BOOK REVIEW

MINIMIZING RACISM IN JURY TRIALS: The Voir Dire Conducted by Charles R. Garry in People of California v. Huey P. Newton. Edited by Ann Fagan Ginger. National Lawyers Guild, P.O. Box 673, Berkeley, California 94701. 250 pages $10 ($6 for students).

PERHAPS MORE APPROPRIATELY described as "systemized injustice," what is known as the criminal justice system in this country has consistently militated against the interests of Black people. Given the present situation, it could not be otherwise. It is white policemen[1] who exercise their power and discretion in the threshold encounter on the street, white prosecutors who decide whether to initiate criminal proceedings on what charge, and white judges[2] and jurors who are ordained to make the "impartial" decisions on the merits of the case. The result of this legalized conspiracy is a foregone conclusion: non-whites have a significantly greater chance of being arrested, prosecuted, and convicted.

With conditions being as they are for the average black person, it is only with a tremendous degree of tolerance for functional naïveté and blatant hypocrisy that one can understand the furor raised by Kingman Brewster's doubtful attitude[3] about the probable fate of more militant blacks. It is not at all illogical to assert that a system which has amply demonstrated its recalcitrance to assure minimal justice for those it does not understand, will move affirmatively to deny justice to those whom it fears.

Minimizing Racism in Jury Trials[4] tells of efforts to obtain a fair trial for Huey P. Newton, co-founder and Minister of Defense of the Black Panther Party. Newton was charged with the murder of one Oakland police officer and the attempted murder of another.[5] After four days of deliberation the

1. For discussion of lack of black policemen see Newsweek, LXXVIII: no. 7, August 16, 1971 at 19.
2. See Beverly Blair Cook, *Black Representation in the Third Branch,* BLACK LAW JOURNAL, p. 260 *supra.*
3. The President of Yale University is quoted as saying, "I am appalled and ashamed that things should have come to such a point that I am skeptical of the ability of black revolutionaries to achieve a fair trial anywhere in the United States." *Behind the Turmoil at Yale: Black Power and the Courts,* U.S. News and World Reports, LXVIII: No. 19, May 11, 1970, at 41-42.
4. *Minimizing Racism in Jury Trials: The Voir Dire Conducted by Charles R. Garry in People of California v. Huey P. Newton* (A. F. Ginger ed. 1969), hereinafter called *Minimizing Racism in Jury Trials.*
5. At approximately 5:00 a.m. on the morning of October 28, 1967, in the heart of the black ghetto in Oakland, California, a white Oakland police officer stopped a vehicle occupied by two black men. Shortly thereafter, Officer John Frey was dead; another officer Herbert Heanes, and the driver of the car, Huey P. Newton, were seriously wounded. Huey P. Newton was indicted for murder.
The only information from Officer Frey received over the Police Information Network was that he observed a "known Black Panther vehicle." He requested a "rolling check" on the license number, but reported no violations, and his conversation with the radio operator contained no reference to anything suspicious or unusual about the vehicle or its occupants. Before receiving any information on the requested "rolling check," Officer Frey told the radio operation that he was going to stop the vehicle. The license numbers of vehicles known by the Oakland Police Department to be owned or used by Black Panthers are circulated by the Department to its officers. And ostensibly, the only reason the vehicle was stopped was that it was on the list.
Huey P. Newton is a co-founder and Minister of Defense of the Black Panther Party for Self Defense. One of the purposes for which the Party was formed was to patrol the ghetto to observe the activiities of the police. When Party members observed police making an arrest or otherwise "hassling" ghetto residents, they would stop and, from a short distance, offer advise to the person being arrested concerning his legal rights. As a result of these patrols, observers reported a decrease in police harassment of the general black community but an increase in harassment and arrests of the Panthers themselves. The defendant had personally been harassed, stopped, searched some 40 to 50 times.
Just who shot whom on the morning of October 28 was in dispute. The only weapon recovered from the scene was that of Officer Heanes. Officer Heanes never saw a gun in defendant's hand, and defendant denied having a weapon. (Based on statement in Opening Brief of California v. Newton) *Minimizing Racism in Jury Trials,* p. 1.

jury returned a verdict which was acknowledged by virtually everyone to be a "compromise" — a compromise between the first degree murder conviction demand by the prosecution and the enraged white community, and the complete acquittal demanded by the "Free Huey" forces in the Black community. The jury acquitted Newton of the assault and found him guilty of voluntary manslaughter.

