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Reconstructing Reality in the Courtroom: Justice and Judgement in American Culture

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RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGEMENT IN AMERICAN CULTURE. By *W. Lance Bennett* and *Martha S. Feldman.* New Brunswick, N.J.: Rutgers University Press. 1981. Pp. x, 203. $14.50.

The criminal trial is a complex procedure, governed by a multitude of seemingly irreconcilable technical rules. Judges and lawyers, in addition to their legal education, often spend years mastering courtroom language and procedures. Despite these complexities, the American criminal justice system thrusts uninitiated laymen into the jury box and requires them to make judgments with grave consequences. The questions of how jurors adapt to this new environment and render decisions of guilt and innocence have been the subject of considerable study.[1] In *Reconstructing Reality in the Courtroom*, social scientists W. Lance Bennett and Martha S. Feldman theorize that the key to understanding the criminal jury's decision-making process is an every-day communication device — the story.[2]

Understanding how the story enables the actors in a criminal trial to communicate sensibly and to perform their roles properly can clear up "several of the mysteries surrounding criminal trials" (pp. 4-5). For example, it is unclear how jurors assimilate vast amounts of technical information, when lawyer behavior significantly affects trial outcome, and how bias subtly infiltrates the judicial process (pp. 5-6). Bennett and Feldman argue that "[d]espite that maze of legal jargon, lawyers' mysterious tactics, and obscure court procedures, any criminal case can be reduced to the simple form of a story" (p. 4). Unfortunately, there is no such simple device to help lawyers decipher the "maze of social science jargon" in which the authors mask the answers to these mysteries.

The book is divided into four parts. In Parts I and II, Bennett and Feldman explain why stories are appropriate tools to assist jurors in organizing information and how they are used to do so. Familiar literary devices, such as flashbacks, flash-forwards, and subplots enable jurors to incorporate complex, disjointed, and conflicting testimony into a coherent scenario. Grammar conventions, such as verb tense and pronoun usage, further help jurors to assimilate information and to identify the central action. Juries also draw on their "vast store of background knowledge about social life" (p. 50) to make inferences where gaps or ambiguities exist. Jurors then integrate the central action, the surrounding actions, and their background knowledge, to interpret the overall story. Finally, the jury evaluates the five

1. *See, e.g.,* M. GLEISSER, JURIES AND JUSTICE 217-67 (1968); H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY (1966); Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. L. & SOC. CHANGE 1 (1973); Costopoulos, *Persuasion in the Courtroom*, 10 DUQ. L. REV. 89 (1972); Forston, *Sense and Non-Sense: Jury Trial Communication,* 1975 B.Y.U. L. REV. 601; Wasserman & Robinson, *Extra-Legal Influences, Group Process, and Jury Decision-Making: A Psychological Perspective,* 12 N.C. CENT. L.J. 96 (1980).

2. The authors define a story as "simply a communicational form that provides for the development, climax, and denouement of action in the context of a defined collection of actors, motives, and scenes." P. 7.

elements of the story (scene, act, agent, agency, and purpose) for completeness and consistency (p. 62).

Throughout the book, but particularly in Part II, Bennett and Feldman rely on intricate and technical arguments to support their theory that "the structure of a story can be just as important as its documentation" (p. 67). Readers lacking a strong social science background may find the discussion in Part II only marginally intelligible. Readers trained in law may prefer to concentrate on Chapter 1, where the authors lay out their theory, and then jump directly to Part III, where the authors apply their theory to the criminal trial.[3]

In Part III, Bennett and Feldman shift their focus from the jury to the lawyers. Because juries process information through the use of stories, the authors argue, lawyers must be sensitive to the structure of the story they present to the jury. In his intructions to the jury, the judge identifies the elements of the crime with which the defendant is charged. The authors equate these elements to the five structural elements of a story. Because the government bears the burden of proof in a criminal trial, the need to fashion "a structurally complete and internally consistent story that [considers] all the evidence" (p. 97), dictates the prosecution's trial strategy.

