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History and Criticism of Juror Handbooks as a Method of Orientation

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named in the unrecorded trust agreement was the beneficial owner of all the rents and earnings of the property and the proceeds of any sale of the same.[35]

The issue before the Supreme Court in *Barkhausen v. Continental Illinois Nat'l Bank & Trust Company*[36] was whether or not the trustee was the agent of the beneficiaries of an Illinois land trust. The trust property, when conveyed to the trustee, was subject to a mortgage indenture containing a provision that on conveyance of the mortgaged property, the mortgage obligations were to be assumed by the grantee. When he acquired title, the trustee executed an assumption agreement whereunder as trustee, and not personally, he assumed all the covenants of the mortgagor under the mortgage indenture. The Supreme Court held that this assumption agreement exonerated the trustee from personal liability, but did not so relieve the beneficiaries in the absence of evidence showing that the trustee acted as agent of the beneficiaries in executing the assumption agreement. In short, *Barkhausen* stands for the proposition that the trustee in an Illinois land trust is not the agent of the beneficiary solely by virtue of acting on direction from the beneficiary.

CONCLUSION

This discussion by no means exhausts the myriad advantages available under the Illinois land trust. There are further benefits, such as those in the tax area which are outside the scope of this comment. Suffice it to say, in summary, that the Illinois land trust differs substantially from the more familiar common law land trust in the instances mentioned above.

[35] Ibid., at 43.

[36] 3 Ill.2d 254, 120 N.E.2d 649 (1954).

HISTORY AND CRITICISM OF JUROR HANDBOOKS AS A METHOD OF ORIENTATION

While the use of the jury system in criminal cases is widely approved as an important cornerstone of justice,[1] the inefficiencies and hazards present in its operation have been widely criticized in recent years.[2] One of the

[1] Knox, Jury Selection, 22 N.Y.U.L.Q. Rev. 433, 434 (1947) in which Judge Knox reports the views expressed by the Section of Judicial Administration of the American Bar Association at its meeting in July 1938. "Jury service . . . is the chief remaining governmental function in which lay citizens take a direct and active part, and trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community." Miner, The Jury Problem, 41 Ill. L. Rev. 183 (1946); Sherry, Juries in Criminal Cases, 11 Law Soc. J. 192 (1944); A.B.A. Committee Report, The Judge-Jury Relationship, 23 Ore. L. Rev. 3 (1943).

[2] Broeder, The Functions of the Jury, 21 U. Chi. L. Rev. 386 (1954); Coffin, Jury Trial Tragic But Not Entirely Hopeless, 25 J. Am. Jud. Soc. 13 (1941); Miner, The Jury Problem, 41 Ill. L. Rev. 183 (1946); Richardson, The Jury and Methods of Increasing Its Efficiency, 14 A.B.A.J. 410 (1928); Wicker, Jury Panels in Federal Courts, 22 Tenn. L. Rev. 203 (1952).

most frequently mentioned defects in the jury system is the confusion, delay and uncertainty caused by the "ignorance" of the juror. This "ignorance" is not so much a matter of lack of native intelligence as a deficiency of information about his duties during the legal proceedings.[3]

The typical juror is plucked from his everyday life and thrust into a maze of legal procedure which is undoubtedly confusing to the average person. The terminology used in the courtroom is at least partially incomprehensible to him even in this day of television programs depicting courtroom proceedings. Since jury service is not a frequent experience, there is little opportunity to learn the legal jargon and procedure by personal observation. Obviously, the operation of the jury system is handicapped by this shortcoming in the prospective juror.

What is the solution to this problem? The two methods of enabling the juror to gain the desired information which have been advocated by legal writers are pretrial oral lectures by the court and the distribution of "jury primers" or juror information booklets.[4] "Jury primers" were first introduced in the New York Courts in 1925.[5] Since that time, the use of jury information pamphlets of either the question and answer or narrative types has been adopted in many states and the federal court system.[6] Although no statistical report has been compiled, it is alleged that at least some elevation of the level of juror interest and efficiency has been achieved.[7]

In view of the apparent need for preliminary juror instruction of some sort, it would seem that the juror handbooks would be uniformly accepted throughout the judicial systems. Unfortunately, while the original purpose of the pamphlets was to provide the prospective jurors with a general outline of their duties, the contents of the booklets have touched on subjects

[3] Galston, Civil Jury Trials and Tribulations, 29 A.B.A.J. 195 (1943); Miner, The Jury Problem, 41 Ill. L. Rev. 183 (1946); Richardson, The Jury and Methods of Increasing Its Efficiency, 14 A.B.A.J. 410 (1928).

