

1977

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Recommended Citation

Jon Van Dyke, *Selecting a Jury in Political Trials*, 27 Case W. Res. L. Rev. 609 (1977)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol27/iss3/3>

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Selecting a Jury in Political Trials*

*Jon Van Dyke***

Because juries exercise the controversial power of tailoring static law to the exigencies of a particular case, it is imperative that the jury constitute a cross-section of the community. Impaneling a representative jury is even more difficult, and more critical, in a highly publicized political trial. Professor Van Dyke examines the justifications for the defendant's use of social science techniques to scrutinize prospective jurors, and finds that such practices sometimes lead to public doubt about the impartiality of the jury's verdict. He concludes that although some defense attorneys may be obliged to survey the attitudes of potential jurors to overcome biases in the jury selection process, the interests of justice would be better served if the lists used to impanel jurors were more complete, if fewer excuses and challenges were allowed, and if (as a result) the resulting jury more accurately reflected the diversity of the community.

I. INTRODUCTION

IMPANELING AN IMPARTIAL JURY in a trial that has received extensive media attention presents problems, especially if it is a political trial, which can be loosely defined as a trial in which political issues, activities, or personalities are central to the case. Because all the participants approach a political trial with combative positions, legal institutions and safeguards are strained and often become vulnerable to manipulation at a time when strength, stability, and impartiality are most needed. The jury, which is given the ultimate decisionmaking authority in criminal trials "in order to prevent oppression by the Government,"¹ is taxed when the glare of public-

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1. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

ity and clash of ideologies combine in a courtroom confrontation. A representative jury is essential in these trials because only a group representing a broad spectrum of viewpoints can resolve the conflicting evidence in a manner that truly reflects the community's consensus and because only the judgment of such a broad-based body will be accepted as legitimate by all the competing factions. Sensational criminal trials present many of the problems of political trials.

II. JURY NULLIFICATION

It is usually in political trials that the jury has the opportunity and the motivation to give its own reading not only of the facts but of the law as it is to be applied in the particular situation.² The jury's right to render its decision according to its convictions (not merely according to the judge's instructions on the law) was established in the trial of William Penn and William Mead in 1670.³ The most famous American case of the jury's use of this power, which is frequently called "jury nullification," came in the 1735 trial of John Peter Zenger, who had printed material not authorized by the British mayor of New York and was accused of "seditious libel." Although Zenger had clearly violated the law, the jury refused to convict, following the advice of Zenger's lawyer that they "have the right beyond all dispute to determine both the law and the facts."⁴ This right was well established by the end of the eighteenth century. In 1794, for instance, John Jay, Chief Justice of the Supreme Court, explicitly told a panel of jurors when he was sitting as a trial judge that they had the right "to determine the law as well as the fact in controversy."⁵

But in the nineteenth century, several prominent judges, apparently not accepting the idea that a jury can logically be given the right to mitigate the severity of the law without also having the power to create laws (which clearly is not the jury's role), refused to tell the jury of its power to nullify,⁶ and this refusal was approved by the Supreme Court in 1895.⁷ The jury in fact still has the power to judge the law and the facts—since acquittals by a jury cannot be appealed on any grounds—but most judges will not inform jurors of this power. Most often, judges will instruct jurors that they have

2. J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 225-51 (1977).

3. *Id.* at 5.

4. J. ALEXANDER, A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER 78 (1963).

5. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

6. *United States v. Morris*, 26 F. Cas. 1323, 1331 (C.C.D. Mass. 1851) (No. 15,815); *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1851) (No. 14,545).

7. *Sparf and Hansen v. United States*, 156 U.S. 51 (1895).

the power only to decide the facts, not the law, and must accept the law as stated by the judge.

