

Book Review

SCIENTIFIC JURY SELECTION

Joel D. Lieberman, Ph.D. and

Bruce D. Sales, Ph.D.

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*Reviewed by Gary R. Giewat, Ph.D.**

In discussing research problems in the social sciences, social psychologist Kurt Lewin remarked over 50 years ago:

The greatest handicap of applied psychology has been the fact that, without proper theoretical help, it had to follow the costly, inefficient, and limited method of trial and error. Many psychologists working today in an applied field are keenly aware of the need for close cooperation between theoretical and applied psychology. This can be accomplished in psychology, as it has in physics, if the theorist does not look toward applied problems with highbrow aversion or with a fear of social problems, and if the applied psychologist realizes that there is nothing so practical as a good theory.¹

Scientific Jury Selection successfully integrates empirical research with applied social science. The authors provide a thorough overview of the history of scientific jury selection with a strong academic point of view. They identify and review what

* Gary Giewat, Ph.D., is a social psychologist and litigation consultant with Delta Litigation Consulting in Westchester County, New York. He is a member of the American Society of Trial Consultants.

1. Kurt Lewin, *Problems of Research in Social Psychology, in FIELD THEORY IN SOCIAL SCIENCE; SELECTED THEORETICAL PAPERS* 169 (D. Cartwright ed.) (1951).

is likely the majority of social science research relevant to jury selection. As a practicing trial consultant, I found this survey very useful as a refresher that touches on theory and methodology. The work also covers areas that consultants or other readers may not be familiar with, including the history of this young profession. This book will be useful to attorneys as a means for becoming better consumers of jury consulting services. The book also provides the judiciary and court administrators with insight into the theory and methods of what litigation consultants do and dispels myths and stereotypes about what we do.

It should be noted that the term “scientific jury selection,” in the eyes of many litigation consultants is perhaps a misnomer. “Scientific jury selection,” per se, is not *science* in the Popperian² sense of testability and falsification or of Fisher’s³ testing of hypotheses. Instead, litigation consultants with a background in the social sciences who are involved with jury selection use *tools* and *theory* from the social sciences in assisting attorneys with jury selection.⁴ I am among the litigation consultants who view their role as a hybrid, blending social science theory and methodology with years of experience in the courtroom.

Lieberman and Sales dispel the misguided view that litigation consultants assist with jury selection in a John Grisham-like manner, “reading” people by drawing conclusions about behavior from jurors’ clothing and non-verbal cues much the same as Rankin Fitch did in “Runaway Jury.”⁵ Rather than the Hollywood mythology, Lieberman and Sales address the

2. Karl Popper was an influential 20th century philosopher. For Popper, a theory is scientific only if it is refutable by a conceivable event. Every genuine test of a scientific theory then is logically an attempt to refute or to falsify it, and one genuine counter-instance falsifies the whole theory. STEPHEN THORNTON, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), <http://plato.stanford.edu/entries/popper/#Trut>.

3. R.A. Fisher is thought of as the father of modern statistics. His legacy includes statistical evaluation and the null hypothesis. That is, if there is a statistical difference between a treatment group and a control group, one may reject the null hypothesis of no difference between groups. In addition, Fisher is often cited as setting the $p < .05$ level as the acceptable probability for determining statistical significance. ELAZAR J. PEDHAZUR & LIORA PEDHAZUR-SCHMELKIN, MEASUREMENT, DESIGN, AND ANALYSIS: AN INTEGRATED APPROACH (1991).

4. The field has also been named “systematic jury selection.” See, e.g., VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 91 (2001).

5. JOEL D. LIEBERMAN & BRUCE D. SALES, SCIENTIFIC JURY SELECTION (2006).

“tools” that litigation consultants use to help guide and advise attorneys including community attitude surveys, supplemental jury questionnaires, proper questioning techniques, and, yes, to some extent, non-verbal and paralinguistic behavior.⁶

The authors cover a variety of topics in this volume, first tracing the origins of scientific jury selection to the 1972 Harrisburg Seven trial⁷ and other political themed cases in the 1970’s where academics offered their time and skills to assist the defense in criminal trials that were challenging, to say the least, in terms of identifying potential bias in jurors.⁸ The authors then trace the evolution of scientific jury selection in complex civil trials of the 1980’s and recent high-profile criminal trials including O.J. Simpson, Martha Stewart, and Kobe Bryant.⁹ Lieberman and Sales also thoroughly review the purposes and effectiveness, and ineffectiveness, of voir dire as they examine the historical development of voir dire, explaining its intended purpose, as well as its unsanctioned roles in educating jurors and attorneys’ efforts to ingratiate themselves with jurors.¹⁰