[4] Carrington, A Handbook For Jurors, 9 Texas L. Rev. 37 (1930); Knox, Jury Selection, 22 N.Y.U.L.Q. Rev. 433 (1947); Richardson, The Jury and Methods of Increasing Its Efficiency, 14 A.B.A.J. 410 (1928); A.B.A. Committee Report, The Judge-Jury Relationship, 23 Ore. L. Rev. 3 (1943); comment J. Crim. L. C. & P. S. 620 (1948).

[5] Primary Lessons For Jurors, 11 A.B.A.J. 289 (1925). Copy of the initial pamphlet contained in 11 A.B.A.J. 401 (1925).

[6] Samples of several types of juror handbooks may be found in People v. Lopez, 32 Cal.2d 673, 677, 197 P.2d 757, 759 (1948); Miner, The Jury Problem, 41 Ill. L. Rev. 183, 187 (1946); Primary Lessons For Jurors, 11 A.B.A.J. 401 (1925); Preliminary Instructions to Jurors, 17 A.B.A.J. 282 (1931).

[7] Miner, The Jury Problem, 41 Ill. L. Rev. 183 (1946); Richardson, The Jury and Methods of Increasing Its Efficiency, 14 A.B.A.J. 410 (1938); A.B.A. Committee Report, 23 Ore. L. Rev. 3, 6 (1943).

and have been distributed in such a manner that they were subjected to criticism by some of the courts.[8]

PRETRIAL ORAL INSTRUCTIONS

The practice of giving preliminary oral lectures to the panel of jurors on their duties was followed long before the introduction of jury handbooks.[9] These remarks were customarily delivered by the court to the entire jury panel after they reported for jury service and prior to voir dire examination.[10] In the earlier cases prior to the adoption of jury booklets, the contents of these lectures varied considerably. Although some judges merely gave a general outline of the duties of a juror,[11] others issued "cautionary instructions" emphasizing the desirability of a speedy trial and the undesirability of a controversy which might lead to a "hung jury."[12] No doubt, in each case, the court merely intended to inform the jurors of a procedure which would increase their efficiency. However, the patent difficulty in phrasing the preliminary instructions in an acceptable manner is all the more formidable when orally given. By a slip of the tongue or poor choice of language, the most well meaning judge can make a statement which will tend to substantially prejudice the rights of the accused to a fair trial.

The state courts have been highly critical of oral dissertations to the jurors, prior to the cases involving oral instructions combined with the

[8] United States v. Gordon, 253 F.2d 177, 188 (C.A. 7th, 1958) (dissent); People v. Lopez, 32 Cal.2d 673, 685, 197 P.2d 757, 766 (1948) (dissent); People v. Schoos, 399 Ill. 527, 78 N.E.2d 245 (1948).

[9] Thomas v. State, 97 Tex. Crim. 432, 262 S.W. 84 (1924); Williams v. State, 89 Tex. Crim. 334, 231 S.W. 110 (1921); Hammet v. State, 84 Tex. Crim. 635, 209 S.W. 661 (1919); State v. Miller, 90 Kan. 230, 133 P. 878 (1913).

[10] People v. Tennant, 32 Cal. App. 2d 1, 88 P.2d 937 (1939); Pugh v. State, 131 Tex. Crim. 169, 97 S.W.2d 200 (1936); Blackshear v. State, 126 Tex. Crim. 417, 72 S.W.2d 601 (1934); People v. Fisher, 340 Ill. 216, 172 N.E. 743 (1930); Thomas v. State, 97 Tex. Crim. 432, 262 S.W. 84 (1924); Williams v. State, 89 Tex. Crim. 334, 231 S.W. 110 (1921); Hammett v. State, 84 Tex. Crim. 635, 209 S.W. 661 (1919); State v. Miller, 90 Kan. 230, 133 Pac. 878 (1913).

