Science: Threatening the Jury

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Trial

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MAN HAS TAKEN a new bite from the apple of knowledge, and it is doubtful whether we will all be better for it. This time it is not religion or the family that are being disturbed by the new knowledge but that venerable institution of being judged by a jury of one's peers. The jury's impartiality is threatened because defense attorneys have discovered that by using social science techniques, they can manipulate the composition of juries to significantly increase the likelihood that their clients will be acquitted.

The problem is not that one may disagree with a particular jury verdict that has resulted in such cases; enough different defendants have been freed with the help of social science jury-stacking to disturb observers on all sides. The trouble is that the technique raises serious doubts about the very integrity of the jury system, that it increases the advantage of rich and prominent defendants over poor and obscure ones and, most ominously, that it may prompt the state to start hiring social scientists of its own. It would seem only a matter of time before prosecutors, with all the resources at their disposal, get fed up with losing cases partly because the defense has scientifically loaded panels with sympathetic jurors.

Prosecutors have already had to swallow a number of such defeats. A team headed by sociologist Jay Schulman and psychologist Richard Christie, for example, took an active role in selecting juries which discharged radical defendants in the Harrisburg Seven case, the Camden 28 trial over a draft-office raid, and the Gainesville Eight case involving Vietnam Veterans Against the War; Schulman is now working in Buffalo, N.Y., for the Attica defendants. A team of black psychologists, moreover, helped choose the jury that acquitted Angela Davis, and nothing of late has done more to publicize scientific intervention in jury selection than the Mitchell-Stans trial in New York.

In that case, helping to choose the jury was Marty Herbst, a "communication" specialist versed in social science techniques. He advised the defense to seek a jury of working-class persons, of Catholic background, neither poor nor rich ("average income of $8,000 to $10,000"), and readers of New York's Daily News. To be avoided were the college educated, Jews, and readers of the New York Post and The New York Times. These sociological characteristics are widely associated with conservative politics, respect for authority and suspicion of the media.

In the original jury, the defense succeeded in getting 11 out of 12 jurors who matched the specifications. By a fluke, the 12th juror became ill and was replaced by another who, though college educated, was a conservative banker, thus completing the set.

Interviewing Acquaintances

THE MORE ELABORATE ways in which social science can help select acquittal-prone juries are illustrated by the Schulman-Christie team's work in the trial of Indian militants at Wounded Knee.

As described in a May, 1973, report, the team first assembled a sociological profile of the community through interviews with 576 persons chosen at random from voter registration lists. The interviews allowed the research team to crosstabulate such characteristics as occupation and education with attitudes favorable toward the defense —especially toward Indians—and to select out the best "predictor variables." Such analysis was needed because people of the same social background hold different attitudes in different parts of the country; hence a generalized sociological model would not suffice. (In Harrisburg, where the Berrigan trial was held, for example, women proved more friendly toward the defense than men, but the reverse was true in Gainesville).

Next, observers were placed in the courtroom to "psych out" prospective jurors, using anything from the extent to which they talked with other prospective jurors to their mode of dress. (In the Angela Davis case, handwriting experts analyzed the signatures of prospective jurors.)

Information gained in this way was compared to what the computer predicted about the same "type" of person, based on the interview data which had been fed into it. This double reading was further checked, especially when the two sources of information did not concur, by field investigators who interviewed acquaintances of the prospective jurors.

How Many Challenges?

SUCH INFORMATION becomes more potent in the hands of defense lawyers the more challenges there are and the more unevenly the challenges are distributed. The number is important because the more persons one can challenge, the more one can select a jury to one's liking. The unevenness is important to prevent the other side from applying the same procedures and nullifying one's work.

The number of challenges varies with the seriousness of the offense and from state to state. A common pattern is that if the prospective penalty is death, each side receives 30 challenges, plus 3 for each of four alternate jurors. If 10 years' imprisonment is at stake, the respective numbers are 20 and 2, and so on down the scale. The

original intention was to allow the fairest selections in the weightiest cases. But with the introduction of social science into jury picking, the unwitting result is that the more serious the trial, the more jury-stacking is allowed.

Similarly, uneven challenges are introduced, at the judge's discretion, to make up for other imbalances. While a judge can severely limit the challenges on both sides to avoid a long jury selection process, this significantly increases the chances of having any convictions that might result overturned by a higher court on the ground of a biased jury—and reversals are considered a blot on a judge's record. In the Mitchell-Stans case, the judge allowed the defense 20 peremptory challenges. the prosecution 8, to make up for adverse publicity preceding the trial. This obviously helped the defense lawyers secure the kind of jury they favored.