The controversy over jury nullification has been renewed in recent years,⁸ and in two states (Indiana and Maryland), judges still specifically inform jurors of their authority to nullify the law in appropriate cases.⁹ Chief Judge David Bazelon of the United States Court of Appeals for the District of Columbia Circuit believes that jurors should be told that part of their job is to pass judgment on the equity of applying the law to the defendant charged in the particular case:

The [jury nullification] doctrine permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice. The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is "unlawful" but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury—as spokesman for the community's sense of values—that must explore that subtle and elusive boundary. . . . The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed.¹⁰

The Supreme Court has not considered the jury nullification doctrine directly since their 1895 decision, but the Court has in a number of recent cases recognized the jury's role as the community's conscience and has recognized its importance as a law-making body.¹¹ Perhaps the most telling clue to the Court's view of the jury's role is contained in the following passage from a 1968 opinion written by Justice Potter Stewart:

[O]ne of the most important functions any jury can perform in making such a selection [between life and death] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment

8. See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *United States v. Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972); *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972); *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969). See also Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481 (1968); Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976); Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW. 224 (1970).

9. In both Indiana and Maryland, nullification has constitutional underpinnings. IND. CONST. art. I, § 19, *construed in*, *Holliday v. State*, 254 Ind. 85, 257 N.E. 2d 679 (1970); *Pritchard v. State*, 248 Ind. 566, 230 N.E. 2d 416, 421 (1967); MD. CONST. art. 15, § 5, *construed in*, *Wyley v. Warden*, 372 F.2d 742, 743 n.1 (4th Cir. 1967).

10. *United States v. Dougherty*, 473 F.2d 1113, 1142 (D.C. Cir. 1972).

11. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."¹²

The necessity of impaneling a jury that fairly represents the community in cases where the jury may consider the law as well as the facts cannot be overemphasized.

The parties to political trials clearly realize the importance of jury selection. The methods of selecting juries for these trials have been almost as well publicized as the trials themselves. The prosecution's use of the Federal Bureau of Investigation to investigate prospective jurors and the defense's use of sophisticated psychological and sociological techniques have raised serious questions about the whole process of jury selection, particularly the appropriateness of challenges. Prospective jurors have been so studied, scrutinized, and judged that the juries in some of these trials cannot by any stretch of the imagination be considered a randomly selected cross-section of the community.

This extensive investigation has some justification, to be sure. In well-publicized cases, the government often has advantages that it does not always possess in run-of-the-mill cases. One, of course, is publicity and the feelings it can stir against defendants who hold unpopular views. Two others are picking the location of the trial and sequestering the jury, which can affect the jury in ways that render it more likely to favor the government.

III. PUBLICITY

In political trials, both the prosecution and the defense tend to argue in the court of public opinion before the trial even begins. The public first learned about the Harrisburg Seven case when F.B.I. director J. Edgar Hoover, testifying before Congress in November 1970, told his astounded listeners of a plot by members of the "East Coast Conspiracy to Save Lives" to kidnap Henry Kissinger and hold him hostage until the end of the Vietnam War.¹³ Hoover's statement made headlines across the country, and Hoover was put under some pressure to deliver evidence. Shortly thereafter, indictments were issued, once again accompanied by massive publicity.¹⁴

Some government attempts to mold public opinion backfire, and sometimes the defense can compete successfully with the government in the

12. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

13. *N.Y. Times*, Nov. 28, 1970, at 1, col. 1.

14. See generally J. NELSON & R. OSTROW, *THE FBI AND THE BERRIGANS: THE MAKING OF A CONSPIRACY* (1972); W. O'Rourke, *THE HARRISBURG 7 AND THE NEW CATHOLIC LEFT* (1972).

