally unsuccessful appeals will ensue: the defendant who vows to “Take my case to the United States Supreme Court” has far less than a one percent chance of doing so. Sometimes the jury reaches an irretrievable impasse, called a “hung jury.” In this event, the judge declares a mistrial and the entire process may begin anew, depending mainly on how aggressive or energetic the prosecutor is.

This is the primer version of the criminal trial process. Because its nuances are something about which many media lawyers are ignorant, the viewing public is regularly exposed to televised debates that center on issues such as why double jeopardy doesn't apply when juries hang; why defendants go "scot-free" when victims fail to appear in court; and, if the victim is female, whether case dismissals might have something to do with the "patriarchal" nature of American society—without pause to consider that the United States is by any measure among the least patriarchal societies known to world history. If the media lawyer is a defense advocate, she may complain about the ease by which juries hear references to the defendant's nasty reputation for doing things having nothing directly to do with the charged crime.

Beyond this, there are tougher questions, about which this volume attempts to provide some explanation.

* * *

This volume recognizes that the jury and the courtroom personnel that surround it are both subcultures; that subcultures develop shared understandings or rules; and that the jury, or, if the case is disposed without one, the "courtroom workgroup" must forge a path to a desired result, or outcome. However, the rules by which juries abide are both more, and less constrained than those of the courtroom workgroup are.

More, because juries do not have all the information necessary to construct a complete and accurate account of a historical event. As Blumberg (CHAPTER 2) notes, before trial begins the judge and attorneys, operating "almost as if a group," may have disallowed some evidence. Evidentiary rules about the authentication of documents, the admissibility of opinion evidence, privileged communications, hearsay and the like further delimit what the jury may hear. The story upon which the jury bases its decision, therefore, is not the same story to which the courtroom workgroup is privy.

In effect, the courtroom workgroup makes an advance determination about that which the jury will hear. To paraphrase Clifford Geertz, whatever it (the workgroup) is after, it certainly isn't the "whole truth and nothing but the truth"; if judges, including those on appellate courts are seeking objective reconstructions of past events, there must surely be better ways to find out than this. To suggest that judges, juries, the public and the media do not always agree on the outcome is to overstate the obvious; had the jury known everything it needed to make an accurate assessment, there probably would not have been a trial. Sometimes they do have all the facts; in one such case a bewildered juror is said to have remarked, "I am wondering why we are here."

No judge in America, however, is going to inform this juror, “Ma’am, you are here to help us diffuse responsibility for a complex social problem to which there is no real solution. Please understand that the criminal law is something of a vast wastebasket, filled with of all kinds of stuff that other social institutions—governmental, family, religious—have been unable to remedy. Add to this, the criminal justice system often mixes up legal questions with large-scale social problems: religious, socioeconomic, racial; the nature and extent of a woman’s property interest in her body; cancer patients’ rights to smoke marijuana and voters’ rights to decriminalize it.

“Further, victims often do not report, and those that do complain may be the least creditable. The prosecutor may overcharge a defendant, hoping to improve her bargaining position. This in turn swells the bargaining power and influence the defense lawyer has over his client, which is important because long, drawn out trials are costly affairs; back-stair wire-fixing (CHAPTERS 2 AND 3) is far more profitable.

“Prosecutors sometimes, however, erroneously overcharge defendants who are the least culpable, and undercharge those deserving of the most drastic sanctions available under the law. We hope it all washes out in the end, and you are here to help us make it work. Keep in mind we actually care less what your verdict is than the fact you are able to reach one. It sounds perverse I know, but it makes sense to us, we are men and women with letters in the law. So sorry to have inconvenienced you, thank you Ma’am, so very much.”

Juries are additionally more constrained in their decisionmaking because they must decide the case using criteria (jury instructions) written in what Clarence Darrow called “ambiguous Chinese,” not the unwritten informally applied code that the judge and attorneys would use if bargain justice were engaged. And jury verdicts must at least sound in reasonable doubt, even if decided on some other basis.

Even when we can watch jury decisionmaking, we do not always know if a juror is acting in accordance with reasonable doubt, or simply articulating his or her sentiments in those terms. Therefore, when suggested that jury verdicts depend heavily on considerations of “victim legitimacy” (CHAPTER 4) *and* reasonable doubt (CHAPTER 6), that is precisely what is meant. Sometimes it is impossible to tell the difference.

But juries are also less constrained in their decisionmaking, for many of the same reasons. Since they get incomplete information told in disconnected, question and answer form during a series of dull “examinations,” they can recreate the past using inferences—however illogical or far-fetched—and apply a provincial definition of the reasonable doubt standard, one specific to their worldviews and sometimes queer perceptions of the case.

Irrespective of the “completeness” of the story given them, they are rarely in a position to directly perceive the events in question. True, some crimes are videotaped but seldom; most trials are disputes about events that took place out of the minds and sight of the police.