[11] People v. Tennant, 32 Cal. App. 2d 1, 88 P.2d 937 (1939); People v. Fisher, 340 Ill. 216, 172 N.E. 743 (1930); Blackshear v. State, 126 Tex. Crim. 417, 72 S.W.2d 601 (1934); Hammett v. State, 84 Tex. Crim. 635, 209 S.W. 661 (1919).

[12] In Pugh v. State, 131 Tex. Crim. 169, 170, 97 S.W.2d 200 (1936), the assembled jury panel was told: "[T]hat in case of disagreement one juror should yield 'his judgment in order to keep from having a hung jury.'" In Williams v. State, 89 Tex. Crim. 334, 23 S.W. 110, 111 (1921), the trial judge instructed the jury: "[T]hat they should pay close attention to the testimony, thereby avoid controversy among themselves touching the statements of the witnesses, and that by thus proceeding a verdict might be reached more speedily and more satisfactorily." In State v. Miller, 90 Kan. 230, 234, 133 P. 878, 880 (1913), the court stated: "[A]nd my experience has taught me that there are more than 100 guilty men who escape to one innocent man convicted."

distribution of jury primers.[13] But they universally refused to regard the remarks as sufficiently prejudicial to warrant reversal. Doubtful remarks have been found not prejudicial because the defense counsel selected a jury satisfactory to the defendant after voir dire examination,[14] or because the court instructed the jurors that its remarks should not be regarded as tending to show guilt or innocence of the accused after the remarks were objected to,[15] or that the contents of the lecture were not prejudicial in general.[16] In one case, a California court stated that: "The outline of the duties by the trial court, although unusual, is within the inherent power of the court in controlling the proceedings."[17]

The preliminary oral remarks referred to above should not be confused with oral instructions given at the time of the charge to the jury. The problem involved in the latter category primarily concerns final instructions which are required by statute to be in writing.[18]

Considering the consistent criticism of preliminary lectures by the court and the previously stated general feeling that some sort of juror education was required to raise their efficiency, the growing trend toward adopting "jury primers" was inevitable.

JURY HANDBOOKS IN THE STATE COURTS PRIOR TO UNITED STATES V. GORDON[19]

The first case in which it was contended that the use of juror handbook constituted bias was *Knight v. State*.[20] In that controversy, the Supreme

[13] The giving of oral preliminary instructions "is not commended, and should be indulged, if at all, with great caution." People v. Fisher, 340 Ill. 216, 247, 172 N.E. 743, 756 (1930); "[T]rial courts should avoid venturing out into broad fields of lectures to juries. . . ." Thomas v. State, 97 Tex. Crim. 432, 262 S.W. 84, 85 (1924); "The practice of lecturing the jury is always fraught with the danger that either the language or the motive of the court may be misconstrued." Williams v. State, 89 Tex. Crim. 334, 231 S.W. 110, 111 (1921).

[14] People v. Tennant, 32 Cal. App. 2d 1, 88 P.2d 937 (1939); People v. Fisher, 340 Ill. 216, 172 N.E. 743 (1930).

[15] Williams v. State, 89 Tex. Crim. 334, 231 S.W. 110 (1921).

[16] Pugh v. State, 131 Tex. Crim. 169, 97 S.W.2d 200 (1936); Blackshear v. State, 126 Tex. Crim. 417, 72 S.W.2d 601 (1934); Hammett v. State, 84 Tex. Crim. 635, 209 S.W. 661 (1919).

[17] The court stated this theory without citation of any constitutional, statutory or judicial authority. It sems to fairly summarize the underlying feeling of the state courts which have passed on preliminary oral lectures to jurors. People v. Tennant, 32 Cal.2d 1, 88 P.2d 937, 940 (1939).

[18] Ill. Rev. Stat. (1929) c. 110, § 73; People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934); People v. Kelly, 347 Ill. 221, 179 N.E. 898 (1931). See People v. Fisher, 340 Ill. 216, 172 N.E. 743 (1930).

[19] United States v. Gordon, 253 F.2d 177 (C.A. 7th, 1958).