It is primarily with this compromise verdict and the jury selection process used to obtain a jury obviously affected by but not as polarized as the community at large that this work concerns itself. Edited by Ann Fagan Ginger, *Minimizing Racism in Jury Trials* follows the defense of Huey Newton from pre-trial motions to post-conviction appellate brief. The culmination of the herculian task of reducing thousands of pages of transcripts, briefs, and notes into one comprehensive volume, this book is highly recommended as an insightful manual on the tactics and techniques of the brilliant Charles R. Garry, Newton's defense counsel. Having unsuccessfully challenged the composition of the grand jury[6] which returned the indictment and the jury veniremen, he utilized the traditional voir dire[7] to remove the most racist whites from the jury and educated those that remained. In his words "we concentrated on eliminating from the *Newton* jury everyone infected with white racism, either objective or subjective."[8]

Then why wasn't there an acquittal? Why did this voir dire which took over two weeks, consumed some 1500 pages of the trial transcript, involved a panel of 150 prospective jurors result in a "compromise" and not complete exculpation?

CERTAINLY A PART of the answer lies in the fact that, with one exception, Blacks were systematically excluded from sitting on the jury. Of the initial panel only 21 of the 152 jurors examined were Black. Ten of them were challenged for cause because of their opposition to capital punishment. Prosecutor Jensen removed 8 through peremptory challenges. The fact that even one Black was left on the jury can probably be credited to the fact that another judge on the same bench had recently granted a mistrial when the prosecutor used peremptory challenges on every black. Even so, Jensen assured that the token representation was as middle-class as possible.

Were these instances of systematic exclusion the complete answer, then framing a solution to the problems would be relatively simple. One would need only to legislate into being more effective ways of assuring that all segments of the population are included in the veniremen and out of existence the right of the prosecution to peremptory challenges. While both

6. "Very soon after I got into the case I realized that the entire method of picking grand jurors in Alameda County was repugnant to the concept of a 'cross section of the community.' I found that grand jurors were handpicked by superior court judges from among their friends, men and women over 50 years of age from the same background as the judges. I concluded this was justice by cronies of judges, and that it must be challenged. Without a challenge to the method of selecting grand jurors you can not lay the foundation or start to kindle the conscience of the community. Soon a second aspect of the grand jury system came under attack. It angered me when I realized that in a grand jury, the lawyer can not cross-examine prosecution witnesses, as he can in the preliminary hearing when the DA proceeds by information. The district attorney has unfettered discretion, without any giudelines, to pick and choose which cases to file by information and which to bring before the grand jury. It is only a very small number that go to the grand jury where the defendant is hog-tied in this way." id. at xvi-xvii.

7. For a historical discussion of the voir dire see Moore, *Voir Dire Examination of Jurors · I The English Practice*, 16 Geo. L. J. 438 (1928). "Summarizing voir dire use: its proper use is intended to disclose bias, partiality, or indifference among venieremen and to provide information as a basis for cause challenges and to permit the intelligent use of pre-emptory challenges. Exercise of these challenges is a critical element in securing a fair and impartial trial." New Jersey Law Journal, November 26, 1970, at 6, col. 3.

8. *Minimizing Racism in Jury Trial* at xxi.

would constitute definite improvements over the status quo, neither necessarily confronts the more basic issues raised by Garry and Robert Blauner, a sociologist who writes as a partisan for the defense in his essay "Sociology in the Courtroom: The Search for White Racism in the Voir Dire."

While Professor Blauner raises the basic theoretical issues, it is none other than Garry who raises the practical problems. In proposing his own answer to the compromise he says:

> " . . . I was not able within the short period of time that is permitted on voir dire to obtain answers that would convince the judge to eliminate all those persons I was satisfied within myself had elements of racism. The court did not see eye to eye with us in granting challenges for cause based on answers showing white racism. Second, I exhausted all of my twenty peremptory challenges. I would have eliminated at least six of the jurors who sat on the case if I had had any peremptory challenges left."[9]

Considering the length of the voir dire[10] and the limited legal and financial resources of the great majority of black defendants, this admission presents a cogent argument for continuing the search for a more efficient and effective alternative. However, it should be stated at the outset that the court-conducted voir dire, long a hallmark of the federal system[11] and now being adopted by many states,[12] is not an adequate alternative. In addition to the obvious contention that the voir dire should remain adversarial in nature is the fact that in a court-conducted voir dire, the judge in entrusted with the responsibility of selecting "impartial" jurors. No one has yet proven that judges are any less racist than the rest of the society. Thus there is no reason to suggest that the jurors will be any less racist than the judge.

PROFESSOR BLAUNER SUGGESTS that "the most effective way to eliminate white racism in the judgement of a racially-relevant case would be to form a jury of citizens from the racial minority groups . . . [whose] experience as victims of discrimination . . . make them more aware of the totality of circumstances which motivate black and other non-white defendants."[13] As real as the racism, however, is the fact that non-white juries will remain non-existent. Recognizing this, Professor Blauner proposes a four prong "test" which would be used to identify the least racist whites.[14]

9. Id.

10. In the recent trial of Black Panthers Bobby Seale and Erika Huggins the jury selection took over four months with some 1550 prospective jurors called.