forum of media manipulation. Take the case of the Milwaukee Fourteen. In September 1968, this group, which earned its sobriquet after its arrest, raided a Selective Service office in Milwaukee and burned draft files. They were accused by the state of Wisconsin of burglary, theft, and arson and were convicted after a trial marked by widespread and often hostile media coverage. The defendants themselves issued press releases and encouraged publicity. Subsequent federal charges filed against them were dismissed by the federal district judge after he had questioned 137 prospective jurors and determined that they were so prejudiced that an impartial jury could not be selected (the dismissal was upheld on appeal).¹⁵ Similarly, the 1970 murder charges against Black Panther leaders Bobby Seale and Ericka Huggins in New Haven were subsequently dismissed after one jury was unable to reach a unanimous verdict. The judge ruled that an unbiased jury could not be selected without "superhuman efforts which this Court, the State and these defendants should not be called upon either to make or to endure."¹⁶ Selection of the first trial jury had taken four months and had required the examination of about 1,100 prospective jurors. Then, on the trial's opening day, J. Edgar Hoover had called the Panthers "the most dangerous group in America."¹⁷

IV. THE TRIAL SITE

In some political trials, the federal government has used its power to select trial locations in a way that has seemed to increase rather than reduce the prejudice to the accused. In cases of national scope, several trial sites are usually available, and the federal government seems to have tried to choose locations with populations that are most receptive to the government's position.

The trial of Dr. Benjamin Spock, Rev. William Sloan Coffin, and three other antiwar activists in 1968 could have been brought in New York or Washington, D.C., but the government chose Boston—where it expected and obtained a more conservative jury panel and a more conservative judge. The government was also able to obtain a jury venire containing virtually no women to try Doctor Spock, who wrote the most popular book on child care ever published. According to reports, the government somehow persuaded the jury clerk to slip down to the next name whenever he came across a woman.¹⁸ The 1972 trial of the Harrisburg Seven could have been held in

15. See 1970 Wis. L. REV. 209.

16. N.Y. Times, May 1, 1971, at 1, col. 5.

17. See D. FREED, *AGONY IN NEW HAVEN: THE TRIAL OF BOBBY SEALE, ERICKA HUGGINS AND THE BLACK PANTHER PARTY* (1973).

18. Zeisel, *Dr. Spock and the Vanishing Women Jurors*, 37 U. CHI. L. REV. 1 (1969).

Philadelphia, New York, or Rochester—which were all mentioned as locations of draft boards that had been raided—or in Washington, D.C., where the defendants allegedly interfered with heating tunnels and planned to kidnap Henry Kissinger. But the government chose the Middle District of Pennsylvania. Even within this district, the government had a choice of three sites: Lewisburg (a college town and site of the federal prison), Scranton (containing a high proportion of Catholics, Democrats, and militant mine workers), or Harrisburg, the site chosen (with its high proportion of Republicans, a low proportion of Catholics, a high proportion of fundamentalist religious sects and war-related industries).¹⁹ For the Pentagon Papers Trial of Daniel Ellsberg and Anthony Russo in 1973, the government chose Los Angeles—rather than the other possible sites of Boston, New York, or Washington—probably because of Southern California's heavy concentration of defense industries. At one point during the selection of the first jury in July 1972, all 16 prospective jurors picked by lot for preliminary questioning admitted to a personal or family connection, past or present, with the military or a defense industry.²⁰

The defense can request a change of venue, but such requests are not necessarily granted. In the 1975 Joan Little case, the defense successfully moved to have the trial held in another county after surveying residents of the area in which the stabbing took place and finding that virtually everyone thought the defendant guilty.

V. SEQUESTRATION

Sequestration, like selection of a presumably pro-government trial site, also has the potential of affecting the jury's makeup. In plain language, "sequestration" means that the jurors are kept in the custody of the government until they are officially released by the judge, a process that can raise the possibility of prejudice to the defendant and access to the jury by the government. This procedure is used to insulate the jurors from publicity about the trial and information about the defendants that is not admissible into evidence. These objectives are important, but it is also important to realize that when juries are to be sequestered the number of excuses for hardship is increased dramatically, and the representativeness of the resulting jury is affected.