[20] 50 Ariz. 108, 69 P.2d 569 (1937). The pamphlet involved was called "Instructions to the Jurors from the Judges of the Maricopa County Superior Court."

Court of Arizona found nothing in the pamphlet which would tend to prejudice the rights of the defendant. Rather, they stated:

> [T]he pamphlet contains some very wholesome and helpful advice to jurors, which if followed, would not only advance the administration of justice but remove many of the objections to and criticisms of the jury system.[21]

The court relied solely on the fact that several other states were already utilizing the handbooks and that the pamphlet in question was based on a copy of a juror handbook being used in the Michigan courts.[22] The general proposition of whether the courts had the authority to issue preliminary instructions was answered, "If anyone has questioned the trial court's right to issue instructions to jurors, we have not been able to locate the case."[23] The court further pointed out that the appellant had advanced no contention of specific prejudice to the defendant's cause. It was inferred that had specific prejudice been proven to result from the distribution of the handbook, a new trial would have been granted.[24]

In *People v. Cowan*,[25] the appellants maintained that the handing out of the pamphlet in another department of the court was a deprivation of the constitutional right of "due process" in that it consisted of instructions given to the jurors outside the presence of the defendants. The court did not pass on the contents of the handbook since it did not appear in the record. The conviction was affirmed primarily because the appellant failed to show even a possibility of prejudice resulting from the distribution of the pamphlets.

> It cannot be assumed that the fact that some or all of the jurors at some other time had been generally instructed as to their duties, or had received other instructions in some other case, would result in a disqualification or would prevent them from fairly acting under and in accordance with the specific instructions given to them in this particular case.[26]

The first judicial recognition that prejudice might result from exposure to a juror handbook came in *People v. Weatherford*.[27] The prospective jurors were given a 15-page pamphlet entitled: "General Instructions Concerning the Duties and Responsibility of Trial Jurors in the Criminal Departments of the Superior Court of Los Angeles County, California. *Read and Study Them Carefully*."[28] The appellate court reversed a con-

[21] Ibid., at 572.

[22] Ibid., at 573; Kansas, Michigan, New York and Washington.

[23] Ibid., at 573.

[24] At this early stage, no consideration was given to the objections that the pamphlets impinged on the right of the accused to trial by jury or invaded the legislative prerogative.

[25] 44 Cal. App. 2d 155, 112 P.2d 62 (1941).

[26] Ibid., at 160, 65. [27] 160 P.2d 210 (1945). [28] Ibid., at 216 (emphasis supplied).

viction for murder on the following grounds: (1) That the contents of the pamphlet were not a mere "short summary of the general duties of Jurors" but detailed instructions on matters of law;[29] (2) that since all instructions to the jury were required to be in writing by statute, the fundamental constitutional rights of the defendant were violated;[30] and (3) that since certain statements in the pamphlet were found to be wholly inapplicable to a murder case, the court refused to assume under the circumstances that the statements were not confusing, misleading and prejudicial.[31] The court in comparing the *Cowan* case emphasized that the contents of the pamphlet in that case were not examined because it did not appear in the record.[32]

Less than two months later, the Supreme Court of Washington refused to overrule a denial of a motion for new trial because the mere availability of a juror handbook was not prejudicial.[33] The appellant failed to show that the pamphlet had even been seen by any of the jurors. Further, counsel had full knowledge of the existence of the pamphlet prior to the verdict and had failed to call it to the court's attention prior to entry of the verdict. The question as to whether the pamphlet itself might be prejudicial was not decided.[34]

In *People v. Schoos*,[35] the Illinois Supreme Court examined a "jury primer" closely. A conviction for armed robbery was reversed and remanded on the reasoning that the trial court had prejudiced the rights of the appellant by personally distributing the "jury primers" accompanied by an oral admonition that: "I may want to interrogate you on the principles and propositions contained therein."[36] All the jurors did, in fact, read and study the "primer" and listen to the lecture and admonition by the trial court.

The court's objections to the handbook were two: First, that many of the statements in the "primer," while they might not be misleading to a lawyer, would "most assuredly" be misleading to a layman;[37] and, second,

[29] Ibid., at 217.

[30] Cal. Const. Art. 6, § 4½; Cal. Penal Code §§ 1047, 1127.