In discussing the substance of scientific jury selection, Lieberman and Sales skillfully review the use of community attitude surveys as a tool in identifying potential bias in jurors for jury selection, as well as for change of venue.¹¹ Their work is not a “how to” or a guideline for jury selection; that was not their intent. Instead, the authors outline the important issues of which both attorneys and the judiciary should be aware, including sample size, questionnaire length, the use of bogus items and other methodological and statistical issues. Knowledge about these issues will make for a better attorney-consumer of

6. LIEBERMAN & SALES, *supra* note 5. See generally chapters 3, 6, and 7.

7. In the Harrisburg Seven trial, seven anti-Vietnam-war activists were accused of plotting to kidnap Secretary of State Henry Kissinger. Sociologists and psychologists sympathetic to the defense assisted with jury selection by conducting survey research and produced a juror profile that was used to assist with voir dire. See Jay Schulman et al., *Recipe for a Jury*, 37 PSYCHOL. TODAY 41, 77-84 (1973).

8. See LIEBERMAN & SALES, *supra* note 5, at 3.

9. LIEBERMAN & SALES, *supra* note 5.

10. *Id.* at 107.

11. *Id.* at 39. The American Society of Trial Consultants’ Professional Code includes a detailed overview of procedural issues regarding survey methodology in venue research. See ASTC Professional Code, Venue Surveys, http://www.astcweb.org/public/about_us/code.cfm.

consulting services and more knowledgeable judiciary when motions for change of venue are submitted.

The most significant sections of *Scientific Jury Selection* address the role of demographic factors¹² and of personality and attitudes¹³ as they relate to identifying unfavorable or biased jurors. The authors highlight the tradition of using demographics as a predictor of juror behavior. While skilled and talented advocates in their day, famed attorneys Clarence Darrow and Melvin Belli made broad and sweeping generalizations regarding juror type.¹⁴ For instance, Belli believed that married people are perhaps more forgiving, while Darrow suggested that wealthy jurors were conviction prone.¹⁵ Even today, over reliance on demographic stereotypes is pervasive. In a 2003 California District Attorney Association Capital Prosecution Seminar, a senior deputy district attorney made a blanket statement on his practice of excluding Jews during jury selection in capital trials.¹⁶ A 1986 training videotape prepared by an assistant district attorney in Philadelphia advised against seating African-American women in capital cases.¹⁷

The authors rightfully caution on the use of demographics as predictors of juror behavior and highlight their limited predictive value in light of empirical research demonstrating little relationship between demographics and verdict preference.¹⁸ On the basis of factors such as age, occupation, gender, race, and socioeconomic status, the authors conclude that broad generalizations made on the basis of demographic factors may be unreliable and flimsy as predictors of behavior,¹⁹ a conclusion with which this author generally agrees.

Lieberman and Sales do not discount *fully* juror demographics as characteristics to take into consideration when

12. LIEBERMAN & SALES, *supra* note 5, at 57. Demographics are characteristics of human populations which describe factors such as age, gender, marital status, etc. See GLOSSARY: A SURVEY RESEARCHER'S HANDBOOK OF INDUSTRY TERMINOLOGY AND DEFINITIONS (1992).

13. LIEBERMAN & SALES, *supra* note 5, at 79.

14. *Id.* at 58.

15. *Id.*

16. Leonard Post, *Boxing with Jury Selection*, NAT'L L. J., April 27, 2005, <http://www.law.com/jsp/article.jsp?id=1114506316826>.

17. Commonwealth v. Lark, 746 A.2d 585, 589-90 (Pa. 2000).

18. LIEBERMAN & SALES, *supra* note 5, at 57.

19. *Id.* at 77.

making decisions during jury selection. Instead, they explain that demographic characteristics might account for a *modest* degree of verdict preference.²⁰ For instance, I have experience in civil litigation where in a case involving employment discrimination, religiosity was a decidedly important variable; devout Baptists were unsympathetic to a plaintiff whose claims had considerable merit, but whose marital infidelity was viewed with great disdain and compromised his credibility. Some demographic factors might be considered quasi-attitudinal, such as education, political orientation or religion. Varied life experiences influence the way jurors attend to and process information. Using varied demographic factors may sometimes assist in jury selection decision making, particularly in the context of federal court, where attorney conducted voir dire is often absent. Nonetheless, as Lieberman and Sales point out, demographics alone are of modest value in identifying potentially biased or adverse jurors during jury selection.