Jurors are therefore free to select among the evidence, and under the vaguely defined reasonable doubt standard apply the law any way they choose. They can also use general “worldview” knowledge (“Los Angeles Police detectives lie”) in preference to case-specific knowledge (“The defendant’s DNA was on the bloody dagger”). Moreover, their verdict may rest on some “trivial particular” (Koski, 2002)—a highly memorable but meaningless evidentiary tidbit: “The blood-shrunken gloves didn’t fit.”

* * *

How effectively do trials operate to produce correct judgments about guilt or innocence? The concept of “correctness” in jury judgment is slippery one. In every case, there is a factual reality and a set of applicable legal rules. Occasionally, the law and the facts combine in such a way that they leave the “correct” verdict uncertain. However, in most cases, any objective decisionmaker would invariably reach the correct verdict.

As Professor Lawrence Baum informs us, decisionmaking in trials is dependent on the information the jury gets, and again, this is often both incomplete and inaccurate.

Incomplete information is a widespread problem. In some cases, important evidence may not exist; there may be for instance, no witnesses to the alleged crime. Burglary is a good example: precisely for the reason there are no witnesses, burglars prefer to do their work when nobody is at home. Witnesses or physical evidence that do exist may go undiscovered, or occasionally ruled inadmissible because the police cannot demonstrate a proper “chain of custody.”

Witnesses, the primary sources of evidence in most cases, illustrate too the problem of *inaccurate information*. People are imperfect in their capacities to perceive, recall and relate what they have seen and heard. Identification of suspects is especially prone to error, particularly cross-race identification and most of all, white-on-black cross-race identification. Sociological studies and common sense—the person “I could have sworn I recognized” in the supermarket—inform us that fallible humans make mistakes when identifying persons they have seen, even if minutes earlier.

A jury is therefore also disabled by wrong information. Processing that information to reach a verdict adds further difficulties, the topic of CHAPTER 6. After all, jurors are witnesses not to real-world events but to trials. During trials, sworn witnesses to real-world events testify about those events, but again

these witnesses' recollections may be incomplete, inaccurate and/or comprised of a patchwork of half-truths and distortions—sometimes well-rehearsed lies, combined with poorly presented versions of the truth—or some combination thereof.

The jury must also analyze the evidence to choose the most credible version of the facts. In some trials, this process is easy, because there is only one credible version—the prosecutor's. The defendant, according to one correctional administrator, is “not just a loser, but a double loser who failed even at crime,” who then confessed on videotape after waiving his Fifth Amendment right against compulsory self-incrimination (in common parlance, the “right to remain silent”); and who at trial repeats the same hopelessly inculpatory story—a right given him by the US Supreme Court under the euphemistic “right to self-representation.”

But in trials where two (or more) interpretations are possible, the choice is more difficult, especially when only the offender and the victim testify and they give competing accounts. They look and behave similarly, speak the same dialect, live in the same neighborhood and attended the same school. If one is morally bankrupt or financially fit, probably so is the other. Having reviewed the relevant research, one trial researcher remarked, “Decisions about whether a statement is the truth or a lie are made about as well as if one were tossing a coin.”

Ironically, not only do police officers regress in their ability to differentiate between the truth and deception the longer they have been on the job and the higher the rank they have earned, but simultaneously grow more confident in their ability to make these judgments.

“Facts,” said Judge Jerome Frank, “are guesses,” a truism underscored by the success of law professor Barry Scheck's (Yeshiva University, Benjamin Cardozo School of Law) *Innocence Project*, which has secured the release of dozens of inmates, some on death's door, because DNA evidence has shown “actual innocence” where a jury—again, a hastily formed and haphazard subculture—previously found guilt. For years I have lectured my students that the likelihood of wrongful conviction grows more, not less probable as crime severity increases. Juries are far more willing to send an obviously guilty garden-variety felon back to the street than they are to acquit a multiple-homicide defendant tried on scanty evidence. Reasonable doubt is on something of a sliding scale, and in very serious cases, it can become a presumption of guilt the defendant must overcome.

The final step for the jury is to apply legal rules to the facts, rules that like jigsaw puzzles are frequently missing pieces. Again and most important, it is necessary to determine whether the defendant is guilty beyond a reasonable doubt, but as noted, its meaning is murky. The Supreme Court has approved

at least five *classes* of definitions, and has even ruled that *no* definition is required.

As above, a decisionmaking task at this level of ambiguity is fertile ground for the deployment of irrelevant, but very memorable “trivial particulars.” Juries not only have the power to acquit on the premise that the defendant resembles the forewoman’s grandson, but sometimes do. “In a trial-advocacy lecture,” one prosecutor reported, “we were warned never to ask jurors after a trial how they had reached their verdict. Their answers would be too disturbingly unrelated to the facts.”

The adversary system, discussed across all chapters, influences for good and bad the presumably objective fact-finding function of the jury. The desire of prosecutors and defense attorneys to win cases gives them incentive to smoke out relevant information, but only if probative to their view of the case. Failure to hand over favorable defense evidence is among the most common grounds for disbarment of prosecutors. Moreover, the “clash between competitors” does nothing to reduce the difficulty inherent in reaching a correct verdict, especially if one or both sides are professionally incompetent or “underzealous”—among the most common grounds for disbarment of defense lawyers.