The defense, on the other hand, shapes its strategy according to the structural strengths and weaknesses of the prosecution's story. When the prosecution fails to present a complete story, the defense employs the "challenge strategy." The defense points out the gaps or inconsistencies in the prosecution's theory through cross-examination and closing statements. When the prosecution's story is complete, but contains an ambiguous central element, the defense relies on the "redefinition strategy." If the defense can disrupt several connections in the prosecution's account of the relevant facts by redefining a key element, the resulting inconsistencies can render that account suspect. When the prosecution's story is structurally sound and unambiguous, but fails to incorporate a large amount of evidence, the defense counters with the "reconstruction strategy." This strategy "involves placing the central action in the context of an entirely new story to show that it merits a different interpretation" (p. 104).

The effect of each side's strategy upon the jury depends upon "the careful development and use of tactics" (p. 116). Each lawyer may make hundreds of tactical moves during the course of a trial. Although many of these moves may be captivating and dramatic, only those that affect the development of the chosen strategy are likely to influence the outcome. Bennett and Feldman identify three influential trial tactics. Through "definitional tactics," lawyers elicit precise answers from witnesses "to narrow the possible definitions of evidence to just the ones that fit" (p. 118) their story strategy. "Inferential tactics" enable lawyers to establish connections that fit loose bits of evidence into the central action to create a consistently structured story. Through "validation tactics," lawyers strengthen their evidence

3. The authors' "theory emerged gradually over the course of more than a year of ethnographic study of criminal trials in the Superior Court of the state of Washington in King County (Seattle), Washington. P. 11. They observed over sixty criminal trials and studied the transcripts of forty trials. Additionally, two videotapes of actual trials were made available to them.

by pointing out consistent evidence elsewhere in the story and by establishing the credibility of the witness. Lawyers who master these tactics, the authors argue, can improve the likelihood of a favorable verdict.

In Part IV, Bennett and Feldman use the story framework to bring coherence to the fragmented body of current literature addressing bias in the courtroom. The authors acknowledge that variables such as racial prejudice and the nature of the crime may influence jury decisionmaking. However, "[s]uch factors become relevant in trial only when they intersect with central judgmental issues in stories" (p. 149). While social prejudices cannot be eliminated,

> if we can identify the cognitive-communicational structure of legal judgement, then it should be possible to detect story strategies that make extraneous factors more or less likely to enter judgements. If such story characteristics can be monitored, then it should be possible to make formal rulings about the acceptability of cases to alert participants to the likelihood that particular factors will enter judgement in a particular case. [P. 149.]

Bias, then, involves more than some prejudice against a particular *party*. To be significant, bias must also operate in the jury's understanding of the facts.

The reliance on storytelling in the courtroom can bias jurors despite their sincere efforts to make impartial decisions. Individuals who lack the communication skills to produce a structurally sound story are less credible witnesses, even though they are telling the truth. Further, when a structurally sound story is told, the jury may disbelieve the witness unless they "share the norms, experiences, and assumptions necessary to draw connections among story elements" (p. 171). The jury's inability to relate to a witness is the most threatening type of prejudice, since it is the most difficult to detect.

While *Reconstructing Reality in the Courtroom* may be of interest to social scientists, its value to the legal profession is limited. Its most apparent limitation is the complex social science vernacular in which its analysis is cast. A more significant limitation, however, is its failure to provide any new advice on how to improve the criminal justice system. The most practical advice offered is that lawyers should realize that cultural differences between witness and jurors can lead to breakdowns in communication. This, however, is scarcely a new concern.[4] The book does little more than impose an obscure description on familiar phenomena, implying the necessary but erroneous message that those who master the authors' vocabulary will thereby gain an understanding of the courtroom that only experience can provide.

4. *See* Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417, 1418 (1969) ("Cultural differences — ignorance of mores, language, life styles — compound the jury problem where defendants are not from the predominant socio-economic group, particularly where racial differences are present."). The Note goes on to use the same example used by Bennett and Feldman (p. 181) — the defendant who had been put "in the dozens." *Id.* at 1419.

LEGAL PSYCHOLOGY: EYEWITNESS TESTIMONY — JURY BEHAVIOR. By *L. Craig Parker*. Springfield, Ill.: Charles C Thomas. 1980. Pp. vii, 185. $22.75.