Personality factors and attitudes are viewed as more reliable predictors of juror behavior than demographics.²¹ The authors provide an interesting review and discussion of personality theories and characteristics such as authoritarianism²², dogmatism,²³ just world beliefs²⁴ and attitudinal issues such as tort reform and the death penalty.²⁵ The attitudes people maintain have value in predicting behavior to some extent. But, it is important to use this construct carefully when making decisions in jury selection.

As the authors point out, there is a marked pitfall in relying on attitudes to predict behavior when the focus is on a

20. *Id.* at 76.

21. *Id.* at 79.

22. Authoritarianism is a personality construct that was first studied during the Post World War II era. Persons defined as authoritarian in nature have a desire for order, conform to conventional norms, and defer to authority. The classic research was conducted by Theodor Adorno. See THEODOR ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950).

23. Similar to the authoritarian construct, dogmatism focuses primarily on those with an inflexible and closed minded personality. See MILTON ROKEACH, *THE OPEN DOOR AND THE CLOSED MIND* (1960).

24. The general premise of "just world beliefs" is that people get what they deserve in life, that good things happen to good people and bad things happen to bad people. See MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980).

25. LIEBERMAN & SALES, *supra* note 5, at 95.

broad, global range of issues.²⁶ That is, asking jurors if they dislike large corporations is far less informative than asking more specific questions, like “To what extent do you believe large corporations are ethical?” or “How common is it for large corporations to cheat to get ahead?” Here, Lieberman and Sales identify the importance of level of specificity in attempting to predict actual behavior.²⁷ The more specific a question is regarding attitude, the better the ability to predict behavior.

The attitude-behavior connection has long been a focus of study in social psychology. In predicting behavior, attitudes are known to have only a modest correlation. However, the degree to which attitudes accurately predict behavior depends in large part on the specificity of the assessed attitude. The probability of accurately predicting a behavior can be increased by asking about *specific* attitudes. Thus, in voir dire questions it is best to focus on attitudes toward specific issues rather than broad or global attitudes. As an example, a question such as “Are you in favor of the death penalty” is of less value than something more specific, such as “Are you in favor of the death penalty in a case involving a woman convicted of murder in a case involving spousal abuse?” This section of the book specifically addressed to jury selection underscores the value offered by litigation consultants, with training in the social sciences, in jury selection. The authors conclude that consultants with knowledge and training in attitude theories, cognition and survey research are best able to assist attorneys in revealing potential bias in jurors via careful and systematic application of the tools of their trade.²⁸

Does scientific jury selection work? The answer to that question, according to Lieberman and Sales, is *yes*. . . and *no*. . . and *maybe*. In other words, there is no clear answer to this question. To empirically verify whether scientific jury selection is effective is a challenge for several reasons. The first challenge is to define “effective.” Is effectiveness evaluated solely on the basis of winning or losing? Is the assistance effective if a jury convicts a defendant in a murder trial, but recommends a life

26. *Id.* at 152.

27. *Id.* at 100.

28. *Id.* at 165.

sentence rather than death? Or, is litigation consulting effective when a corporate defendant is found negligent, but the damage award is only \$100,000 when the plaintiff sought \$15 million?

The authors discuss several studies that assess the effectiveness of scientific jury selection.²⁹ They point to case studies suggesting that scientific jury selection is effective. But, that research does not involve true experimental design using a control and treatment group. And yet research that addresses the question using more sophisticated experimental design is flawed because it often relies on artificial scenarios, small sample sizes, lack of judicial admonitions and may use law students rather than attorneys. A variety of other factors in addition to jury trial consulting services can influence case outcome, such as attorney skill and experience, the use of other experts, graphic presentations, and more. In the end, the most significant determinant of case outcome is the actual case evidence.³⁰

The authors make clear, after reviewing experimental and quasi-experimental research, that the strength of case facts is a stronger predictor of verdict variance than juror characteristics. On the other hand, case strength is not always clear cut and in those instances where the scales of justice could easily tip one way or the other, the ability to account for 1% to 10% of variation in juror verdict preference or inclination might be especially valuable.