11. In 1924 the "Judicial Conference of Senior Circuit Judges" recommended that: "Examination of the prospective jurors shall be by the judge alone. If counsel on either side desires that additional matter be inquired into, he shall state the matter to the judge, and the judge if the matter is (deemed) proper shall conduct the examination." 10 A.B.A.J. 875 (1924). This recommendation was adopted by many courts and was accepted by Congress in 1938 when it enacted Rule 47 (a) of the Federal Rules of Civil Procedure, which rule is paralleled by Rule 24 (a) of the Federal Rules of Criminal Procedure. For a comprehensive discussion of federal practice see Moore, *Voir Dire Examination of Jurors: II The Federal Practice,* 17 Geo. L. J. 13 (1929).

12. See State v. Manley, 54 N.J. 259 (1969). This unanimous landmark opinion by Justice John J. Francis, who before his appointment to the New Jersey Supreme Court was an active trial lawyer with extensive experience with the voir dire, went out of its way to introduce a new rule patterned on the federal practice.

13. *Minimizing Racism in Jury Trials* at 67.

14. "First, I suggested that the least racist person would not deny racial prejudice, but would be aware that he reflected elements of the society's pervasive racism. He would be sensitive to his racist tendencies, would keep them in his consciousness rather than suppress them, and would strive of course to reduce their impact. The second criteria (deals) with knowledge. To effectively combat racism, a white person should not see blacks as "invisible" but be attuned to the social circumstances of the present and the forces in the past which have produced our racial crisis. Thus . . . the least racist whites would have some substantial knowledge of black or race relations history and familiarity with the content and character of Afro-American culture . . . .
The third point (involves) contact and experience with members of the minority group. Since the social

Psychological pre-testing of jurors has been suggested before.[15] Arguably, well-constructed tests, designed to isolate levels of racism, administered independent of a particular trial would be superior to the present voir dire in at least three areas: (1) accuracy, (2) neutrality, and (3) economy. In addition, by broadening the scope of the test so as to isolate other undesirable traits, it may be possible to improve the overall quality of juries.

Blauner, however, strikes directly at the heart of the process. In his words:

> " . . . racial bias cannot be dealt with as some negative property that can be detected through the voir dire. It is so omnipresent in American society that the only means of [even] minimizing it in a predominantly white jury would entail a process of qualifications that would locate that minority of least-racist, who, along with non-whites, would constitute the panel from which the final jury could be drawn."[15]

Professor Blauner approaches the objective of "impartiality" with tremendous skepticism. He points out:

> "A juror who is without any significant biases that are relevant to a case like *People v. Newton* is almost a non-existent animal. Further, such a state of mind [impartiality] might not even be desirable. A man or woman without any preconceptions related to a trial growing out of a confrontation between a black militant and a white policeman would have to be a person of apathy, ignorance, even stupidity . . . "[17]

He concludes that the fiction of impartiality should be discarded as a "cultural lag hopelessly out of tune with reality" and "at war" with what is perhaps the more meaningful objective — a representative panel.[18] The more successful a process is in de-selecting the more partial people, the less likely it is that all segments of the community will be represented.

The very nature of the questions raised by Blauner probably explain the reluctance of the criminal justice system to consider them. With few exceptions, the myth of the "impartial juror" continues unimpeded. With even fewer exceptions purposeful inclusion of black jurors has been rejected. The major response to the extended voir dire has not been its adoption or modification consistent with its objectives. Rather the issue of "court congestion" is being used as an excuse to universalize the federal system of court-conducted voir dire.

It is the "deliberate speed" with which the criminal justice system confronts the problem on racist juries that assures the continued necessity of using the voir dire as a last ditch band-aid measure. *Minimizing Racism in Jury Trials* is an excellent manual for those who heroically attempt this futile surgery.

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and cultural barrier between whites and blacks is a keystone of the racist system, leading a life that is primarily segregated in terms of work, residence, and friendship in itself reflects and maintains white racism . . . .

Finally, I (suggest) that a non-racist must be involved in efforts to combat discrimination and prejudice. Personal, subjective racism can only be eliminated or diminished in the process of undermining the objective racism in the society and its institutions. *Minimizing Racsm in Jury Trials* at 67-68.

15. Psychological Tests and Standards of Competence for Selecting Jurors, 65 Yale L. J. 531 (1956).
16. *Minimizing Racism in Jury Trials,* at 68.
17. Id.
18. Historically, the concept of representativeness predates that of the "impartial jury." In fact, the original jurors were clearly not "impartial" as we understand the term, but were more like modern witnesses and were frequently friends of the accused. An interesting discussion of this area can be found in T. Plucknett, *A Concise History of the Common Law* (1956), at 127.