In all cases, jury service is a hardship because of the loss of time and the inadequate pay, but in a protracted trial, this hardship is likely to be substantially more severe, making it that much more difficult to impanel a jury

19. Tavis, *Introduction* to Schulman, Shaver, Colman, Emrich, & Christie, *Recipe for a Jury*, *PSYCH. TODAY*, May 1973, at 37-38.

20. *N.Y. Times*, July 16, 1972, § 4, at 12.

that is representative of the community. Employed persons, particularly those who work at lower-paying or hourly-paid jobs, are unlikely to be able to spare the time to serve on a long trial because the compensation for jury duty is so small. When the jury selection for the first Watergate bugging trial began in January 1973, 100 of the 250 persons summoned for jury duty asked to be (and were) summarily excused after Judge John J. Sirica announced that the jury would be sequestered during the trial.²¹ The same result occurred when Judge Sirica was impaneling the jury in October 1974 for the major coverup trial.²²

Once a panel of jurors who can serve for a long trial is assembled, the problem of impartiality remains because the jurors are cut off from the outside world during sequestration except for the contacts that are authorized by the government. For the period of the trial, the government censors the news for the jurors. Jurors may blame the defendant or the prosecutor for their temporary incarceration or resent being locked up while the defendant is allowed to be free.

The government may even try to curry favor with the jurors by indulging their desires. One juror after the 1968 *Spock* case described how the federal government took care of him during sequestration: "We had entertainment—always the best—food always the best, martinis before dinner, the government spared no expense to see that our life was as pleasant as possible. I gained twelve pounds during the trial. We went to the best restaurants and so forth."²³ Another juror was specially escorted by two marshals during the trial to see his son play rugby. The possibility that jurors will feel grateful to the government for such attention may conceivably translate itself into a pro-government bias.

Personality problems that can affect the verdict one way or the other can arise when jurors are sequestered together for a long period of time. When the time for deliberation arrives, the jurors may not be speaking as individuals with different perspectives, coming from different parts of the community, because they may have formed strong relationships with other jurors. Federal District Judge Ray McNichols wrote a report on sequestration for the Committee on the Operation of the Jury System in which he raises this problem:

A more insidious problem may lurk in the background of the practice of isolating 12 to 18 peers, chosen as a representative cross section of their society, from their regular routine and habitat for relatively long periods of time. Nothing suggests to the writer that any definitive study has been made of the psychological impact on

21. San Fran. Chronicle, Jan. 9, 1973, at 8.

22. N.Y. Times, Oct. 2, 1974, at 22 (city ed.).

23. J. MITFORD, *THE TRIAL OF DR. SPOCK* 226 (1973).

an individual or a group of individuals exposed to this experience. Only an educated curiosity forms a basis for posing the problem, and no solution is here proposed. *One wonders, nevertheless, what personality or character changes might occur in the panel during a seven months' virtual isolation [as occurred in the Manson trial] from normal day to day existence.*²⁴

Juries sequestered for shorter periods may form into small factions, and when the deliberations begin, jurors may have teammates who support their arguments. The jury sequestered for the 1974 Mitchell-Stans trial was invited during the trial by juror Andrew Choa to his office for a private screening of a movie, and he—the only affluent member of the jury—provided other small treats during their period of confinement, thus enabling him to assume a dominant role when the discussion began.²⁵

Sequestration sometimes does, of course, fulfill its intended purpose of insulating the jurors from improper influences. The defense in the trial of the Harrisburg Seven had originally opposed sequestration but concluded later it helped their side.²⁶ Post-verdict interviews with seven of the jurors (who substantially acquitted the Seven) revealed that the pressure from friends, relatives, the community, and the media—all of whom assumed the defendants were guilty—might have proved irresistible.

Sequestration is a device used to enable the court to conduct a fair trial without putting limits on the freedom of the press, and because of these competing interests, it is sometimes justified. Its use always raises problems, however, and it should be understood that when a jury is sequestered it is less likely to be representative and that, despite the fact that sequestration is intended to eliminate outside influences on the jury, it may exert its own influences.