[31] The court specifically pointed out the following: "A verdict of guilty does not necessarily mean a term of imprisonment in the state prison, but may, in some cases, result in a county jail sentence, a fine, or proceedings under the provisions of the probation law." People v. Weatherford, 160 P.2d 210, 212 (1945).

[32] Ibid., at 216, 217.

[33] State v. Cooney, 23 Wash. 2d 539, 546, 161 P.2d 442, 446 (1945).

[34] Ibid.

[35] 399 Ill. 527, 78 N.E.2d 245 (1948). A copy of the booklet written and used by the court may be found in: Miner, The Jury Problem, 41 Ill. L. Rev. 183 (1946); comment in 38 J. Crim. L.C.&P.S. (1948); noted in 62 Harv. L. Rev. 139 (1948).

[36] 399 Ill. 527, 530, 78 N.E.2d 245, 247 (1948).

[37] Ibid., at 531, 247.

that the use of the handbook deprived the appellant of his constitutional right to trial by jury as guaranteed at common law. It was stated that by requiring the jurors to read and absorb the contents of the pamphlet, the court was disqualifying jurors who would otherwise be qualified under the legislative scheme.[38]

About six months after the *Schoos* decision, the California Supreme Court, in *People v. Lopez*,[39] confirmed a conviction for assault with a deadly weapon in spite of the defendant's contention that the distribution of a jury booklet entitled "General Instructions" constituted instruction of the jurors outside the presence of the appellant and his counsel. No claim was made that any part of the pamphlet contained erroneous statements of law. Nor was it proven that any of the jurors had read the handbook.[40]

The majority opinion in the *Lopez* case met the constitutional question squarely. It stated: (1) The pamphlet was intended to be merely a general outline on juror duties and not the instructions that were required by statute to be given the jury at the close of the trial; (2) that neither the letter nor the spirit of the California Constitution required the keeping of prospective jurors in a state of ignorance concerning general preliminary information which makes them more able to perform their duties; and (3) that the constitutional guaranty is sufficiently preserved where the trial court instructs the jury as to the problems of the individual case in the presence of the defendant.[41]

The dissenting opinion disputed the propositions set out by the majority. It criticized specific sections as being incorrect statements of the law. Further, the claim that the instructions were merely general advice to the jurors was incorrect in that "[t]hey go into great detail on many questions of the value of various kinds of evidence and the like."[42] The minority emphasized that since the booklets were issued by an attaché of the court, it is probable that the recipient would feel duty bound to study them thoroughly. And since the prospective juror would have more time to study the "General Instructions" than the specific instructions by the court, the former would be more deeply impressed upon his mind.[43]

The use of jury booklets was inferentially approved in *Klettke v. State*.[44] The point directly in litigation was the giving of oral pretrial indoctrina-

[38] Ill. Const. Art. II, § 5; Ill. Rev. Stat. (1947) c. 78, § 2; People v. Schoos, 399 Ill. 527, 78 N.E.2d 245, 251 (1948).

[39] 32 Cal. 2d 673, 197 P.2d 757 (1948).

[40] Copy of the pamphlet used set out in full in People v. Lopez, 32 Cal. 2d 673, 677, 197 P.2d 757, 759 (1948).

[41] Cal. Const. Art. I, § 13.

[42] People v. Lopez, 32 Cal.2d 673, 676, 197 P.2d 757, 760 (1948).

[43] Ibid., at 676, 760.

[44] 223 P.2d 787 (1950).

tion, but the court approved any type of juror instruction of a general nature.

In summary, prior to 1958, Arizona and California had generally approved the use of juror handbooks with Washington and Oklahoma indicating that the distribution and use would be approved if the question was raised.[45] Only Illinois had specifically disapproved the use of a "jury primer" as being a departure from the statutory scheme for qualification of jurors.[46] It should be noted that the point of whether the handbooks constituted impingement on the right to trial by jury was raised only in California and Illinois where the decisions were squarely contradictory.[47] The "inherent power" of the courts to give general written instructions appears to have originated in *Knight v. State*[48] simply because there had been no decisions on the point prior to that time. No doubt, any of these five states would have granted a new trial if specific prejudice of a substantial nature could have proven to result from the use of a juror handbook.

