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## American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Trial by Jury (Approved Draft)

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## RECENT BOOKS

### BOOK REVIEWS

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO TRIAL BY JURY (APPROVED DRAFT). Recommended by the *Advisory Committee on the Criminal Trial*. New York: Institute of Judicial Administration. 1968. Pp. xii, 180. Paper, \$2.

*Standards Relating to Trial by Jury* is one of a series of tentative reports being prepared on a variety of topics by advisory committees of the American Bar Association project on minimum standards for criminal justice. That project grew out of a proposal, made in 1963 by the Institute of Judicial Administration at New York University Law School, that the ABA undertake to formulate such standards. On the basis of the report of a pilot study committee, the ABA, at its annual meeting in August of 1964, authorized the project for three years with a budget of 750,000 dollars. The project has dealt with the entire spectrum of the administration of criminal justice, including the functions performed by law enforcement officers, by prosecutors, and by defense counsel, and the procedures to be followed in the pretrial, trial, sentencing, and review stages. The titles of the committees indicate the broad scope of the project: "Police Function," "Pretrial Proceedings," "Prosecution and Defense Functions," "Criminal Trial," and "Sentencing and Review." A separate advisory committee was created to deal with the subject of fair trial and free press.<sup>1</sup>

The Committee on Criminal Trial published the report on trial by jury, and almost 8,000 copies of that report are being distributed within the American Bar Association. Thus adequate opportunity is being provided for the expression of divergent views, and for the closing of "loopholes." Certainly much more time is being offered for consideration than is given any particular piece of legislation in state legislatures or in the national Congress.

Let us see what *Trial by Jury* has done. First, I suppose, we should consider whether we want a uniform standard for criminal justice across the United States. We certainly have not got one in morals and ethics, as is evidenced by Nevada's gambling and openly run houses of prostitution. Each state has its own idiosyncracies, which either are arbitrarily based upon the authority of antiquity or else purposefully exist to satisfy a particular cultural need. I suppose we should have general uniformity in criminal procedure, but there should definitely be provisions for certain exceptional

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1. See also Newman, Book Review, 66 MICH. L. REV. 1058 (1968).

situations that are related to particular local cultures. I find that very few, if any, of the broad general recommendations in the jury trial project offend local custom, although a few of those recommendations mildly affront my sense of due process.<sup>2</sup>

At the outset, the report discusses the scope of the right to jury trial and indicates that it is unsettled whether the Federal Constitution requires trial by jury in every criminal proceeding. *Duncan v. Louisiana*,<sup>3</sup> however, is cited as support for the proposition that the Constitution does not guarantee the right of jury trial to defendants charged with petty offenses. The recommended standard provides for jury trial in all instances except those involving petty offenses, and in those instances, it hedges a possible lack of due process—and therefore, justice—with a suggestion that defendants be granted a right of appeal.

The report's recommended procedures for jury trial with less than twelve jurors and for conviction upon less than a unanimous verdict might be useful in trials involving petty crimes. In this connection, it is noted that "at any time before a verdict, the parties with the approval of the court may stipulate that the jury shall consist of any number less than that required for a full jury" (p. 8). Of course, the use of a jury numbering less than twelve should be distinguished from permitting conviction on less than a unanimous verdict. I like a jury of twelve; I like the unanimous verdict. I know that England, the "home of the jury" (which really it is not), now has juries with less than twelve members and allows convictions upon less than unanimous verdicts in criminal cases. Those innovations seem to be working in the land where the principles of *Escobedo*, *Gideon*, and *Miranda* were the order of the day long before they became watchwords of American constitutional dogma. The advisory committee for this report concluded that the minimum standards should recognize the propriety of less than unanimous verdicts, such as are now permitted in six states. This conclusion was "bolstered by the fact that these standards disapprove of the continued use of the *Allen* or 'dynamite' charge as a means of influencing minority jurors to change their position" (p. 28).