In *Legal Psychology*, L. Craig Parker presents an overview of the legal and psychological concepts of eyewitness testimony and jury behavior. The author attempts to integrate the discipline of psychology into legal practice in order to overcome the reluctance of the legal profession to employ psychological concepts. After a brief outline of the other contexts in which these disciplines interact, Parker examines a large volume of psychological research pertaining to two discrete areas — eyewitness testimony and jury behavior. As a complement to these studies, he reviews Supreme Court decisions relevant to these subjects. Unfortunately, his discussion only infrequently goes beyond this summary format. Parker fails to suggest any guidelines for the practical application of psychology to the practice of law. *Legal Psychology* is, consequently, unlikely to have a significant impact on either psychological or legal literature.

Parker first attempts to provide some background on the interface of law and psychology. He begins by briefly summarizing the legal-psychological overlap involved in areas ranging from eyewitness testimony to legal socialization. This is followed by a historical survey of those psychological studies with legal implications. This somewhat haphazard section leaves the lay reader overwhelmed, not only by the large number of studies surveyed, but also by their tenuous relevance to the book's subject matter. Although this survey may be of interest to psychologists, it is too unwieldly to be of use to lawyers. Parker does underscore the undeserved nature of the legal field's ambivalence towards psychology, but, in general, this overview of the interface fails to give the lay reader the intended background.

Parker then examines the field of eyewitness testimony in detail. His thesis throughout is that the present legal rules ignore the research conclusions: judges and juries are insensitive to the inaccuracies that are part of most eyewitness testimony (p. 30). Parker finds it incongruous that the judiciary continues to stress the weight of eyewitness testimony when both experimentation and actual mistaken identifications demonstrate that this testimony is frequently inaccurate.

Parker focuses on the variables that might result in differing eyewitness testimony for identical situations. Unfortunately, these variables, which range from race to religion, sex to socioeconomic background, are presented through an unorganized series of experimental results.[1] Parker underlines an experimental variable as affecting eyewitness testimony and applies his talent for criticism to the experiment's methodology. This leaves the reader confused as to the actual significance of these variables. A section on the importance of these variables and their applicability to the legal

1. One reviewer indicates that Parker's list of experiments was not comprehensive and omitted studies that had contributed significantly to this particular field. *See* Wells, *Gaps and Canyons in Psycho-Legal Research* (Book Review), 27 CONTEMP. PSYCH. 55, 56 (1982).

issues surrounding eyewitness testimony[2] would have been helpful. The judiciary is unlikely to adopt psychological principles without guidelines for accurately doing so.

This failure to provide direction is even more apparent in Parker's section on memory testing. The research in this area presents excellent possibilities for practical application in a legal context. Parker surveys studies ranging from the effect of mug shot displays on memory retention (interference) to tests on the comparative accuracy of identification between artist's sketches and composite portraits. An experiment on the number of incorrect identifications resulting from the nonverbal cues of the person conducting the trial identification seems, for example, an obvious candidate for legal implementation. Parker again declines the opportunity to summarize this psychological data in a way that would indicate a direction for legal reform.

Parker does attempt, through Supreme Court decisions,[3] to illustrate the legal perspective on eyewitness testimony. He finds that the decisions fluctuate from excellent analyses applying recent psychological studies[4] to decisions based solely on intuition.[5] A case not discussed by Parker underscores his frustration with legal rulings. In *United States v. Crews*[6] the Court, without the benefit of psychological studies, held that a witness' courtroom identification rested on an independent recollection and was not the result of illegally obtained pretrial identification.[7] The research in this area, however, indicates that the initial identification becomes a reinforcement for all future identifications. The illegal pretrial identification would then prejudice the defendant at trial (p. 110). This supports Parker's theme that the courts often ignore or reject the findings of experimental psychology.

Yet Parker again fails to provide proposals to remedy the deficiencies. He points out that the Court has attempted to safeguard defendants by requiring the presence of a lawyer at the identification. The lawyer, however, is unlikely to know how to protect his client in this situation. Parker stresses the prejudice and bias which pervades many identifications, but he fails to provide practical instruction for the lawyer who has a client in a lineup. Parker merely discusses suggestions, such as videotaped lineups, made by other commentators without recommending any (pp. 110-15).

Parker thus adds very little to the understanding or prevention of inaccurate eyewitness identifications. Legal commentators have long recognized the unreliability of this sort of testimony.[8] The key legal problem —

2. Parker has been criticized for failing to discriminate between variables that can be used in a practical context and those that have only questionable value for those in the legal field. *Id.* at 56.