THE GORDON CASE

The juror handbook question was presented for the first time in a federal court in *United States v. Gordon*.[49] Because this is the basis for all the later decisions in both the federal and state courts, it should be subject to the closest scrutiny.[50]

The petit juror handbook used in the federal district courts at the option of the court was severely criticized by a three judge panel in the original *Gordon* opinion rendered on July 16, 1957. Subsequently, on petition of the United States, a rehearing *en banc* on the handbook question was granted. Upon rehearing, the court reversed itself on the handbook issue by a vote of three to two. The first opinion was stricken with respect to the ruling on the handbook and the opinion rendered on rehearing was substituted.[51]

[45] People v. Lopez, 32 Cal.2d 673, 197 P.2d 757 (1948); Knight v. State, 50 Ariz. 108, 69 P.2d 569 (1937). Accord: Klettke v. State, 223 P.2d 787 (1950); State v. Cooney, 23 Wash.2d 539, 161 P.2d 442 (1945).

[46] People v. Schoos, 399 Ill. 527, 78 N.E.2d 245 (1948).

[47] People v. Lopez, 32 Cal.2d 673, 197 P.2d 757 (1948); People v. Schoos, 229 Ill. 527, 78 N.E.2d 245 (1948).

[48] Knight v. State, 50 Ariz. 108, 69 P.2d 569 (1937).

[49] 253 F.2d 177 (C.A. 7th, 1958).

[50] Horton v. United States, 256 F.2d 138 (C.A. 6th, 1958); United States v. Mathison, 256 F.2d 803 (C.A. 7th, 1958); United States v. Allied Stevedoring Corporation, 258 F.2d 104 (C.A. 2d, 1958); Ferrarra v. State, 101 So. 2d 797 (1958); People v. Izzo, 14 Ill.2d 203, 151 N.E.2d 329 (1958).

[51] 253 F.2d 177 (C.A. 7th, 1958). The initial panel was composed of Judges Finnegan, Major, and Schnackenberg. Prior to rehearsing, Judge Major who wrote the original opinion retired. The rehearing en banc was before Chief Judge Duffy and Judges Finnegan, Hastings, Parkinson and Schnackenberg.

The pamphlet in question had been given to the prospective petit jurors upon reporting for service. They were told that it was a "nice jury book and they should read it."[52]

The majority opinion, written by Judge Parkinson, concerned itself primarily with the method of objection to the distribution of the pamphlet by challenging the array. It was held that the proper manner of discovering possible bias of the jurors by the handbook was a challenge to the polls for cause. The court stated that in absence of such a challenge for cause, the defendant had waived his right to disqualify any juror on grounds that he was prejudiced as a result of exposure to the juror handbook.[53]

Chief Judge Duffy, in a concurring opinion, proclaimed that: (1) Nothing in the contents of the handbook or the manner of distribution of it was "[A]n impingement upon the jury system or an invasion of the prerogatives of the legislative branch of the government;"[54] (2) that the pamphlet was not meant by its authors to be more than a broad orientation of jurors to their duties and not an all inclusive treatise of criminal and civil law;[55] (3) if the handbook is considered as a whole, there is no basis for claiming that it contained prejudicial error in the instant case; and (4) that the Judicial Conference of the United States was acting within its statutory authority in ordering the issuance of the handbook.[56]

Judge Finnegan, concurring as to the reversal of the conviction but dissenting as to the handbook issue, quoted *in extenso* from the original opinion. He maintained that: (1) The challenge to the array was sufficient to preserve the handbook question for review under Federal Rule 52(b);[57] (2) the pamphlet purported to inform the juror as to procedure and the rights of a person in both criminal and civil cases, and in doing so, it was

[52] Ibid., at 184. In conversation on February 11, 1959, Mr. Roy H. Johnson, Clerk, Northern District Court, Illinois stated that the handbook was immediately withdrawn from use after the Gordon trial upon direction of the court and its use has not been resumed.

[53] Chitty's Criminal Law, 5th American Edition, Vol. I, pp. 535(a) to 539; Cooley's Blackstone, 3rd Edition, Vol. II, pp. 357 to 359.