Social scientists, of course, did not invent the idea of using challenges to help get a favorable jury. But until recently lawyers commonly could not use much more than rules of thumb, hunches, or experience to guide their challenges. As Justice John M. Murtagh put it: "One human being cannot read the mind of another." The lawyers on both sides, moreover, were more or less equal in their abilityy to exercise this kind of homespun social psychology.

The new methods are quite a bit more accurate, though fortunately they are far from foolproof. People do not always act out their predispositions. Social science data is statistical, not absolute. At best survey techniques, even when supplemented with psychological analysis, can produce only "probabilistic" profiles, not guaranteed results. At the Berrigan trial, two of the defense attorneys' careful selections—one a woman with four conscientious objector sons—held out for a guilty verdict on the conspiracy charge, causing a hung jury.

Nevertheless, the recent spate of acquittals demonstrates that the impact can be considerable and that, on the average, the method will work well. Hence we are surely in for more frequent use of the technique.

It Takes Money

IT MIGHT BE SAID that soon both sides to all trials will be equipped with the same capability and that so long as the granting of an uneven number of challenges is curbed, giving both sides similar selection power, the edge of the social science helpers will be dulled. But the extent to which this takes place will be limited by the costliness of the technique.

Radical defendants have benefited from the free labor of scores of volunteers and the time donations of high-powered consultants, though even they needed expensive computers. As Howard Moore Jr., Angela Davis' chief counsel, put it: "We can send men to the moon, but not everyone can afford to go. Every unpopular person who becomes a defendant will not have the resources we used in the Davis case." The Mitchell and Stans bills for their social science helpers may run to a five-digit figure.

Clearly, the average defendant cannot avail himself of such aid. Therefore, the net effect of the new technique, as is so often the case with new technology, will be to give a leg up to the wealthy or those who command a dedicated following. This is hardly what the founders of the American judicial system had in mind.

It might also be argued that juries are, on the average, far from representative anyhow; studies do show that too many higher income, higher educated people do not serve, that juries end up disproportionately filled with "housewives, clerical workers, craftsmen, and retired persons." Furthermore, the legal defense of those who can pay or otherwise attract top talent has always been much better than that of the average defendant. But a society moving toward greater justice would seek to correct these flaws, not to accentuate them.

Also, it should be noted that up to now the procedure has been used, as far as we know, solely by defense attorneys. The state has not provided any district attorneys with social science teams and computers. However, what would happen if the state did resort to systematic reliance on such techniques? Could any but the wealthiest defendants then compete with the state?

No Good Remedies

UNFORTUNATELY, ONE cannot unbite the apple of knowledge. Even sadder is that we see here, as we have seen so often before, that attempting to contain the side-effects of the application of science is costly, at best partially effective, and far from uncontroversial itself. To put it more succinctly, there seem to be no half-good, let alone good, remedies.

