



### BS2 *Voir Dire*: Is It Science or Is It “Bull”—A Historical Perspective and Comparative Analysis

Patricia C. Smith, MSL\*, Harris County District Attorney's Office, Houston, TX 77002; Patricia Williams, MS, RN, Cambria, CA 93428; Randall Smith, BSME, Houston, TX 77014

**Learning Overview:** The goal of this presentation is to encourage dialogue about *voir dire* and explore what the scientific and legal communities can do to ensure an unbiased jury.

**Impact on the Forensic Science Community:** This presentation will impact the forensic science community by reaching out to other disciplines to promote jury service and encourage a fair and unbiased jury selection process through enhanced research, testing, and analysis.

The United States Constitution ensures the Defendant's right to a jury trial.<sup>1</sup> The United States is not the only country that engages in jury trials. Great Britain, Canada, Australia, New Zealand, and more than 40 other nations employ juries of citizens drawn from the general population who decide cases collectively.<sup>2</sup> Scotland, Wales, and Canada do not give the right to a jury trial to defendants “... for which the prescribed punishment is less than two years in prison.”<sup>3</sup> However, 80% of all jury trials worldwide take place in the United States.<sup>4</sup>

The makeup of a jury consists of judges, lay persons, citizens, and experts who are utilized in other countries depending on the type of case. Historically, jury selection excludes those new to the area, non-citizens, advanced age, poor health, non-voters, and non-drivers. Some people are automatically excluded (for example, Los Angeles County Probation Officers are excused from jury duty once they fill out the jury service survey).

A jury's role is to render a verdict based on evidence presented at trial. Each juror is to be convinced beyond a reasonable doubt. There is no clear definition of reasonable doubt and many legal scholars, judges, and lawyers will not attempt to define it. Some legal reactionaries have opined a preponderance of the evidence is loosely quantifiable as >=51% and beyond a reasonable doubt is more than that. How can a jury render a fair and unbiased verdict if the jury does not know or understand what reasonable doubt is? Unfortunately, it is this lack of clarity that opens the door for jury misconduct.

Our Founding Fathers were very familiar “with a long list of government abuses from English history ... [where] the English monarchy had punished, tortured, and killed people for everything from disagreeing with the king to choosing a different religious path from the government's approved denomination;” a practice that resulted in an increase in jury misconduct.<sup>5</sup> Therefore, is society picking “the lesser of two evils” and should reaching a jury verdict supersede the attempt of perfect justice?

The Lord Mansfield's Rule from 1785 said “jurors could not impeach their verdict by making affidavits or otherwise testifying as to their own misconduct.”<sup>6</sup> However, in 1905, the Texas Legislature allowed jurors to testify during hearings based on jury misconduct.<sup>6</sup> The idea of cases overturned because of a juror's misconduct or allegations of a juror's misconduct has fueled the notion for the need of criminal justice reform. More specifically, the need for scientific jury selection or professional jurors may be the solution.

People have become desensitized after decades of watching television shows and movies about police officers, lawyers, and doctors. Is it possible professional jurors already exist? Are jurors more likely created by clever lawyers and jury consultants? The following is a list of cases, television shows, and movies involving jury misconduct that may have been prevented through carefully constructed *voir dire* or utilizing trial consultants differently:

- *People of the State of California v. Orenthal James Simpson*
- *Lloyd v. Johnson & Johnson*
- *State of Florida v. John Goodman*
- Television show, *Bull*
- Motion picture, *Runaway Jury*<sup>7</sup>
- *12 Angry Men* (1957) and *Twelve Angry Men* (1997)<sup>8,9</sup>

Ultimately, there has been little to no research determining that utilizing consultants directly or indirectly adversely affected *voir dire* or jury verdicts.

#### Reference(s):

1. 6<sup>th</sup> Amendment, United States Constitution.
2. Hans, Valerie P. “Jury Systems Around the World” (2008). *Cornell Law Faculty Publications*. Paper 305. <http://scholarship.law.cornell.edu/facpub.305>.
3. Hans, Valerie P. & Neil Vidmar. *Judging the Jury*. Perseus Publishing: Cambridge, Massachusetts 1986.
4. Hans, Valerie P. & Neil Vidmar. *Judging the Jury*. Perseus Publishing: Cambridge, Massachusetts 1986.
5. No author. *Revolutionary War and Beyond*. Only, no date. Retrieved July 24, 2018. [www.revolutionary-war-and-beyond.com](http://www.revolutionary-war-and-beyond.com).
6. Keltner, David. *Jury Misconduct in Texas: Trying the Trier of Fact*, 34 SW L.J.1131 (1980). Retrieved July 24, 2018. <https://scholar.smu.edu/smulr/vol34/iss5/3>.
7. *Runaway Jury*, directed by Gary Fleder (2003, New Orleans, LA: Regency Enterprises, 2009). DVD.
8. *12 Angry Men* (1957), directed by Sidney Lumet (1957, Los Angeles, CA: United Artist, 2011). DVD.
9. *Twelve Angry Men* (1997), directed by Williams Friedkin (1997, Los Angeles, CA: MGM, 1997). DVD.

#### *Voir Dire*, Jury, Trial Consultants

Copyright 2019 by the AAFS. Permission to reprint, publish, or otherwise reproduce such material in any form other than photocopying must be obtained by the AAFS.