VI. SOCIAL SCIENCE AND JURY SELECTION

To overcome the government's common advantage in highly publicized trials, defense lawyers have been approaching jury selection in a more sophisticated way, drawing upon the knowledge of psychologists and sociologists to help choose the ultimate jury panel. It is in the voir dire that defense lawyers have concentrated a great deal of their attention and energy, in part as a response to the government's use of the F.B.I. to investigate prospective jurors,²⁷ which was done in the *Spock* and *Harrisburg* cases.

24. R. McNichols, Preliminary Report on the Sequestration of Jurors (1971) (unpublished report in Administrative Office of the Federal Courts, Wash., D.C.).

25. N.Y. Times, May 26, 1974, § 4, at 15; *id.*, May 15, 1974, at 41 (city ed.).

26. Schulman, Shaver, Colman, Emrich & Christie, *Recipe for a Jury*, PSYCH. TODAY, May 1973, at 82-83 [hereinafter cited as Schulman & Shaver].

27. J. MITFORD, *supra* note 23, at 99-100, 217. Use by the prosecutor of information on prospective jurors collected and supplied by the F.B.I. has been upheld on the ground that it

Generally, the defendants have no opportunity to obtain this information.²⁸ The methods used by the defense—and by the prosecution when it employs the F.B.I.—raise serious questions about the integrity of the selection process. A look at the work by the defense teams in the trials of Angela Davis, the Harrisburg Seven, John Mitchell and Maurice Stans, and Joan Little brings into focus the problems of detailed questioning and challenging.²⁹

Angela Davis's chief defense attorney, Howard Moore, enlisted the services of a team of black psychologists to help choose a sympathetic jury.³⁰ During the two-and-a-half weeks that the jury was being selected, the psychologists visited the courtroom each day in teams of two, and during every break and each evening they would meet with defense attorneys to share their impressions. Verbal responses to questions and nonverbal indications of personality and disposition were studied and evaluated. Often the psychologists suggested a line of questions to be pursued by the lawyers. When a jury panel was finally selected, Angela Davis rose and stated to the court: "Although I cannot say that this is a jury of my peers, I can say that, after much discussion, we have reached the conclusion that the men and women sitting on the jury will put forth their best efforts to give me a fair trial."³¹ After hearing all the evidence, this jury found her to be not guilty.

The Harrisburg Seven Defense Committee assembled a team of specialists in 1971 to help understand and evaluate the prospective jurors.³² This team included Jay Schulman and Richard Christie, who helped pioneer the "scientific" method of jury selection in this case and later applied it to other prominent political trials such as the Camden Twenty-eight, Gainesville Eight, the Wounded Knee defendants, and the Joan Little case. In the Harrisburg case, a group of sociologists first conducted a general telephone survey of 1,236 randomly selected registered voters to see if the panel of

does not result in a jury biased against the defendant but rather eliminates bias against the government. *United States v. Falange*, 426 F.2d 930 (2d Cir. 1970). The argument that such data collection will discourage citizens from serving as jurors has been dismissed as "far-fetched bogies." *United States v. Costello*, 255 F.2d 876, 882 (2d Cir. 1958). See generally Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839 (1968); *Editor's Page*, 57 GEO. L.J. 461 (1969).

28. One author reports that the scant case law that has addressed itself to the issue concludes that the defense has no right to information obtained by the F.B.I. for the prosecutor. Okun, *supra* note 27, at 854. In the trial of Angela Davis, however, the judge granted a defense motion that enabled the defense to share the government's information about prospective jurors. *N.Y. Times*, Feb. 18, 1972, at 39 (city ed.).

29. See J. VAN DYKE, *supra* note 2, at 141-45, 160-66.

30. See generally Robinson, *How Psychology Helped Free Angela*, *EBONY*, Feb. 1973, at 44.

31. *N.Y. Times*, March 15, 1972, at 39 (city ed.).