Indeed, I believe that the giving of the "dynamite charge" in any context in no way accords with due process. Such coercion of the jury is deadly in this country where jurors are not in the habit of "standing up to trial judges" as I have seen them do in England. I think the "dynamite charge" is as devastating to due process as is a

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2. See, e.g., text following note 6 *infra*, text accompanying notes 8 and 11 *infra*, and p. 620 *infra*.

3. 391 U.S. 145 (1968).

judge's comment on the evidence or his comment on the failure of the defendant to testify.<sup>4</sup>

It is recommended that the jury trial may be knowledgeably waived. I offer no criticism here. The commentary in this section of the report is authoritative, learned, and extremely objective.

The problem of selecting the venire—the prospective jurors—is adequately treated. And I think I know something about that problem since I had the pleasure of testifying before Senator Tydings' Committee on Federal Jury Reform. Under the old federal system, "key men" picked jurors. I thought that this "loaded" method of jury selection was horrendous in the federal courts. It provided for the selection of a blue-ribbon jury, hand-picked by the key man. That system, however, has now been changed.

The report recommends that questionnaires be used to screen prospective jurors. I disagree. Trial jurors should be qualified in the same manner as those who vote for governor and President. If they have the capacity to vote for chief executives, they should have the capacity to vote on an individual's guilt or innocence. Certainly, I do not want unlettered dunderheads on my juries, particularly when I am engaged in a complicated criminal case such as one involving fraud or involving a tax law or securities law violation. But neither do I want all accountants or people who have passed intelligence tests or history tests or people who come only from the "educated" side of the tracks. I have seen jury commissioners use such questionnaires and examinations deliberately to weed out jurors favorable to the plaintiff on the civil side and jurors who might vote for the defendant on the criminal side. I just do not believe that intelligence or historical knowledge is a necessary attribute for those whose function it is to mete out justice.

In regard to the selection of the jury panel and the *voir dire* examination, there is dispute as to whether trial counsel should be permitted to direct individual questions to prospective jurors. I believe that such questions should be allowed and that they should be oral and direct rather than made in writing through the court. Competent and resourceful trial counsel can pick a jury as intelligently and as expeditiously as can the trial judge, who in many cases has never had trial experience as a practitioner. I feel that any person whom I defend has hired me—and not the trial judge—to represent his interests. I feel that I, as well as the opposing counsel, should have this opportunity—besides those provided by the opening statement and argument—for intimate contact with the jury. Counsel who abuse the privilege of direct interrogation during *voir dire* may be penalized by the *nisi prius* judge. But the fact

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4. Both of the latter procedures are apparently unconstitutional. See *Griffin v. California*, 380 U.S. 609 (1965).

that some attorneys abuse that privilege does not justify denying it to those who conduct *voir dire* examinations with propriety.

The recommended standards for peremptory challenges in criminal cases are inadequate. The report suggests that ten peremptory challenges be allowed when the offense is punishable by death or life imprisonment, that six be granted if the offense is some other felony, and that three be allowed if the offense is a misdemeanor. Those are too few. I would at least double the number in each category.<sup>5</sup> At common law, a defendant on the criminal side was entitled to thirty-five peremptory challenges—more than most states allow at the present time. The report notes that New York permits a large number of challenges, but it suggests that this may be “explained in part by the fact that no additional challenges are made available when there are additional defendants joined for trial” (p. 72). I would certainly allow additional challenges in the perplexing and confusing cases involving numerous defendants, particularly when—as often is the case—conflicts of interest appear.<sup>6</sup>

The committee apparently condones the practice found in some jurisdictions, which requires parties to exercise peremptory challenges as each juror is individually selected. I disagree as to both the effectiveness and the justice of this procedure. I would first seat the entire jury and then call upon counsel to exercise his peremptories. I favor this approach because the jury is a body of twelve persons, not two, six, or eight. The over-all complexion of the panel may provide a reason for challenging certain jurors who appeared to be acceptable when first seated.