[54] U.S. Const. Amend. VI; 28 U.S.C.A. § 1861 (Supp., 1958); Ill. Rev. Stat. (1957) c. 78, § 2; Patton v. United States, 281 U.S. 276 (1930); Capital Traction Company v. Hof, 174 U.S. 1 (1898).

[55] United States v. Gordon, 253 F.2d 177 (C.A. 7th, 1958). The handbook was prepared by a committee of five eminent federal district court judges appointed by Chief Justice Harlan Stone. After revision, it was submitted to the Judicial Conference of the United States which approved it and authorized the Administrative Office to have it printed and distributed.

[56] 28 U.S.C.A. § 331 (Supp., 1958); 28 U.S.C.A. § 604 (Supp., 1958).

[57] 18 U.S.C.A., Federal Rules of Criminal Procedure, Rule 52 provides: "(b) Plain Error—Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

defective in that some of the statements made were incorrect and, more important, in the statements that were omitted;[58] (3) that distribution of the handbook constituted impingement on the right of the accused to trial by jury in that it required jurors to be especially educated for the trial;[59] (4) the issuance of the pamphlets was an invasion of the prerogatives of Congress in that it made juror qualifications other than those required by statute;[60] and (5) the Judicial Conference of the United States cannot go beyond issuing recommendations and suggestions under the statute which created it. It acted beyond its power in authorizing the Administrative Director to issue the handbooks.[61]

THE IMPACT OF THE GORDON CASE

In view of the strong conflict in the *Gordon* case, one would expect some efforts to "cop a plea" by advancing the contentions of the dissent.

In *Horton v. United States*,[62] handbooks were distributed to members of the jury prior to the trial. The defense counsel, in moving for a new trial, alleged that the use of the handbook was unknown to him at the time of the trial. His argument used the substance of the *Gordon* dissent and asserted that the discovery of the distribution of the pamphlet was new evidence sufficient to warrant a new trial because of prejudice. The motion was denied and upon appeal the trial court's ruling was affirmed, relying on the majority reasoning in *Gordon*. The Court of Appeals declared:

> [I]n dealing with the charge of prejudice, we do not consider it in a vacuum, out of context and disassociated from attendant circumstances. There was no showing that any member of the jury had read the handbook.[63]

In addition, the court pointed out: "To say that the challenged statement impinged upon the independent judgement of the jurors would . . . *open the door to innumerable appeals*. . . ."[64]

[58] Particular criticism was leveled at the following statement: "A verdict of guilty does not necessarily mean that the defendant will receive a long sentence or that he will be required to serve any sentence at all. The Judge may impose such sentence as appears to him to be just with the limits fixed by law or in a proper case he may suspend sentence and place the defendant on probation." United States v. Gordon, 253 F.2d 177, 190 (C.A. 7th, 1958).

[59] U.S. Const. Amend. VI; 28 U.S.C.A. § 1861 (Supp. 1958); Ill. Rev. Stat. (1957) c. 78, § 2.

[60] Ibid.

[61] 28 U.S.C.A. §§ 331, 604 (Supp. 1958); Judge Hastings concurred with Chief Judge Duffy and Judge Parkinson without separate opinion. United States v. Gordon, 253 F.2d 177, 189 (C.A. 7th, 1958). Judge Schnackenberg concurred substantially with Judge Finnegan's dissent on the handbook issue. Ibid., at 191.

[62] 256 F.2d 138 (C.A. 6th, 1958).

[63] Ibid., at 142.

[64] Ibid., at 143.

In *United States v. Mathison*,[65] appellant, relying on the original opinion in *Gordon*, moved to vacate sentence. The motion was denied and, upon appeal, the Court of Appeals affirmed the ruling. The decision was based on the second *Gordon* opinion and the fact that the appellant had in no way raised the point during the trial.