32. The information in this section is taken from a complete and thorough account of the Harrisburg jury matter by Schulman & Shaver, *supra* note 26, at 39.

prospective jurors was in fact representative of the voters in the area. Interviewers requested data on age, sex, education, race, and occupation from the random sample. Partly on the basis of evidence thus obtained, which indicated that the existing panel did not conform to the random-sample statistics, the trial judge ordered a new jury panel selected. The researchers then conducted a series of face-to-face interviews designed to elicit more personal information. Forty-five volunteers were quickly trained to speak to 252 people selected at random from the earlier group of 1,236, and they asked about which newspapers or magazines the interviewees read, which radio and television programs they watched, their knowledge of defendants and the trial, who they considered "the greatest Americans" of the last fifteen years, their trust in government, their children, religious preferences, hobbies and organizational memberships, their views on antiwar activities and the use of force by police to maintain order, the legitimacy of supporting the government even when one believes that the government is wrong, and whether a person brought to trial is usually guilty.

After the interviewing process was completed, the social scientists assembled the data and concluded that religion was the key factor in the attitudinal scheme of those interviewed. Certain religious affiliations—Episcopalian, Methodist, Presbyterian, and Fundamentalist sects—were found to be strongly opposed to the ideological position of the defendants. Catholics, Brethren, and Lutherans were deemed favorable. Another startling conclusion was that, although education and contact with metropolitan news media is usually equated with liberalism, quite the opposite was the case in the Middle District of Pennsylvania. The liberals among the well-educated apparently leave the Harrisburg area, and those college-educated persons who stay become business and civic leaders and are usually conservative Republicans. The data, in fact, revealed that most people in the Harrisburg area are quite conservative.³³ And the researchers felt that at least four out of every five persons who would qualify as jurors would be opposed to the defendants. The judge's decision to allow counsel to conduct its own voir dire and frame its own questions to the jurors was therefore most beneficial to the defense.

After three weeks, the panel of 465 prospective jurors was narrowed down by excuses and challenges for cause to 46. Federal District Judge R. Dixon Herman used the struck-jury system for peremptory challenges, whereby the defense would exercise its 28 peremptories and the prosecution

33. Eighty percent trusted the government, compared to the national level of 40-50%; 87% felt that the right to private property is sacred; only 37% had heard of Rev. Philip Berrigan, the most well-known of the defendants; 81% approved police violence to maintain order; 65% thought that government should be supported even when it was wrong.

would use its 6 to pare the 46 down to a jury of 12. The defense strategy was thus to rate these remaining 46 prospective jurors. A scale ranging from 1 (highly favorable juror) to 5 (highly undesirable) was set up, and as much information as possible about each juror was assembled. The two characteristics that seemed especially important to the defense point of view in addition to religion were opposition to authority and a social style that was more "maternalistic"—caring and loving—than "paternalistic"—stern and disciplinary. And at least one juror had to be Catholic in order to inhibit any anti-Catholic sentiments. Using these standards, the defense rated eight of the 46 prospects as #1, five as #2, fifteen as #3, and eighteen as #4 or #5. The prosecutor, apparently having made similar judgments about some of the jurors, used his six peremptory challenges against six of the #1's.³⁴ The defense thus had to decide which five jurors should be chosen from category 3 in addition to the seven it would save from groups 1 and 2.

A major concern was how the members of the jury would relate to each other as a group. How independent would individual jurors be in arriving at their own decisions, and to what extent would they stand firm once they had made up their minds? Responses elicited during the voir dire and information gathered from members of the community furnished some guide in answering these questions, but often the data were conflicting, and hard choices had to be made. The defense felt that a group of women would stick together during the long sequestration, and they hoped that at least one would have a negative reaction to Boyd Douglas, the prosecution's chief witness, who had proposed marriage to several young college students to get information from them. This negative reaction, they thought, might then be passed along to the other women in the subgroup.