With respect to striking the challenged jurors, many trial counsel prefer that this process be done secretly, but I believe that I have been able to do it inoffensively in open court. My usual practice is to rise and very briefly to thank and excuse the juror by name. The panel, being informed of the nature of the peremptory challenge, does not take offense—at least, that is my feeling.<sup>7</sup>

The report considers the use of juror handbooks. I think that those handbooks are completely out of place in an adversary judicial proceeding. They just cannot be made objective, and yet they become as authoritative and influential as the perplexing jury instruction.<sup>8</sup> I am against any kind of jury handbooks, as I would be against

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5. It should be noted that most states have too few peremptory challenges on the civil side as well.

6. See *People v. Aranda*, 63 Cal. 2d 518, 407 P.2d 265 (1965), which seems to prohibit joint trials in conspiracy cases when the problem of accusatory statements might arise.

7. Of course, I could be completely wrong. It is my experience that the more “adept” one becomes at picking juries, the more he realizes how little he has learned.

8. See p. 619 *infra*.

sending jurors to special schools. Jury handbooks and schools are nothing more than sophisticated methods of thought control.

The report condemns the old procedure of bringing defendants into the presence of the jury in prison garb or chains. Under the suggested standards the defendant is not only entitled to an instruction that he is "presumed to be innocent," but he must also have the physical appearance of one who is innocent. The report also considers the perplexing problem that the violent courtroom conduct of a defendant who insists upon being present may cause the jury to be prejudiced against him. But the possible prejudicial effects of such behavior apparently are not considered sufficient to render the jury incapable of delivering a fair and impartial verdict, as long as the judge instructs the jury to disregard the defendant's conduct in arriving at their verdict. Thus the report suggests that if appropriate instructions are given, the jury should be permitted to hear and decide a case even if they have witnessed the defendant's violent courtroom display. The use of a soundproof glass cage might prove helpful in minimizing prejudice against unruly defendants<sup>9</sup> but it is neither specifically recommended nor specifically ruled out. Despite the high cost of such a piece of equipment, its use would seem to be preferable to the more barbaric practices of some contemporary courts, such as that employed in the recent Chicago riot conspiracy case in which the judge ordered an unruly defendant to be physically bound and gagged.<sup>10</sup>

The report also recommends that jurors be permitted to take notes during the trial, "regarding the evidence presented to them and [to] keep these notes with them when they retire for their deliberation" (p. 11). While I doubt that a juror's notes can have anything like the completeness and accuracy of the court reporter's transcript, nevertheless note-taking may trigger a juror's memory and focus his attention on pertinent facts. Thus, it may have the effect of improving the quality of his decisions. But the trial judge should be particularly careful to point out that if a juror has any doubt about the meaning or accuracy of his notes, he should ask that the record be read.

The recommendations include a provision which would permit the substitution of a judge if that judge certifies that he has "familiarized" himself with the record of the trial. I disagree. There are few, if any, cases in which it is necessary to substitute a judge.<sup>11</sup> I would rather have a day or two break in the trial until a sick judge

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9. Such cages were used to enclose the defendants at trial in the Eichmann and Sirhan cases.

10. N.Y. Times, Oct. 30, 1969, at 1, col. 2.

11. In the relatively few cases in which the judge dies or becomes permanently disabled, a new trial may be granted.

returns than risk the possibility of having a completely different personality guide the destinies of my client. The requirement that the substitute judge need only certify his familiarity with the case in order to qualify is insufficient to guarantee fairness to the parties involved in the litigation. There is too much insight to be gained by actually seeing and listening to the witnesses at trial—and too much judicial discretion in the final judgment—not to make such insight determinative of the outcome of the case.

In most jurisdictions, jury instructions are virtually incomprehensible to the average juror. *Trial by Jury* suggests nothing to clarify them and perhaps there is nothing that can be done. The difficulty may lie in the very nature of the subject; the instruction attempts the all-but-impossible task of conveying in a brief but succinct manner the meaning of technical and often confusing points of law to a small group of persons who lack legal expertise. Some states, through bar associations and judicial committees, have provided uniform books of jury instructions. The textual portions of these books are excellent, but the instructions themselves are ponderously unintelligible and in the best tradition of the garbled prose of the lawyer. I defy any juror, after listening to some of these instructions, to explain them intelligently either to a fellow juror or even to himself.