3. Moore v. Illinois, 434 U.S. 220 (1977); United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1973); Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

4. *See* United States v. Wade, 388 U.S. 218, 228-36 (1967).

5. *See* Moore v. Illinois, 434 U.S. 220 (1977).

6. 445 U.S. 463 (1980).

7. 445 U.S. at 473.

8. *See, e.g.*, E. BORCHARD, CONVICTING THE INNOCENT (1932); E. LOFTUS, EYEWITNESS TESTIMONY (1979); P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES (1965); Le-

devising procedures to reduce the risks of erroneous identifications without crippling criminal law enforcement — has already been resourcefully undertaken by other observers.[9] The need, therefore, is less for another demonstration that eyewitness testimony is suspect than for the political determination to do something about it. Parker's book is highly unlikely to contribute to this last objective.

Parker next examines the research and legal practice on jury decision rules. After a succinct review of the Supreme Court cases on jury size and unanimous decisions,[10] Parker again enters the realm of psychological literature.[11] He emphasizes that when the courts have used psychological studies in their rationale, they have often relied on research of limited credibility. Parker does an excellent job of pointing out the weaknesses in the experiments on jury decision rules. Weaknesses include the homogeneity of the subject sample (frequently college students) as opposed to the heterogeneous sample required for jury selection, and the inherent differences between deciding a hypothetical case and an actual case. Again, the thorough criticism of these psychological hypotheses leaves the reader insecure as to their importance. The overall thrust of the results is that the decisions of a six-person jury and a nonunanimous twelve-person jury may infringe upon a defendant's rights. Parker stresses, however, that because of "outstanding weaknesses" these studies are of questionable value to the judiciary (p. 141). This subject, however, does illustrate the promise of experimental research on legal issues. Parker emphasizes the limitations of this research without minimizing psychology's potential. The reader is left with the hope that future research may resolve the lingering uncertainty.

Parker also analyzes some of the research on jury behavior. He divides his analysis into two sections. First he reviews the studies on nonlegal factors, such as sex, race and status, that can influence jury decisions. Unfortunately, the data generated by these studies seems too piecemeal to advance knowledge much beyond the intuitive level. Parker's next section, on the use of social scientists in jury selection, reinforces this skepticism. He comments on the legal arguments espousing the dangers of stacking the jury. Parker, however, hesitates to give any credence to the alleged benefits of experimental psychology to jury selection procedures. Lawyers should note that in order for psychological techniques to have any significant effect, the psychologist must have an unusually comprehensive background in this area and the evidence must be sufficiently ambiguous for jury biases to influence the ultimate decision. Until further developments occur in this

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vine & Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079 (1973).

9. *See, e.g.*, Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods*, 38 BROOKLYN L. REV. 261 (1971) (suggesting, among other things, "blank lineups" — lineups in which the suspect does not initially participate).

10. Recent cases that Parker does not include in his discussion are Burch v. Louisiana, 441 U.S. 130 (1979) (The Court held that the provisions of the Louisiana Constitution that permitted nonunanimous six-person jury decisions were unconstitutional.), and Brown v. Louisiana, 447 US. 323 (1980) (The Court held that the decision in *Burch* was retroactive.).

11. Wells suggests that psychologists may find M. SAKS, JURY VERDICTS (1977), a more thorough work on jury behavior. Wells, *supra* note 1, at 56.

field, Parker suggests that the intuition of the individual lawyer may be just as productive a tool for jury selection as experimental psychology.

An additional chapter tying these loose ends of psychological research together would be useful to both lawyers and psychologists. While Parker bemoans the reluctance of lawyers to use psychology, the reader is left unsure of what Parker feels should be psychology's contribution to the law. He outlines flaws in the research, but does not deal directly with the concerns of lawyers. A legitimate concern is that psychological studies are oversimplified and, therefore, are not applicable to real life situations (p. 17). As a summary of recent Supreme Court law and psychological studies, Parker's presentation is often unorganized. The reader is required to decide for himself which principles are relevant to the legal problems. The discipline of legal psychology has a vast opportunity for selecting those experimental results that are valid and designing methods of applying them to legal procedure. A better understanding of legal issues, however, is important to any book hoping to influence psychology's effect on the law. *Legal Psychology* fails to address the concerns of lawyers, and hence fails in its intended goals.[12]

12. Parker's book is also reviewed by Wells, *supra* note 1.