Litigation consultants provide an additional set of eyes and ears for a trial team in order to allow for the most effective use of peremptory challenges and inform counsel on cause challenges. Consultants with a background in the social sciences use the tools and theory from psychology and sociology to provide a more systematic and objective approach to the jury selection process. As noted by the authors, scientific jury selection may be viewed as an actuarial decision making approach, relative to the attorneys' experiential based clinical approach.³¹ The experiential approach is more susceptible to a variety of errors

29. *Id.* at 153.

30. *Id.*

31. Lieberman and Sales discuss the theoretical reasons why an actuarial approach, based in statistically oriented judgment, is more accurate and valid than a clinical decision making approach, which relies primarily on personal experience. *See id.* at 146.

in judgment including overreliance on heuristics, mental or cognitive “shortcuts,” and stereotypes.

Beyond the history of scientific jury selection, its mechanics and efficacy, Lieberman and Sales discuss briefly other services offered by litigation consultants, including focus group research, mock trials, shadow juries and post trial interviews.³² Although the litigation consulting industry has its roots in jury selection, the authors place undue emphasis on the importance of jury selection services, in the opinion of this author. The pre-trial services offered by consultants provide significant value to attorneys in identifying the strengths and weaknesses of a case, identifying and testing trial themes, assessing risk, providing insight for settlement in civil litigation, and of course insight into strategies for jury selection. From an economic perspective, in my opinion, attorneys may get more “bang for their buck” with pre-trial services as opposed to jury selection.

In discussing the litigation consulting profession as a whole, issues of ethics and professionalism invariably arise—as they should. Lieberman and Sales provide an evenhanded overview, examining issues such as fairness, affordability, discoverability, standards and more.³³ The American Society of Trial Consultants has been working diligently for the last several years, and continues to do so, developing practice guidelines for trial consultants.³⁴

Highlighting the lack of certification or licensure of consultants, the authors suggest that licensing would guarantee minimal academic backgrounds, participation in continuing education, and sanctions against practitioners who violate professional standards. While the call for stringent standards for professional conduct has merit, the authors fail to recognize

32. *Id.* at 167.

33. *Id.* at 187.

34. The American Society of Trial Consultants was founded in 1982. It is formed of professionals who devote themselves to enhancing the effectiveness of legal advocacy. Members work with attorneys in planning all phases of trial—including discovery, trial preparation, and jury behavior. The work of members encompasses expertise in many fields, including psychology, communications, graphic design, and theater, as well as the law. The American Society of Trial Consultants is the pre-eminent organization for establishing practice standards, ethical guidelines, and continuing education for members of this highly specialized field. See The American Society of Trial Consultants, <http://astcweb.org/public/index.cfm>.

that unlike attorneys and psychologists who have received similar training from accredited institutions, litigation consultants do not have similar backgrounds and training. Instead, litigation consultants come from diverse educational and practice backgrounds including psychology, communications, social work, law, theatre, business, political science, and more.

Conclusion

The primary value of *Scientific Jury Selection* is its breadth of coverage and appeal to consultants, attorneys, students, and the judiciary. The authors state in their introduction that:

The ultimate goal of this book is to familiarize readers with various consultant activities that are related to jury selection and to discuss research that has evaluated the effectiveness of those activities. As a result, psychologists, other social scientists, and practicing jury selection consultants who read the book should have a better understanding of the current research relevant to scientific jury selection and of areas in which new research needs to be conducted to advance the field. In addition, attorneys who read the book should be better able to decide whether to hire selection consultants to assist in future litigation, and if they do, what types of services these consultants should provide. We hope that this will lead to more widespread and creative collaborations between academic researchers, consultants, and attorneys and that more effective approaches for eliminating biased jurors can be developed.³⁵

In a single volume, *Scientific Jury Selection* provides a thorough review of the roots and history of the application of social science to jury selection, gives an overview of the purpose and effectiveness of voir dire, and then a thorough compilation of relevant social science research to date that examines varied issues related to jury selection. The authors conclude their work with a call for increased collaboration between litigation consultants and academic researchers. This call for collaboration has been answered by the American Society of Trial Consultants via student research grants, student paper competitions, and increased involvement with academic researchers throughout the United States.³⁶

While *Scientific Jury Selection* has a strong academic slant, the research addressed by its authors will have broad appeal for

35. LIEBERMAN & SALES, *supra* note 5, at 15.

36. The American Society of Trial Consultants, *supra* note 34.

many, including attorneys, judges, and graduate students considering litigation consulting as a career. For practitioners in the field, *Scientific Jury Selection* is useful as a “go to” reference for a variety of special niche topics related to jury selection.