Frankly, I do not have a solution to the problem of unintelligible jury instructions, but I do believe that there are other methods of apprising the jury of the law that are at least as effective as the traditional statement from the bench. I tried a criminal case in Indiana not long ago—a delightful piece of alleged sodomy by a doctor. I learned that in criminal cases in Indiana, counsel argues law as well as facts to the jury and may tell the jury to take the law from any “reasonable source,” including his own argument. Maybe with all the adept lawyers on television (present company excepted), such as Mr. Mason and Mr. Judd, jurors should be allowed to take their law from any “readily available source” rather than only from the courts. The modern American juror pretty well knows what the law is anyway, and with a wide-open *voir dire*, opening statement, and argument, perhaps little harm would be done if the judge did not instruct at all, but instead put each attorney upon his honor not to misquote the law.

In any case, the recommendations in *Trial by Jury* are confined to the traditional form of jury instructions in which the judge summarizes the relevant points of law. In particular, the recommended standards stipulate that instructions must be discussed with counsel prior to delivery. This requirement promotes justice by avoiding unfair surprise to an attorney who might otherwise rely on a particular aspect of the law that is not going to be mentioned

by the court. In addition, the report suggests that the jury be permitted to take the actual written charge to the jury room. I am apprehensive about this procedure; it may increase the likelihood that the jury will place undue emphasis on a particular instruction. I think that a better procedure would be for the judge, having, in the first place, kept the instructions to a minimum, to suggest to the jury that they come back into the courtroom to have any unclear instructions explained. If the jury returns asking for clarification, the trial judge should call both counsel into his chambers for assistance and, on the transcript, determine what help should be given the jury.

With regard to the problem of the deadlocked jury, the suggestions of the study are appropriately directed more to the concern for ultimate justice than to the need for expediency in reaching a verdict. The "dynamite charge" is disavowed. The report also suggests that before the jury retires for deliberation the court *may* give warning instructions on consulting, unanimity, surrendering honest convictions, and other facets of the jury's actual deliberative process. I would prefer a suggestion that these admonitions *must* be given in every case.

The report recommends that in some cases the individual jurors be polled after the jury has returned with the verdict. I would suggest that this polling be permitted upon the court's own motion in every case. I agree that, "while it is appropriate for the court to thank jurors at the conclusion of a trial for their public service, such comments should not include praise or criticism of their verdict" (p. 16). Such neutrality is the best guarantee of objectivity in all verdicts—at the risk, perhaps, of allowing the exceptional errant verdict to pass without notice.

*Trial by Jury* provides for the impeachment, on the basis of extrajudicial evidence, of a verdict that is shown to be dishonest or coerced. The report also suggests that jurors' affidavits be used in such cases, but it gives no consideration to the manner in which the affidavits are to be taken. The American Bar Association and other bar associations have for years suggested that it is unethical for the trial lawyer to seek out a juror *after* a verdict has been reached in order to discuss his verdict with him. Indeed, I think that the ideal procedure would be for the jurors to return their verdict and then to depart from the courtroom keeping their deliberations forever unrevealed. If there is to be a provision for the impeachment of verdicts, however, it seems that there must be some procedure by which jurors may be questioned about their decisions. Moreover, if the right to impeach an improperly arrived-at verdict is thought to be an integral part of due process—as seems to be implicit in the report's recommendations—then the judge should perhaps be re-

quired to instruct the jurors to talk with the lawyers on each side of the case. In fact, an admonition that they do not have to do so would, under this view, be a denial of due process to the defendant. Such a result seems at best undesirable.

Frankly, I do not know how the need for secrecy and privacy in jury deliberations can be balanced with the right to impeach an improper verdict. In any case, I personally will remain hesitant to talk with jurors after they have announced their verdict; my ego has been shattered too many times when I have spoken to jurors after a trial and discovered that they found for my client on the basis of a point which I had thought minor or, worse still, one that I had not thought of at all.

On the whole, *Trial by Jury* is a worthwhile, objective report that is well worth the time and money which has been invested in it.

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