The proof of the effectiveness of this mode of jury selection can only be determined after the deliberations are concluded and the verdict is recorded. In this case, it was 10-2 for acquittal on the main charge of conspiracy. Interestingly enough, the only two jurors who voted against acquittal came from the #2 category, not #3.³⁵ While the jury was deliberating, the defense staff interviewed again 83 people from the original 252 people randomly selected and previously contacted. Of the 61 people who had been following the trial and were willing to express themselves on the guilt or innocence of the defendants, the overwhelming majority thought the defendants were guilty as charged. The jury, on the other hand, voted 10-2

34. The government used the F.B.I. to check jurors' backgrounds, which meant that they also had detailed information with which to decide whom to challenge.

35. One of these jurors had not been questioned fully by the defense lawyers because they felt the juror might reveal information to the prosecutor that would encourage him to challenge her. The other had been rated #2 because he gave pro-defense answers, although the social predictors were unfavorable. The defense wondered later if he had told the truth at voir dire.

for acquittal on the conspiracy charge. This result tends to confirm the "success" of the defense's methods in selecting a sympathetic jury. Looking for factors that led to the guilty or innocent judgment, the defense found that 37 percent of the interviewed women thought the defendants were guilty on all or most counts, whereas 57 percent of the men made this same judgment. (The jury consisted of nine women, three men.) The most accurate predictors, however, were education and religion; exposure to the media also contributed to an antidefense attitude.

In the 1974 New York City trial of John Mitchell and Maurice Stans on charges of conspiracy and perjury, the defense, also using social science techniques, had the opportunity to mold the jury in much the same way that the Harrisburg defense shaped their jury. Once again, the judge gave the defense a substantial advantage in the number of peremptory challenges: 20 for the defense and only 8 for the prosecution. Judge Lee Gagliardi (a Nixon appointee) decided on these figures because he felt the substantial pretrial publicity had put the defendants at a disadvantage.³⁶ Judge Gagliardi made two other decisions that may have helped the defendants. He eliminated for cause many of the better educated potential jurors because of their possible prejudice,³⁷ and he excused all persons who indicated that they would suffer a severe hardship by being sequestered for many weeks,³⁸ thus eliminating the most economically precarious jurors—and many nonwhites—who might differ politically with Stans and Mitchell.

The defendants hired Marty Herbst, a communications consultant, to assist in the jury selection, and he recommended that they seek blue-collar jurors, Roman Catholic if possible, who had not gone to college, earned between \$8,000 and \$10,000 and read the *New York Daily News* rather than the *New York Times* or *New York Post*. To be avoided were Jews and what Herbst called "limousine liberals." "We wanted," he said later, "people who were home established, to the right, more concerned with inflation than Watergate," and who might somehow associate John Mitchell with John Wayne.³⁹ At least one person selected to be a juror had never heard of either of the defendants before the trial began.

When the trial ended and the jurors were sent to the jury room for deliberations, they sat for 20 minutes without saying anything. Finally, they asked for copies of the indictment and began taking preliminary votes, which indicated that a majority favored a guilty verdict. But after much discussion,

36. Etzioni, *Scientific Jury-Stacking Puts Judicial System on Trial*, Boston Globe, June 23, 1974, § A, at 3.

37. Zeisel, *Mitchell-Stans Judged*, N.Y. Times, May 26, 1974, § 4, at 15.

38. N.Y. Times, Feb. 20, 1974, at 14 (city ed.).

39. Arnold, *How Mitchell-Stans Jury Reached Acquittal Verdict*, N.Y. Times, May 5, 1974, at 41 (city ed.).

the jury seems to have become dominated by Andrew Choa, an alternate who joined the jury when a vacancy developed and the one juror who did not fit all the criteria layed down by Herbst: he had gone to college (and the Harvard Business School) and was vice-president of the First National City Bank. He not only knew who the defendants were but had in fact contributed to Richard Nixon's presidential campaign. Juror Choa was able to direct the rest of the jury's attention to weaknesses in the prosecution's case and was instrumental in producing the final result: a unanimous verdict for acquittal on all counts.⁴⁰ The scenario for acquittal was thus somewhat unpredictable, but certainly some of the defense tactics paid off.