The handbook issue arose again in *United States v. Allied Stevedoring Corporation*[66] where the pamphlets were not distributed to the prospective jurors, but one of the trial jurors studied a pamphlet which he possessed from a previous term of jury service. He correctly advised his fellow jurors, while in deliberation, concerning the matter of whether the jury could recommend leniency for one of the defendants. The jury did not rely on this advice, but sought and received special instructions from the court on this point. A motion for retrial based on the contention that the use of the pamphlet denied a fair trial was denied. Upon appeal, the ruling was affirmed, citing the *Gordon* case. It was pointed out that the jury was not, in fact, influenced in any way.[67]

The "jury primer" was commented on by the Supreme Court of Illinois in *People v. Izzo*.[68] It was a murder case and the jurors were given oral remarks outlining their duties prior to voir dire examination. No handbook was used. In his extemporaneous dissertation, the trial judge misstated several things, none of which were found to prejudice the rights of the accused to trial by jury. The court stated, "[N]o litigant has a right, constitutional or otherwise, to have his case tried before ignorant jurors."[69] Even though the handbook question was not involved, the court, in dicta, stated that on the subject of "jury primers," it reversed the decision in *People v. Schoos*.[70]

The first litigation of the handbook issue in Florida was in *Ferrarra v. State*.[71] After examining the pamphlet, it was held that it did not change the local juror qualifications nor did it constitute a premature charge. The court rejected the argument that the booklet was a premature charge because it found no statements therein that "could be dignified as charges on questions of law."[72]

CONCLUSION

From the foregoing discussion, there can be no justifiable doubt that there is a need for some specie of orientation to prepare jurors to do an

[65] 256 F.2d 803 (C.A. 7th, 1958).

[66] 258 F.2d 104 (C.A. 2d, 1958). Noted in 107 U. Pa. L. Rev. 115 (1958).

[67] United States v. Allied Stevedoring Corporation, 258 F.2d 104, 107 (C.A. 2d, 1958).

[68] 14 Ill. 2d 203, 151 N.E.2d 329 (1958).

[69] Ibid., at 209, 334.

[70] Ibid. But cf. People v. Schoos, 399 Ill. 527, 78 N.E.2d 245 (1948).

[71] 101 So.2d 797 (1958).

[72] Fla. Stat. (1955) §§ 40.01(3), 918.10; Ferrarra v. State, 101 So.2d 797, 801 (1958).

intelligent and efficient job. Oral instructions by the court are not a good solution to the problem. They are subject to the difficulties inherent in any extemporaneous speech. A slip of the tongue, poor phrasing or the unconscious insertion of a loose or erroneous statement of the law is infinitely more likely to occur when oral preliminary indoctrination is attempted.

A close examination of the leading cases on the juror handbook question discloses the principal objections to them to be the following: (1) The contents attempt to cover too much ground in legal procedure and evidentiary matter; (2) they have almost uniformly phrased certain statements poorly; (3) by *requiring* the distribution and use, either expressly or impliedly, the courts preempt the power of the legislature to control the qualifications required of jurors and impinge upon the constitutional right to trial by jury; and (4) the primers constitute premature charges outside the presence of the accused.

With all proper deference to the extremely learned members of the judiciary who have drafted the various handbooks, it must be pointed out that some of the context has been objectionable in phrasing. That there has been criticism from several federal judges and supreme court justices of two of the larger states in the Union reinforces this view. It would be relatively easy to remedy this situation by avoiding the previously criticized pitfalls in future editions.[73]

The contention that a juror handbook constitutes a premature charge outside the presence of the accused has been properly denied by all courts passing on it. This theory has little efficacy if the contents of the booklets do not contain the oft contested statements.

The most knotty objection is that of impingement on the jury system and invasion of the prerogatives of the legislatures to set up minimum qualifications for jurors. It is a dead issue for the time being, but may possibly be resurrected at some future time.

Three suggested cures are: (1) Elimination of the practice of placing symbols of the court's authority and statements to the effect of "read this or else" on the covers and frontispieces of the pamphlets should overcome the criticism that there is an express or implied command to assimilate the proffered information; (2) if need be, the "primers" should be printed under the auspices of the American Bar Association or the local bar association to remove any doubts as to the preempting of the legislative prerogative; and (3), the most extreme and surest cure would be to amend the statutory juror qualification to state that the distribution and use of the handbooks are within the power of the courts.

[73] Handbook on Jury Service, with a special preface by Judge Bolitha J. Laws, United States District Court, Washington, D.C. Published for the Institute of Judicial Administration by Oceana Publications, Inc.