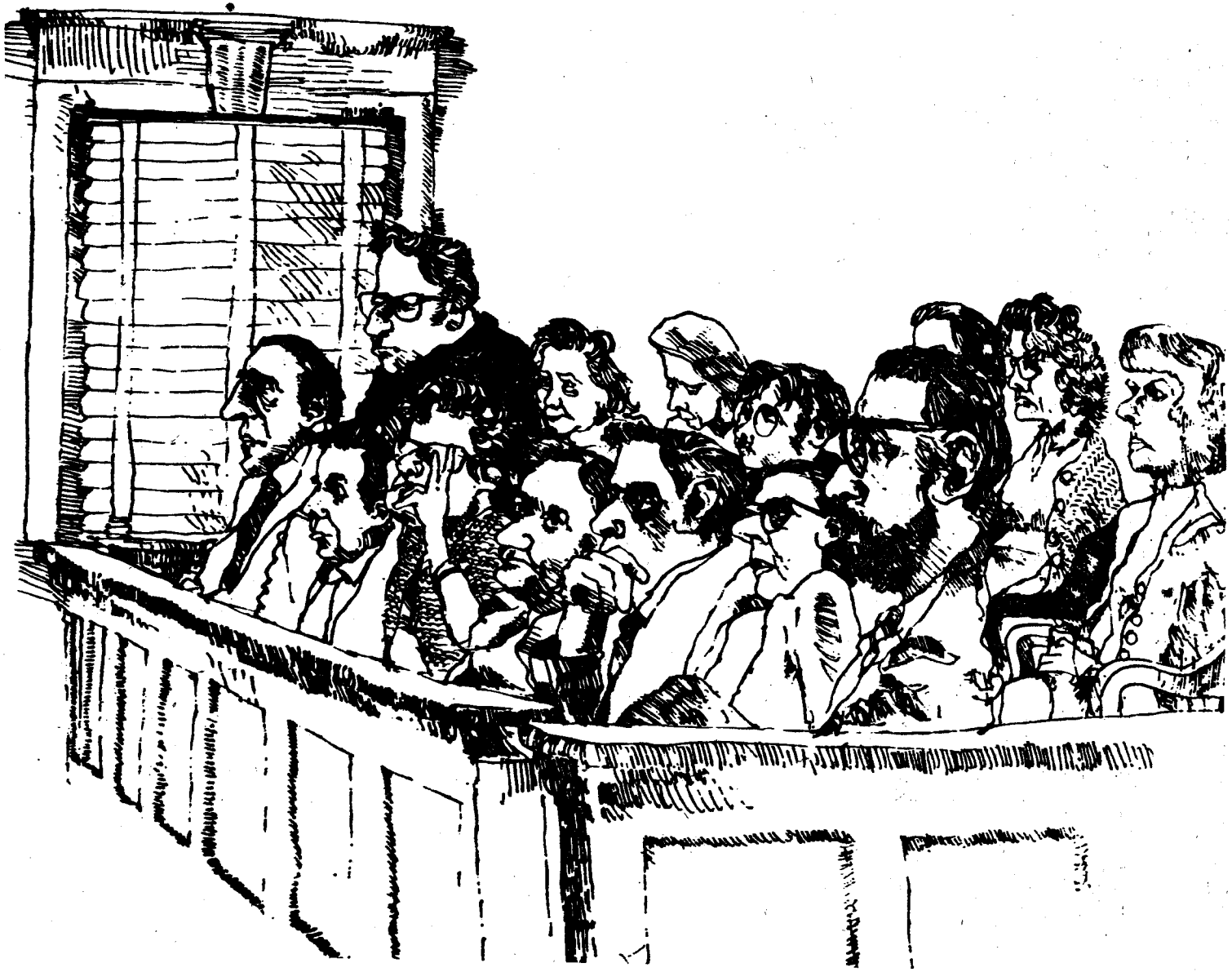
Probably the best place to start is with prospective jurors. If fewer persons were excused from jury duty, the universe from which jurors are drawn would be more representative of the community and, to a degree, less easy to manipulate. Next, serious consideration could be given to reducing challenges, especially peremptory ones. This approach, though, constitutes not only a wide departure from tradition, but limits the possibility of uncovering prejudicial attitudes in would-be jurors.

More powerful but even more problematic is to extend the ban on tampering with the jury to all out-of-court investigations of prospective jurors. It could be defined as a serious violation of law to collect data about prospective jurors, to investigate their handwriting, to interview their neighbors and the like, and any discovery of such data-gathering could be grounds for a mistrial. This would not eliminate the lawyers' courtroom use of sociology and psychology or the usefulness of community profiles based on studies of citizens at large. But it could curb the more sophisticated application of those techniques which require homing in on the characteristics of particular jurors.

Another potent but controversial answer is for the judge alone to be allowed to question and remove prospective jurors. In this way the judge could seek both an open-minded jury and one which represents a cross-section of the community, not sociologically loaded dice. To the extent that judges themselves are free of social bias, this would probably work quite well. However, since jury selection has some effect on the outcome of each case, such a relatively active role by the judge flies in the face of the prevalent Anglo-Saxon tradition, according to which the judge is a neutral referee between the sides, not a third party. The challenges, though, could become the task of a specialist attached to the courts.

The most radical remedy would be to follow Britain's lead and restrict the conditions under which citizens are entitled to a jury trial. (In Britain only 2 to 3 per cent of the cases still go to a jury.) Moreover, the jury is considered by many to be a major cause of rising court costs and delays in cases coming to trial. Nor is there any compelling evidence that trial by jury is fairer than trial by judges. These are hardly the days, though, in which reforms entailing less participation by the people and greater concentration of power in the hands of elected or appointed officials are likely to be either very popular or wise.

But until one remedy or another is applied, the state will almost surely have to do its own research, if only to even the odds. District attorneys or U.S. attorneys cannot be expected to stand by doing nothing while defendants in the most serious cases buy themselves a significant edge in trial after trial. The champions of the technique will have to realize that the days when it could be reserved for their favorite defendants will soon be over.



Drawing by Brian McCall