Social science methods of selection were again used with sophistication in the trial of Joan Little in 1975, where the defense's first step, as in the Harrisburg case, was to survey the county in which the alleged crime took place to gauge public feeling about the case. After finding that most people in the county thought the defendant guilty and, furthermore, that the jury pool substantially underrepresented blacks, women, and young people, they successfully moved for a change of venue. In the new location (Raleigh, in Wake County), the team interviewed almost a thousand residents to obtain their attitudes about police, blacks, rape, and other issues considered important to the trial, and to find out their income, occupation, and other socioeconomic data. After questioning the jury pool in the same way, they found the same profile of responses, meaning that, if their methods were correct, the jury wheel was indeed representative. After charting (with a computer) the correlation between age, education, and other factors with attitudes, they came up with certain standards by which to identify favorable and unfavorable jurors,⁴¹ and discovered that what people read was the most important measure of their views. The jury finally assembled was half black and half white⁴² and acquitted the defendant.

VI. CONCLUSION

Methods such as these may indeed help obtain a jury that acquits a defendant, but possibly at the cost of diminishing respect for the judicial system. Panels that seem to have been manipulated by one side or the other (or both) will not fulfill their purpose of conveying legitimacy to the community. Even people who believe a defendant innocent may wonder at the "justice" being rendered by an apparently hand-picked jury.

40. Arnold, *How Mitchell-Stans Jury Reached Acquittal Vote*, N.Y. Times, May 5, 1974, at 1, col. 6.

41. Tivnan, *Jury by Trial*, N.Y. Times, Nov. 16, 1975, (Magazine), at 30.

42. There were originally seven white and five black jurors, but one white juror fell ill and was replaced by a black.

Obtaining an impartial jury is admittedly difficult in well-publicized cases, as Chief Justice John Marshall recognized in the trial of Aaron Burr in 1807.⁴³ The chance that jurors will have formed an opinion on the case is much greater than in other cases. Because of that difficulty, and the importance of impaneling a jury that embodies the community's conscience in such sensitive cases, special care must be taken in jury selection. The question must be asked in these trials, as in the challenge process as a whole, how much and what kind of questioning is really necessary to obtain an impartial jury. There are other steps that can be taken in highly publicized trials that may make extensive questioning and challenges unnecessary and help preserve the random character of the panel.

Judges should be aware of actions that might be taken by the government to increase rather than reduce bias in the jury, and resist them. They should work to ensure that a representative jury is impaneled by special attention to actions that can distort the jury's capacity to speak for the community. Exhaustive questioning may in fact be necessary in cases that are nationally publicized. But in most cases, better solutions can be found to reduce the potential bias. One is to change the site of the trial to a location with an ethnic population similar to the area in which the crime allegedly occurred, and with a fair number of persons of the defendant's ethnic background—thus replicating the community's character in a less emotional atmosphere.⁴⁴ Another is to make sure that selection procedures are truly random by insisting that the list of prospective jurors is as complete as is humanly possible, resisting all requests for excuses, limiting challenges for cause to cases of clear and unmistakable prejudice, and limiting peremptory challenges to no more than three, or at most five. The body thus impaneled should be truly representative. It will certainly be diverse and may take longer to deliberate, but its verdict—because it will be the expression of a consensus of the community's view—is more likely to be accepted by all factions as impartial and legitimate.

43. See *United States v. Burr*, 25 F. Cas. 55 (C.C. Va. 1807) (No. 14,693); see J. VAN DYKE, *supra* note 2, at 142-43, 160.

44. See *Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971); *Rideau v. Louisiana*, 373 U.S. 723 (1963).