The desire to win can cause a prosecutor to obfuscate information or wrongfully charge (CHAPTER 3), and the defense can become lazy or overly cozy with the government’s prosecutors (CHAPTER 2). Even (or especially) in an “ideal” adversary system, both sides are fighting not for truth but to win.

During jury selection (CHAPTER 5), lawyers work hard to obtain jurors who are biased and partial, those who will separately or together—perhaps through a process of “coalition formation”—support their side. The goal is to create support for the lawyer, and most certainly not to encourage the jury to carefully examine the embarrassingly damning evidence she hopes they will overlook.

The adversary system also affects the testimony of witnesses, who under Alan M. Dershowitz’s (CHAPTER 2) “Rules of the Justice Game” are encouraged to lie. Trial judges may consider perjury inevitable, an attitude sometimes carried with them if later chosen for a seat on a court of appeals.

The adversary system is especially problematic when one side has an advantage over the other in the ability to make its case effectively. This advantage can arise from differences in the quality of the attorneys, which implicates a “deep pocket” issue: the party with the most money wins. Moreover, the criminal defendant with access to huge sums of cash usually does not need a trial. In the event he does, the frenzy that surrounds his acquittal serves only to taint the next round of jurors. His case is used to misrepresent the majority of cases, since multiply advantaged criminals are a rare commodity and as such, dis-

proportionately represented across the news and news-like media. Far more often, the defendant is beyond poor, and the resources of the state dwarf his.

* * *

In preparing this book, an important consideration was one to which I have referred as the “deershining method of social research.” Most students and all professors of the social sciences are familiar with this technique. In broadest brush it consists of the atheoretical manipulation of statistical “evidence.”

The sheer proliferation of academic journal articles that purport to quantitatively test hypotheses is one manifestation of it, but another and less obvious, but more insidious symptom entails “secondary data analysis.”

Here, one or more large datasets collected by someone other than a book or article author, for some purpose other than that for which the author wishes to use these data, are located. Often the sample consists of a highly atypical but convenient group: 18 to 22 year-old college students.

Like LEGO'S, these numbers are plugged into formulas that are arithmetically derived in some unspecified way by someone other than the author, to represent a theory of social life developed by yet another person. The numbers are entered into a statistical program using a personal computer and manipulated.

Under one variation of this method, the data are “mined,” that is, various statistical tests are performed with no particular theory first advanced. Depending on what if any “statistically significant relationships” are found—the Holy Grail of quantitative manipulation—a “theory,” by definition after-the-fact, is postulated. This theory purports to explain the relationships between the numbers, and is passed on to the reader as though it supports a sound premise about important real-world social phenomena—including, in the legal context, human life and its termination.

Being more assured about reported observations than his or her own, this entire process insures that the researcher need not observe any phenomena that exist in the world. The results are often presented with charts and tables, sometimes figures and diagrams, that are accompanied by too little description with which to determine how these charts and tables represent the theory, support or do not support it, and if and to what extent the arithmetic assumptions underlying the statistical formulae used have been violated.

The reader must therefore accept on their face the “researcher’s” conclusions because—like Bambi caught in the headlights of a pickup truck—he or she is helpless to disagree with this scientific-sounding official-looking morass.

The reader has been deershined.

“I was bemused,” comments Gilbert Geis in the June 2002 *The Criminologist*, by a “young job candidate who rather proudly proclaimed that there were

enough data sets lying about that he was certain that he could make a career out of secondary analyses of such material. He may well be correct, but it seemed to me a dreary way to spend one's lifespan."

But as renowned sociologist Lloyd E. Ohlin has politely observed, thoughtful observational research has "fallen on hard times in this computer era"; this brand of scholarship is a satisfactory placebo for university committees because, adds Charles Sykes, it bloats like academic pabulum the resumes of university professors and the shelves of the libraries where they work.

Because this kind of analysis is incapable of scrutiny, it cannot be disproved, or falsified. Since falsification of theory is the hallmark of legitimate science, preposterous suppositions about the way the social world operates may hold the attention of the scholarly community for years or even decades: others are precluded from examining not just the input, but the throughput (operationalization and methodology) from which the output (conjecture about social life) has been inferred.

The practice also helps to explain why social science is regarded by academicians and the public alike as "soft" science, incapable of competing with "real" science—medicine, physics, zoology and the like.

Finally, it is for this reason why "statistics can be used to prove anything," why "trees cause pollution," "spanking causes crime," and "lettuce causes cancer," but also why it does not find its way into the pages of this little book.

This book is organized as follows. CHAPTER 1 details the most frequent method of criminal case disposition, the plea bargain. CHAPTER 2 discusses the defense function, while the prosecutor's duties are the subject of CHAPTER 3. CHAPTER 4 demonstrates that generally the victim, not the police or courts, is the "gatekeeper to the criminal justice system"—and sometimes a reluctant one at that. CHAPTER 5 discusses jury selection, including the controversial practice of "scientific jury selection." CHAPTER 6 explores deliberation, verdict, and the process and meaning of the two. The volume concludes encouragingly, cautiously respectful of the context and culture of the jury trial.

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